DE FACTO DETREBLING: THE RUSH TO SETTLEMENT IN ANTITRUST CLASS ACTION LITIGATION

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Antitrust law provides that successful private plaintiffs are entitled to treble damages. Despite this, in antitrust class action litigation, courts have subtly dismantled the treble damage regime by manipulating the standard for reviewing proposed settlements. Federal law requires judicial approval of class action settlements in order to ensure that the class members' interests are adequately protected. However, following the Second Circuit's 1974 Grinnell *opinion, federal courts decline to consider the trebling of damages when estimating the value of class claims extinguished by antitrust class action settlements. Despite its longevity, the* Grinnell *rule has received no academic attention. This is surprising because the* Grinnell *court based its decision on a misreading of its source material. More importantly, the* Grinnell *rule undermines both the compensatory and deterrent functions of antitrust law.*

INTRODUCTION

Treble damages are a hallmark of American antitrust law. The damages awarded to a successful private plaintiff in an antitrust lawsuit are automatically tripled. The drafters and defenders of the treble damage provision believed that the damage multiplier was necessary to compensate for the fact that antitrust violations are hard to detect. In the absence of treble damages, firms might conclude that it was in their interests to violate the antitrust laws. Controversial from conception, the trebling of antitrust damages continues to provoke debate. In its 2007 report, the congressionally appointed Antitrust Modernization Commission revisited the issue and recommended that antitrust damages continue to be trebled.[1] But most participants in these ongoing debates fail to recognize that courts have already effectively detrebled antitrust damages.

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1. ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS, 17 (2007), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/introduction.pdf.

Antitrust laws are essential for a functioning free-market economy. Competitive markets require that firms not collude on price or otherwise agree to limit output. Nor should dominant firms be able to engage in predatory acts that drive efficient rivals from the market. In the face of either illegal cartels or monopolies, an industry will generally experience inefficiency in the form of reduced output. From the consumer standpoint, some purchasers will be inefficiently excluded from the market altogether, while those who remain will be forced to pay an illegally inflated price.

Private litigation is necessary for an antitrust regime to work effectively. In our multi-trillion-dollar economy, where tens of thousands of different products and services are bought and sold, government antitrust authorities simply do not have the necessary resources and information to detect and prosecute all antitrust violations. To compensate for this, antitrust law provides a private cause of action so that consumers may seek recovery for illegal overcharges. However, in most cases, each individual customer of an antitrust violator suffers only a small amount of damage, generally far less than the court costs associated with filing an antitrust lawsuit. Indeed, during the 1890 debate over the Sherman Act, Senator James George of Mississippi predicted on the Senate floor that, given the low stakes for each individual victim, as well as the difficulty of a "poor . . . farmer, or mechanic, or laborer . . . undertak[ing] to get damages from a powerful and rich corporation . . . . [F]ew, if any, of such suits will ever be instituted, and not one will ever be successful."[2]

Senator George could have been proven correct but for the emergence of class action litigation, which allows individual victims of price-fixing conspiracies or illegal monopolization to unite their claims in one lawsuit. Absent the ability to combine their lawsuits into a single case, in many instances consumers would rationally determine that their damages were too small to justify pursuing litigation against the defendant. Realizing this, many firms could conclude that entering cartels or illegally monopolizing markets would be profit maximizing because their victims would be unlikely to hold them accountable. The class action vehicle fundamentally changes the calculus—litigation to remedy dispersed injury becomes viable, and violations become less profitable. In short, class actions are critical for making antitrust laws effective.

Unfortunately, the efficacy of class action litigation as a means of enforcing antitrust laws is becoming increasingly suspect, as some class counsel rush to secure settlements that ensure a significant payout for the attorneys but leave the class significantly undercompensated and allow antitrust violators to retain much of their ill-gotten gains. This undermines the deterrent effect of private lawsuits and, consequently, of antitrust laws more broadly. Congress sought to prevent collusive settlements by requiring trial judges to approve all class action settlements in federal court. However, this safety net has proven inadequate in antitrust class action litigation because reviewing judges refuse to consider the trebling of antitrust damages. The judicial disregard of trebling during the

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2. Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1, 24–25 (1989) (quoting 21 CONG. REC. 1768 (1890)); *see id.* at 24 ("[T]he Congressmen who spoke to the issue of consumer lawsuits were generally doubtful about their efficacy.").

settlement approval process results in de facto detrebling of antitrust damages. Because antitrust class action litigation almost invariably settles and trebling does not affect the settlement amount, antitrust deterrence suffers and consumers are denied the benefits of mandatory trebling.

Part I of this Article reviews the costs and benefits of class action settlements. Because class action settlements entail a risk of collusion between defendants and class counsel, the presiding judge must approve any proposed settlement before it becomes operative. In determining whether a proposed settlement is appropriate, reviewing judges consider a range of factors. Although the factors provide the patina of objectivity, they are subject to misapplication by judges.

Part II introduces one of these factors for reviewing proposed settlements: the best possible recovery that a prevailing class could win at trial. In the context of antitrust class action litigation, the best possible recovery is the damages suffered by all of the class members, trebled. Despite the fact that this trebling is automatic in antitrust cases, courts do not consider the trebling of antitrust damages when comparing the proposed settlement amount to the best possible recovery that the class could achieve at trial. Part II reviews the history and rationale behind this rule.

Part III argues that the initial failure to consider trebling when evaluating the reasonableness of proposed antitrust class action settlements was premised on a misreading of the state of the law at the time. Furthermore, the justifications for the current rule are severely flawed. Most importantly, the decision to omit any consideration of trebling at the settlement stage undermines the core purposes of antitrust law—compensating victims of antitrust violations and deterring future misconduct. Part III concludes by suggesting how courts should treat trebling in unusual cases.

Finally, Part IV discusses how considering trebling could influence settlement rates, settlement amounts, and the volume of frivolous litigation. While a change in approach could increase settlement amounts in some cases, proper application of the best possible recovery factor would not inappropriately impede the settlement process. Neither would it encourage frivolous antitrust suits. Ultimately, proper consideration of trebling when evaluating proposed settlements in antitrust class action litigation would enhance deterrence, facilitate compensation, and represent a more honest application of the governing legal test.

I. THE BENEFITS AND RISKS OF CLASS ACTION SETTLEMENTS

As with most private lawsuits, the vast majority of class action litigation settles.[3] Class action lawsuits asserting antitrust claims are no exception.[4] The high

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3. John Bronsteen, *Class Action Settlements: An Opt-In Proposal*, 2005 U. ILL. L. REV. 903, 910 (2005) ("Few class actions actually go to adjudication; nearly all of them settle."); Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 151 (2003) ("Settlements, not judgments after trial, stand overwhelmingly as the end result of actions certified to proceed on a classwide basis that are not resolved on dispositive motions." (citations omitted)).

settlement rate of antitrust class actions is particularly significant because most major price-fixing cases are brought as class actions.[5] Given the prevalence of class actions as a mechanism to vindicate victims of antitrust violations, it is important to understand the costs, benefits, and process of class action settlements.

A. The Benefits of Settlement

Judges and litigants generally view settlement as a win–win outcome. Because plaintiffs face great difficulty in winning antitrust cases, settlement is attractive to class counsel, who want to ensure some recovery for both the class and themselves. Conversely, because damages awarded upon a plaintiff's victory in antitrust litigation are automatically trebled, the risk-averse defendant has a strong incentive to settle in order to eliminate the pricey worst-case scenario.[6] Presiding judges, too, favor settlement and routinely attempt to convince and sometimes cajole litigants to settle their litigation rather than rely on juries to resolve the dispute. Courts often invoke the "'strong judicial policy in favor of settlements, particularly in the class action context.'"[7]

Settlement purportedly carries several benefits. First, settlement brings certainty to an inherently uncertain process. All interested parties seek repose: defendants want to minimize their exposure, the class wants some compensation, and the class counsel want to ensure that they recover their costs and receive some remuneration for their efforts.[8] A settlement guarantees that defendants will not face bankrupting liability and that the class members (and their counsel) will not

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4. *Antitrust Damage Allocation: Hearings Before the Subcomm. on Monopolies and Commercial Law of the H. Comm. on the Judiciary*, 97th Cong. 8,246 (1981/1982) [hereinafter *Antitrust Damage Allocation Hearings*] (statement of Hubert L. Will, Senior U.S. District Court Judge for the Northern District of Illinois) ("Something over 90 percent—actually 92 percent of all civil cases and roughly 89 percent of antitrust cases—are settled."); Edward D. Cavanagh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 TUL. L. REV. 777, 813 (1987) ("The Georgetown data indicate that 88.2% of the antitrust cases surveyed settled."); Hugh Latimer, *Damages, Settlements and Attorneys' Fees in Antitrust Class Actions*, 49 ANTITRUST L.J. 1553, 1553 (1980) (antitrust class actions settle); Monograph Task Force, *Minority Report on Contribution*, *in* CONTRIBUTION AND CLAIM REDUCTION IN ANTITRUST LITIGATION, 1986 A.B.A. SEC. ANTITRUST 64, 67 ("Whatever criticism fairly may be made of the liabilities imposed by the antitrust laws or of the coercive nature of class actions, the undeniable fact remains that 95 percent of all major antitrust litigation today is resolved by settlement.").

5. *Antitrust Damage Allocation Hearings*, *supra* note 4, at 19 (statement of Stephen D. Susman).

6. *See* DAVID BOIES, COURTING JUSTICE 229 (2004) ("Another potential problem is that by aggregating hundreds of thousands and sometimes millions of small claims, class counsel can threaten defendants with exposure so great that they are reluctant to take the risk of going to trial even if they believe they have good defenses; even a small risk of a very large loss may be one the defendant is unwilling to take.").

7. Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 116 (2d Cir. 2005) (quoting *In re* PaineWebber Ltd. P'ships Litig., 147 F.3d 132, 138 (2d Cir. 1998)).

8. *See* Patrick Woolley, *Rethinking the Adequacy of Adequate Representation*, 75 TEX. L. REV. 571, 611 (1997) ("Settlements are attractive to both plaintiffs and defendants, not because they mimic the results of trial, but because they limit the inherent risks of litigation.").

end up with nothing.[9] In addition to assuring some recovery for the class, settlements generally speed the delivery of payments, as class members do not have to wait for the years of pre-trial, trial, and appeals processes to run their courses before receiving recompense from the defendant.[10] Similarly, the class counsel—who, absent a settlement, would not get paid until years later[11]—receive their fees and reimbursements for costs sooner with a settlement.

Second, settlements conserve judicial resources. Class action litigation taxes the legal system, contributing to the backlog in American courts.[12] Judges favor settlements as a docket-clearing mechanism. Judges are especially eager to remove complex class action suits from their dockets.[13] Indeed, some judges have gone so far as to endorse "the familiar axiom that a bad settlement is almost always better than a good trial."[14] Other judges view a trial as evidence that the attorneys have failed.[15]

Finally, many observers find virtue in compromise itself. Instead of pursuing a complete victory, each side voluntarily accepts a result that it can live with. Litigants on both sides are more likely to perceive an outcome as fair if they played a role in fashioning the result.

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9. Some commentators have argued that defendants have an additional incentive to settle early in order "to avoid unfavorable publicity, which can harm customer or supplier relationships, or public goodwill." H. Robert Halper, *The Unsettling Problems of Settlement in Antitrust Damage Cases*, 32 ANTITRUST L.J. 98, 100 (1966). But recent econometric scholarship suggests that "defendants do not worry about reputation effects, contrary to speculation in earlier articles." Jeffrey M. Perloff, Daniel L. Rubinfeld & Paul Ruud, *Antitrust Settlements and Trial Outcomes*, 78 REV. ECON. & STAT. 401, 408 (1996).

10. BOIES, *supra* note 6, at 252 ("There are many reasons why this is the case. Whether there was an overcharge, and if so how much is always hotly disputed by defendants; the extent to which a jury will accept the figures claimed by plaintiffs is uncertain. A settlement in the hand may well be worth two (or even three) in the bush. Also a settlement accelerates by several years when payment is made—a cost to defendants and a major benefit to the plaintiffs.").

11. *See id.* at 230.

12. *Antitrust Damage Allocation Hearings*, *supra* note 4, at 246 (statement of Hubert L. Will) ("Without settlements, we cannot effectively operate a judicial system."); Yosef J. Riemer, *Sharing Agreements Among Defendants in Antitrust Cases*, 52 GEO. WASH. L. REV. 289, 306 (1984) ("[S]ettlements produce a substantial savings in judicial resources and thus aid in controlling backlog in the courts; and settlements promote efficient use of private resources by reducing litigation and related costs.") (footnote omitted).

13. *See* John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 389 (2000) ("[O]nce a potential settlement of complex litigation is in view, federal trial courts tend to tolerate almost any conflict in order to achieve a settlement that brings litigation peace—but at a cost paid by the class members.").

14. John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 714 n.121 (1986).

15. Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 925–26 (2000) (noting comment of federal trial judge).

These general arguments in support of settlements are particularly persuasive in antitrust class action litigation. First, certainty of outcome is highly valued in antitrust litigation. Extensive trial preparation means greater costs that class counsel worry will go uncompensated if they lose—either before a jury or at summary judgment. From the defendant's perspective, because damages awarded in antitrust cases are automatically trebled, defendants face vast exposure should they not prevail at trial.[16] As the potential costs of losing are magnified, the value of certainty increases. Second, antitrust class action litigation can be particularly time-consuming[17] and complex,[18] increasing the judge's desire to have the case resolved through an early settlement.[19]

B. The Risks of Settlement

While settlements do help litigants realize the advantages just discussed, a settlement in class action litigation is not without significant costs. These costs are primarily visited upon the class members who will not have their day in court. The vast majority of settlements deny the victims of corporate misdeeds full recovery for the damages they suffered. Defendants may attempt to settle early in order to prevent plaintiffs from acquiring particularly damning evidence during discovery.[20] A well-financed defendant may be able to pressure a shallow-pocketed plaintiff to acquiesce in a low-ball settlement.[21] All of these factors may lead to a settlement that fails to disgorge ill-gotten gains if the defendant did, in fact, violate the law. Conversely, if the plaintiff's case is, in fact, frivolous, then

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16. Perloff et al., *supra* note 9, at 408 ("[W]e find that risk aversion plays an important (qualitative and quantitative) role in explaining why cases settle instead of going to trial. For every 1% increase in the probability that the plaintiff wins, the probability that the case settles rises by nearly 0.13%.").

The defendant also values settlement because "[a]ntitrust suits are frequently lengthy, complicated and costly both in terms of monetary costs, including legal fees and related discovery expenses, and nonmonetary costs, including dislocation of employees, decline in firm morale and negative publicity. Given these substantial defense costs and the uncertainties of litigation, settlement may prove to be the cheaper alternative, wholly apart from the merits of the claims." Cavanagh, *supra* note 4, at 809.

17. *Antitrust Damage Allocation Hearings*, *supra* note 4, at 575 (statement of the Statistical Analysis and Reports Division Administrative Office of the U.S. Courts) ("Private antitrust cases remain in the courts longer and if they come to trial, consume more trial time than any other case type.") (providing data).

