



COMPETITION LAW
REMEDIES:
PRIVATE RIGHTS OF ACTION
&
CRIMINALISATION

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&

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U.S. Federal Trade Commission



Little on Remedies



Well-developed scholarship
on the substance of
competition law.



Relatively little by
comparison on sanctions
and remedies

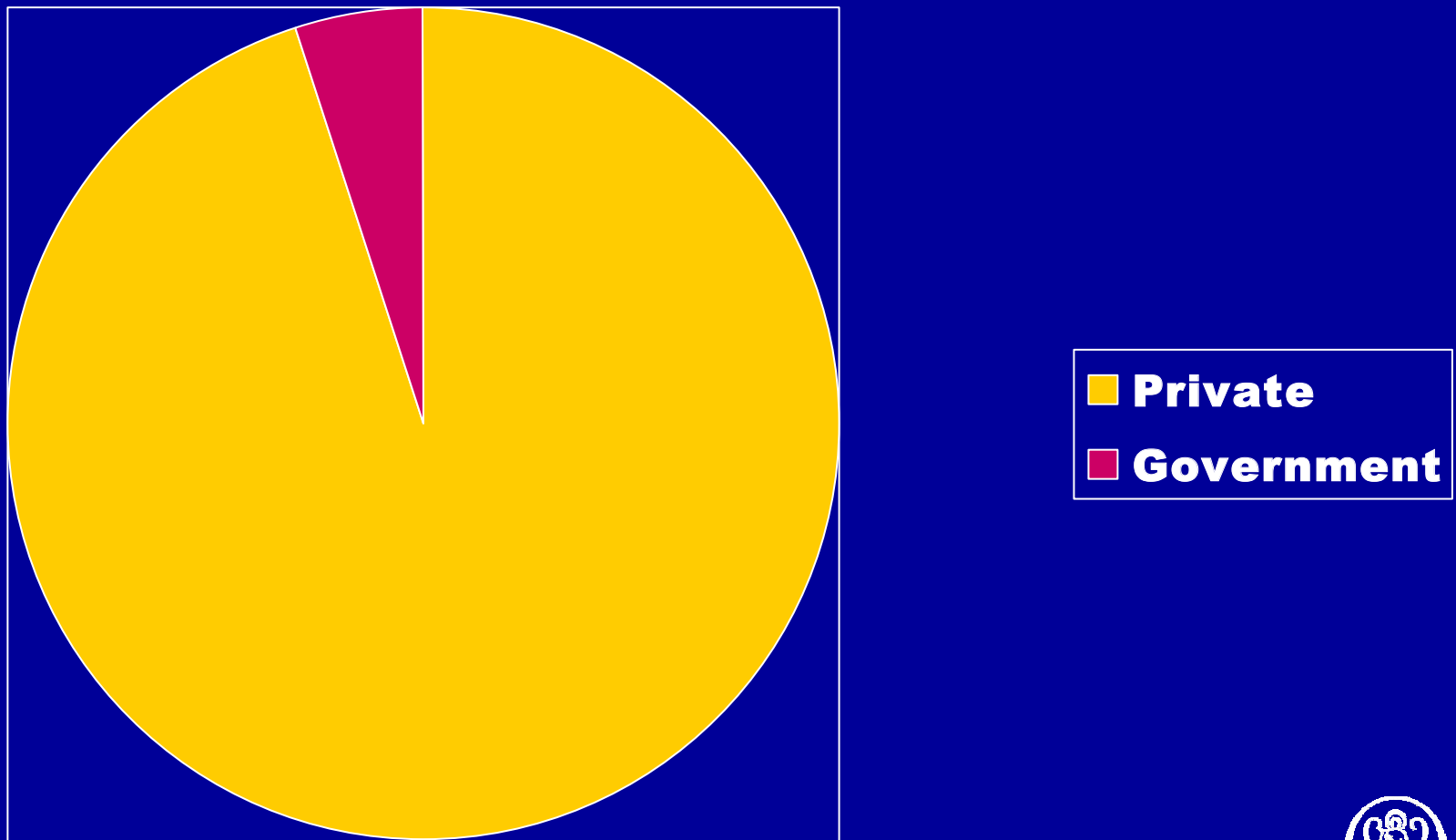


Today's agenda--

1. Competition law remedies in the U.S.
2. Permissible inferences of duality.
3. The compensatory objective: how well do we do in the U.S.?



