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### Post-Trial Motions in Private Antitrust Actions: A Practitioner's Guide

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# Post-Trial Motions in Private Antitrust Actions: A Practitioner's Guide

John E. Rumel\*

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## I. Introduction

Private antitrust actions frequently involve protracted pretrial proceedings and lengthy trials, the litigation and outcome of which invariably have a significant impact on the parties and their counsel. A victorious plaintiff will have convinced the fact finder that the defendant engaged in anticompetitive conduct causing injury to plaintiff's business and often resulting in substantial damages. A prevailing defendant will have vindicated its business practices, perhaps preserving or enhancing its market position. Both plaintiff's and defendant's counsel will share in the result—certainly, for both sides, professionally and, assuming a contingent-fee arrangement, on plaintiff's side, financially.

However, for most antitrust litigants and their counsel, the jury's verdict signals that the game is, at best, half over. Post-trial motions invariably follow. Those motions may address a number of issues, including testing the validity of the jury's verdict, reconciling prior settlements and judgments in the case, and resolving the issue of which party should ultimately bear the expense of the litigation.

This Article will discuss post-trial motion practice in private antitrust actions brought in federal court. It is designed to provide the antitrust lawyer with a practical guide to identifying and briefing recurring issues in post-trial motion practice. While the law concerning many of these motions has developed in both antitrust and non-antitrust contexts, where available, annotations have been drawn from antitrust case law. Those motions and issues unique to antitrust practice will, of course, be highlighted.

Because certain post-trial motions may only be raised by a prevailing antitrust plaintiff or counterclaimant, this Article will first discuss motions affecting the jury's determination of the prevailing party, including motions to poll the jury, for judgment notwithstanding the verdict (JNOV), and for new trial. A discussion of motions affecting the amount of the judgment, including

motions for set-off of prior settlements and for grant of interest and applications for attorney's fees and costs, will follow.

## II. Motions Affecting the Jury's Determination

### A. *Motion to Poll Jury*

Although not specifically codified, it has long been settled that a party in a civil action, including a private antitrust action, may demand a poll of the jury after the verdict has been announced but before it has been recorded.<sup>1</sup> The purpose underlying the polling procedure

is to give each juror an opportunity, before the verdict is recorded, to declare in open court his assent to the verdict which the foreman has returned and thus to enable the court and the parties to ascertain with certainty that a unanimous verdict has in fact been reached and that no juror has been coerced or induced to agree to a verdict to which he has not fully assented.<sup>2</sup>

If, upon polling, a juror dissents, the court may either order a mistrial<sup>3</sup> or return the jury for further deliberations.<sup>4</sup>

Given the complexity of law and proof in most antitrust actions and given the high stakes involved in any action for treble damages, a party suffering an adverse verdict should, as a matter of course, demand a poll of the jury in a timely fashion. In the unlikely event that a juror dissents, the party receiving the dissenting vote will usually prefer a mistrial to further jury deliberation.<sup>5</sup> However, assuming the jury is not hopelessly deadlocked, the most judicially and financially economical practice would be to return the jurors for further deliberations.

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1. *Humphries v. District of Columbia*, 174 U.S. 190, 194 (1899); *Hausrath v. New York Cent. R.R. Co.*, 401 F.2d 634, 638 (6th Cir. 1968); *Pessin v. Keeneland Ass'n*, 298 F. Supp. 593, 596 (E.D. Ky. 1969); cf. FED. R. CRIM. P. 31(d) ("When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the Court's own motion.").

2. *Virgin Islands v. Hercules*, 875 F.2d 414, 418 (3d Cir. 1989) (quoting *Miranda v. United States*, 255 F.2d 9, 17 (1st Cir. 1958)); see also *Pessin*, 298 F. Supp. at 596.

3. *Curry v. Moore-McCormack Lines*, 51 F.R.D. 301, 303 (S.D.N.Y. 1970); *Finn v. Carnegie-Illinois Steel Corp.*, 68 F. Supp. 423, 429 (W.D. Pa. 1946).

4. *Castleberry v. NRM Corp.*, 470 F.2d 1113, 1117 (10th Cir. 1972); *Bruce v. Chestnut Farms-Chevy Chase Dairy*, 126 F.2d 224, 225 (D.C. Cir. 1942).

5. C. WRIGHT & A. MILLER, 9 FEDERAL PRACTICE AND PROCEDURE § 2504 at 490 (1971).

## B. Motion for Judgment Notwithstanding the Verdict

1. *Rule 50(b)*.—Federal Rule of Civil Procedure 50(b) permits a party who has moved for a directed verdict at the close of all of the evidence to move, no more than ten days after entry of judgment or within ten days after the jury is discharged if no verdict was returned, to set aside the verdict and judgment and have judgment entered in accordance with its motion for directed verdict.<sup>6</sup>

As discussed below,<sup>7</sup> Rule 50(b) and the general law developed in connection with motions for JNOV have been applied to a variety of antitrust actions.

2. *Necessity of Motion for Directed Verdict*.—Generally, a motion for JNOV will not be entertained if the party making it has not made a motion for directed verdict at the close of all of the evidence<sup>8</sup> or has failed to include the specific grounds for its JNOV motion in its motion for directed verdict.<sup>9</sup> Thus, if a party moves for a directed verdict after the opposing party has presented its evidence but fails to renew the motion at the close of all the evidence, the party may not thereafter move for JNOV.<sup>10</sup> The purpose of this strict requirement is to alert the opposing party to the alleged insufficiency of the evidence at a point in the trial when the party may still cure the defect by presenting further evidence.<sup>11</sup>

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6. FED. R. CIV. P. 50(b) provides in pertinent part:

Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the Court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the party's motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with the party's motion for a directed verdict.

7. See *infra* notes 20-27 and accompanying text.

8. *Wells Real Estate v. Greater Lowell Bd. of Realtors*, 850 F.2d 803, 810 (1st Cir.), *cert. denied*, 488 U.S. 955 (1988); *Farley Transp. Co. v. Santa Fe Trail Transp. Co.*, 786 F.2d 1342, 1345 (9th Cir. 1985); *Albrecht v. Herald Co.*, 452 F.2d 124, 127 (8th Cir. 1971).

9. *Bonjorno v. Kaiser Aluminum & Chem. Corp.*, 752 F.2d 802, 813-15 (3d Cir. 1984), *cert. denied*, 477 U.S. 980 (1986); see also *Hilord Chem. Corp. v. Ricoh Elec., Inc.*, 875 F.2d 32, 37-38 (2d Cir. 1989).

10. *Farley Transp.*, 786 F.2d at 1345.

11. *Id.* at 1346; *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d 821, 825 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979).

Various exceptions have tempered the harshness of the general rule. First, some courts take a liberal view of what constitutes a sufficient motion for directed verdict at the close of the evidence and would hear JNOV motions after inartfully made or ambiguously stated motions for directed verdict or after objections to jury instructions.<sup>12</sup> Other courts would allow JNOV motions when the evidence following a party's unrenewed motion for directed verdict was brief and would not possibly have changed the court's original ruling.<sup>13</sup> At least one court has made an exception where the trial judge takes the original directed verdict motion under advisement, reasoning that the court's reservation of a ruling maintains the motion as a continuing objection to the sufficiency of the evidence and that the requirement should not be enforced unless the opposing party has suffered prejudice from the moving party's failure to renew the motion.<sup>14</sup>

Notwithstanding these exceptions, to clearly establish its right to move for JNOV a party in an antitrust action should always renew its motion for directed verdict at the close of the evidence.

3. *Standard/Grounds for Grant or Denial.*—In civil actions generally and antitrust actions specifically, the standard applicable to a JNOV motion is whether the evidence and its inferences, taken as a whole and viewed in a light most favorable to the nonmoving party, are sufficiently substantial to support the jury's verdict.<sup>15</sup> Thus, JNOV will only be warranted where the evidence supports but one conclusion: No reasonable jury could have found against the moving party.<sup>16</sup> In antitrust actions where the evidence is en-

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12. *Farley Transp.*, 786 F.2d at 1347; *Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co.*, 532 F.2d 572, 577 (7th Cir. 1976).