18. *See In re* Motorsports Merch. Antitrust Litig., 112 F. Supp. 2d 1329, 1337 (N.D. Ga. 2000) ("An antitrust class action is arguably the most complex action to prosecute. The legal and factual issues involved are always numerous and uncertain in outcome.").

19. *Cf. In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 784 (3d Cir. 1995) ("The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation.").

20. BOIES, *supra* note 6, at 238 ("Defendants can particularly benefit from settling before the plaintiff understands everything that is in the defendants' files and in the memories of the defendants' employees.").

21. *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076 (1984).

the defendant's settlement payment may represent a form of ill-gotten gains for the class and its counsel.[22]

The unique character of class action litigation magnifies the risk that settlements will undercompensate victims of antitrust violations. Both the class members and class counsel seek to maximize their proceeds from the defendant, but the class counsel control the process, in that they negotiate the settlement of the class's claims. And the class counsel do so largely out of view of their putative clients, the class members. Because each individual generally has little at stake in the litigation, and class members' identities are often unknown to each other, the class members have insufficient incentive and ability to monitor the class counsel's action.[23]

Armed with negotiating authority and a lack of oversight, the class counsel may attempt to secure a settlement that maximizes the outcome for the lawyers at the expense of the best possible result for the class. For instance, plaintiffs' law firms may increase their profitability by settling a case early in the litigation process—instead of taking the case to trial—because this reduces their trial preparation costs (e.g., court costs, research, and discovery expenses) while generally ensuring a positive return on their initial investment.[24] Thus, the class counsel may assiduously avoid a trial that has a higher expected value for the class than does the settlement, because the lawyers prefer a relatively quick guaranteed payout for themselves.[25]

While early settlements may maximize the class counsel's return on investment, they may also lead to an underselling of the class claims, especially when full discovery has not been completed.[26] The class is generally helpless to prevent collusive settlements, as only its attorneys know all of the relevant facts,

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22. Project, *Developments in the Law—The Paths of Civil Litigation*, 113 HARV. L. REV. 1752, 1812 (2000) ("Unfortunately, the pressure to settle exists even with respect to frivolous filings, which are an ongoing concern in the class action context, and are as costly to litigate as legitimate claims. The pressure on defendants to settle even non-meritorious claims gives plaintiffs substantial leverage—so much so that some courts and commentators characterize it as 'blackmail.'").

23. *See* Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 78, 81 (2007); *see also* Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. CHI. LEGAL F. 403, 405 (2003); Judith Resnik, *Litigating and Settling Class Actions: The Prerequisites of Entry and Exit*, 30 U.C. DAVIS L. REV. 835, 854 (1997).

24. Janet Cooper Alexander, *Contingent Fees and Class Actions*, 47 DEPAUL L. REV. 347, 358 (1998); Coffee, *supra* note 13, at 390–91.

25. BOIES, *supra* note 6, at 252 ("In addition, where (as in a class action) the plaintiffs' lawyers are on a contingency fee, there can be a tendency for counsel to seek a quick settlement without the risks or costs of a trial. Rewarding counsel with a percentage of any recovery is supposed to align their interest with the class, and to a large extent this works. But the alignment can break down where counsel has an opportunity to earn a quick, large fee, then move on to another class action in the firm's inventory. This is particularly true where the recovery to any single class member from a settlement is small, but the contingency fee to counsel will be large because of the size of the class.").

26. *See* Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 832 (1997).

including the likelihood of prevailing at trial and the most informed estimate of the expected value of the claims.[27] This disconnect between the class and its counsel suits the defendant, who wants to minimize its total expenditures—litigation costs, plus payments to the class—and is largely indifferent to the allocation of its payout between the class and its counsel.[28] The settlement negotiation process provides class counsel an opportunity "to entice defendants to reduce their total payments by providing counsel with generous fees but affording inadequate compensation to the class."[29] This is perhaps best illustrated by coupon-based settlements, which often result in the class receiving restriction-laden coupons of little or no real value, while the class counsel receive high fees based on an inflated estimation of coupon value.[30] In extreme cases, the class members receive nothing for surrendering their claims.[31] Yet even when the settlement provides cash to the class, collusive settlements "pay the absent class members less than the expected value of the litigation."[32] Self-interested class counsel are willing to settle on the cheap in exchange for generous attorneys' fees.[33]

Collusive settlements are detrimental for two related reasons. First, class members are denied adequate compensation for their legal injuries. Second, inadequate settlements may fail to disgorge a defendant's ill-gotten gains and can render illegal conduct cost-beneficial,[34] which undermines the deterrent effect of the law. In short, settlement is not so inherently desirable that it should be encouraged at any cost.[35]

C. Ensuring Fair, Adequate, and Reasonable Settlements

Courts and Congress both recognize that the divergence of economic interests between the class and its counsel can lead to settlements that fail to

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27. Leslie, *supra* note 23, at 81.

28. *See* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1376 (1995).

29. Richard A. Nagareda, *Turning from Tort to Administration*, 94 MICH. L. REV. 899, 933 (1996); *see In re* Cendant Corp. PRIDES Litig., 243 F.3d 722, 730 (3d Cir. 2001) ("[D]ivergence in [class members' and class counsel's] financial incentives . . . creates the 'danger . . . that the lawyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment for fees.'" (quoting *In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768, 820 (3d Cir. 1995) (internal quotation marks omitted))).

30. *See* Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. REV. 991, 991 (2002).

31. *See* DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS 94–95 (2000) (discussing one such case).

32. Bronsteen, *supra* note 3, at 910.

33. *See* Coffee, *supra* note 14, at 714 ("Often the plaintiff's attorneys and the defendants can settle on a basis that is adverse to the interests of the plaintiffs. At its worst, the settlement process may amount to a covert exchange of a cheap settlement for a high award of attorney's fees." (footnote omitted)).

34. Deborah R. Hensler & Thomas D. Rowe, Jr., *Beyond "It Just Ain't Worth It": Alternative Strategies for Damage Class Action Reform*, 64 LAW & CONTEMP. PROBS. 137, 138 (2001).

35. *See infra* Part III.C.5.

compensate the class members sufficiently for relinquishing their legal claims.[36] The risk of inadequate settlements led Congress to require judges to approve settlements in class action litigation in federal court. Rule 23(e) of the Federal Rules of Civil Procedure requires the trial judge to "conduct a careful inquiry into the fairness of a settlement to the class members before allowing it to go into effect and extinguish, by the operation of res judicata, the claims of the class members who do not opt out of the settlement."[37] Rule 23(e) requires judges to attempt to identify and reject collusive settlements.[38]

While Congress did not provide much guidance as to how federal judges should distinguish reasonable settlements from inadequate ones,[39] most courts examine a list of factors to determine the adequacy of a proposed settlement. The most common test is the "*Grinnell* factor test," which examines:

> (1) the complexity, expense and likely duration of the litigation;
> (2) the reaction of the class to the settlement;
> (3) the stage of the proceedings and the amount of discovery completed;
> (4) the risks of establishing liability;
> (5) the risks of establishing damages;
> (6) the risks of maintaining the class action through the trial;
> (7) the ability of the defendants to withstand a greater judgment;
> (8) the range of reasonableness of the settlement fund in light of the best possible recovery; [and]
> (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.[40]

This list is highly influential and hundreds of subsequent decisions have looked to the *Grinnell* factors in evaluating proposed class action settlements.[41]

While none of the factors is dispositive, courts hold some to be more important than others. The *Grinnell* court itself opined that "[t]he most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement."[42] This is essentially a distillation of the final two *Grinnell* factors, which "consider the settlement fund's range of reasonableness 'in

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36. *In re* Auction Houses Antitrust Litig., 197 F.R.D. 71, 72 (S.D.N.Y. 2000).

37. Mars Steel Corp. v. Cont'l Ill. Nat'l Bank & Trust Co. of Chi., 834 F.2d 677, 682 (7th Cir. 1987).

38. Weinberger v. Great N. Nekoosa Corp., 925 F.2d 518, 524 (1st Cir. 1991) ("It is because of the potential risk that plaintiffs' attorneys and defendants will team up to further parochial interests at the expense of the class that the Rule 23(e) protocol . . . includes scrutinizing settlements for indicia of collusion.").

39. FED. R. CIV. P. 23(e)(2) now provides that "[i]f the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate."

40. City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974).

41. *See, e.g.*, Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 117 (2d Cir. 2005).

42. *Grinnell*, 495 F.2d at 455 (citations omitted).

light of the best possible recovery' and . . . 'all the attendant risks of litigation.'"[43] With some slight variations in nomenclature—a few courts speak of the "maximum possible recovery" as opposed to the "best possible recovery"[44]—all courts recognize that the proposed settlement's adequacy "must be judged 'not in comparison with the best possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of the plaintiffs' case.'"[45] This, in turn, is not a mathematical calculation that yields the "correct" reasonable settlement amount; instead, "'there is a range of reasonableness with respect to a settlement—a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.'"[46] Ultimately, judges must balance the *Grinnell* factors to determine whether the settlement is fair, adequate, and reasonable.

II. THE "BEST POSSIBLE RECOVERY" FACTOR IN ANTITRUST CLASS ACTION LITIGATION

Application of most *Grinnell* factors is unaffected by the nature of the cause of action underlying the settlement. For example, whether the defendant is accused of violating the federal securities laws or a state's products liability statute, courts will analyze the factor relating to the defendant's financial stability in a similar fashion. But at least one inquiry has different implications when the underlying lawsuit sounds in antitrust: the best possible recovery factor. Antitrust claims differ from most other causes of action in that antitrust damages are automatically trebled. If the jury finds for the plaintiff in an antitrust trial, the jury calculates the actual damages caused by the defendant's antitrust violation and the judge must triple that amount.[47]

Despite the fact that trebling is mandatory, federal courts generally refuse to consider the trebling of antitrust damages when evaluating proposed settlements in antitrust class action litigation. The source of this refusal is the *Grinnell* case itself. *Grinnell* involved a class asserting antitrust claims. The Second Circuit in its influential decision opined that it would be "improper" to consider the fact that any damages following trial would be trebled "when computing a base recovery figure which will be used to measure the adequacy of a settlement offer."[48] The court claimed that it was following an established common law rule, asserting that "the

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43. *In re* AOL Time Warner ERISA Litig., No. 02 Civ. 8853 SWK, 2006 WL 2789862, at *9 (S.D.N.Y. Sept. 27, 2006) (quoting *Grinnell*, 495 F.2d at 463).

44. *See, e.g.*, FTR Consulting Group, Inc. *ex rel.* Cel-Sci Corp. v. Advantage Fund II, Ltd., No. 02 Civ. 8608(RMB), 2005 WL 2234039, at *2 (S.D.N.Y. Sept. 14, 2005).

45. *In re* PaineWebber Ltd. P'ships Litig., 171 F.R.D. 104, 130 (S.D.N.Y. 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997) (quoting *In re* "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 762 (E.D.N.Y. 1984)).

46. Frank v. Eastman Kodak Co., 228 F.R.D. 174, 186 (W.D.N.Y. 2005) (quoting Newman v. Stein, 464 F.2d 689, 693 (2d Cir. 1972)).

47. Of course, the judge could find error in the jury's decision on liability or calculation of damages. But once the single damages are determined, the trebling is mandatory, subject to some minor, seldom-used statutory exceptions. *See infra* notes 163–67 and accompanying text.

48. *Grinnell*, 495 F.2d at 458.

vast majority of courts which have approved settlements in this type of case, even though they may not have explicitly addressed the issue, have given their approval to settlements which are traditionally based on an estimate of single damages only."[49]

Subsequent courts followed *Grinnell* en masse. Some opinions suggested that it was permissible to ignore the trebling of damages because "the sufficiency of an antitrust settlement may properly be evaluated by comparison to possible single damages."[50] Some judges acknowledged that trebling would occur following a trial, but then silently declined to mention such trebling when evaluating the proposed settlement in antitrust class actions.[51] Other decisions speak about disregarding trebling as being "the standard" when reviewing antitrust settlements.[52] But most courts have explicitly held to a paradoxical rule: it is mandatory that reviewing courts ignore mandatory trebling. For example, some judges have reasoned that "[w]hen measuring the adequacy of a proposed settlement in an antitrust case, it is inappropriate to consider the trebling of a possible jury verdict in estimating the potential liability of the defendant."[53] Others have opined that "[i]n reviewing the range of reasonableness of the settlement fund in the light of the best possible recovery, *the trebling of the estimated recovery following trial may not be considered*."[54] This outright prohibition on considering trebling represents the current majority approach to the issue.[55] But whether they

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49. *Id.* at 458–59 (citing Robert H. Halper, *The Unsettling Problems of Settlement in Antitrust Damage Cases*, 32 ANTITRUST L.J. 98 (1966); Joseph L. Alioto, *The Economics of a Treble Damage Case*, 32 ANTITRUST L.J. 87 (1966)).

50. Ohio Pub. Interest Campaign v. Fisher Foods, Inc., 546 F. Supp. 1, 9 (N.D. Ohio 1982).

51. *See, e.g.*, *In re* Linerboard Antitrust Litig., 321 F. Supp. 2d 619, 632–33 (E.D. Pa. 2004); *In re* NASDAQ Mkt.-Makers Antitrust Litig., 187 F.R.D. 465, 478 (S.D.N.Y. 1998).

52. *In re* Lorazepam & Clorazepate Antitrust Litig., Civ. 99-0790(TFH), 2003 WL 22037741, at *3 n.6 (D.D.C. June 16, 2003) ("Although the Direct Purchasers could potentially recover *treble* damages, the standard for evaluating settlement involves a comparison of the settlement amount with the estimated single damages." (citations omitted)); *see also In re* Domestic Air Transp. Antitrust Litig., 148 F.R.D. 297, 319 n.25 (N.D. Ga. 1993) ("In analyzing the range of possible recoveries, the Court will consider an estimate of single, rather than treble, damages.").

53. Jack Faucett Assocs., Inc. v. AT&T, No. 81-1804, 1985 WL 5199, at *5 (D.D.C. filed Dec. 16, 1985) ("An important criterion of reasonableness of a settlement is the dollar value of the proposed settlement compared to the potential recovery of actual *single* damages." (emphasis added)).

54. Alexander v. Nat'l Football League, No. 4-76-Civil-123, 1977 WL 1497, at *17 (D. Minn. filed Aug. 1, 1977) (emphasis added).

55. *See In re* Ampicillin Antitrust Litig., 82 F.R.D. 652, 654 (D.D.C. 1979) (citing City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974)) ("The recovery of actual single damages must be the basis for the Court's assessment of monetary recovery in an antitrust settlement."); *see also In re* Remeron Direct Purchaser Antitrust Litig., No. Civ.03-0085 FSH, 2005 WL 3008808, at *9 (D.N.J. Nov. 9, 2005); *In re* Remeron End-Payor Antitrust Litig., Nos. Civ. 02-2007 FSH, Civ. 04-5126 FSH, 2005 WL 2230314, at *24 (D.N.J. Sept. 13, 2005) ("In order to evaluate the propriety of an antitrust class action

consider the *Grinnell* rule to be permissive or mandatory,[56] courts evaluating the reasonableness of a proposed class action settlement almost uniformly decline to consider the trebling of antitrust damages.[57]

Courts have advanced several reasons why the trebling of damages should not be considered when comparing the proposed settlement amount to the likely recovery at trial. The remainder of Part II reviews these rationales.