U.S. Antitrust Cases



Features of U.S. Private Suits



Courtroom Drama

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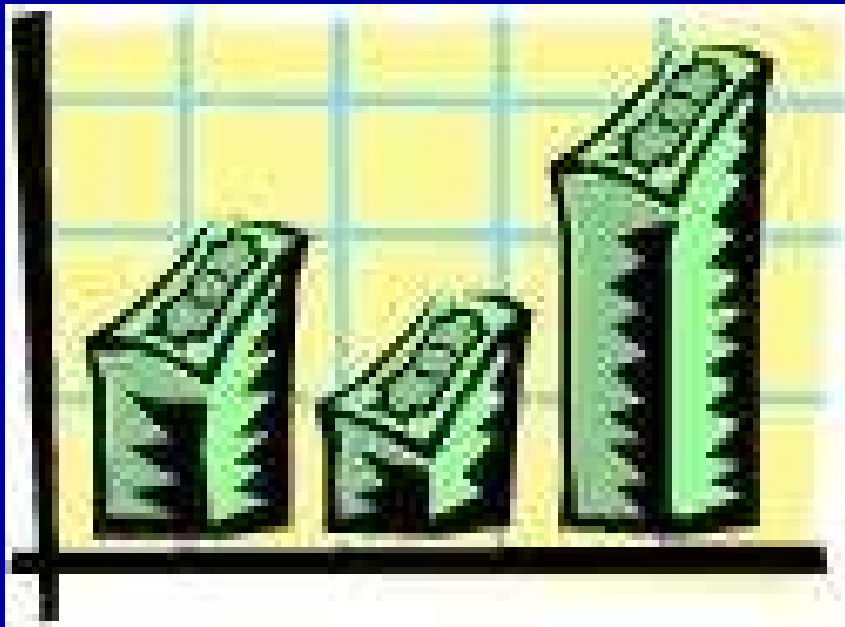
- Fact pleading unnecessary.
- Permissive discovery.
- Class actions.
- Proving damages with specificity not required.
- Attorney fees & costs to successful plaintiffs. Nothing for successful defendants.





Features of U.S. Private Suits

3 X actual damages

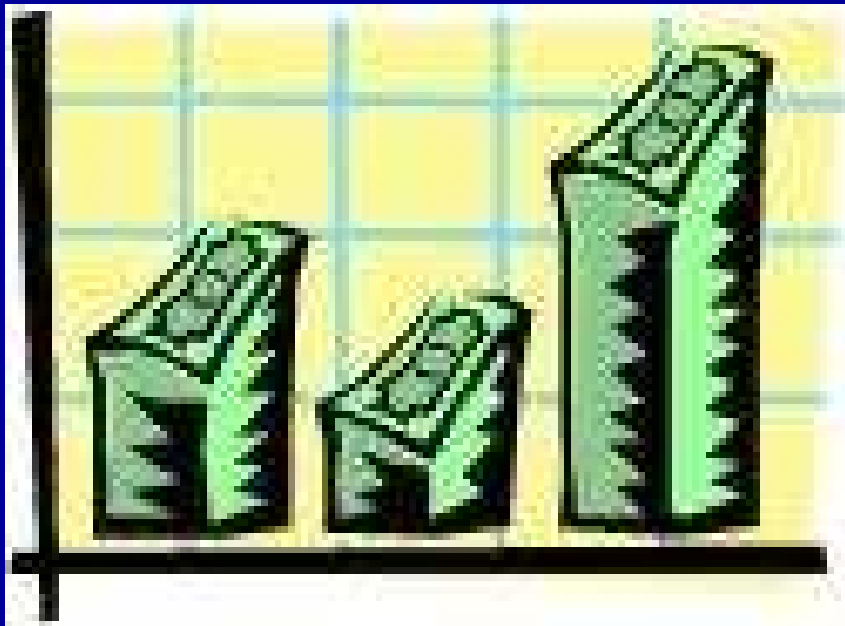


- No, I didn't. The U.S. does not have treble damages. It has only single damages.
- While the statute provides for treble damages, it does not provide for pre-judgment interest.
- When analyzed, the U.S. awards only single damages.