13. *Ebker v. Tan Jay Int'l Ltd.*, 739 F.2d 812, 823 (2d Cir. 1984); *Wells Real Estate v. Greater Lowell Bd. of Realtors*, 850 F.2d 803, 810 n.7 (1st Cir.), *cert. denied*, 488 U.S. 955 (1988). *But cf.* *Coker v. Amoco Oil Co.*, 709 F.2d 1433, 1437 (11th Cir. 1983).

14. *McKinnon v. City of Berwyn*, 750 F.2d 1383, 1389 (7th Cir. 1984).

15. *General Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 801 (8th Cir. 1987) (denial of motion for JNOV must be affirmed "unless the record taken as a whole lacks any evidence to support the jury's verdict"); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1026 (9th Cir.), *cert. denied*, 459 U.S. 825 (1982); *see also* *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 683 F. Supp. 680, 686 (S.D. Ind. 1988) (evidence must be substantial; a mere scintilla will not suffice), *aff'd*, 881 F.2d 1396 (1989), *cert. denied*, 110 S. Ct. 1326 (1990).

16. *The Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148, 1151 (9th Cir. 1988); *Kelco Disposal, Inc. v. Browning-Ferris Indus.*, 845 F.2d 404, 407 (2d Cir. 1988), *aff'd*, 109 S. Ct. 2909 (1989).

tirely circumstantial, the court must decide whether a reasonable jury "could reach the suggested conclusion on the basis of the hard evidence without resorting to guesswork or conjecture."<sup>17</sup> Irrespective of whether the evidence is direct or circumstantial, neither the district court nor the court of appeals may judge the credibility of witnesses or substitute their judgment for that of the jury, provided that substantial evidence supports the verdict.<sup>18</sup> Courts have defined substantial evidence as more than a scintilla; it is such relevant evidence that a reasonable juror might accept as adequate to support a conclusion.<sup>19</sup>

4. *Motion for JNOV in Antitrust Actions.*—Notwithstanding the deferential standard toward jury verdicts, motions for JNOV have been granted on both liability and damages issues in a variety of antitrust actions. Although the following is by no means an exhaustive list, courts have granted JNOV as to liability where plaintiffs have failed to prove the following elements of their antitrust claims: an impact on interstate commerce in conspiracy to monopolize and attempt to monopolize claims,<sup>20</sup> abuse of monopoly power in a monopolization claim,<sup>21</sup> the relevant market or monopoly power in monopolization claims,<sup>22</sup> dangerous probability of success in an attempt to monopolize claim,<sup>23</sup> a horizontal price fixing conspiracy in a restraint of trade claim,<sup>24</sup> price discrimination and an ability to recoup a predatory investment in a Robinson-Patman

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17. *The Jeanery*, 849 F.2d at 1151 (quoting *Edward J. Sweeney & Sons v. Texaco, Inc.*, 637 F.2d 105, 116 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981)).

18. *William Inglis & Sons*, 668 F.2d at 1026; *A.A. Poultry Farms, Inc.*, 683 F. Supp. at 686; *International Wood Processors v. Power Dry, Inc.*, 593 F. Supp. 710, 718-19 (D.S.C. 1984), *aff'd*, 792 F.2d 416 (4th Cir. 1986).

19. *Airveld, Inc. v. Airco, Inc.*, 742 F.2d 1184, 1189 (9th Cir. 1984), *cert. denied*, 469 U.S. 1213 (1985); *A.A. Poultry Farms*, 683 F. Supp. at 686.

20. *Ford Wholesale Co. v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1204, 1205 (9th Cir.), *cert. denied*, 419 U.S. 876 (1974).

21. *Olympia Equip. Leasing Co. v. Western Union Tel.*, 797 F.2d 370, 383 (7th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987).

22. *Dimmitt Agri Indus. v. CPC Int'l, Inc.*, 679 F.2d 516, 531 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983); *Fount-Wip, Inc. v. Reddi-Wip, Inc.*, 568 F.2d 1296, 1301-02 (9th Cir. 1978).

23. *International Distrib. Centers v. Walsh Trucking*, 812 F.2d 786, 790-93 (2d Cir.), *cert. denied*, 482 U.S. 915 (1987).

24. *Wilcox v. First Interstate Bank of Or.*, 815 F.2d 522, 524-28 (9th Cir. 1987).

claim,<sup>25</sup> and antitrust injury and damages, *i.e.*, injury to competition, not merely injury to competitors, in a restraint of trade claim.<sup>26</sup> As to damages, courts have granted JNOV where plaintiffs failed to present sufficient evidence or offer a rational estimation of antitrust damages.<sup>27</sup>

Thus, while the standard for JNOV is deferential, as it should be, to the jury's verdict, JNOV motions are routinely made and frequently granted in private antitrust actions. JNOV motions should be made whenever the plaintiff fails to meet the exacting liability requirements of the antitrust laws—such as where a plaintiff proves, at most, liability under a state law tort theory but fails to prove market power or injury to competition—or where a jury awards damages in excess of those proven at trial.

### C. Motion for New Trial

1. *Rule 59.*—Under Federal Rule of Civil Procedure 59, a party or the court on its own initiative may move for a new trial within ten days after entry of judgment.<sup>28</sup> A motion for a new trial is addressed to the sound discretion of the district court.<sup>29</sup> While the

25. *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1403, 1406-08 (7th Cir. 1989).

26. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488-90 (1977).

27. *Olympia Equip. Leasing Co. v. Western Union Tel.*, 797 F.2d 370, 381-83 (7th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987); *Murphy Tugboat Co. v. Crowley*, 658 F.2d 1256, 1260-63 (9th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982).

28. FED. R. CIV. P. 59 provides in pertinent part:

(a) A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States.

(b) A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

. . . .

(d) Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, a court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

29. *Allied Chem. Corp. v. Daiflon, Inc.*, 440 U.S. 33, 36 (1980) (*per curiam*); *Wells Real Estate v. Greater Lowell Bd. of Realtors*, 850 F.2d 803, 810 (1st Cir.), *cert. denied*,



specific grounds for granting or denying the motion will be discussed *infra*,<sup>30</sup> the court's ruling will usually be guided by the interests of justice.<sup>31</sup>

2. *Joinder with Motion for JNOV.*—Under Rule 50(b), “[a] motion for a new trial may be joined with [a motion for JNOV], or a new trial may be prayed for in the alternative.”<sup>32</sup> Under Rule 50(c)(1), the district court must rule on both motions.<sup>33</sup>

The Rule 50(b) joinder provision benefits the party who suffers an adverse jury verdict. If the verdict is not supported by substantial evidence (the standard for ruling on a motion for JNOV), then by definition the verdict must also be against the weight of the evidence. The joinder provision allows the district court to grant JNOV under the more stringent evidentiary standard and, alternatively, determine that a new trial is appropriate if its JNOV is reversed. If an appellate court does reverse the JNOV but finds that the verdict is against the weight of the evidence, it need not reinstate the jury verdict but may instead grant a new trial. Moreover, where a party has lost its right to move for JNOV by failing to renew its motion for directed verdict at the close of the evidence, an alternative motion for new trial will provide the district court an opportunity to order a new trial and avoid entering judgment on the jury's verdict.

3. *Standard/Grounds for Determination.*—Rule 59(a) is broadly written and does not specify any particular grounds for granting or denying a motion for new trial.<sup>34</sup> Overall, however, the new trial standard is less stringent than the substantial evidence standard applied to motions for JNOV.<sup>35</sup> In ruling on motions for

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488 U.S. 955 (1988); *Baum v. Great W. Cities, Inc. of New Mexico*, 703 F.2d 1197, 1211 (10th Cir. 1983).