A. Settlement Is a Compromise

In reviewing proposed settlements in antitrust class actions, courts note that "the essence of settlement is compromise."[58] Courts that disregard the trebling of damages emphasize the importance of compromise, which means the settlement "will not represent a total win for either side."[59] In the spirit of this axiom, courts suggest that the class members need not recover 100% of their losses, and neither should the starting point for making compromises exceed this figure.[60] Ignoring trebling, according to this thinking, is inherent in the nature of compromise.[61]

Courts that crave compromise often note that a settlement can be reasonable even if the amount is but a small fraction of the single damages that could be recovered. Judges who preclude consideration of trebling when reviewing proposed settlements take great solace in the line of precedent holding exactly that. In *Grinnell* itself, the court opined that "[t]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved."[62] Subsequent courts have seized upon that language to approve settlements in antitrust class actions that provided the class with but a "small percentage of the

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settlement's monetary component, a court should compare the settlement recovery to the estimated single damages.").

56. I have located only one case not following the *Grinnell* approach. *See In re* Auction Houses Antitrust Litig., No. 00 Civ. 0648(LAK), 2001 WL 170792, at *7 (S.D.N.Y. Feb. 22, 2001), *aff'd*, 42 Fed. Appx. 511 (2d Cir. 2002); *see also In re* Compact Disc Minimum Advertised Price Antitrust Litig., 216 F.R.D. 197, 210 n.30 (D. Me. 2003) (questioning the wisdom of ignoring treble damages, but following that approach).

57. *See, e.g.*, *In re* Warfarin Sodium Antitrust Litig., 212 F.R.D. 231, 257–58 (D. Del. 2002); Fisher Bros. v. Phelps Dodge Indus., 604 F. Supp. 446, 451 (E.D. Pa. 1985); *In re* Art Materials Antitrust Litig., 100 F.R.D. 367, 371–72 (N.D. Ohio 1983).

58. *In re* W. Union Money Transfer Litig., No. CV-01-0335, 2004 WL 3709932, at *18 (E.D.N.Y. Oct. 19, 2004) (quoting *In re* Union Carbide Corp. Consumer Prods. Bus. Sec. Litig., 718 F. Supp. 1099, 1103 (S.D.N.Y. 1989)).

59. *In re* Mex. Money Transfer Litig., 164 F. Supp. 2d 1002, 1014 (N.D. Ill. 2000), *aff'd*, 267 F.3d 743 (7th Cir. 2001) (citation omitted).

60. *Warfarin Sodium*, 212 F.R.D. at 258.

61. *See id.*; *see also In re* Dennis Greenman Sec. Litig., 622 F. Supp. 1430, 1435 (S.D. Fla. 1985), *rev'd on other grounds*, 829 F.2d 1539 (11th Cir. 1987) (employing similar reasoning to discount trebling in a non-antitrust class action settlement).

62. City of Detroit v. Grinnell Corp., 495 F.2d 448, 455 (2d Cir. 1974).

single damages sought."[63] Approved settlements often represent less than 10% of the estimated single damages.[64]

B. Considering Trebling Reduces Ability to Achieve Settlement

Although the defense and class counsel who negotiated a proposed settlement bear the burden of proving its reasonableness, in reality courts often view settlements as desirable in and of themselves. Armed with a favorable disposition towards settlement, many judges greet facts and factors that hinder settlement as unwelcome impediments. Unsurprisingly, then, many courts condemn consideration of trebling because it makes it harder for defendants and class counsel to reach an acceptable accord. The *Grinnell* court asserted that "to argue that treble damages ought to be considered in a calculation of a base recovery range is to distort the entire theoretical foundation which underlies the settlement process" and that it "might well hinder the highly favored practice of settlement."[65] Subsequent courts have relied upon *Grinnell*'s reasoning to argue that "potential treble recovery . . . should not be superimposed as a yardstick for measuring the adequacy of a settlement, lest the settlement negotiation process be derailed before leaving the station."[66]

C. Ignoring Trebling Compensates for Uncertainty

Courts have advanced two arguments based on uncertainty to justify the rule against considering treble damages when assessing proposed settlements. First, courts assert that uncertainty over the class's ability to prove liability excuses any consideration of trebling at the settlement review stage. Courts have held that "[i]n order to evaluate the propriety of an antitrust class action settlement's monetary component, a court should compare the settlement recovery to the estimated single damages. Although in certain circumstances a plaintiff class may recover treble damages if it prevails at trial, that result is far from certain."[67] In other price-fixing class actions, courts have invoked "the recognized difficulties of proof"[68] and the "inherent risks of litigation"[69] to rationalize comparing the proposed settlement only to single damages. In a similar vein, some commentators

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63. *In re* Remeron End-Payor Antitrust Litig., Nos. Civ. 02-2007 FSH, Civ. 04-5126 FSH, 2005 WL 2230314, at *24 (D.N.J. Sept. 13, 2005).

64. *See In re* Folding Carton Antitrust Litig., 84 F.R.D. 245, 254 (N.D. Ill. 1979) (collecting cases).

65. *Grinnell*, 495 F.2d at 459.

66. *In re* Dennis Greenman Sec. Litig., 622 F.Supp. 1430, 1441 (S.D. Fla. 1985) (securities case); *see In re* Domestic Air Transp. Antitrust Litig., 148 F.R.D. 297, 319 n.25 (N.D. Ga. 1993) (quoting *id.*) (antitrust case); *see also* Jack Faucett Assocs., Inc. v. AT&T, No. 81-1804, 1985 WL 5199, at *5 (D.D.C. filed Dec. 16, 1985) (citing *Grinnell*, 495 F.2d at 458–60).

67. *Remeron End-Payor*, 2005 WL 2230314, at *24 (citations omitted); *see also In re* Remeron Direct Purchaser Antitrust Litig., No. Civ.03-0085 FSH, 2005 WL 3008808, at *9 (D.N.J. Nov. 9, 2005) (citations and internal quotation marks omitted).

68. *In re* Art Materials Antitrust Litig., 100 F.R.D. 367, 372 (N.D. Ohio 1983) (citing *Grinnell*, 495 F.2d at 458).

69. Fisher Bros. v. Phelps Dodge Indus., 604 F. Supp. 446, 451 (E.D. Pa. 1985) (citing *Grinnell*, 495 F.2d at 458).

have trivialized "the availability of treble or punitive damages or statutory fee awards" as unnecessary "distract[ions]" from the larger issue of substantive liability.[70]

Second, courts have suggested that the trebling of damages itself is somehow speculative. Judges then invoke this purported uncertainty to justify evaluating a proposed antitrust class action settlement in comparison to single damages alone. For example, in response to objections from class members that the reasonableness of a proposed settlement should "take[] into account the potential for treble damages under antitrust . . . statutes," trial courts have responded that "[r]ecovery of such damages is purely speculative . . . and need not be taken into account when calculating the reasonable range of recovery."[71] In at least one case, the district court focused on the uncertainty of *when* treble damages would be awarded (i.e., given the risk of a lengthy trial) to warrant ignoring trebling altogether when reviewing the proposed antitrust settlement.[72] Other courts have pointed to the presence of non-antitrust claims (or state antitrust claims) without automatic trebling as creating sufficient uncertainty so as to discount the automatic trebling of the federal antitrust claims.[73]

D. Treble Damages Are Like Punitive Damages

In non-antitrust class action litigation, in which the underlying cause of action permits punitive damages, courts generally decline to consider the possibility of punitive damages when evaluating the reasonableness of a proposed settlement. Judges opine that plaintiffs are not entitled to punitive damages as a matter of right[74] and that punitive damages are subject to great uncertainty.[75]

Some courts have analogized treble damages to punitive damages in order to justify disregarding treble damages when reviewing settlements of antitrust class action suits. For example, one court reasoned that "[t]reble damages under the antitrust laws are much like punitive damages in other civil litigation," and, thus, "the appropriate range of settlement should be based on the potential single

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70. *See, e.g.*, Kent A. Lambert, *Class Action Settlements in Louisiana*, 61 LA. L. REV. 89, 114 (2000).

71. *In re* Warfarin Sodium Antitrust Litig., 212 F.R.D. 231, 257–58 (D. Del. 2002) (citations omitted).

72. *In re* Linerboard Antitrust Litig., 321 F. Supp. 2d 619, 632 (E.D. Pa. 2004) ("[A]lthough Plaintiff Classes would be entitled to treble damages if successful at trial, the protracted nature of class action antitrust litigation means that any recovery would be delayed for several years."). Apparently, in this court's view, money now cancels out treble damages later, so trebling can be ignored.

73. *See, e.g.*, *In re* Remeron End-Payor Antitrust Litig., Nos. Civ. 02-2007 FSH, Civ. 04-5126 FSH, 2005 WL 2230314, at *29 (D.N.J. Sept. 13, 2005); *In re* Lorazepam & Clorazepate Antitrust Litig., Civ. 99-0790(TFH), 2003 WL 22037741, at *3 n.6 (D.D.C. June 16, 2003).

74. Adams v. Robertson, 676 So. 2d 1265, 1291 (Ala. 1995).

75. *In re* Dennis Greenman Sec. Litig., 622 F. Supp. 1430, 1441 (S.D. Fla. 1985), *rev'd on other grounds*, 829 F.2d 1539 (11th Cir. 1987).

damages incurred by plaintiffs."[76] Similarly, courts in non-antitrust cases have invoked *Grinnell*—an antitrust case without punitive damages—to rationalize the broad holding "that potential recovery of damages which are punitive in nature should not be considered in judging the reasonableness of the amount of a class action settlement."[77] In short, the conflation of treble and punitive damages is a common theme among courts intent on ignoring damage multipliers when reviewing proposed settlements.

E. Courts Ignore Trebling in Non-Antitrust Suits

In addition to the Sherman Act, other federal statutes provide for the possibility of treble damages. Examples include the Racketeering Influenced and Corrupt Organization Act (RICO) and the Real Estate Settlement Procedures Act (RESPA).[78] As with antitrust class litigation, courts evaluating the reasonableness of proposed settlements in these non-antitrust class actions generally do not consider the trebling of damages.[79] Context can be important here. In one case, the class had advanced multiple claims, including a RICO count, and the court correctly disregarded the possibility of trebling because the RICO claim appeared frivolous under the governing law.[80] Other courts have taken no notice of the possibility of treble damages because, under the statutory scheme at issue, such damages were "uncertain"[81] or "speculative."[82] These non-antitrust cases often

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76. *In re* N.M. Natural Gas Antitrust Litig., 607 F. Supp. 1491, 1506 (D. Colo. 1984).

77. *Adams*, 676 So. 2d at 1291 (citing City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974)).

78. *See, e.g.*, 12 U.S.C. § 2607(d)(2) (2006) ("Any person or persons who violate the prohibitions or limitations of this section shall be jointly and severally liable to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service.").

79. *See, e.g.*, *In re* Cmty. Bank of N. Va. & Guar. Bank Second Mortgage Litig., Civil Action Nos. 02-1201, 03-425, 03-1380, 05-589, 05-590, 05-688, 05-1386, 06-768, 2007 WL 2008494, at *8 (W.D. Pa. July 5, 2007) ("[W]ith respect to the original proposed settlement, . . . a comparison of the proposed settlement amount to the single (actual) damages of the class members, as opposed to the treble damages that they would be entitled to under RESPA, is reasonable and appropriate . . . ."); *In re* W. Union Money Transfer Litig., 2004 WL 3709932, at *11 n.11 (E.D.N.Y. Oct. 19, 2004) ("In accordance with established law, I do not take into account the possibility of treble damages under RICO when considering the reasonableness of a proposed class action settlement. . . . '[I]t is inappropriate to measure the adequacy of a settlement amount by comparing it to a possible trebled base recovery figure.'" (quoting County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 1324 (2d Cir. 1990) (citation omitted))).

80. *In re* Baldwin-United Corp., 607 F. Supp. 1312, 1331 (S.D.N.Y. 1985) ("As for treble damages under RICO, it is improbable that plaintiffs would succeed in establishing a non-frivolous RICO violation under the recent controlling law of this Circuit."). The court approved the proposed settlement. *Id.* at 1337.

81. *See In re* Dennis Greenman Sec. Litig., 622 F. Supp. 1430, 1441 (S.D. Fla. 1985), *rev'd on other grounds*, 829 F.2d 1539 (11th Cir. 1987); *see also County of Suffolk*, 907 F.2d at 1324 (noting "several 'substantial bases for a dismissal of the action'" to justify ignoring trebling when considering settlement in RICO class action).

quote *Grinnell*'s rejection of trebling to support their decisions.[83] In essence, an ill-conceived rule for antitrust class actions has crept into the law of class action settlements more broadly.[84]

F. Treble Damages Assume Fault, While Settlement Should Not

The *Grinnell* court declared that judges evaluating settlements in antitrust class action litigation should compare the proposed settlement to a recovery of single damages, because any consideration of treble damages would force the settling defendants to admit that they had violated the antitrust laws. The *Grinnell* opinion asserted:

> [T]o argue that treble damages ought to be considered in a calculation of a base recovery range is to distort the entire theoretical foundation which underlies the settlement process. It requires defendants to admit their guilt for the purpose of settlement negotiations. One of the underlying premises on which such negotiations are based, however, is that defendants never have to concede their guilt. They can protest their innocence of any wrongdoing and assert that they are settling for purely pragmatic business reasons. To require treble damages to be considered as part of the computation of the base liability figure would force defendants automatically to concede guilt at the outset of negotiations. Such a concession would upset the delicate settlement balance by giving too great an advantage to the claimants – an

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82. Weil v. Long Island Sav. Bank, 188 F. Supp. 2d 258, 264 (E.D.N.Y. 2002) ("Moreover, in light of the difficulty of proving a RICO claim, a potential treble damages award is speculative."). Courts ignore both punitive damages and the potential trebling of damages in RICO cases because these are speculative. Treasurer of State v. Ballard Spahr Andrews & Ingersoll LLP, 866 A.2d 479, 487 (Pa. 2005).

Part of this uncertainty comes from the difficulty of proving the underlying RICO claim. *See, e.g.*, *In re* PaineWebber Ltd. P'ships Litig., 171 F.R.D. 104, 127 (S.D.N.Y.), *aff'd*, 117 F.3d 721 (2d Cir. 1997) ("Assuming that the Class could prove predicate acts of fraud as well as the other requirements to establish a substantive violation of 18 U.S.C. § 1962, it still would not have standing to recover treble damages or attorneys' fees under RICO unless it could also show injury and causation.").

83. *See, e.g.*, *County of Suffolk*, 907 F.2d at 1324 (quoting *Grinnell* to reject considering treble damages when reviewing proposed settlement in RICO class action); *Greenman*, 622 F. Supp. at 1441 ("The Court agrees with the rationale of the *Grinnell* court that potential treble recovery (or, for the same reason, punitive recovery) should not be superimposed as a yardstick for measuring the adequacy of a settlement, lest the settlement negotiation process be derailed before leaving the station.").

Judges in non-antitrust cases rely on antitrust cases to justify ignoring trebling when evaluating a proposed settlement. *See, e.g.*, *Ballard*, 866 A.2d at 485.