Features of U.S. Private Suits


3 X actual damages



- See Parker, “The Deterrent Effect of Private Treble Damage Suits: Fact or Fantasy,” 3 *N.M.L.Rev.* 286 (1973), Parker, “Treble Damage Action: A Financial Deterrent to Antitrust Violations,” 16 *Antitrust Bull.* 483 (1971)
- Lande, “Are Antitrust ‘Treble’ Damages Really Single Damages,” 54 *Ohio St. L.J.* 115 (1993)



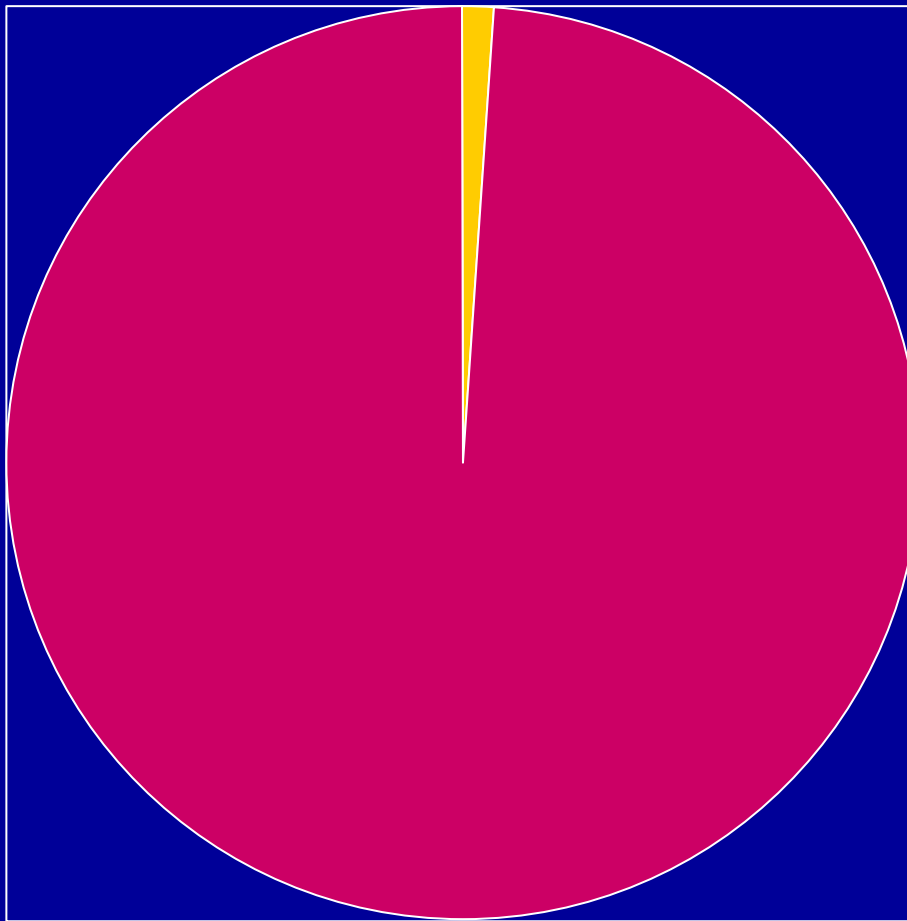
Features of U.S. Private Suits



You cannot talk intelligently about "multiple" damages without also discussing pre-judgment interest.



European Competition Cases



■ **Private**
■ **Government**



EU Private Rights of Action



- In the Courage Case, the Court held that there was a private right of action for redress of competition injuries under the Community law.

The Court of Justice



Ashurst Report

ashurst

Study on the conditions of
claims for damages in case of
infringement of EC competition rules

COMPARATIVE REPORT

Prepared by Denis Waelbroeck,
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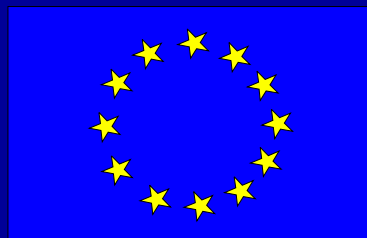
31 August 2004

- Despite the Courage decision, there is effectively no private antitrust litigation within Europe.
- The number of cases litigated through to judgment in all of Europe can be counted on ones hands.