30. See *infra* notes 34-42 and accompanying text.

31. *Juneau Square Corp. v. First Wis. Nat'l Bank*, 624 F.2d 798, 806-07 n.11 (7th Cir. 1980); *Pitts v. Electro-Static Furnishing*, 607 F.2d 799, 804 (8th Cir. 1979).

32. FED. R. CIV. P. 50(b).

33. FED. R. CIV. P. 50(c)(1) provides in pertinent part:

If the motion for judgment notwithstanding the verdict . . . is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial.

34. See *supra* note 28.

35. *Airweld, Inc. v. Airco, Inc.*, 742 F.2d 1184, 1188 n.1 (9th Cir. 1984).

new trial, most courts have focused on two distinct criteria: (1) the amount and nature of proof presented at trial and (2) the fairness of the proceedings. Applying the first criterion, courts may grant a new trial if the jury's liability verdict was against the weight of the evidence.<sup>36</sup> Courts have not only focused on proof of liability but have also evaluated whether the damages awarded were excessive or not supported by the evidence.<sup>37</sup>

Applying the second criterion, courts have awarded new trials to avoid a "miscarriage of justice."<sup>38</sup> Courts may grant a new trial if there has been misconduct by the court or counsel,<sup>39</sup> if there has been misconduct in the jury's deliberations or decision,<sup>40</sup> or if the damage award is fueled by passion and prejudice and shocks the conscience.<sup>41</sup> Finally, as a subcategory of the fairness criterion, a new trial may be ordered in cases involving newly discovered evidence.<sup>42</sup>

4. *Partial New Trial.*—Rule 59(a) states that a new trial may be granted "on all or part of the issues,"<sup>43</sup> thereby allowing the district court to grant a partial new trial. Where an error is made at trial on a discrete issue and the error does not taint the jury's determination of other issues, a new trial may be ordered on that single issue.<sup>44</sup>

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36. *City of Malden v. Union Elec. Co.*, 887 F.2d 157, 161 (8th Cir. 1989); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1027 (9th Cir. 1982).

37. *Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440, 1451-52 (9th Cir. 1988); *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 791 F.2d 1356, 1360, 1365-67 (9th Cir. 1986); *Segal v. Gilbert Color Sys.*, 746 F.2d 78, 80-81 (1st Cir. 1984).

38. *Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1359 (9th Cir. 1976); *Simpson v. Skelly Oil Co.*, 371 F.2d 563, 570 (8th Cir. 1967); *Tann v. Service Distrib.*, 56 F.R.D. 593, 598 (D. Pa. 1972), *aff'd*, 481 F.2d 1399 (3d Cir. 1973).

39. *DeRance, Inc. v. PaineWebber*, 872 F.2d 1312, 1327 (7th Cir. 1989); *Simpson v. City of Maple Heights*, 720 F. Supp. 1306, 1308-10 (N.D. Ohio 1989).

40. *McCoy v. Goldston*, 652 F.2d 654, 659 (6th Cir. 1981); *Davison v. Monessen S.W. Ry. Co.*, 144 F. Supp. 599, 600 (D. Pa. 1956).

41. *Tann*, 56 F.R.D. at 598; *Graling v. Reilly*, 214 F. Supp. 234, 235 (D.D.C. 1963).

42. *National Anti-Hunger Coalition v. Executive Comm. of the President's Private Sector Survey on Cost Control*, 711 F.2d 1071, 1075 (D. Cir. 1983); *Strobl v. New York Mercantile Exch.*, 590 F. Supp. 875, 878 (S.D.N.Y. 1984).

43. FED. R. CIV. P. 59(a); *see supra* note 28.

44. *Eximco, Inc. v. Trane Co.*, 737 F.2d 505, 513 (5th Cir. 1984); *Devine v. Patteson*, 242 F.2d 828, 832 (6th Cir. 1957).

Partial new trials frequently involve jury damage awards. Thus, where liability has been properly determined, a district court may grant a new trial limited to the issue of damages if that issue is not so interwoven with the liability question that the damage issue cannot be submitted to a new jury without causing confusion or uncertainty, thereby denying a fair trial.<sup>45</sup>

Numerous courts have ordered or approved the grant of a new trial limited to the issue of damages in antitrust actions.<sup>46</sup> In *MCI Communications v. American Telephone & Telegraph Co.*,<sup>47</sup> an antitrust action alleging, *inter alia*, predatory pricing, the court of appeals affirmed the jury's finding that AT&T had monopolized the telephone interconnection industry.<sup>48</sup> However, because the jury had awarded damages for certain conduct that was not unlawful under the antitrust laws, the court of appeals ordered a new trial restricted to the issue of damages.<sup>49</sup> In so holding, the court indicated that a separate trial on the damages issue was "an effective method of simplifying factual presentation, reducing cost, and saving time."<sup>50</sup> The court further noted that plaintiff MCI's proof of damages was distinct from its proof on liability and that "[t]o the extent that it is necessary to educate the fact finder . . ., evidence which might normally be associated with the determination of liability may have to be introduced or reintroduced."<sup>51</sup>

In antitrust actions where the only real dispute is damages, a partial new trial may be an attractive alternative to both the parties and the court. Assuming a new trial will be ordered, a plaintiff will usually favor a new trial limited to damages, because it will allow the plaintiff to retain its liability verdict and avoid reproving that issue. A defendant, while preferring a second crack at dis-

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45. *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 499-501 (1931); *Digidyne Corp. v. Data Gen. Corp.*, 734 F.2d 1336, 1347 (9th Cir. 1984).

46. *Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440, 1451-52 (9th Cir. 1988); *Farley Transp. Co. v. Santa Fe Trail Transp. Co.*, 786 F.2d 1342, 1352 (9th Cir. 1985); *Digidyne*, 734 F.2d at 1347; *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1166-67 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 305 (2d Cir. 1979).

47. 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983).

48. *Id.* at 1174.

49. *Id.* at 1166-68.

50. *Id.* at 1167.

51. *Id.* at 1168.

proving liability, may also benefit from a partial new trial on damages by convincing the court to exclude, on relevance grounds, inflammatory liability evidence that may have caused the jury to award the excessive damages in the first instance. Finally, the court may favor a partial new trial limited to damages because it will frequently eliminate the need for time-consuming evidence relating solely to liability and thereby streamline the subsequent trial.

### III. Motions Affecting the Amount of the Judgment

#### A. *Motion for Remittitur in Lieu of New Trial*

It has long been settled that where the trial court determines that a damage award is excessive, but not the result of passion or prejudice, the court may either grant a motion for new trial or deny the motion conditioned upon the prevailing party's accepting a remittitur.<sup>52</sup> In effect, the prevailing party must choose to either submit to a new trial or accept a reduced amount of damages that the court considers justified.<sup>53</sup>

Courts have followed a variety of standards in determining the amount that should be remitted from an excessive verdict. Some courts have reduced an excessive verdict to the minimum amount a jury could properly award on the theory that any greater sum would deprive a defendant of its right to a jury determination on the damages ultimately awarded.<sup>54</sup> Other courts, disdaining any precise standard, have reduced an excessive verdict to whatever amount the court itself believed a jury could properly have awarded.<sup>55</sup> Still other courts, reasoning that a jury intended to

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52. *Linn v. United Plant Guard Workers*, 383 U.S. 53, 65-66 (1966); *Dimick v. Schiedt*, 293 U.S. 474, 483-85 (1935); *Minneapolis, St. Paul & Sault Ste. Marie Ry. v. Moguin*, 283 U.S. 520, 521 (1931); *Seymour v. Summa Vista Cinema*, 809 F.2d 1385, 1387 (9th Cir.), *modified on other grounds*, 817 F.2d 609 (9th Cir. 1987).