84. The *Grinnell* rule makes more sense when the trebling, or award of punitive damages, is discretionary. So, ironically, while it may be appropriate for courts to import the *Grinnell* approach into non-antitrust class action settlements, that should not validate that approach in the antitrust context, where the mandatory nature of the trebling makes the *Grinnell* approach less sensible.

> advantage that is not required by the antitrust laws and one which might well hinder the highly favored practice of settlement.[85]

As noted above, subsequent courts have reasoned that treble damages are akin to the punitive damages available in other types of civil litigation.[86] Viewing trebling as a separate penalty, judges have held that "as a general matter, settlement discussions should not begin with a figure that includes the penalty, as settlement represents an attempt to resolve the litigation without determining fault."[87] These courts have adopted the *Grinnell* court's admission-of-guilt rationale in order to hold that "[w]hen measuring the adequacy of a proposed settlement in an antitrust case, it is inappropriate to consider the trebling of a possible jury verdict in estimating the potential liability of the defendant."[88] Courts in non-antitrust cases have also cited the *Grinnell* court's admission-of-guilt argument to reject any consideration of treble or punitive damages in evaluating a proposed settlement.[89]

III. JUDGES SHOULD CONSIDER TREBLING

While these rationales for disregarding trebling during the settlement review process may seem reasonable, the rule adopted by courts is both unfounded and counterproductive. Upon closer inspection, the purported judicial justifications ring hollow. More importantly, the rule to disregard trebling when reviewing proposed settlements in antitrust class actions undermines the very purposes of antitrust law.

A. Grinnell *Misread the State of the Law*

The very origin of the rule to disregard trebling is founded on an apparent misreading of the law at the time. The *Grinnell* court claimed to be following a majority rule. The decision asserted:

> [T]rebling is improper when computing a base recovery figure which will be used to measure the adequacy of a settlement offer [in part because] the vast majority of courts which have approved settlements in this type of case . . . have given their approval to settlements which are traditionally based on an estimate of single damages only.[90]

In proclaiming this majority rule, the court cited not a single case. Instead, the court claimed to rely upon two speeches—one by government attorney Robert

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85. City of Detroit v. Grinnell Corp., 495 F.2d 448, 459 (2d Cir. 1974).

86. *In re* N.M. Natural Gas Antitrust Litig., 607 F. Supp. 1491, 1506 (D. Colo. 1984).

87. *Id.*

88. Jack Faucett Assocs., Inc. v. AT&T, No. 81-1804, 1985 WL 5199, at *5 (D.D.C. filed Dec. 16, 1985) (citing *Grinnell*, 495 F.2d at 458–60).

89. *See In re* Dennis Greenman Sec. Litig., 622 F. Supp. 1430, 1441 (S.D. Fla. 1985), *rev'd on other grounds*, 829 F.2d 1539 (11th Cir. 1987) ("A process which in essence forces admissions of guilt by requiring that negotiations start downwards from a treble recovery ceiling is not a mechanism likely to encourage settlements.").

90. *Grinnell*, 495 F.2d at 458.

Halper and the other by famed antitrust practitioner (and, later, mayor of San Francisco) Joe Alioto—published in the *Antitrust Law Journal*.

Astonishingly, neither of the court's cited sources provides the empirical evidence claimed by the court, and both speeches advocate an approach that is completely contrary to the rule announced by the *Grinnell* court. The totality of Halper's statement on the subject reads:

> Despite this imprecision and the obvious fact that settlement results will depend upon the particulars of any given claim, rough rules of thumb have been mentioned that peg settlement objectives in the range between fifty per cent of realistic single damages on the low side and total actual damages plus litigation costs on the high side.[91]

Halper in no way suggests that the trebling of damages should be ignored. Instead, in discussing "settlement objectives," Halper uses single damages to define the appropriate *outcome* of the settlement process, not the starting point for either settlement negotiations or the evaluation of any proposed settlement, as the *Grinnell* court claims. Further, while Halper concludes that 50% of single damages represents the low end of a reasonable settlement, *Grinnell* cited Halper to justify approving a settlement representing less than 50% of the estimated single damages and then created a rule that subsequent courts have used to approve settlements representing 5% of estimated single damages. In short, Halper's analysis supports neither the *Grinnell* approach nor its ultimate consequences.

Joe Alioto's presentation is similarly unsupportive of the *Grinnell* court's claim of a majority rule to ignore trebling. Alioto's entire pronouncement on class settlements and antitrust damages is: "An acceptable formula for settlement is a combination of single damages plus litigation expenses. In this context, litigation expenses include a reasonable attorney's fee."[92] Alioto in no way suggests that the "vast majority" of antitrust class actions use single damages as the *starting* point for evaluating a proposed settlement. He argues quite the opposite: that single damages plus litigation costs should be the *endpoint* of the settlement negotiation process. If courts ignore the trebling of damages and evaluate all proposed settlements as a fraction of single damages—as *Grinnell* and its progeny do—then the result advocated by Alioto is unattainable.

In short, the only two sources cited by the *Grinnell* court conclude that a settlement based on 100% of single damages is an appropriate outcome. Yet *Grinnell* used these sources to assert that the complete recovery of single damages through settlement is a nonstarter. Despite this complete misreading of the source material, later courts relied on the Second Circuit's misstatement of fact and believed themselves to be following a well-established majority rule.[93] Through constant repetition, the lie has become truth, and now the majority of courts do disregard treble damages when evaluating proposed settlements in antitrust class

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91. Halper, *supra* note 9, at 99.

92. Joseph L. Alioto, *The Economics of a Treble Damage Case*, 32 ANTITRUST L.J. 87, 95 (1966).

93. *See, e.g.*, *In re* Art Materials Antitrust Litig., 100 F.R.D. 367, 371–72 (N.D. Ohio 1983).

action litigation. The *Grinnell* misstatement has become a self-fulfilling prophecy.[94] The lesson: if a court falsely announces a majority rule and subsequent courts rely on it, then the original court's incorrect proclamation will, in fact, become the majority rule.[95]

B. Ignoring Trebling Clearly Misreads the "Best Possible Recovery" Factor

Independent of any misreading of precedent, the failure to consider trebling when reviewing antitrust class action settlements clearly misreads the letter and spirit of the eighth *Grinnell* factor. The factor is supposed to look at the *maximum* or *best* possible recovery assuming that the class prevails at trial.[96] The maximum recovery that the class can achieve in an antitrust class action is not single damages; it is automatically trebled damages.

The patent illogic of the judicial misapplication of this factor is easily demonstrated by the language courts use. In discussing the actual numbers in a case, courts will refer to the plaintiff's estimate of single damages as "the maximum measure of damages" that the class could possibly recover.[97] For example, in one case in which single damages were estimated at $133.8 million, the court asserted that a proposed "settlement amount of $44.5 million represents more than 33% of the maximum possible recovery" and thus approved the settlement as "very reasonable."[98] As a matter of simple math, the court's calculation is wrong because if the class had prevailed at trial and the damage estimate proved accurate, the class's recovery would have been over $400 million,

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94. *See, e.g.*, *Antitrust Damage Allocation Hearings*, *supra* note 4, at 169 (statement of Jerry S. Cohen) ("[T]he cases that are settled, historically have been based on 4 years of damages on a single-damage basis. That is the settlement formula that has historically been used in settling cases."); 6 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS 208 (4th ed. 2002) ("However, antitrust settlements are traditionally negotiated and compromised on the basis of an estimate of single damages only, in contrast to treble damages.").

95. It remains possible that the *Grinnell* court was correct and most courts did decline to consider the trebling of damages, but it failed to cite a single such case. In the one reported opinion that I could find predating *Grinnell*, an Illinois district court relied on the fact that antitrust damages would be trebled in order to *deny* preliminary approval of the proposed class action settlement. Liebman v. J. W. Peterson Coal & Oil Co., 73 F.R.D. 531, 535–36 (N.D. Ill. 1973).

96. *In re* EVCI Career Colls. Holding Corp. Sec. Litig., Nos. 05 Civ. 10240(CM), 05 CV 10287, 05 CV 10515, 05 CV 10610, 06 CV 00304, 06 CV 00347, 06 CV 01684, 2007 WL 2230177, at *9 (S.D.N.Y. July 27, 2007) ("In order to calculate the 'best possible' recovery, the Court must assume complete victory on both liability and damages as to all class members on every claim asserted against each defendant in the Action.").

97. *See, e.g.*, *In re* Remeron Direct Purchaser Antitrust Litig., No. Civ. 03-0085 FSH, 2005 WL 3008808, at *8 (D.N.J. Nov. 9, 2005) ("Plaintiffs' expert economist estimates that the maximum antitrust damages (prior to trebling) ranged from $108 million to $133 million, while Defendants' expert, relying on a similar damage model but disagreeing on certain material assumptions, estimated the same range as $23.9 million to $29.7 million. It is by no means certain that Plaintiffs would have succeeded in recovering the maximum measure of damages estimated by Plaintiffs' expert.").

98. *In re* Warfarin Sodium Antitrust Litig., 212 F.R.D. 231, 258 (D. Del. 2002).

which represents the damage award after automatic trebling. The settlement thus represented only 11% of the true maximum possible recovery, not 33%. That figure may still represent a fair, adequate, and reasonable settlement—which is what the *Grinnell* factors are intended to detect—but when courts consistently refer to single damages as the class's "best possible recovery," they are misrepresenting the law and the class's stake in the litigation. Judges are stating a half-truth—actually a one-third truth—when they falsely assert that victorious class plaintiffs cannot recover more than single damages.

But such judicial statements are not a mere miscalculation. The misapplication of the "best possible recovery" factor has consequences, as Part III.D. will demonstrate. However, before considering those consequences, a closer inspection of the rationales underlying the *Grinnell* rule is in order.

C. The Rationales for Ignoring Trebling Are Flawed

Part II reviewed the justifications that courts have advanced for ignoring trebling when approving proposed settlements in antitrust class action litigation. This Section examines those rationales in detail and finds them lacking.

1. Uncertainty of Liability Should Not Influence Consideration of Trebling

When determining whether a proposed settlement is reasonable, courts must consider the probability that the class would succeed at trial. If the probability of liability is low, then the class's claims are not worth much and a very low settlement could be reasonable.[99] In contrast, if the class's case is strong and the probability of success at trial is high, then the expected value of the claims being relinquished increases and so must the amount paid in settlement in order to make the resolution fair and adequate to the class members. Courts in antitrust class actions uniformly consider the strength of the class claims and the attendant risks of establishing liability at trial.[100] Oftentimes, courts combine an inquiry into the probability of proving liability and establishing damages.[101] After these

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99. *In re* "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740, 762 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987) ("The dollar amount of the settlement by itself is not decisive in the fairness determination. The fact that the settlement amount may equal but a fraction of potential recovery does not render the settlement inadequate. Dollar amounts are judged not in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case." (citations omitted)).

100. *See, e.g.*, *In re* Warfarin Sodium Antitrust Litig., 212 F.R.D. 231, 255 (D. Del. 2002) (citing *In re* Cendant Corp. Litig., 264 F.3d 201, 237 (3d Cir. 2001)) ("Risks of Establishing Liability. This factor considers the potential rewards or risks if class counsel decided to litigate rather than settle.").

101. *See* MANUAL FOR COMPLEX LITIGATION § 21.62 (4th ed. 2004), at 316 ("[T]he advantages of the proposed settlement versus the probable outcome of a trial on the merits of liability and damages as to the claims, issues, or defenses of the class and individual class members."); *see, e.g.*, *In re* Warfarin Sodium Antitrust Litig., 391 F.3d 516, 537 (3d Cir. 2004) ("The Risks of Establishing Liability and Damages: These factors survey the potential risks and rewards of proceeding to litigation in order to weigh the likelihood of success against the benefits of an immediate settlement."); Hammon v. Barry, 752 F. Supp.

calculations are performed, the probability analysis is used to discount the amount of the "best possible recovery." The value of the proposed settlement is compared to the best possible recovery adjusted for the class's likelihood of success.[102] The actual calculations are not as precise as a description of the process may imply. The probability estimations create a range of reasonableness within which, in theory, the proposed settlement must fall in order to earn approval.[103]

Courts in antitrust class actions have misused the concept of uncertainty in two ways. First, while uncertainty is generally endemic to the litigation process, in some cases the probability of antitrust liability is fairly certain. Private class action litigation often follows in the wake of a successful government case against antitrust violators. Price fixing is a criminal offense, with the number of successful federal prosecutions rising annually. Liability is relatively easy to establish in follow-on suits, because a conviction in a criminal proceeding—or final judgment in any government civil proceeding—proves the plaintiff's prima facie case for liability and estops the defendant from disclaiming liability in subsequent private litigation.[104] Because this makes liability easier to establish in antitrust class

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1087, 1095 (D.D.C. 1990) (courts must "evaluate the strengths and weaknesses of class members' claims within the framework of their likelihood of establishing liability and damages at trial").

102. *In re* Lupron Mktg. & Sales Practices Litig., 228 F.R.D. 75, 97 (D. Mass. 2005); *Warfarin Sodium*, 212 F.R.D. at 257 ("'[I]n cases primarily seeking monetary relief, the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement.'" (quoting *In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig., 55 F.3d 768, 806 (3d Cir. 1995))); *see also In re* PaineWebber Ltd. P'ships Litig., 171 F.R.D. 104, 130 (S.D.N.Y.), *aff'd*, 117 F.3d 721 (2d Cir. 1997) ("The adequacy of the amount offered in settlement must be judged 'not in comparison with the best possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of the plaintiffs' case.'" (quoting *In re* "Agent Orange" Prods. Liab. Litig., 597 F. Supp. 740, 762 (E.D.N.Y. 1984))); *In re* WorldCom, Inc., 347 B.R. 123, 147–48 (Bankr. S.D.N.Y. 2006) ("The final two factors of the *Grinnell* test are usually considered together since both speak to the fairness of the settlement's terms relative to the possible outcomes of litigation."); *In re* AOL Time Warner ERISA Litig., No. 02 Civ. 8853 SWK, 2006 WL 2789862, at *9 (S.D.N.Y. Sept. 27, 2006) ("The last two *Grinnell* factors consider the settlement fund's range of reasonableness 'in light of the best possible recovery' and compared to a 'possible recovery in light of all the attendant risks of litigation.' Though courts are encouraged to consider the best possible recovery, the range of reasonableness inquiry is tightly bound to the risks of litigation . . . ." (quoting City of Detroit v. Grinnell Corp., 495 F.2d, 463 (2d Cir. 1974))).

103. *In re* Remeron End-Payor Antitrust Litig., Nos. Civ. 02-2007 FSH, Civ. 04-5126 FSH, 2005 WL 2230314, at *23 (D.N.J. Sept. 13, 2005) ("The range of reasonableness of the settlement fund in light of the best possible recovery and all the attendant risks of litigation. A court evaluating a proposed class action settlement should also consider 'whether the settlement represents a good value for a weak case or a poor value for a strong case.'" (quoting *Warfarin Sodium*, 391 F.3d at 538) (other citations omitted)); *In re* Warfarin Sodium Antitrust Litig., 212 F.R.D. 231, 257 (D. Del. 2002) ("These damages estimates should generate a range of reasonableness within which a district court approving or rejecting a settlement will not be set aside.").