Commissioner Kroes



**Former
Commissioner Monti**

**Both Monti & Kroes call
for private rights of action.**



Green Paper on Private Rights of Action



- American style discovery?
- Punitive damages?
- Indirect purchaser suits?
- Class actions?
- Abolish loser pays costs rule?
- Toll statute of limitations with public prosecutions?



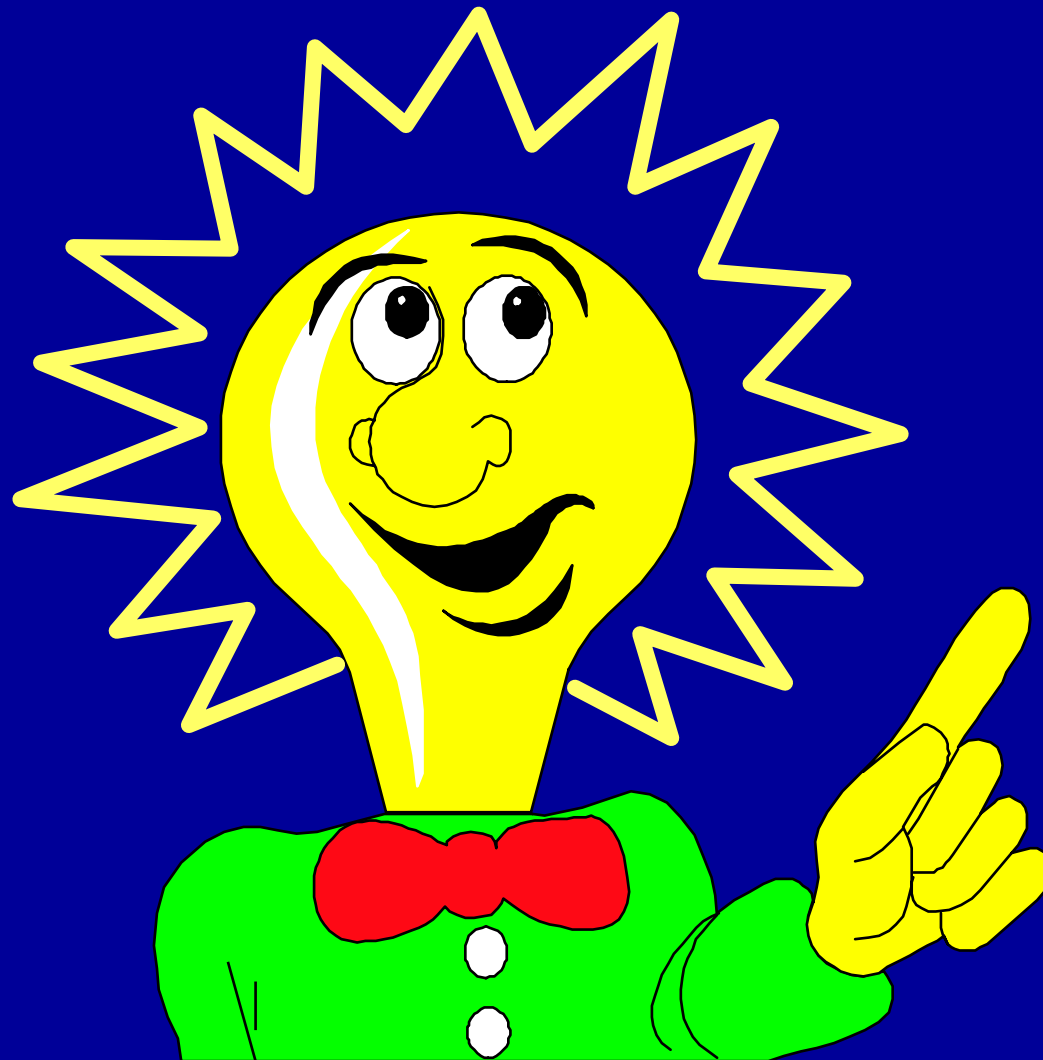
Lawyers groups endorse private rights of action for Europe.



Excellent. This should really improve firm profitability.



What can we learn from the American experience?