53. *Fenner v. Dependable Trucking Co.*, 716 F.2d 598, 603 (9th Cir. 1983) (citing *Minthorne v. Seeburg Corp.*, 397 F.2d 237, 244-45 (9th Cir. 1968), *cert. denied*, 397 U.S. 1036 (1970)); *Korotki v. Goughan*, 597 F. Supp. 1365, 1385-86 (D. Md. 1984).

54. *See, e.g., Meissner v. Papas*, 35 F. Supp. 676, 677 (E.D. Wis. 1940), *aff'd*, 124 F.2d 720 (7th Cir. 1941).

55. *See Lanfranconi v. Tidewater Oil Co.*, 376 F.2d 91 (2d Cir.), *cert. denied*, 389 U.S. 951 (1967); *Meehan v. Central R.R. Co. of N.J.*, 181 F. Supp. 594, 608 (S.D.N.Y. 1960).

award the maximum amount possible, have held that an excessive verdict must be remitted to the maximum amount sustained by the evidence.<sup>56</sup> The "maximum recovery rule" would appear to be the only rule consistent with the plaintiff's right to trial by jury under the seventh amendment.<sup>57</sup> The standard that the court chooses is critical, for a prevailing party who accepts a remittitur, even under protest, cannot appeal the propriety of the original remittitur order.<sup>58</sup>

The availability of remittitur in an antitrust action is especially important to a defendant, because every dollar reduced from an antitrust verdict reduces the ultimate judgment by three dollars. A prevailing antitrust plaintiff may likewise benefit from the remittitur procedure, because it may constitute an acceptable compromise between the trial court sustaining a substantial verdict that it does not believe was completely supported by the evidence and ordering a new trial, thereby depriving the plaintiff of its monetary award and further burdening the court's calendar.

### *B. Motion for Set-Off as a Result of Settling Defendant*

Frequently, in multi-defendant antitrust actions, a plaintiff will settle with one or more defendants before trial. An issue may arise as to whether, and under what circumstances, the amount received in settlement should be set off from the amount a plaintiff recovers at trial.

A set-off for settlement is an equitable measure designed to avoid double recovery.<sup>59</sup> It is well-settled in antitrust conspiracy actions that the amount of any settlement should be set off against

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56. See, e.g., *Peters v. T. G. & Y. Stores Co.*, 707 F.2d 227, 230 (5th Cir. 1983); *D & S Redi-Mix v. Sierra Redi-Mix*, 692 F.2d 1245, 1249 (9th Cir. 1982).

57. *Community Television Serv. v. Dresser Indus.*, 435 F. Supp. 214, 218 (D.S.D. 1977), *aff'd*, 586 F.2d 637 (8th Cir. 1978), *cert. denied*, 441 U.S. 932 (1979); *Call Carl, Inc. v. BP Oil Corp.*, 403 F. Supp. 568, 578 (D. Md. 1975), *aff'd in part and rev'd in part on other grounds*, 554 F.2d 623 (4th Cir.), *cert. denied*, 434 U.S. 923 (1977).

58. *Donovan v. Penn Shipping Co.*, 429 U.S. 648, 650 (1977) (per curiam); 999 v. C.I.T. Corp., 776 F.2d 866, 873 (9th Cir. 1985); *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d 821, 840 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979). A plaintiff may, however, appeal from those parts of the judgment separate and distinct from the remittitur. *Denholm v. Houghton Mifflin Co.*, 912 F.2d 357, 359-61 (9th Cir. 1990); *Lanier v. Sallas*, 777 F.2d 321, 325 (5th Cir. 1985).

59. *Convoy Corp. v. Sperry Rand Corp.*, 601 F.2d 385, 388 (9th Cir. 1979).

any damage award assessed against the remaining defendants at trial.<sup>60</sup> This rule is both logical and fair in a conspiracy case, because a defendant is jointly and severally liable for all damages caused by its coconspirators in furtherance of the conspiracy.<sup>61</sup> Thus, provided the jury has been instructed to assess the remaining defendant with all damages caused by its coconspirators' anticompetitive conduct, a set-off properly prevents a prevailing plaintiff from receiving a windfall.

However, in nonconspiracy cases involving multiple defendants, *i.e.*, in cases in which the defendants are not jointly and severally liable, several courts have indicated that a set-off of a prior settlement "would not normally be permitted."<sup>62</sup> This rule is based on the equitable principle that "where two or more defendants are responsible for separate injuries, an amount received in settlement from one defendant for one of the injuries may not be used to reduce the liability of the other defendant for the other injury."<sup>63</sup> While ruling in the "non-set-off" context, courts of appeals have increasingly required that juries assess damages only for injuries caused by the anticompetitive conduct of a particular defendant and not for injuries resulting from other causes.<sup>64</sup> Assuming the jury is so instructed where one or more defendants have settled before trial, the jury must be presumed to have awarded only those damages proximately caused by the remaining defendant.<sup>65</sup> Under these circumstances, any set-off of the settle-

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60. *New York v. Hendrickson Bros.*, 840 F.2d 1065, 1086 (2d Cir.), *cert. denied*, 488 U.S. 848 (1988); *Baughman v. Cooper-Jarrett, Inc.*, 530 F.2d 529, 534 (3d Cir.), *cert. denied*, 429 U.S. 825 (1976); *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 398 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957); *see also Singer v. Olympia Brewing Co.*, 878 F.2d 596, 600 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 729 (1990).

61. *In re Cement and Concrete Antitrust Litig.*, 817 F.2d 1435, 1439 (9th Cir. 1987), *rev'd on other grounds sub nom. California v. ARC Am. Corp.*, 490 U.S. 93 (1989); *In re Uranium Antitrust Litig.*, 617 F.2d 1248, 1257 (7th Cir. 1980).

62. *U.S. Indus. v. Touche Ross & Co.*, 854 F.2d 1223, 1235 n.17 (10th Cir. 1988) (citing *Shapiro, Bernstein & Co. v. Goody*, 248 F.2d 260, 267 (2d Cir. 1957), *cert. denied*, 355 U.S. 952 (1958)).

63. *U.S. Indus.*, 854 F.2d at 1236; *Hess Oil Virgin Island Corp. v. UOP, Inc.*, 861 F.2d 1197, 1208 (10th Cir. 1988).

64. *See, e.g., United States Football League v. National Football League*, 842 F.2d 1335, 1378-79 (2d Cir. 1988); *Farley Transp. Co. v. Santa Fe Trail Transp. Co.*, 786 F.2d 1342, 1352 (9th Cir. 1985); *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1161-66 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983).

65. *See generally Manufacturers Hanover Trust Co. v. Drysdale Sec. Corp.*, 801 F.2d 13, 27 (2d Cir. 1986), *cert. denied*, 479 U.S. 1066 (1987) ("juries are presumed to follow

ment amount would deprive a prevailing plaintiff of full recovery and grant a windfall to the remaining defendant. Thus, while set-off may be appropriate in antitrust conspiracy cases, set-off generally will not be appropriate in nonconspiracy cases involving multiple defendants.

Assuming a set-off is appropriate, should the set-off be taken before or after the verdict is trebled? Since the Ninth Circuit's seminal decision in *Flintkote Co. v. Lysfjord*,<sup>66</sup> courts have consistently deducted settlement proceeds *after* trebling.<sup>67</sup> One court has succinctly stated three reasons for the *Flintkote* rule:

First, the antitrust laws provide that the plaintiff should receive three times the proven actual damages. If settlement proceeds are deducted before trebling, the plaintiff's total award is less than what the law allows. Since antitrust defendants are joint tortfeasors, each is liable to complete the total deserved damages irrespective of fault. Second, one purpose of the trebling provision is to encourage private plaintiffs to bring suit. Any ultimate recovery totaling less than three times proven damages would weaken the statutory incentive through judicial construction. Third, deduction of settlement proceeds before trebling would discourage settlement by making litigation relatively more profitable for plaintiffs: every dollar received in settlement would cause a three-dollar reduction in the judgment at trial.<sup>68</sup>

Thus, while the right to set off may depend on whether the action involves a single injury and joint and several liability or separate injuries and concurrent liability, any proper set-off must be taken after trebling the damage award.