104. 15 U.S.C. § 16(a) (2006) ("A final judgment or decree . . . rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust

actions based on prior convictions, courts in such cases cannot legitimately discount the automatic trebling of damages by invoking any uncertainty regarding liability.[105] Yet judges routinely discount the fact of trebling in follow-on class actions.[106]

More importantly, regardless of whether an antitrust class action follows a successful government action, the probability of liability is completely independent of the fact of trebling. The probability of liability is rarely susceptible to a precise mathematical calculation of one correct figure.[107] Uncertainty about the probability of liability will appropriately create a range of reasonableness, within which a proposed settlement could fall and be adjudicated as fair and adequate.[108] The range of reasonableness of a proposed settlement is a function of three necessary inputs: the class's likelihood of success on liability, the calculation of actual damages, and any damage multiplier that a court must apply. In the case of antitrust claims, the expected value of the claims is the probability of liability *times* (expected) actual damages *times* three.[109] Ironically, the only number that is certain in our equation is the third one: the jury's damage award will be trebled. It seems odd that in the name of increasing certainty, courts should ignore the only

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laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto . . . .").

105. *See* Phillip A. Proger & Deborah Platt Herman, *The Price of Price Fixing Through International Cartels*, 1999 BUS. L. INT'L 24, 47 ("Given the presumption of civil liability that arises once a defendant is found criminally liable (either through a guilty plea or conviction), most civil cases are settled.").

The one exception following a government prosecution is that the first firm to confess to participating in an illegal cartel can receive amnesty from criminal penalties and have its damages in private litigation limited to single damages. However, given that antitrust law imposes joint and several liability, without a right to contribution, this should not change the treble damage calculation against the defendants as a whole.

106. *See, e.g.*, *In re* Folding Carton Antitrust Litig., 84 F.R.D. 245, 266 (N.D. Ill. 1979).

107. Frank v. Eastman Kodak Co., 228 F.R.D. 174, 186 (W.D.N.Y. 2005) ("The determination whether a settlement is reasonable does not involve the use of a mathematical equation yielding a particularized sum." (internal quotation marks omitted)).

108. *In re* Corrugated Container Antitrust Litig., 643 F.2d 195, 212 (5th Cir. 1981) ("We think this requires a three-step process. First, the district court must evaluate the likelihood that plaintiffs would prevail at trial. Second, the district court must establish a range of possible recovery that plaintiffs would realize if they prevailed at trial. And third, guided by its findings on plaintiffs' likelihood of prevailing on the merits and such other factors as may be relevant, the district court must establish, in effect, the point on, or if appropriate, below, the range of possible recovery at which a settlement is fair and adequate."); *see also* Newman v. Stein, 464 F.2d 689, 693 (2d Cir. 1972) ("[T]here is a range of reasonableness with respect to a settlement—a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.").

109. For example, in an antitrust case that the class has a one-third chance of winning, the expected value of the case is, in fact, 100% of actual damages. If the plaintiff were victorious at trial, the defendant would also be liable for the plaintiffs' attorneys' fees and costs separately, so this would not affect the net value of the case at trial for the class.

certain input in the formula necessary to establish the expected value of the class's claims.

To disregard trebling because of uncertainty results in double-counting in a manner that impermissibly reduces the class recovery. The recent *Remeron Direct Purchaser Antitrust Litigation*[110] settlement is instructive. The court correctly notes that the "assessment of the reasonableness of a proposed settlement seeking monetary relief requires analysis of the present value of the damages a plaintiff would likely recover if successful, appropriately discounted for the risk of not prevailing."[111] Through proper discounting, a court can determine the expected value of the class's claims. But then the court held that "to evaluate the propriety of an antitrust class action settlement's monetary component, a court should compare the settlement recovery to the estimated single damages. Although in certain circumstances a plaintiff class may recover treble damages if it prevails at trial, that result is far from certain."[112] Of course, there is no uncertainty about trebling, so the court has counted uncertainty against the class twice. After the court has discounted the "best possible recovery" to take account of the less-than-one probability of liability—i.e., the uncertainty as to whether the class would prevail at trial—it is wrong to say that that same uncertainty (now accounted for) should reduce the damage calculation if the class did prevail at trial. A court cannot legitimately discount the probability of victory and then discount the damages *again* based on the plaintiff's less-than-perfect probability of winning. Such double discounting is unwarranted.

2. Trebling Is Not Speculative

In addition to invoking the uncertainty of liability to justify disregarding trebling at the settlement stage, some courts have cited the uncertainty of trebling itself. Judges are correct to note that the probability of proving damages will affect the expected value—i.e., the range of reasonableness—to which the proposed settlement should be compared.[113] However, courts sometimes confuse the uncertainty involved in estimating damages and the fact of trebling them. For example, the Delaware district court in *In re Warfarin Sodium Antitrust Litigation* rejected "tak[ing] into account the potential for treble damages under antitrust or consumer fraud statutes [because r]ecovery of such damages is purely speculative . . . and need not be taken into account when calculating the reasonable range of recovery."[114] While the court's point is well-taken with respect to consumer fraud statutes that do not require trebling, but merely allow it, the

110. No. Civ. 03-0085 FSH, 2005 WL 3008808, at *9 (D.N.J. Nov. 9, 2005).

111. *Id.* at *9.

112. *Id.* (internal quotation marks omitted).

113. *In re* Warfarin Sodium Antitrust Litig., 212 F.R.D. 231, 256 (D. Del. 2002) ("Risks of Establishing Damages[.] 'Like the fourth factor, this inquiry attempts to measure the expected value of litigating the action rather than settling it at the current time.'" (quoting *In re* Cendant Corp. Litig., 264 F.3d 201, 238 (3d Cir. 2001) (internal quotation marks omitted))); *Remeron*, 2005 WL 3008808, at *8.

114. 212 F.R.D. at 257–58 (citations omitted).

trebling of antitrust damages is most certainly not "purely speculative"—it is mandatory.[115]

The argument that trebling should be ignored with respect to federal antitrust claims because treble damages are speculative betrays either a serious confusion about federal antitrust law or an unbridled desire to approve proposed settlements in antitrust class action litigation. If the argument that trebling is speculative were made by a litigant, it would be sanctionable. When asserted by a federal judge, it is merely absurd. The likelihood of victory and the jury's subsequent calculation of damages may be speculative, but courts already address the speculative nature of these two events by discounting them. And while the estimated amount of damages itself may represent only a rough approximation, the trebling of that damage estimate is not in doubt. In short, trebling is automatic, not doubtful. Thus, arguments to ignore trebling because it is speculative are erroneous.

3. Antitrust's Treble Damages Are Distinguishable from Punitive Damages

Several opinions have suggested that judges should not consider trebling when evaluating proposed settlements in antitrust class action litigation for the same reasons that punitive damages are disregarded in non-antitrust cases.[116] The primary argument for ignoring punitive damages is that they are speculative. Punitive damages are inherently uncertain, both with respect to their likelihood and their amount. A jury that finds for the plaintiff on liability may or may not award punitive damages. Judges may rightly decline to consider such damages when the class counsel can show no "reasonable likelihood of recovering punitive damages" and the possibility of collecting such damages is "so slight as to be evanescent."[117] Even if the likelihood of some punitive damage award were high, the amount of such damages would be largely indeterminate during pretrial settlement negotiations. When punitive damages are awarded, the amount is neither consistent nor predictable, as the jury is afforded some discretion.[118] Further, when juries do award punitive damages, that amount can be substantially lessened by the trial court or upon appellate review.[119]

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115. 15 U.S.C. § 15(a) (2006) (a successful antitrust plaintiff "*shall* recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee" (emphasis added)).

116. *See supra* Part II.D. One may argue that courts should not ignore the possibility of punitive damages because most defendants do not and punitive damages may motivate many class counsel. Nevertheless, I leave that argument for another day. Instead, this Section argues that even if courts properly ignore punitive damages when evaluating proposed settlements, judges should nevertheless consider the trebling of damages in antitrust class action litigation.

117. *In re* Baldwin-United Corp., 607 F. Supp. 1312, 1331 (S.D.N.Y. 1985).

118. Cooper Indus. v. Leatherman Tool Group, Inc., 532 U.S. 424, 437 n.11 (2001); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991) ("One must concede that unlimited jury discretion . . . in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities.").

119. *See, e.g.*, BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 582–83 (1996).

While these arguments for disregarding punitive damages may be persuasive, treble damages in antitrust litigation meaningfully differ from punitive damages. There is no uncertainty about trebling in antitrust class actions. It is not performed by the jury: it is automatic and easily calculable. There is no uncertainty about the size of the damage multiplier: actual antitrust damages are multiplied by a factor of three—no more and no less. Trebling is not subject to review by either trial or appellate judges. In short, the arguments for ignoring punitive damages when reviewing the adequacy of a proposed non-antitrust class action settlement are inapplicable to the trebling inherent in antitrust cases.

4. Trebling Does Not Impermissibly Assume Fault or Guilt

Beginning with the *Grinnell* opinion itself, several courts have asserted that the automatic trebling of antitrust damages should not affect the review of proposed settlement amounts because this would require the defendant to admit fault on the underlying claim.[120] This argument is specious and at odds with the pro-compromise justification for ignoring trebling. All settlements are based on the premise that the plaintiff enjoys a non-negligible chance of prevailing at trial. Settlement does not constitute an admission of fault—indeed, most settlements state this unequivocally. Rather, the settlement reflects both parties' recognition that, given the costs and risks of litigation, agreeing to settle is a prudent financial decision.

The *Grinnell* court's logic implies that almost *any* settlement is an admission of guilt, to the extent that it must be compared to a potential award to a prevailing class. That potential award can only be determined by positing what would happen if the defendant lost at trial. The court reviews the proposed settlement in light of that possible outcome, without either party or the court stating that the defendant is, in fact, liable in order to calculate the best possible recovery. Of course, in an antitrust case, that means treble damages. Taking that fact into account is no more an admission of guilt than any settlement greater than the nuisance value of the suit is.

If a settlement reflected a defendant's admission of fault, it would do so by declining to discount the probability of liability. Similarly, a court reviewing a proposed settlement could only "force" the defendant to admit fault by refusing to approve any proposed amount less than 100% of the class's estimated recovery at trial. Any settlement and subsequent judicial review based on a probability of liability of less than one does not force a defendant to admit guilt. In any case, the issue of admission of fault goes to the probability of liability, not the trebling of damages, which is an entirely separate component of the formula for calculating the expected value of the class's claims.[121]

Finally, it bears noting that in many cases, the antitrust defendant has already admitted guilt or been found guilty in a criminal case. As discussed above, some antitrust class actions are follow-on class litigation, which has been preceded by a successful government prosecution (generally against price-fixing cartels). To

120. *See supra* Part II.F.
121. *See supra* note 47 and accompanying text.

assert that defendants in antitrust class actions pursued in the wake of a criminal conviction should be freed from the burden of treble damages lest a settlement represent an admission of fault is absurd. The defendant is liable, and its fault has already been established.[122] That fact should be taken into account when reviewing the reasonableness of a proposed settlement, not ignored through de facto detrebling.

In short, courts are misguided in asserting that the consideration of trebling somehow compels or constitutes an admission of liability by the defendant. All settlements are based on a probability of liability, not an admission of guilt. To take automatic trebling of the likely damage award into consideration does not change this fact.

5. Compromise Does Not Justify Ignoring Trebling

Finally, the spirit of compromise does not justify ignoring trebling. For example, while stating that "[a] settlement is by nature a compromise between the maximum possible recovery and the inherent risks of litigation,"[123] courts treat the single damages as the maximum possible recovery despite the fact that the true maximum possible recovery is three times this judicial starting point for evaluating settlement reasonableness. Of course any settlement is a compromise. The members of the class must compromise in that they do not receive their full treble damages that they would receive if successful at trial. But the compromise must be calculated from the proper starting point. The settling antitrust defendant is not avoiding single damages (discounted by the probability of a class victory); it is avoiding treble damages (discounted by the probability of a class victory). To make single damages the baseline for evaluating the settlement gives the antitrust defendant two-thirds of the loaf for free before any bargaining for a compromise has even begun. In extolling the virtues of compromise, many courts overlook the one-sided sacrifice that they are imposing on the class. The class is compelled to compromise two-thirds of its recovery without the defendant making any corresponding concession. This violates the principle of compromise that both sides give ground in a balanced fashion. Compromise is great, but it is a *pas de deux*.

D. The Consequences of Ignoring Trebling

Perhaps more troubling than the transparent arguments made to justify ignoring trebling is the fact that courts do not address the effect of the *Grinnell* rule on antitrust law more broadly. The review of proposed settlements must be made with an eye toward giving effect to the goals of the underlying body of substantive law. The primary purposes of private antitrust suits are to compensate victims of antitrust violations and to deter such violations in the future. Because trebling plays a pivotal role in achieving these goals, ignoring trebling in the settlement evaluation process significantly interferes with the antitrust regime.

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122. While there still may be an issue as to whether the defendant is liable to these particular plaintiffs, the fact of the defendant's antitrust violation is not in doubt.

123. *In re* Warfarin Sodium Antitrust Litig., 212 F.R.D. 231, 258 (D. Del. 2002).

1. Ignoring Trebling Undermines Compensation

The framers of the Sherman Act intended the statute to provide compensation to the victims of anticompetitive conduct.[124] Because illegal monopolies and cartels increase their profits by restricting output and raising prices, antitrust violations inflict injury on consumers in the form of overcharges.[125] Congress created the private cause of action under the Sherman Act "primarily as a remedy for the victims of antitrust violations."[126] But Congress also made the remedy distinctive from other private federal causes of action: successful antitrust plaintiffs would automatically receive three times the overcharge.

Treble damages play an important part in compensating the victims of antitrust violations. Although such damages perhaps seem punitive in function, the Supreme Court has acknowledged that treble damages are intended to fulfill the compensatory goals of the Sherman Act by "counterbalancing 'the difficulty of maintaining a private [antitrust] suit . . . .'"[127] Treble damages offset the relatively low probability of antitrust violators being caught, sued, and found liable. Thus, the Court has noted that "treble damages serve as a means of deterring antitrust violations and of compensating victims."[128]

The *Grinnell* approach undermines the compensatory function of private antitrust lawsuits. If courts do not take the automatic trebling of damages into account when reviewing settlements, then consumers in most antitrust class actions will never receive adequate reimbursement for illegal overcharges by either a cartel or a monopolist that has violated the Sherman Act. The treatment of trebling during settlement is critical because almost all antitrust class actions settle. Yet courts consistently approve settlements in antitrust class actions that represent a small fraction of the potential recovery, often as low as 5% of the class's estimated single damages.[129] Many judges take guidance from the *Grinnell* opinion's

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124. Roderick G. Dorman, *The Case for Compensation: Why Compensatory Components Are Required for Efficient Antitrust Enforcement*, 68 GEO. L.J. 1113, 1116–19 (1980); *see also* Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65, 70 (2003) ("There are two substantive justifications for permitting groups to litigate through the class action mechanism: compensation and deterrence."); Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 OHIO ST. L.J. 115, 122 (1993) ("The legislative history and case law indicate that compensation is a goal, perhaps even the dominant goal, of antitrust's damages remedy.").

125. Antitrust violations may also injure consumers by reducing quality, innovation, or choice. These injuries are not addressed in this Article.

126. Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 575 (1982) (citing Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485–86 (1977); Ill. Brick Co. v. Illinois, 431 U.S. 720, 746–47 (1977)).

127. *Brunswick*, 429 U.S. at 486 n.10 (quoting Senator Sherman).

128. *Am. Soc'y of Mech. Eng'rs*, 456 U.S. at 575–76; *cf.* Cook County, Ill. v. United States *ex rel.* Chandler, 538 U.S. 119, 130 (2003) ("[T]reble damages have a compensatory side . . . .") (False Claims Act case).

129. *In re* Linerboard Antitrust Litig., 296 F. Supp. 2d 568, 581 & n.4 (E.D. Pa. 2003) (collecting cases); *In re* Folding Carton Antitrust Litig., 84 F.R.D. 245, 254 (N.D. Ill. 1979) (collecting cases).

pronouncement that "there is no reason, at least in theory, why satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery."[130] Payments well below single damages are now the norm.[131]

The problem is exacerbated by the fact that other factors already discount the antitrust award. Independent from courts disregarding trebling in private class action suits, even nominally treble damages often only approximate single damages in antitrust litigation.[132] Professor Robert Lande has explained how the "lack of prejudgment interest, effects of the statute of limitations, plaintiffs' attorneys' fees and other costs of bringing suit, and court costs"[133] combine to undercut the compensatory function of antitrust class action settlements despite mandatory trebling. For example, in private class actions against defendants already found guilty of price fixing—in which a settlement should approach treble damages—settlement amounts are often based on a timeframe far more limited than the actual duration of the conspiracy.[134] As a result of these legal rules, even

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130. *In re* Remeron End-Payor Antitrust Litig., Nos. Civ. 02-2007 FSH, Civ. 04-5126 FSH, 2005 WL 2230314, at *24 (D.N.J. Sept. 13, 2005) (quoting City of Detroit v. Grinnell Corp., 495 F.2d 448, 455 (2d Cir. 1974)).

131. BOIES, *supra* note 6, at 252 ("In the usual antitrust case (particularly a class action), even though the antitrust laws provide for damages three times the amount of the illegal overcharge, the settlement amount is a fraction of the estimated actual overcharge."); *Id.* at 333 ("Although the antitrust laws provide for treble damages, most price-fixing class actions settle for some amount less than the actual overcharge.").

132. *See* Joseph F. Brodley, *Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals*, 94 MICH. L. REV. 1, 23 n.91 (1995) ("In fact, treble damages turn out to be closer to single damages when current losses, litigation costs, and future recovery are discounted to present value."); Robert Pitofsky, *Antitrust at the Turn of the Twenty-First Century: The Matter of Remedies*, 91 GEO. L.J. 169, 171 (2002) ("Studies show that treble damages really amount approximately to single damages in most circumstances.").

133. Lande, *supra* note 124, at 159; *see id.* at 173 ("[J]udges should realize that awarded antitrust damages probably are at most equivalent to the single damages level. Judges should fight any conscious or unconscious tendency to award defendants close decisions out of a reluctance to 'over-punish' defendants or 'over-reward' plaintiffs.").

134. *See, e.g.*, *Antitrust Damage Allocation Hearings*, *supra* note 4, at 169–70 (statement of Jerry S. Cohen) ("Mead was found guilty of having engaged in a price-fixing conspiracy for a 10-year period. Because of the doctrine of fraudulent concealment—that is, the purchasing agents should have known—the damages were paid out on a basis of 2 5/8 years. Now, what happens to all the money that was lost by all the companies involved on the consumer side for the previous eight years? If you can get away with 8 years of price fixing and you only have to pay for 2 it is worthwhile. I challenge anyone to show me any antitrust suit where the defendants, either after settlement or after a verdict, have ever been forced to cough up more than a fraction, treble damages or no treble damages, of what that suit, with their actions, have actually cost the consuming public."); *see also id.* at 169 ("[T]he cases that are settled, historically have been based on 4 years of damages on a single-damage basis. That is the settlement formula that has historically been used in settling cases."); 6 CONTE & NEWBERG, *supra* note 94, at 208 ("Defense counsel will usually negotiate an antitrust class settlement limited to the four-year statute of limitations, before the filing of a complaint, though the plaintiffs' counsel will usually seek, initially at

putatively successful antitrust plaintiffs may not be made whole by an award of nominally single damages.

Even those few settlements that appear at first glance to award full single damages do not necessarily provide complete compensation for illegal overcharges.[135] For example, in *In re Folding Carton Antitrust Litigation*,[136] the court praised the creation of a settlement fund that represented 118% of the estimated single damages, which the court extolled as "unprecedented."[137] But the court's response was unduly enthusiastic. First, the private class action followed a successful criminal case against the defendants, so liability had already been established. Second, the court assumed that the class could not expand the period of recovery by showing that the defendants had fraudulently concealed their misconduct.[138] If properly motivated, the class counsel likely could have successfully persuaded the court to toll the statute of limitations, which would have increased the damages recoverable at trial. After all, the defendants were clearly liable and they had concealed their price-fixing conspiracy. Despite these considerations, the court reasoned that because judges in antitrust class actions "compare the recovery to single as opposed to treble estimated damages," once the single damages measure is reached, "litigation could not possibly have achieved a more beneficial recovery for the class."[139] The reasoning is painfully tautological: once we assume that the class can never receive more than single damages, then a settlement of single damages cannot be improved upon and must be approved by the reviewing judge. Of course, the premise is entirely wrong: the successful class plaintiffs would, in fact, necessarily secure greater than single damages at trial due to the automatic trebling of antitrust awards.

This is not to say that class members in any given antitrust class action litigation are necessarily entitled to full recovery (or any particular proportion) of their estimated damages. The proper level of settlement is a function of several variables, including the probability of prevailing at trial and of proving damages. But an accurate estimate of the probable damages in a victorious antitrust lawsuit must include the automatic trebling of any compensatory damages awarded. By ignoring trebling, settlements pay less than the expected value of a colorable antitrust claim. If judges undervalue the class members' claims, they run the risk of approving inadequate settlements. As a result, such settlements undercompensate the class members for the value of their claims being extinguished.[140] Most importantly, even when the defendants have absolutely

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least, to recover damages based on the entire alleged conspiracy period, when it is longer than four years.").

135. In at least one class action, the defendant did apparently agree to pay treble damages in settlement because the class's case was so strong. *See* Abrams v. Interco Inc., 719 F.2d 23, 25 (2d Cir. 1983); *see also* Parker v. Time Warner Entm't Co., 239 F.R.D. 318, 335 (E.D.N.Y. 2007) (discussing *Abrams*).

136. 84 F.R.D. 245 (N.D. Ill. 1979).

137. *Id.* at 268–69.

138. *Id.* at 254.

139. *Id.* at 269.

140. *See* Bronsteen, *supra* note 3, at 904–05 ("Collusive settlements benefit the defendant (which insulates itself from future lawsuits by every class member) and the

engaged in the illegal conduct, cheated consumers will generally only get back pennies on the dollar if single damages are the starting point for evaluating a settlement. That means that consumers who have, in fact, been victims of an antitrust violation will not be made whole.

The *Grinnell* detrebling approach virtually ensures that class members harmed by a corporation's antitrust violations will not receive full compensation for their injuries.[141] Except in those few instances where antitrust class actions are litigated to victory for the plaintiffs, consumer victims of price-fixing conspiracies and illegal predation almost never receive full compensation through class action litigation. Compared to the true expected value of the class claims, proposed settlements approved pursuant to a detrebling rule are inherently suspect and most likely inadequate.

2. Ignoring Trebling Undermines Deterrence

The American antitrust regime is also designed to deter antitrust violations. Optimal deterrence is critical but elusive because many antitrust violations are difficult to detect and punish.[142] Price-fixing firms, in particular, make significant efforts to conceal their illegal conspiracies, including using code names, public phones, and fake travel itineraries.[143] Victims of antitrust violations are often unlikely to know whether the price they paid was artificially inflated due to either illegal monopolization or price-fixing.

Private antitrust litigation is important for deterrence. Congress believed "that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws."[144] The Supreme Court has long recognized that "the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat" to deter antitrust violations.[145] Treble damages are necessary to make sure that individual victims of antitrust violations have sufficient incentive to investigate and pursue their claims, and thus fulfill the deterrent role envisioned for them. The Supreme Court has explained that "Congress created the treble-damages remedy . . . precisely for the purpose of encouraging *private* challenges to antitrust violations. These private suits provide a

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plaintiffs' lawyer (who receives a hefty fee while avoiding the time, expense, and uncertainty of a trial), but those settlements undercompensate the class members by giving them less than the expected value of the lawsuit.").

141. *Antitrust Damage Allocation Hearings*, *supra* note 4, at 169 (statement of Jerry S. Cohen) ("A case that is settled is never settled for the full amount of damages that are due to the consuming public. So that, even in the settlement situation, the public is only getting a portion of what it has lost.").

142. Christopher R. Leslie, *Cartels, Agency Costs, and Finding Virtue in Faithless Agents*, 49 WM. & MARY L. REV. 1621, 1634 (2008).

143. *Id.*

144. Minn. Mining & Mfg. Co. v. N.J. Wood Finishing Co., 381 U.S. 311, 317–18 (1965).

145. Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 139 (1968); *see* Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 572 (1982) ("A principal purpose of the antitrust private cause of action . . . is, of course, to deter anticompetitive practices." (citation omitted)).

significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations."[146] By aggregating hundreds, thousands, and sometimes millions of individual claims into one lawsuit, private litigation in the form of class actions is particularly important.

The class settlement process is critical to antitrust deterrence. Many private antitrust claims are brought in the form of class actions, and because almost all antitrust class actions settle, systemic problems in the class action settlement process have significant consequences for the American antitrust legal regime. If the settlement structure uniformly fails to require violators to disgorge ill-gotten gains, then the overall deterrent effect of antitrust is diminished, if not eliminated, in many market sectors.[147]

One purpose of trebling is to ensure that antitrust violations are not cost-beneficial even though the probability of an antitrust violation being discovered and litigated is less than certain.[148] If damages were merely compensatory, antitrust violations would be cost-beneficial. As long as a firm enjoys a non-negligible chance of evading responsibility, violating antitrust laws appears rational: if not caught, the firm secures illegal profits, and, if caught, it simply returns the ill-gotten gains. If defendants pay less than full damages, then their illegal activity can be net profitable.[149] Trebling can help solve this problem by increasing the likelihood that the expected value of violating antitrust laws is net negative. When courts disregard trebling during the settlement approval process, this undermines deterrence because "treble damages were . . . designed to deter future antitrust violations."[150] Before *Grinnell* advocated ignoring treble damages, at least one district court rejected a proposed antitrust settlement in an amount less than single damages because it did "not believe that the fairness of any settlement proposal should be determined on the assumption that the retention by defendants of some of their illegal profits is the norm and that the anti-trust laws are, therefore, ineffective."[151] Similarly, in congressional hearings on antitrust damages held in the early 1980s, Judge Hubert Will testified, "[w]ith possible treble damages, if you can establish the amount of single damages, it is difficult to justify settlements of less than single damages and thereby permit alleged antitrust violators to retain

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146. Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979).

147. *See* Robert H. Lande, *Why Antitrust Damage Levels Should Be Raised*, 16 LOY. CONSUMER L. REV. 329, 339 (2004) ("Instead of starting at real treble damages and negotiating down to, for example, single damages, the parties have actually been starting at roughly single damages and then negotiating down to perhaps only 1/3 of the violation's true damages. For this reason most settlements lead to inadequate deterrence.").

148. *Hydrolevel*, 456 U.S. at 575 ("Treble damages 'make the remedy meaningful by counter-balancing "the difficulty of maintaining a private suit"' under the antitrust laws.").

149. In reality, it is difficult to get hard data on overcharges because when antitrust cases settle, no finder of fact actually calculates the overcharge. John M. Connor & Robert H. Lande, *How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines*, 80 TUL. L. REV. 513, 551–52 (2005).

150. *Am. Soc'y of Mech. Eng'rs, Inc.*, 456 U.S. at 575.

151. Liebman v. J. W. Peterson Coal & Oil Co., 73 F.R.D. 531, 536 (N.D. Ill. 1973).

part of their illegal profits."[152] Yet, this is the situation we find ourselves in, as price-fixing remains profitable and, thus, persistent.[153]

Absent disgorgement, deterrence suffers. Unfortunately, class action settlements generally fail to fully disgorge the illegal profits secured from antitrust violations. "Even strong cases where one would expect the plaintiffs' chances of success to exceed one in three, such as horizontal price-fixing cases which follow successful criminal prosecutions, generally settle for less than actual damages."[154] In cases following criminal convictions, federal courts have approved antitrust class action settlements that paid less than single damages.[155] This substantially weakens the deterrent value of antitrust law, as even convicted violators may profit from their misconduct.

Some commentators argue that deterrence is a function of criminal penalties, not private litigation.[156] Two facts undermine this position. First, government antitrust authorities have insufficient resources to discover and prosecute all antitrust violations,[157] so many cartels thrive undeterred, reducing output and overcharging their customers.[158] Second, while facially high, criminal penalties do not necessarily disgorge the ill-gotten gains from illegal price-fixing. Under the Department of Justice's Corporate Leniency Program, the first firm to expose a cartel receives amnesty from all criminal penalties. The remaining firms

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152. *Antitrust Damage Allocation Hearings*, *supra* note 4, at 246–47 (statement of Hubert L. Will).

153. *Liebman*, 73 F.R.D. at 536 ("[A] settlement on this basis would mean that the defendants would retain a substantial portion of any illegal gains rather than be penalized for their violations of the anti-trust laws as Congress clearly intended by its provision for treble damages."); BOIES, *supra* note 6, at 227 ("Nevertheless, while treble damage awards can be very large, the profitability of price-fixing has meant that companies continue to do it despite the consequences.").

This ignores transactions costs. But the low probability of detection swamps the transactions costs, which explains the relatively large number of antitrust violations we continue to see.

154. ABA ANTITRUST SECTION, MONOGRAPH NO. 11, CONTRIBUTION AND CLAIM REDUCTION IN ANTITRUST LITIGATION 50 n.241 (1986).

155. *See, e.g.*, JAMES B. LIEBER, RATS IN THE GRAIN: THE DIRTY TRICKS AND TRIALS OF ARCHER DANIELS MIDLAND, THE SUPERMARKET TO THE WORLD 33–34 (Four Walls Eight Windows 2000); ABA ANTITRUST SECTION, MONOGRAPH NO. 11, CONTRIBUTION AND CLAIM REDUCTION IN ANTITRUST LITIGATION 50 n.241 (1986) ("In the *Corrugated Container* cases, for example, total settlements were less than one third of the trial court's estimate of actual damages.").

156. *See* Monograph Task Force, *Part II: The Contribution Debate*, *in* CONTRIBUTION AND CLAIM REDUCTION IN ANTITRUST LITIGATION, 1986 A.B.A. SEC. ANTITRUST 8, 24–25 ("Proponents also claim that the threat of criminal liability and to a lesser extent treble damages, not joint and several liability, are the true deterrents to price fixing and other anticompetitive activity. As one attorney testified, '[a]ny corporate executive foolish enough to engage in such activities in the face of those risks would hardly be deterred by the lack of a contribution statute.'") (quoting *Antitrust Damage Allocation Hearings*, *supra* note 4, at 39 (statement of Denis McInerney)).

157. Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979).

158. Christopher R. Leslie, *Trust, Distrust, and Antitrust*, 82 TEX. L. REV. 515, 517–18 (2004).

are given significant discounts in their criminal fines to reward their cooperation.[159] Although in theory the government retains the right to seek restitution from all firms, including the first confessor who receives amnesty, federal antitrust prosecutors rely on private litigation to disgorge the ill-gotten gains.[160] As if antitrust policy were designed by O. Henry, criminal enforcers afford leniency because private enforcement should disgorge ill-gotten gains, while reviewing judges in private enforcement cases fail to disgorge these same illegal profits, reasoning that the federal authorities are doing so. The result is a failure to disgorge and, consequently, a failure to deter.

E. Reasons for Suspicion: Courts Consider Trebling when Such Consideration Favors the Proposed Settlement

Despite the judicial rule to disregard trebling in deciding whether to approve a proposed settlement, courts nevertheless invoke trebling when such consideration supports approving the proposed settlement. For example, courts consider treble damages when looking at the likelihood of a trial or higher settlement bankrupting the defendants. One of the *Grinnell* factors is the ability of the defendant to withstand a judgment larger than the proposed settlement. The factor's logic lies in the fact that the class does not benefit from securing a jury award greater than the proposed settlement if the class could not collect because the defendant would declare bankruptcy.[161] Courts evaluating settlements in antitrust cases that disregard trebling pursuant to the *Grinnell* rule in assessing the "best possible recovery" factor nevertheless consider trebling when applying the defendant's-ability-to-pay factor, reasoning that the "minimum estimate of trebled recovery . . . could bankrupt the remaining defendants."[162]

At a minimum, the judicial recognition that damages after trial will be trebled exposes the illogic of the court's treatment of the "best possible recovery" factor. The maximum possible recovery is deflated by two-thirds when comparing the proposed settlement to the class's potential recovery at trial, but that same maximum possible recovery is then magnified three-fold when considering the defendant's ability to pay a victorious class after trial. So the court ignores trebling when doing so makes the factor support the proposed settlement, and considers

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159. Christopher R. Leslie, *Antitrust Amnesty, Game Theory, and Cartel Stability*, 31 J. CORP. L. 453, 465–66 (2006).

160. Proger & Herman, *supra* note 105, at 46 ("[W]hile the criminal antitrust laws and policies require co-operating or pleading individuals or entities to make restitution to their victims, the Division does not generally involve itself in restitution, knowing that it can count on the plaintiffs' bar to ensure that customers are compensated.").

161. *In re* Domestic Air Transp. Antitrust Litig., 148 F.R.D. 297, 323–25 (N.D. Ga. 1993).

162. *Id.* at 324. Western Union provides a non-antitrust example of a court considering trebling to make one factor support settlement while ignoring trebling in determining the reasonableness of the settlement amount as compared to the recovery at trial. *See In re* W. Union Money Transfer Litig., No. CV-01-0335, 2004 WL 3709932, at *11 n.11 (E.D.N.Y. Oct. 19, 2004); *see also* Weil v. Long Island Sav. Bank, 188 F. Supp. 2d 258, 264 (E.D.N.Y. 2002) (noting potential trebling in reviewing proposed settlement in RICO case).

trebling when doing so makes another factor favor approval of the settlement. This inconsistency suggests a driving impulse to approve proposed settlements.

F. Minor Complications when Considering Trebling

In considering the trebling of antitrust damages when reviewing proposed settlements, judges may have to confront two issues: the role of detrebling statutes and the presence of non-antitrust claims in antitrust class action litigation. While both of these issues may provide minor wrinkles in the settlement review process, neither significantly complicates the court's analysis.

First, courts should not consider trebling when reviewing proposed settlements in antitrust class action litigation if a relevant statutory detrebling provision applies. While the trebling of antitrust damages is mandatory, a few minor statutory exceptions exist. For example, the National Cooperative Research and Production Act and the Standards Development Organization Advancement Act of 2004 provide for single damages for members of qualifying and appropriately registered joint ventures and standard setting organizations.[163] Similarly, the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 grants the first qualifying cartel member to confess under the government's amnesty program immunity from treble damages, leaving such cooperating firms liable only for single damages in follow-on litigation.[164] Notably, no court that has ignored trebling—or asserted that trebling creates uncertainty—has mentioned these statutory exemptions, nor have the facts of those cases implicated any of these statutory provisions. These statutory provisions need not complicate the review of proposed settlement in antitrust class action litigation. These statutes are rarely implicated and are largely irrelevant in most antitrust litigation. When a defendant does have a colorable detrebling defense, then the court should take that into account when estimating liability and damages.[165] However, judges should not detreble estimated damages absent a statutory provision for single damages in the particular antitrust case at hand. Because the proponents of a class action settlement bear the burden of proving its reasonableness,[166] they should bear the burden of showing that a detrebling statute applies. This is a relatively straightforward legal inquiry that courts are fully equipped to decide.[167]

Second, the presence of non-antitrust causes of action does not justify ignoring trebling generally. In citing the risk of uncertainty to justify disregarding treble damages, reviewing courts sometimes stress that the class action includes non-antitrust causes of action, which do not require trebling. Many federal antitrust class action suits do involve additional non-antitrust causes of action,[168] such as

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163. 15 U.S.C. §§ 4301, 4303 (2006).

164. Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, 118 Stat. 661, 665–67 (2004).

165. *See supra* notes 163–64 and accompanying text.

166. 6 CONTE & NEWBERG, *supra* note 94, at 194 ("Proponents of the settlement bear the burden of proving that the proposal should be approved.").

167. For example, it should be easy to identify the first-confessing firm, which is entitled to detrebling.

168. Perloff et al., *supra* note 9, at 404 ("Most filings included a number of antitrust and non-antitrust claims.").

tortious inference with contract or claims based on state consumer protection statutes.[169] Federal antitrust class action litigation may also include claims pursuant to state antitrust laws that allow recovery of actual damages only. A single settlement may resolve a treble damage antitrust claim and other claims that provide only for single damages.[170] Some courts invoke this fact to ignore trebling.[171] But this is too drastic a solution. Instead, a reviewing judge should delineate between claims with and without automatic trebling.[172] The judge should then estimate the probability of liability and damages for each separate category of claim and then treble the appropriate ones. Of course, if an antitrust claim in a multi-claim class action lawsuit were frivolous, then the trebling provision should not affect the court's valuation of the proposed settlement because the antitrust claim itself should not enter the reasonableness calculation; as a frivolous claim, it is worthless.

In sum, when reviewing proposed settlements in antitrust class action litigation, courts should calculate the maximum possible recovery amount that reflects antitrust's automatic trebling. The initial decision to ignore trebling is founded on a misreading of the cited literature, and the subsequent justifications for the detrebling rule are fatally flawed. Ultimately, the failure to use an accurate estimate of the best possible recovery undermines the very purposes of antitrust law—compensation and deterrence.

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169. *See, e.g.*, *In re* Warfarin Sodium Antitrust Litig., 212 F.R.D. 231, 236 (D. Del. 2002).

170. *In re* Lorazepam & Clorazepate Antitrust Litig., Civ. 99-0790(TFH), 2003 WL 22037741, at *3 n.6 (D.D.C. June 16, 2003) ("Although the Direct Purchasers could potentially recover *treble* damages, the standard for evaluating settlement involves a comparison of the settlement amount with the estimated single damages. . . . [M]any states do not permit the recovery of treble damages . . . ." (citations omitted)).

171. *In re* Remeron End-Payor Antitrust Litig., Nos. Civ. 02-2007 FSH, Civ. 04-5126 FSH, 2005 WL 2230314, at *24 (D.N.J. Sept. 13, 2005) ("Although in certain circumstances a plaintiff class may recover treble damages if it prevails at trial, that result is far from certain. Moreover, in the present case, End-Payor Plainttiffs and Plaintiff States represent consumers pursuant to state laws that provide for varying levels of recovery—some provide only for recovery of equitable relief, and many do not provide for recovery of treble damages.").

172. Courts do not allow the variations in trebling rules among different state antitrust laws to defeat the commonality requirement for federal class action litigation. *Warfarin Sodium*, 212 F.R.D. at 251 ("Several class members object to certifying a single, nationwide class because some members may be eligible for treble damages or punitive damages under their state antitrust or consumer fraud statutes, and Tennessee and Kansas members may be eligible for 'full consideration' damages, thereby destroying commonality. These differences, however, go to damages calculations and thus do not destroy commonality or predominance, though they may be considered by the court in assessing the fairness of the settlement." (citation omitted)).

IV. THE CONSEQUENCES OF CONSIDERING TREBLING: SETTLEMENT RATES AND NUISANCE SUITS

Many courts have justified their refusal to consider treble damages by arguing that the rule facilitates settlement of class action litigation.[173] But, to date, courts have not seriously considered two other consequences of their refusal. If courts were to consider the trebling of damages when evaluating proposed settlements in antitrust class action litigation, it could affect the probability and amount of settlements, as well as the number of antitrust class actions filed, including the number of nuisance suits.

In order to predict the effects of considering trebling, it is necessary to understand the dynamics of the settlement negotiation process. A defendant calculates the expected value of not settling as the anticipated litigation costs *plus* the probability of losing at trial *times* the likely damages that would be awarded—trebled—as well as any attorneys' fees to which a victorious antitrust plaintiff is entitled under the Sherman Act. This formula yields a number—the defendant's settlement value of the case—below which the defendant should be willing to settle. This settlement value is essentially the defendant's reservation price, the maximum that it is willing to pay. A risk-averse defendant would attach a higher settlement value to the case and would consequently be willing to pay more to settle.[174] A rational firm would not pay more than its settlement value of the case; it would willingly pay any lower amount in order to dispose of the case. Any settlement amount between zero and the defendant's reservation price is within the defendant's settlement range.

Plaintiffs, too, calculate the expected value of litigation. In general, the expected value of litigation from a plaintiff's standpoint is the probability of winning *times* the likely damages *minus* litigation costs. In antitrust litigation, the damages would be trebled and the victorious plaintiff is entitled to recover reasonable attorneys' fees and costs. This increases the expected value of antitrust litigation because the potential damage award is higher and costs can be recovered. Like the defendant, plaintiffs consider their likelihood of prevailing and recovering damages in order to calculate a settlement value. A settlement offer at or above this threshold should be accepted; if the settlement offer is below this threshold, it is in the plaintiff's interest to litigate. Any settlement amount between the plaintiff's reservation price and full recovery—i.e., treble damages plus attorneys' fees and costs—is within the plaintiff's settlement range.

For a settlement to be possible in any given litigation, there must be an overlap between the settlement ranges of the defendant and the plaintiff. So long as there is a figure that the defendant would be willing to pay and the plaintiff would be willing to accept, settlement is possible. In many cases, there will be a range of possible settlement, represented by the range of A to B in Figure 1.

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173. *See supra* Part II.B.

174. Evidence suggests that price-fixing firms are, in fact, risk averse. Christopher R. Leslie, *Judgment-Sharing Agreements*, 58 DUKE L.J. (forthcoming 2009).

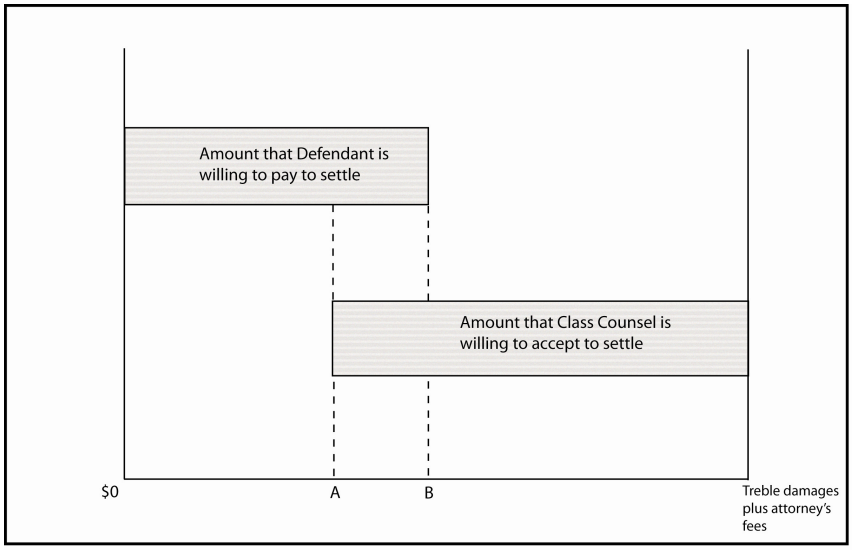

Figure 1

If the plaintiff's reservation price (the lowest price it will accept to settle the litigation) is greater than the defendant's reservation price (the highest price that it will pay to settle), then there is no range of overlap. In this situation, settlement should not occur. Such a lack of overlap can be caused by the parties' differing perceptions about the likely outcome at trial,[175] as well as their levels of risk aversion.[176]

As long as there is overlap, there should be a settlement unless the parties play chicken by refusing to entertain settlement offers that fall within their acceptable range, because each party believes that it can hold out for a better settlement. In light of such tactics, negotiating parties generally conceal their true reservation prices while attempting to discern their opponents'.[177] When both parties successfully misrepresent their reservation prices, it may be hard to tell if their settlement ranges overlap and negotiations may fail to yield a settlement even though a mutually agreeable outcome is theoretically possible.

The class action context potentially changes the settlement range. While the defendant's settlement range should remain unchanged, class counsel may be willing to accept less than the minimum settlement value acceptable to a traditional

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175. Connor & Lande, *supra* note 149, at 553 ("Settlement is very difficult if plaintiffs are optimistic that they will prevail and the award will be large, while defendants believe the opposite."); Perloff et al., *supra* note 9, at 401 ("An important feature of the model is that the likelihood of settlement depends on the parties' beliefs about trial outcomes.").

176. Perloff et al., *supra* note 9, at 401 ("Whether parties to private antitrust lawsuits settle or go to trial depends on their beliefs about the likely trial outcome and on their attitudes toward risk.").

177. *See, e.g.*, BOIES, *supra* note 6, at 245.

plaintiff.[178] The fact that class counsel have more decisionmaking authority and greater incentive to settle than do lawyers representing individual plaintiffs expands the range of possible settlement (by lowering the reservation price). The class counsel may undervalue the class members' claims if they focus on a high-volume, early settlement practice, instead of trying to maximize the likely payoffs for any particular class. Defense counsel may also have substantial leverage over class counsel to force the settlement down to the class counsel's reservation price. First, the defense may be able to drag out the litigation, increasing the class counsel's cost and tying up resources that class counsel would prefer to invest in other litigation. Second, defense counsel may pressure class counsel in one jurisdiction to settle for a particularly low sum by threatening to seek a global settlement in a parallel class action filed in another jurisdiction by other class counsel.[179] This would eliminate the first class counsel's lawsuit entirely, eliminating recovery for their costs, let alone any payment of their attorneys' fees.