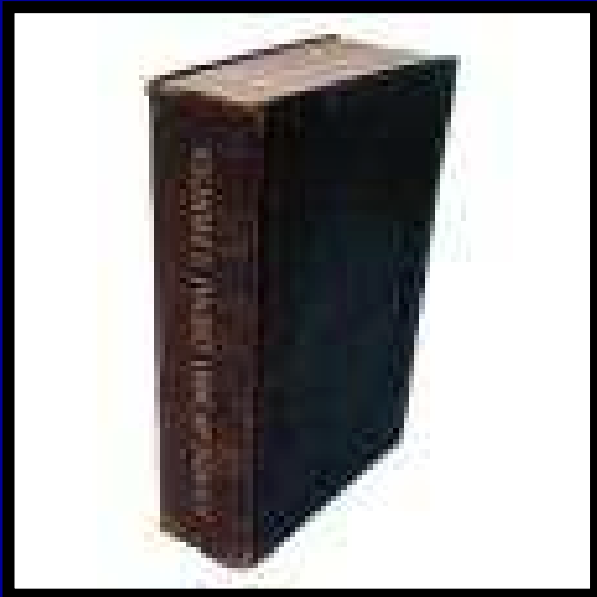
Lessons from America:
private actions are an
important supplement to
public enforcement.



□ Access to evidence: Π gets everything.



Access to Evidence



- "For more than three centuries it has now been recognized as a fundamental maxim that the public...has a right to every man's evidence."

United States v. Bryan, 339 U.S. 323, 331 (1950), *quoting* 8 J. Wigmore, Evidence § 2192 (3d ed. 1940).



Lessons from America:

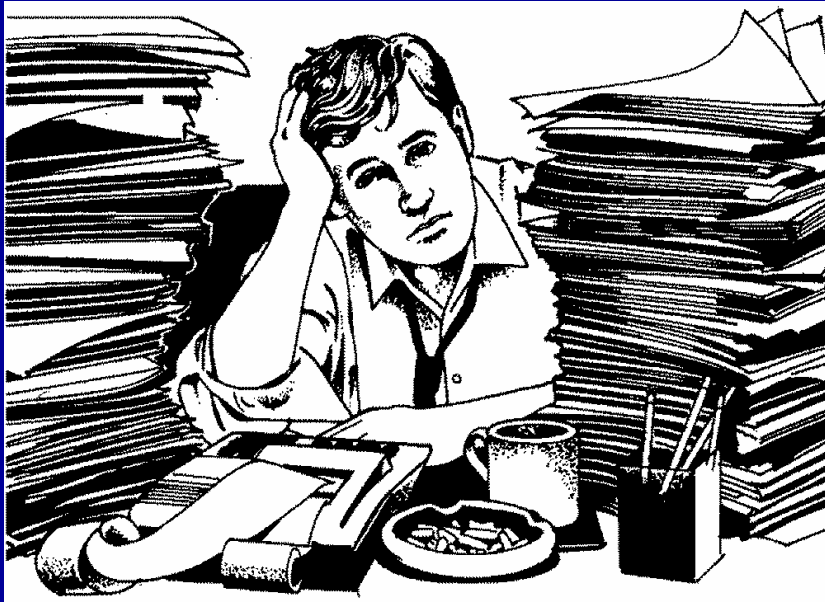
private actions are an important supplement to public enforcement.



- Access to evidence: Π gets everything.
 - 1. Written interrogatories which must be answered under oath.
 - 2. Production of documents. There is no statutory limit. Must produce unless court limits the demand. Documents need not be admissible at trial.
 - 3. Depositions under oath. (May be videotaped. Counsel may not instruct witness not to answer.