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instructions"); *United States v. Jones*, 425 F.2d 1048, 1057 (9th Cir.), *cert. denied*, 400 U.S. 823 (1970).

66. 246 F.2d 368, 397-98 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957).

67. *See, e.g., Sciambra v. Graham News Co.*, 841 F.2d 651, 657 (5th Cir.), *cert. denied*, 488 U.S. 855 (1988); *New York v. Hendrickson Bros.*, 840 F.2d 1065, 1086 (2d Cir.), *cert. denied*, 488 U.S. 848 (1988); *Burlington Indus. v. Milliken & Co.*, 690 F.2d 380, 392-94 (4th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983); *Hydrolevel Corp. v. American Soc'y of Mechanical Eng'rs*, 635 F.2d 118, 130 (2d Cir. 1980), *aff'd on other grounds*, 456 U.S. 556 (1982); *Baughman v. Cooper-Jarrett*, 530 F.2d 529, 534 (3d Cir.), *cert. denied*, 429 U.S. 825 (1976); *Semke v. Enid Auto. Dealers Ass'n*, 320 F. Supp. 445, 446-47 (W.D. Okla. 1970), *rev'd on other grounds*, 456 F.2d 1361, 1371 (10th Cir. 1972); *Bal Theatre Corp. v. Paramount Film Distrib. Corp.*, 206 F. Supp. 708, 715-16 (N.D. Cal. 1962).

68. *Hydrolevel Corp.*, 635 F.2d at 130.

### C. Motion for Grant of Interest

1. *Prejudgment Interest.*—Before 1980, the Clayton Act did not address prejudgment interest in private treble damage actions. Relying on this congressional silence and reasoning that the treble damage provision provided sufficient relief, most courts refused to award prejudgment interest on federal antitrust claims.<sup>69</sup> In 1980, Congress amended the Clayton Act to authorize the award of prejudgment interest in appropriate cases.<sup>70</sup> The amended statute emphasized that the potential award of prejudgment interest is designed to discourage litigants from using delay tactics.<sup>71</sup> One court, perhaps stating the obvious, has held that the jury's ultimate finding against the defendant does not alone establish facts sufficient to justify an award of prejudgment interest.<sup>72</sup> Thus, while

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69. See *Trio Process Corp. v. L. Goldstein's Sons, Inc.*, 638 F.2d 661, 663 (3d Cir. 1981); *HeatTransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964, 986-87 n.20 (5th Cir. 1977); *Trans World Airlines v. Hughes*, 449 F.2d 51, 80 (2d Cir. 1971), *rev'd on other grounds*, 409 U.S. 363 (1973); *Locklin v. Day-Glo Color Corp.*, 429 F.2d 873, 877 (7th Cir. 1970); *Smith v. Pro-Football, Inc.*, 528 F. Supp. 1266, 1275 (D.D.C. 1981), *aff'd in part and rev'd in part on other grounds*, 593 F.2d 1173 (D.C. Cir. 1978). *But cf.* *Eiberger v. Sony Corp. of Am.*, 459 F. Supp. 1276, 1289 (S.D.N.Y.), *rev'd on other grounds*, 622 F.2d 1068 (2d Cir. 1980); *Uniroyal, Inc. v. Jetco Auto Serv.*, 1980-81 Trade Cas. (CCH) ¶ 63,806 at 78,315 (S.D.N.Y. 1981).

70. The Clayton Act § 4, 15 U.S.C. § 15 (1980) provides:

(a) The court may award under this section, pursuant to a motion promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth the claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

- (1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;
- (2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and
- (3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

71. See *Pro-Football*, 528 F. Supp. at 1275 (citing H.R. REP. No. 96-1234, 96th Cong., 2d Sess. 9 (1980)); see also *Fishman v. Wirtz*, 807 F.2d 520, 561 (7th Cir. 1986).

72. *Seven Gables Corp. v. Sterling Recreation Org. Co.*, 686 F. Supp. 1418, 1427 (W.D. Wash. 1988).



Congress has expressly authorized the award of prejudgment interest in antitrust actions, the exacting requirements of the amended statute precludes such an award except in cases involving the most egregious dilatory tactics.

2. *Postjudgment Interest*.—All prevailing plaintiffs, including antitrust plaintiffs, are entitled to an award of interest on the amount of the judgment.<sup>73</sup> Postjudgment interest is mandatory,<sup>74</sup> and its purpose is to compensate the wronged party for being deprived of the economic value of the damage award from the time of the award to the payment of the money judgment.<sup>75</sup>

Before October 1, 1982, section 1961 provided that the state law postjudgment interest rate determined the rate payable on federal judgments.<sup>76</sup> However, as amended in April 1982,<sup>77</sup> section 1961 now establishes the postjudgment interest rate as the rate for the last issue of fifty-two week Treasury bills settled immediately prior to the entry of the judgment.<sup>78</sup> The amended section 1961 retained the provision that the postjudgment interest rate would not float, as it would be set and remain at the T-bill rate "settled immediately prior to the date of the judgment."<sup>79</sup> In essence, the amended statute provided for a national postjudgment rate of interest instead of varying state law interest rates.<sup>80</sup>

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73. 28 U.S.C. § 1961 (1982) (originally enacted as Act of June 25, 1948, ch. 646, 62 Stat. 957).

74. *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291, 1311 (9th Cir.), *cert. denied*, 459 U.S. 1009 (1982); *Perkins v. Standard Oil Co. of Cal.*, 487 F.2d 672, 675 (9th Cir. 1973); *United States v. Michael Schiavone & Sons, Inc.*, 450 F.2d 875, 876 (1st Cir. 1971).

75. *Turner v. Japan Lines, Ltd.*, 702 F.2d 752, 756 (9th Cir. 1983); *Kotsopoulos v. Astoria Shipping Co.*, 467 F.2d 91, 94 (2d Cir. 1972).

76. Former § 1961 provided in pertinent part: "Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law."

77. The amendment was made effective commencing October 1, 1982.

78. Amended § 1961 provides in pertinent part:

(a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. . . . Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. . . .

(b) Interest shall be computed daily to the date of payment and . . . shall be compounded annually.

79. *Campbell v. United States*, 809 F.2d 563, 565, 573 (9th Cir. 1987).

80. *Id.* at 565.

The Supreme Court has recently resolved a conflict among the circuits by holding that the amendment to section 1961 does not apply retroactively to money judgments entered before the amended statute's October 1, 1982 effective date. Ruling in a monopolization action, the Court reasoned that the plain language of both the original and amended statute clearly evinced Congress's intent to apply the amended statute prospectively only and that Congress delayed the effective date for six months so that courts and attorneys could prepare for the change.<sup>81</sup>

The Court also held that postjudgment interest runs from the date of the entry of judgment, not the date of the verdict.<sup>82</sup> The Court recognized that a delay in entry of judgment would force the plaintiff to bear the loss of use of its money judgment from verdict to judgment. However, the Court indicated that the plain language of the statute and the lack of any expressly contrary congressional intent compelled the result and further indicated that the decision concerning the allocation of costs accruing from litigation was a matter for Congress, not the courts.<sup>83</sup>

Finally, the Supreme Court addressed an often perplexing (and frequently expensive) issue: from which judgment shall interest run when more than one judgment has been entered in the same case? The Court first focused on the purpose of postjudgment interest, *i.e.*, to compensate a successful plaintiff for being deprived of compensation for the period between ascertainment of damages and payment.<sup>84</sup> The Court then analyzed the facts before it, noting that the district court had determined on motion for new trial that damages had not been supported by the evidence and that neither party had appealed the court's ruling.<sup>85</sup> Accordingly, the Supreme Court held that because damages had not been "ascertained" at the time of the first judgment, postjudgment interest could only be calculated from the entry of the second judgment.<sup>86</sup> While disagreeing with the majority on its retroactivity ruling, the four dissenters

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81. *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 110 S. Ct. 1570, 1577-78 (1990).