But class action settlements are also different because the negotiations are not merely between the two bargaining parties. The parties must contend with the additional constraint that a federal judge must approve the settlement. The presence of the judge as an independent restriction can prevent deals that are otherwise agreeable to defendants and class counsel.[180] The judge's role is to ensure that the class counsel has not accepted a settlement that is too low. Thus, even though the parties could agree to any settlement between A and B, a judge leery of collusion might refuse to approve any settlement less than a particular amount, C, reducing the viable settlement range between C and B, as represented in Figure 2. A to C is a range of possible agreement in which the defendant and class counsel could agree but the judge would reject the proposed settlement as inadequate.

178. *See supra* Part I.B.

179. *See* Figueroa v. Sharper Image Corp., 517 F. Supp. 2d 1292, 1306–07 (S.D. Fla. 2007) (author served as an expert in the litigation).

180. *See, e.g.*, *In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 803 (3d Cir. 1995) (rejecting a proposed coupon settlement); Clement v. Am. Honda Fin. Corp., 176 F.R.D. 15, 18 (D. Conn. 1997) (same).

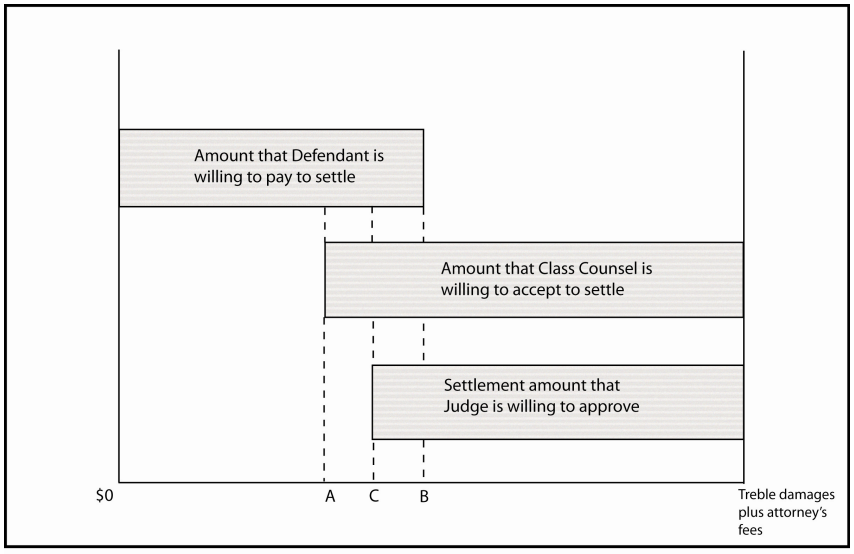

Figure 2

The requirement that the judge scrutinize proposed settlements could therefore narrow the range of possible settlement.[181] The judge serves as a guardian to protect the absent class members against a collusive or otherwise inadequate class action settlement. However, in many cases, judges face systemic pressure to approve proposed class action settlements. Thus, it is possible that the reviewing judge may approve settlements that are best rejected given the merits of the class's claims. In antitrust class action litigation, this may occur because the judge is undervaluing the class's claims by failing to consider the true worth of victory at trial for the class members: treble damages.

Considering the trebled value of the class claims could affect both the probability and amount of settlement in antitrust class actions. Indeed, courts have justified their detrebling approach because it facilitates settlements. The following Sections evaluate the possible effects of considering trebling on settlement outcomes and on the filing of antitrust class actions.

A. Settlement Effects

How would considering trebling affect whether parties to antitrust class actions reach a settlement? In all likelihood, cases will continue to settle if judges consider the automatic trebling of antitrust damages when reviewing proposed

181. Any settlement between C and B is within the range of reasonableness. Courts have long noted that a "just result is often no more than an arbitrary point between competing notions of reasonableness." *In re* Corrugated Container Antitrust Litig., 659 F.2d 1322, 1325 (5th Cir. 1981); *see In re* Cement & Concrete Antitrust Litig., 817 F.2d 1435, 1440 (9th Cir. 1987) (quoting *id.*), *rev'd on other grounds sub nom.* California v. ARC Am. Corp., 490 U.S. 93 (1989). But the point cannot be entirely arbitrary—it must fall within a range of reasonableness.

settlements. So long as there is a settlement point that is acceptable to the defendant, the class counsel, and the presiding judge, then a settlement should take place.[182] As the cost of settlement increases, defendants might be more willing to risk trial (and attempt to escape liability altogether). However, the prospect of treble damages should continue to motivate the defendant to settle.[183] Absent victory on a dispositive motion, settlement is the only way for the defendant to eliminate the risk of being held liable at trial for three times the amount of the plaintiffs' damages.

To the extent that considering treble damages as the benchmark could reduce the likelihood of settlement in some cases, that is as it should be. If the proposed settlement remains adequate when trebling is considered, there is no change. However, if the settlement is inadequate when trebling is considered, then the court should reject the proposal as unreasonable. After all, for any proposed class action settlement, if the judge discounts the estimated damages by two-thirds, the probability of the defendants and class counsel proposing a settlement that could earn the court's approval would significantly increase. But judges do not routinely slash the plaintiff class's maximum recovery by two-thirds in order to justify a proposed settlement as fair and reasonable. The prospect of fast settlements cannot support an unjust rule. The Supreme Court has rejected the use of legal rules merely because their "application out of court yields quick, though inequitable, settlements, and relieves the courts of some litigation. Congestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage speedy out-of-court accommodations."[184]

Altering the approach to settlement approval can have one of three potential effects on the actual amount of a settlement: decreasing it, increasing it, or leaving it unchanged. It is implausible that considering trebling could reduce settlement amounts because when courts compare the proposed settlement to the best possible recovery including trebling, this should increase the minimum acceptable settlement, not decrease it. Although many, if not most, settlement amounts will probably remain unchanged, consideration of trebling will likely increase some settlement outcomes. Class counsel will be less able to negotiate low-ball settlements when judges better appreciate the true (trebled) value of the class claims being relinquished. If judges consider trebling, settlement amounts

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182. If there is no such point—e.g., because the judge is unwilling to approve a settlement—then the case should not settle.

183. *See* Fisher Bros. v. Phelps Dodge Indus., 604 F. Supp. 446, 451 (E.D Pa. 1985) ("The availability of treble damages to a successful plaintiff also enters into a defendant's decision to avoid the risks of litigation."); 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) ("The practical effect of mandatory trebling is to tilt the settlement process in the plaintiff's favor because mandatory trebling so inflates the defendant's cost of losing and the plaintiff's value of a victory in a rule of reason case."); Perloff et al., *supra* note 9, at 408 ("[B]ecause the size of the risk aversion effect increases with the size of damages awarded, trebling antitrust damages has a dramatic effect on the probability of a settlement. Were we to stop trebling antitrust damages, the fraction of cases litigated would increase substantially.").

184. United States v. Reliable Transfer Co., 421 U.S. 397, 408 (1975).

may creep up as the parties worry that a judge may reject their proposed settlements (or, indeed, as parties negotiate higher settlements after the judge actually rejects an early settlement as inadequate).

Higher settlement values may better serve the goals of antitrust law.[185] First, higher settlements are more likely to compensate victims for the full extent of their injuries. Second, higher settlements are more likely to disgorge ill-gotten gains and to enhance deterrence. One major purpose of automatically trebling antitrust damages is to encourage private antitrust litigation and inflict sufficient pain on antitrust violators to make antitrust violations not cost-beneficial. Damages must be greater than mere single damages because the probability of detecting, prosecuting, and litigating antitrust violations is less than one. If judges refuse to consider the automatic trebling of antitrust damages when approving settlements of antitrust class action litigation, then the purposes and functions of trebling are mooted in those cases that end in settlement. Because most antitrust class action litigation settles, judges must take account of trebling when considering the reasonableness of a proposed settlement of an antitrust class action. Otherwise, the importance and deterrent effect of trebling diminish. In short, while settlement amounts might be higher upon consideration of trebling, such a result would better achieve the deterrent goals of antitrust.

B. Effect on Nuisance Suits

In theory, increasing the average settlement award in antitrust class action litigation could have the decidedly negative consequence of encouraging nuisance antitrust suits. Class counsel could use the threat of treble damages to force lucrative settlements in frivolous lawsuits.[186] But there are sound reasons to believe that consideration of trebling would not necessarily encourage nuisance suits. First, judges should dispose of frivolous suits through dismissal or summary judgment, not by approving settlements of whatever magnitude (which line the pockets of the class counsel that brought the frivolous suit). Federal courts are more than willing to dismiss antitrust class actions.[187] Second, settlement values should only increase in those cases where consideration of trebling would render inadequate a settlement that would appear reasonable only when evaluated against a maximum single damage remedy.[188] Third, to the extent that the risk of trebling-induced nuisance suits exists, Congress created the risk when it required automatic trebling in private antitrust suits. It is not the courts' prerogative to reverse Congress by ignoring trebling in the context of settlements.

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185. This discussion assumes that the underlying lawsuit has merit. For a discussion of frivolous suits, see *infra* Part IV.B.

186. *See* Cavanagh, *supra* note 4, at 810.

187. *See, e.g.*, Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1963, 1974 (2007); Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 405 (2004).

188. If the settlement value increases as a result of the judge considering trebling, that may indicate that the underlying suit was likely not frivolous.

C. Balancing the Various Considerations

If judges begin considering the ultimate trebling of any jury-awarded damages, courts could reject some settlement proposals that they would otherwise accept.[189] Using treble damages as the point of comparison may thus result in fewer settlements. In a litigation system that values settlement, this consequence is disfavored. Everything else being equal, reducing settlements may not be desirable. But everything else is not equal. Low-ball settlements have consequences. When courts ignore the trebling of damages, they increase the likelihood of settlement, but they impose serious costs as well.

The purpose of the private antitrust cause of action—and of class action litigation more broadly—is to achieve the twin goals of compensating victims of corporate misdeeds and deterring future violations by making illegal conduct unprofitable. Disregarding trebling undermines both of these core goals. First, most settlements approved in the shadow of *Grinnell*'s detrebling rule result in insufficient compensation for victims of illegal conduct, even if the defendant is undoubtedly liable.[190] Second, these settlements fail to disgorge antitrust violators' ill-gotten gains and consequently undercut the deterrent effect of private antitrust suits.[191]

When judges reject a proposed settlement, as may happen more often if they consider trebling, the litigation can take one of several different courses: (1) the parties settle later for a greater amount; (2) the case proceeds to trial and the defendant wins; (3) the case proceeds to trial and the plaintiff prevails; or (4) the defendant wins a motion to dismiss or for summary judgment.[192] Each of these is arguably a better result than a federal judge approving an unreasonable settlement. If the class has a valid case, the negotiation of a larger settlement serves both the compensatory and deterrent goals of antitrust law.[193] Similarly, if the class litigates its claims to a victory at trial, the class would be significantly better off than by accepting a settlement amount that did not reflect antitrust trebling.[194]

Of course, not all antitrust class action claims are valid and, consequently, not every alternative outcome benefits the class. The litigation could go to trial, and the jury could rule for the defendant. Or, after rejecting a proposed settlement,

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189. This result is probable, but not inherent, either because many currently approved settlements could be reasonable as is even when courts consider trebling or because defendants in other cases may pay more in settlement to adjust for the fact that the value of the best possible recovery will increase when trebling is considered.

190. *See* sources cited *supra* notes 129–31.

191. *See supra* notes 147–53 and accompanying text.

192. Another possible outcome is the class dismissing the case in the settlement-rejecting court and moving the case to another jurisdiction, which approves a settlement similar to the just-rejected one. Also, the plaintiff could win a motion for summary judgment, though this is rarely realistic.

193. The risk of frivolous class action litigation is discussed below.

194. Even here, the case may conclude with a settlement: if the parties cannot reach an agreement before trial and the plaintiff prevails, the case may settle, as the defendant pays significantly more than its pre-trial offers in exchange for dropping any appeals. BOIES, *supra* note 6, at 259–60.

the district judge could grant a defendant's motion to dismiss or for summary judgment. Under these outcomes, the class would receive nothing. While not helpful to the class members, these outcomes are not necessarily bad from a systemic perspective. If the defendant has, in fact, not violated the antitrust laws, then the class is not entitled to compensation and the defendant has no ill-gotten gains to be disgorged. No payment to the class and its counsel is the proper outcome.

Unfortunately, liability is not so cut and dried when the judge evaluates a proposed settlement. The fear that the class will receive nothing in the absence of the particular settlement before the court may motivate federal judges to interpret the *Grinnell* factors in a manner that facilitates the approval of suspect settlements. But the urge to give the class members "something" and to approve any settlement that confers any value on the class is to the long-term detriment of class members—it has led to our current system, where even strong cases settle for pennies on the untrebled dollar.

CONCLUSION

Judges should not approve every proposed settlement. Encouraging settlements is a proper goal. But the question remains, "At what cost?" The decision to approve or reject a proposed class action settlement is rarely easy.[195] No single touchstone for reasonableness exists, which is why there are so many factors that judges should examine before deciding whether to accept or reject any particular settlement. The *Grinnell* factors are just that—factors, not requirements. No proposed settlement has to satisfy every factor. But judges should nonetheless accurately apply every factor. Judges should not misapply factors in order to

195. In many cases, a reasonable settlement will represent less than single damages. Liebman v. J.W. Peterson Coal & Oil Co., 73 F.R.D. 531, 537 (N.D. Ill. 1973) ("We recognize, of course, that a settlement of less than minimum single damages may well be appropriate in a given case. If the issue of liability is speculative, if the defendants are financially incapable of paying more or other relevant factors warrant it, such a settlement may be fair and reasonable. On the basis of the information presented to us, this is not such a case."). For example, a settlement that pays the class 30% of the estimated single damages might, in fact, be fair, adequate, and reasonable. But this conclusion must rest on such factors as the plaintiff's likelihood of success and the defendant's ability to pay. The percentage recovery should not be artificially inflated—such as by ignoring trebling—in order to make the defendant's concession appear to be more generous than it is. In evaluating proposed settlements in antitrust class action litigation, a court should treat such a settlement accurately: as 10% of the maximum possible recovery—i.e., the treble damages that would follow a class victory at trial. A 10% recovery, while facially quite low, may nevertheless be reasonable.

But that range of reasonableness should be defined with reference to the likely damage award should the plaintiffs prevail at trial, a figure that in antitrust cases is automatically trebled damages. Using the wrong base of single damages makes a proposed settlement appear more generous to the class than it actually is. For example, the court in one antitrust case reasoned that a proposed settlement that represented 28% of the estimated damages before trebling was reasonable. But in reality, the proposed settlement represented a mere 9% of estimated damages following a successful trial for the plaintiffs. A single digit percentage recovery is much more likely to appear facially inadequate; representing that same recovery as a 28% recovery makes the dollar amount appear more palatable.

approve a settlement. If a particular factor does not support approval of the settlement, so be it—other factors remain. If most of these other factors support approval of the settlement, then the court can justifiably approve the settlement despite the fact that some elements do not counsel in favor of approval. If the balance of the remaining factors does not support settlement, then the judge should reject the proposal; the judge certainly should not misinterpret the maximum possible recovery factor in order to justify approval of an otherwise inadequate proposed settlement. Ignoring trebling facilitates settlement, but at the high cost of reducing compensation and undermining deterrence of the underlying antitrust violations.