Production of Documents

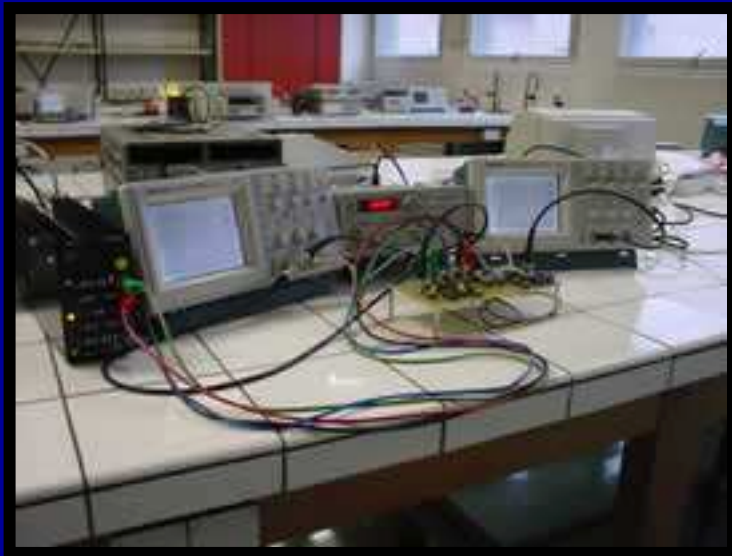


Young solicitor engaged in document production.

- Parties must initially produce
 - Name, address, etc., of each person with evidence that the disclosing party may use to support its case.
 - Copies of all documents that it may use to support its claim or defence.
 - Damage calculations and supporting documents.
 - Insurance policies that might satisfy judgment.



Access to Evidence



- Party has an obligation to preserve evidence—whether hard copy or electronic—as soon as party knows it has evidence that is relevant to litigation or may be relevant to *future* litigation.
- Note the high costs associated with preservation of electronic evidence.



Access to Evidence



- Notice pleading *plus* liberal discovery permits Πs to use litigation to *develop* a case.



Lessons from America: **private actions are an** **important supplement to** **public enforcement.**



- Access to evidence: Π gets everything.
- Class actions



Class Actions

AMERICAN BAR ASSOCIATION

- Benefits of the U.S. Class Action.

The overwhelming benefit of allowing for any collective action is to provide access to the courts to individuals or entities that have each suffered small enough individual losses that it would not be economically efficient for each individually to pursue his or her claims against the defendant.

- 1. Class so numerous that joinder in one action is impractical.
- 2. Common questions of law or fact.
- 3. The claims of the named representatives are typical of the class.
- 4. Class representatives & counsel will represent class fairly & adequately.



Feb. 14, 2006 NEWS

FBI Raids Airlines

**EXTRA
EXTRA**



Follow on Cases



57 federal class actions



Recent Settlement

\$\$\$\$\$\$\$\$\$\$\$\$

10% off when you
next buy our great
product!!

Not valid with any other promotion.

Must be used by June 1, 2006.

- Π s to get coupons which can be used to buy more of the Δ 's products.
- Π s' lawyers to get \$4,000,000 fee.
- Note that both Π s' & Δ 's lawyers support settlement.



Today's agenda--

1. Competition law remedies in the U.S.

2. Permissible inferences of duality.



Duality in the U.S. & Europe

- § 1 Sherman Act: "every contract, combination...or conspiracy...."
 - Disjunctive ignored. Terms all mean the same thing.
 - Art 81: "all agreements among undertakings, decisions by associations... and concerted practices...."
 - Disjunctive important. Terms have separate meanings.
-
- While this may suggest a difference, the case law suggests that there is none. In Europe "concerted practices" permits a finding where there is only circumstantial evidence of an agreement, whereas the U.S. courts have treated the "contract" language very permissively.

Features of U.S. Private Suits



- Private parties select cases on the basis of personal, not public, incentives.
- Duality is a question of fact decided by a jury.
- Duality may be found on the basis of circumstantial evidence.



Features of U.S. Private Suits



On the basis
of these facts,
may the jury
properly infer
the existence
of an
agreement?