82. *Id.* at 1575-76.

83. *Id.*

84. *Id.* at 1576 (citing *Poleto v. Consolidated Rail Corp.*, 826 F.2d 1270, 1280 (3d Cir. 1987)).

85. *Kaiser Aluminum*, 110 S. Ct. at 1576.

86. *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 110 S. Ct. 1570, 1576 (1990).

agreed with the "ascertainment" standard and likewise believed that postjudgment interest should run from the second judgment.<sup>87</sup>

Under *Kaiser Aluminum*, postjudgment interest may not run from the original judgment if plaintiff failed to prove damages during the first trial. To hold otherwise would force a defendant to compensate a plaintiff who has failed to prove that portion of its case most crucial to an award of interest. A more difficult question arises where the jury awards the plaintiff a damage verdict; the district court agrees that damages have been proven but orders a new trial on liability; and a second jury awards another damage verdict, upon which judgment is entered. An even more difficult question arises where a plaintiff proves its damages at the first trial but the district court grants JNOV or, alternatively, a new trial on liability issues; the court of appeals reverses and remands for a new trial on an issue unrelated to proof of damages; and the plaintiff receives a second damage judgment after the new trial. In each example, damages were "ascertained" after the first trial; however, one can argue that damages cannot truly be "ascertained" if liability has not likewise been proven.

The dissent correctly pointed out that the Court's holding was limited to its facts<sup>88</sup> and posited a number of fact patterns commonly encountered by lower courts but not covered by the Court's ruling.<sup>89</sup> Clearly, several lower court rulings awarding interest from the earlier of two judgments survive the Supreme Court's ruling. First, where a district court enters judgment immediately upon a jury's verdict, denies motions for JNOV and new trial, and then enters a second judgment, postjudgment interest should run from the initial judgment.<sup>90</sup> Second, where a damage verdict and judgment granted in plaintiff's favor is reversed by the district court on motion for JNOV but reinstated by the court of appeals, interest on remand should run from the pre-remand judgment.<sup>91</sup> Third, where the district court remits a damage judgment or the

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87. *Id.* at 1594.

88. *Id.*

89. *Id.*

90. *See, e.g.,* *Marshall v. Perez-Arzuaga*, 866 F.2d 521, 522-25 (1st Cir. 1989).

91. *See, e.g.,* *Buck v. Burton*, 768 F.2d 285, 287 (8th Cir. 1985); *Maxey v. Freightliner Corp.*, 727 F.2d 350, 351 (5th Cir. 1984); *Turner v. Japan Lines, Ltd.*, 702 F.2d 752, 754-57 (9th Cir. 1983).

court of appeals reduces it, with a new judgment entered after post-trial motions or on remand, interest should run from the first judgment—at least to the extent damages awarded in the first judgment were awarded in the second judgment.<sup>92</sup>

Antitrust trials are frequently followed by post-trial motions and appellate review, which often result in new trials and post-remand proceedings. Interest on a large judgment rises significantly when many months pass between filing of post-trial motions and their resolution or many years pass between entry of the original judgment and the court of appeals mandate or entry of post-remand judgment. Thus, the issue of whether interest will run from the earlier (or later) of the two judgments is of critical importance. *Kaiser Aluminum* provides only a starting point<sup>f</sup> on the postjudgment interest question. The courts of appeals will be left to apply the Supreme Court's "ascertainment" standard to the myriad of multiple judgment cases that will surely continue to confront the lower courts.<sup>93</sup>

#### D. Application for Award of Attorney's Fees

1. *Who is Entitled to Attorney's Fees.*—Section 4 of the Clayton Act provides for an award of attorney's fees as part of the

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92. See, e.g., *Brooks v. United States*, 757 F.2d 734, 740-41 (5th Cir. 1985); *Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282, 1300 n.28 (9th Cir. 1984), cert. denied, 469 U.S. 1190 (1985); *Perkins v. Standard Oil Co.*, 487 F.2d 672, 675-676 (9th Cir. 1973); *Lowe v. General Motors Corp.*, 527 F. Supp. 54, 57 (N.D. Ala. 1981).

93. The few lower courts that have addressed the question after *Kaiser Aluminum* have reached divergent results. Tersely applying *Kaiser*, one court of appeals affirmed a district court's denial of interest from a vacated damage judgment. *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 917 F.2d 1413, 1447 (6th Cir. 1990). However, several courts, distinguishing *Kaiser* or relying on its dissent, or both, have awarded postjudgment interest from the first of several judgments. See, e.g., *Cordero v. De Jesus-Mendez*, 922 F.2d 11 (1st Cir. 1990) (where jury's initial liability determination upheld and adequate evidentiary basis for initial damage award, interest awarded from first judgment); *Boyd v. Bulala*, 751 F.Supp. 576, 578-84 (W.D. Va. 1990) (where first judgment "legally sufficient," post-first judgment interest awarded); *Keefe v. Bahama Cruise Lines, Inc.*, 753 F. Supp. 349 (M.D. Fla. 1990) (where issues addressed in first trial resolved in same manner on remand and, specifically, where identical damages awarded, same result). Lastly, where a damage award was increased after remand, one court has awarded postjudgment interest on the initial award from the date of the first judgment and on the difference between the increased award and the initial award from the date of the second judgment. *McDevitt & Street Co. v. Marriott Corp.*, No. 88-0102-A (E.D. Va. Jan. 17, 1991) (LEXIS, Genfed library, Currnt file).

cost of suit in a successful antitrust damage action.<sup>94</sup> The award of attorney's fees to a successful antitrust plaintiff or counter-claimant under Section 4 is mandatory,<sup>95</sup> and one court of appeals has held that, to establish an entitlement to a fee award, a plaintiff need only prove antitrust injury rather than "prevailing party" status as required by other fee-shifting statutes.<sup>96</sup> The attorney's fee provision is intended to insulate treble damage awards from expenditures for legal fees, encourage private enforcement of the antitrust laws, and penalize defendants for violating the antitrust laws.<sup>97</sup>

Similarly, Section 16 of the Clayton Act provides for reasonable attorney's fees to an antitrust claimant who "substantially prevails" in a proceeding for injunctive relief.<sup>98</sup> Under Section 16, a plaintiff need not ultimately prevail or obtain a final judgment to recover its attorney's fees; rather, it need only show a causal relationship between the litigation and the practical outcome realized.<sup>99</sup> Thus, awards of attorney's fees have been held to be appropriate both where a court denied a plaintiff's request for injunctive relief but the defendant voluntarily ceased its illegal conduct because of the pendency of the plaintiff's action, and where

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94. 15 U.S.C. § 15 provides in pertinent part: "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

95. *United States Football League v. National Football League*, 887 F.2d 408, 411 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1116 (1990); *Hasbrouck v. Texaco, Inc.*, 879 F.2d 632, 635 (9th Cir. 1989); *Home Placement Serv., Inc. v. Providence Journal Co.*, 819 F.2d 1199, 1210 (1st Cir. 1987); *North Am. Soccer League v. National Football League*, 505 F. Supp. 659, 691 (S.D.N.Y. 1980), *modified on other grounds*, 670 F.2d 1249 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982). *But cf. Litton Sys., Inc. v. American Tel. & Tel. Co.*, 700 F.2d 785, 826-28 (2d Cir. 1983) (denying costs and attorney's fees to a successful antitrust plaintiff as sanction for willfully concealing evidence), *cert. denied*, 464 U.S. 1073 (1984).

96. *United States Football League*, 887 F.2d at 412.