Today's agenda--

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U.S. Private Litigation

Clayton Act § 4--

a) Amount of recovery; [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

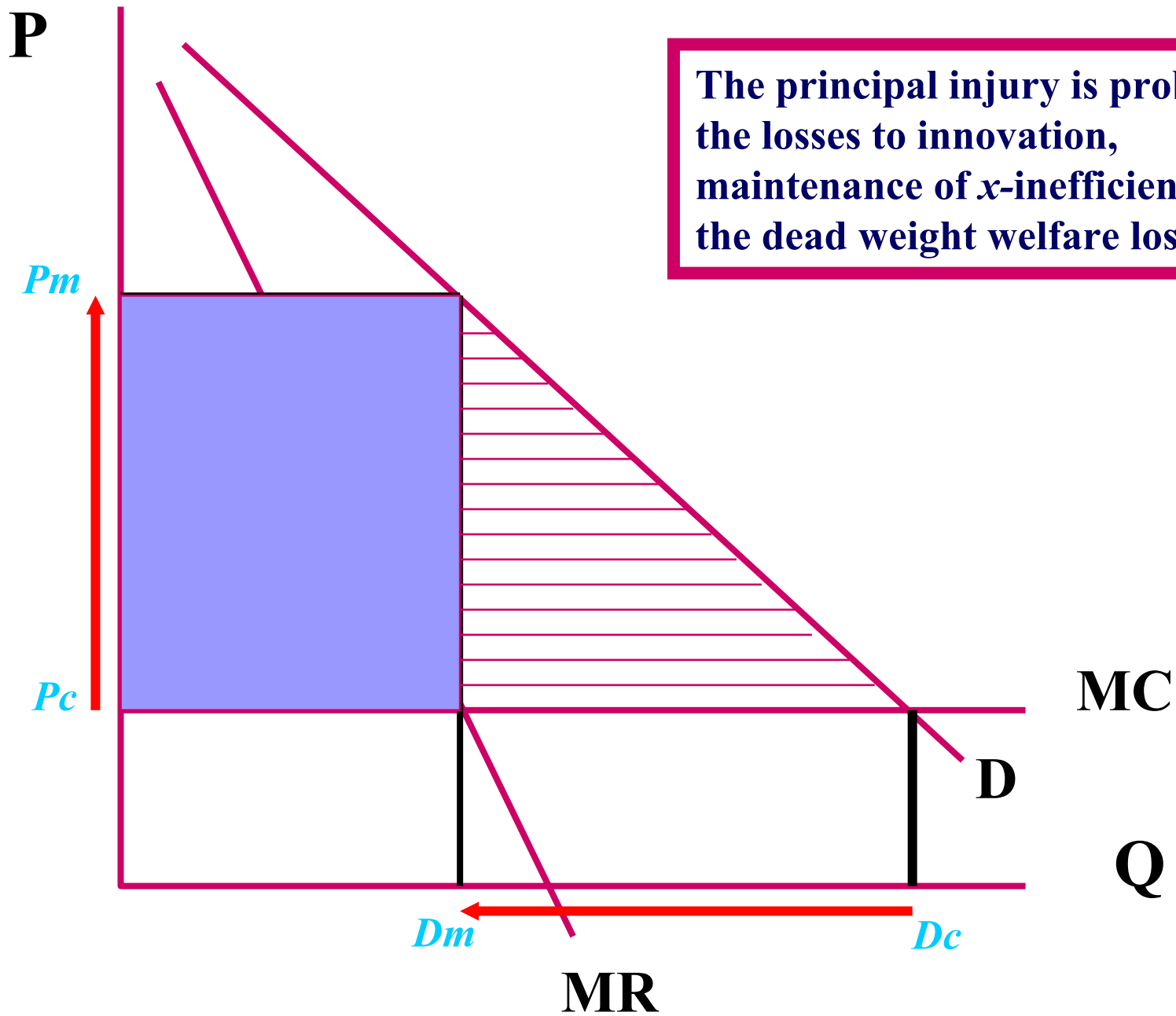
□ Note that "any person" who is injured by sue.



FOUR POSSIBLE SETS OF VICTIMS—

1. Injury to the commonwealth is **most important** and includes diminution in allocative and production efficiencies, presence of x-inefficiencies, etc.
2. There are the **primary identifiable victims** who did not purchase at the anticompetitive price, but who turned to less efficient substitutes instead.
3. Then there are the **secondary victims** who purchased the good at or below their reserve price, i.e., their value of the good or service.
4. Then there are **tertiary victims**, who did not purchase but who are nonetheless injured by the defendant's conduct.

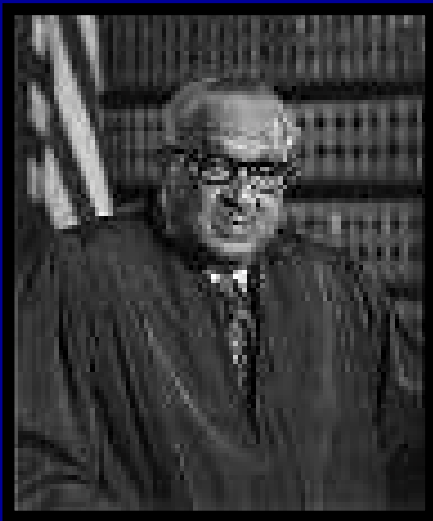




The principal injury is probably the losses to innovation, maintenance of x -inefficiency and the dead weight welfare losses.