97. *Tic-X-Press, Inc. v. Omni Promotions Co. of Ga.*, 815 F.2d 1407, 1424 (11th Cir. 1987); *Twin City Sportservice v. Charles O. Finley & Co.*, 676 F.2d 1291, 1312 (9th Cir.), *cert. denied*, 459 U.S. 1009 (1982).

98. 15 U.S.C. § 26 provides in pertinent part:

Any person . . . shall be entitled to sue for and have injunctive relief . . . against threatened loss or damages by a violation of the antitrust laws. . . . In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

99. *Southwest Marine v. Campbell Indus.*, 732 F.2d 744, 746-47 (9th Cir. 1984); *Grumman Corp. v. LTV Corp.*, 533 F. Supp. 1385, 1387-89 (E.D.N.Y. 1982).

a plaintiff did not obtain permanent injunctive relief because the defendant abandoned its illegal conduct, but obtained preliminary injunctive relief that effectively provided all necessary relief.<sup>100</sup>

Conversely, because of the potential chilling effect on private enforcement and the lack of any reciprocal provision in Section 4, a successful antitrust defendant may not recover its attorney's fees.<sup>101</sup> However, where a plaintiff's antitrust suit is frivolous and totally without merit, a prevailing antitrust defendant may recover its attorney's fees as an award of sanctions under Federal Rule of Civil Procedure 11.<sup>102</sup>

2. *The Lodestar.*—Once an entitlement has been established, the benchmark for an attorney's fee award under Section 4 (and other fee-shifting statutes) is that the fee award must be "reasonable."<sup>103</sup> While the Supreme Court has not addressed the question of reasonableness under Section 4, most courts of appeals and district courts have used a two-part "hybrid" or "blended" approach in setting a reasonable antitrust fee award.<sup>104</sup> Under this standard, a court must first determine the "lodestar" amount, *i.e.*, the dollar amount derived from multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. The court then determines whether an adjustment to the lodestar—either upward or downward—is necessary.<sup>105</sup>

Time spent in pursuing a successful claim is, of course, compensable. Moreover, a court will award fees for time spent on

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100. *Southwest Marine*, 732 F.2d at 746-47; *Grumman Corp.*, 533 F. Supp. at 1387-89.

101. *Byram Concretetanks, Inc. v. Warren Concrete Prods. Co.*, 374 F.2d 649, 650-51 (3d Cir. 1967); *Juneau Square Corp. v. First Wis. Nat'l Bank*, 435 F. Supp. 1307, 1327 (E.D. Wis. 1977), *aff'd*, 624 F.2d 788 (7th Cir. 1980).

102. *Coastal Transfer Co. v. Toyota Motor Sales*, 1987-2 Trade Cas. (CCH) ¶ 67,774 at 59,188 (9th Cir. 1987); *Nassau-Suffolk Ice Cream, Inc. v. Integrated Resources, Inc.*, 114 F.R.D. 684 (S.D.N.Y. 1987).

103. *Reazin v. Blue Cross and Blue Shield*, 899 F.2d 951, 982 (10th Cir. 1990) (citing *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 562 (1986) ("Delaware Valley I")); *see also United States Football League v. National Football League*, 887 F.2d 408, 411, 415 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1116 (1990).

104. *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424, 434 n.9 (1983); *Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830, 838-40 (9th Cir. 1982); *Seven Gables Corp. v. Sterling Recreation Org. Co.*, 686 F. Supp. 1418, 1420 (W.D. Wash. 1988).

105. *Hensley*, 461 U.S. at 431; *United States Football League*, 887 F.2d at 413; *Seven Gables Corp.*, 686 F. Supp. at 1420; *Arthur S. Langenderfer, Inc. v. S.E. Johnson*, 684 F. Supp. 953, 956-57, 959 (N.D. Ohio 1988).

unsuccessful claims that involved a common core of fact as, or a legal theory related to, claims upon which the plaintiff achieved a successful result.<sup>106</sup> Several courts have indicated that in pursuing such claims "a prevailing antitrust plaintiff is entitled to recover a reasonable attorney's fee for every item of service which, at the time rendered, would have been undertaken by a reasonable and prudent lawyer to advance or protect his client's interest in the pursuit of a successful recovery of antitrust damages."<sup>107</sup> Thus, the Supreme Court has allowed recovery of time spent on appeal,<sup>108</sup> and most courts have allowed compensation for time spent on petitions for *certiorari* and retrial.<sup>109</sup> In addition, while not beyond dispute, most courts have awarded attorney's fees for time spent preparing and litigating the question of the fee application itself.<sup>110</sup> And to encourage the "cost-effective delivery of legal services," the Supreme Court and several courts of appeals in the antitrust context have held that paralegal time is properly included in an attorney's fee award.<sup>111</sup>

However, not all time spent is compensable. Courts will review time records and eliminate "excessive, redundant or otherwise unnecessary" hours from a fee award.<sup>112</sup> As alluded to above,<sup>113</sup> the Supreme Court and several courts have held that hours worked on unsuccessful antitrust claims that are based on

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106. *Reazin*, 899 F.2d at 980; *United States Football League*, 887 F.2d at 413-14 (both citing *Hensley*, 461 U.S. at 434-36, and *Texas State Teachers' Ass'n v. Garland Indep. School Dist.*, 489 U.S. 782 (1989)).

107. *Hasbrouck v. Texaco, Inc.*, 879 F.2d 632, 638 (9th Cir. 1989); see also *Pitchford Scientific Instrument Corp. v. Pepi, Inc.*, 440 F. Supp. 1175, 1177 (W.D. Pa. 1977).

108. *Perkins v. Standard Oil Co.*, 399 U.S. 222, 223 (1970).

109. *Knutson v. Daily Review, Inc.*, 479 F. Supp. 1263, 1274-75 (N.D. Cal. 1979); *Pitchford*, 440 F. Supp. at 1178.

110. *Spray-Rite Serv. Corp. v. Monsanto Co.*, 684 F.2d 1226, 1250 (7th Cir. 1982), *aff'd on other grounds*, 465 U.S. 752 (1984); *Perkins v. Standard Oil Co.*, 474 F.2d 549, 555 (9th Cir. 1973); *Sun Publishing Co. v. Mecklenburg News*, 594 F. Supp. 1512, 1523 (E.D. Va. 1984); *Pitchford*, 440 F. Supp. at 1179-80. *But cf. Locklin v. Day-Glo Color Corp.*, 378 F. Supp. 423, 429-30 (N.D. Ill. 1974).

111. *Missouri v. Jenkins*, 109 S. Ct. 2463, 2468-72 (1989); *United States Football League v. National Football League*, 887 F.2d 408, 415-16 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1116 (1990); *Spray-Rite*, 684 F.2d at 1250; *Pacific Coast Agric. Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1210 n.19 (9th Cir. 1975).

112. *Arthur S. Langenderfer, Inc. v. S.E. Johnson*, 684 F. Supp. 953, 957 (N.D. Ohio 1988) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983)); *Seven Gables Corp. v. Sterling Recreation Org. Co.*, 686 F. Supp. 1418, 1421 (W.D. Wash. 1988).

113. See *supra* note 105 and accompanying text.

different facts or legal theories than a successful claim should not be compensated.<sup>114</sup> To help the court determine the number of compensable hours, a fee applicant must submit evidence, usually in the form of detailed time records, supporting the hours worked.<sup>115</sup>

In determining the second component of the lodestar calculation, a reasonable hourly rate must be set. The hourly rate should reflect the prevailing market rate for attorneys of comparable skill and experience in the geographic area in which the litigation occurs.<sup>116</sup> Local (often lower) rates will apply, unless the fee applicant demonstrates that it was unable, through diligent and good-faith efforts, to retain local counsel.<sup>117</sup> Paralegal time will be billed at either cost or the hourly market rates, depending on the prevailing practice in the local community.<sup>118</sup> To compensate for extended delay, inflation, and foregone interest, the Supreme Court has recognized that a fee applicant may be entitled to an award of fees based on their current value.<sup>119</sup> Courts have taken delay into account by allowing compensation at current, as opposed to historical, rates<sup>120</sup> or have suggested or utilized the more complicated, but more accurate, method of adjusting historical rates to present value.<sup>121</sup>

3. *Adjusting the Lodestar.*—Having determined the “lodestar” amount, a court must then decide whether an adjustment—either a

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114. *Hensley*, 461 U.S. at 434-35; *United States Football League*, 887 F.2d at 413.