Compensation for the general damage to the economy--



Justice Thurgood Marshall,
writing for the Court in
Hawaii v. Standard Oil Co.
of California, 405 U.S. 251
(1972).

- The U.S. Supreme Court considered the issue in Hawaii v. Standard Oil Co. of Calf., and concluded that courts could not effectively identify such injury and fashion an appropriate remedy.



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Compensation for Primary Victims: Those who did not buy and substituted something else less desirable--

The lamb was too high,
so I bought chicken
instead.



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- How do we find this guy?
- Since we can't figure out a way to compensate the primary victims, we try to compensate the secondary victims.
- But here too, we don't do a very good job.



FOUR POSSIBLE SETS OF VICTIMS—

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2. There are the **primary identifiable victims** who did not purchase at the anticompetitive price, but who turned to less efficient substitutes instead.
3. Then there are the **secondary victims** who purchased the good at or below their reserve price, i.e., their value of the good or service.





Identifying the secondary victims--

- ▣ Suppose a carbon electrode cartel.
- ▣ Is the steel mill, who purchases them from the cartelists to melt scrap into molten steel and then into ingots, the victim?



Steel Mill?



Identifying the secondary victims--

- Or, is it the buyer of steel ingots from the steel mill who further mills the steel into rebar for sale to steel supply companies the victim?



Direct Purchaser?



Identifying the secondary victims--

- Or, is it the steel supply company who sells rebar to building contractors the victim?

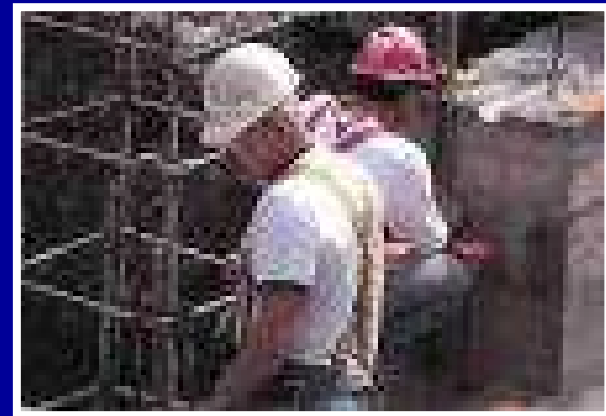


Steel Supply Co?



Identifying the secondary victims--

- Or, is it the building contractor who sells the building to company for use as their headquarters the victim?



Building contractor?



Identifying the secondary victims--

- Or, is the company who ultimately buys the building the victim?
- It obviously depends on how much of the overcharge was passed-on.
- In many cases, it is probably a mixture to some degree of all of the above.



Building owner?

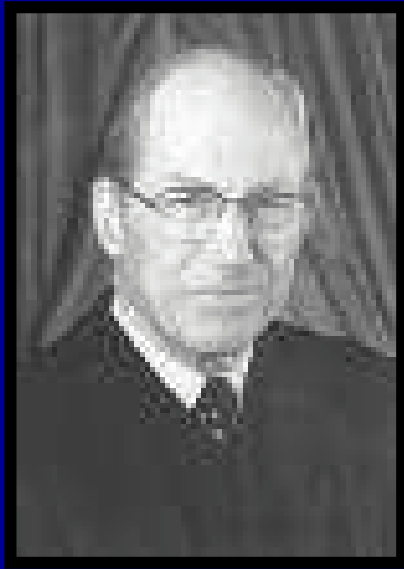




Who has been
“aggrieved”? Is it
one or all of them?
This is a huge pain
in the a#s!



The American experience--



Hon. Byron White
Illinois Brick Co. v. Illinois
431 U.S. 720 (1977)

- The U.S. Supreme Court, in Illinois Brick, held that only direct purchasers may seek damages—unless there is very clear evidence that the injury was “passed on.”
- The rationale for the decision was that otherwise courts would face an impossible task.





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