115. *Arthur S. Langenderfer*, 684 F. Supp. at 957 (citing *Hensley*, 461 U.S. at 433).

116. *Reazin v. Blue Cross and Blue Shield*, 899 F.2d 951, 982 (10th Cir. 1990); *Arthur S. Langenderfer*, 684 F. Supp. at 958.

117. *Arthur S. Langenderfer, Inc. v. S.E. Johnson*, 684 F. Supp. 953, 958 (N.D. Ohio 1988); see also *Pacific W. Cable Co. v. City of Sacramento*, 693 F. Supp. 865, 869 (E.D. Cal. 1988).

118. *United States Football League v. National Football League*, 887 F.2d 408, 416 (2d Cir. 1989) (citing *Missouri v. Jenkins*, 109 S. Ct. 2463, 2471-72 (1989)), *cert. denied*, 110 S. Ct. 1116 (1990).

119. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 716 (1987) (“*Delaware Valley II*”).

120. *Arthur S. Langenderfer*, 684 F. Supp. at 958; *Handgards, Inc. v. Ethicon, Inc.*, 552 F. Supp. 820, 823 (N.D. Cal. 1982), *aff'd*, 743 F.2d 1282 (9th Cir. 1983); *In re Ampicillin Antitrust Litig.*, 81 F.R.D. 395, 402 (D.D.C. 1978). *But cf.* *Seven Gables Corp. v. Sterling Recreation Org. Co.*, 686 F. Supp. 1418, 1421-22 (W.D. Wash. 1988).

121. See *Daly v. Hill*, 790 F.2d 1071, 1081 (4th Cir. 1986); *Gaines v. Dougherty*, 775 F.2d 1565, 1572 (11th Cir. 1985).



reduction or an enhancement—is necessary.<sup>122</sup> In making this determination, courts will look to the factors set forth in *Johnson v. Georgia Highway Express, Inc.*:<sup>123</sup>

- (1) the time and labor required,
- (2) the novelty and difficulty of the questions involved,
- (3) the skill requisite to perform the legal service properly,
- (4) the preclusion of other employment by the attorney due to the acceptance of the case,
- (5) the customary fee,
- (6) whether the fee is fixed or contingent,
- (7) time limitations imposed by the client or the circumstances,
- (8) the amount involved and the results obtained,
- (9) the experience, reputation, and ability of the attorneys,
- (10) the “undesirability” of the case,
- (11) the nature and length of the professional relationship with the client, and
- (12) awards in similar cases.<sup>124</sup>

The Supreme Court has indicated that upward adjustments to the lodestar are permitted in exceptional cases.<sup>125</sup> However, the Court has cautioned that the fee applicant must prove an upward adjustment is necessary<sup>126</sup> and that the lodestar amount is presumptively reasonable.<sup>127</sup> The Supreme Court and other courts have indicated that most of the *Johnson* factors are subsumed in the lodestar calculation in that “complexity of the case” and “skill of

122. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 563 (1986) (“Delaware Valley I”); *United States Football League*, 887 F.2d at 413; *Seven Gables Corp.*, 686 F. Supp. at 1420.

123. 488 F.2d 714, 717-19 (5th Cir. 1974).

124. *Hensley v. Eckerhart*, 461 U.S. 424, 434 n.9 (1983); *United States Football League v. National Football League*, 887 F.2d 408, 415 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1116 (1990); *Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830, 838-41 (9th Cir. 1982); *Seven Gables Corp.*, 686 F. Supp. at 1420.

125. *Delaware Valley I*, 478 U.S. at 565 (citing *Blum v. Stenson*, 465 U.S. 886, 898-901 (1984)).

126. *Blum*, 465 U.S. at 896, *cited in* *Seven Gables Corp. v. Sterling Recreation Org. Co.*, 686 F. Supp. 1418, 1423 (W.D. Wash. 1988).

127. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 564 (1986) (“Delaware Valley I”) (citing *Blum*, 465 U.S. at 897).

counsel” are usually reflected in the hours expended and the reasonable hourly rate.<sup>128</sup> Accordingly, the Supreme Court appears to have limited the possibility of enhancement to two situations: where exceptional results have been obtained<sup>129</sup> and where the risk of nonpayment exists under a contingent fee arrangement.<sup>130</sup>

Under *Delaware Valley II*, the fee applicant is entitled to a contingency enhancement where it establishes that (1) rates of compensation in the private market for contingency fee cases as a class differ from those where counsel was paid, win or lose, on a regular basis; and (2) without an adjustment for risk, the prevailing party would have faced substantial difficulties in securing counsel.<sup>131</sup> The Ninth Circuit has upheld a contingency enhancement in a Robinson-Patman case based on a showing that competent counsel would not take the case without the possibility of receiving a fee enhancement reflecting a return beyond their normal hourly rate.<sup>132</sup>

Downward adjustments are likewise permissible, provided the party seeking the reduction bears its burden of justifying the reduced fee award.<sup>133</sup> Thus, courts of appeals have upheld district court reductions of the lodestar where the plaintiffs achieved only limited success as reflected by small or nominal damage awards.<sup>134</sup>

4. *Contingent-Fee Arrangement.*—An issue sometimes arises regarding the effect of a contingent-fee arrangement on the amount of an attorney’s fee recovery. The Supreme Court and several courts of appeals in antitrust cases have held that a contingent-fee arrangement does not serve as a “cap” on the fee award; thus, if

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128. *Delaware Valley I*, 478 U.S. at 564-65; *Hensley*, 461 U.S. at 434 n.9; *United States Football League*, 887 F.2d at 415.

129. *Blum*, 465 U.S. at 898-901; see also *Seven Gables Corp.*, 686 F. Supp. at 1423 (results obtained not “sufficiently excellent” to justify enhancement).

130. *Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air*, 483 U.S. 711, 729-30 (1987) (“*Delaware Valley II*”); *id.* at 731 (O’Connor, J., concurring in the judgment); *id.* at 741 (Blackmun, J., dissenting).

131. *Id.* at 730-31 (White, J.); *id.* at 731, 733-34 (O’Connor, J., concurring); *id.* at 747-48 (Blackmun, J., dissenting); *Hasbrouck v. Texaco, Inc.*, 879 F.2d 632, 636-37 (9th Cir. 1989).

132. *Hasbrouck*, 879 F.2d at 636-37.

133. *United States Football League v. National Football League*, 887 F.2d 408, 413 (2d Cir. 1989) (citing *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 118 (3d Cir. 1976), *cert. denied*, 110 S. Ct. 1116 (1990)).

134. *Tic-X-Press, Inc. v. Omni Promotions Co.*, 815 F.2d 1407, 1424 (11th Cir. 1989); *United States Football League*, 887 F.2d at 413, 415.

the statutory fee award exceeds the amount of fees available under the agreement, the defendant must pay the higher amount.<sup>135</sup> On the other hand, if the statutory fee award is less than the contingent fee, the defendant must pay the statutory fee and the plaintiff will pay its attorneys the difference between the statutory fee and the plaintiff's contingent debt.<sup>136</sup>

5. *Informal Resolution.*—Attorney's fee applications under Section 4 can involve amounts in controversy approaching or exceeding the underlying antitrust recovery. However, recent decisions make clear that the halcyon days of double or triple lodestar awards are over and that antitrust fee awards will not, except in the rare case, provide successful antitrust claimants and their counsel with a windfall.<sup>137</sup> Given the court's increasing reluctance to grant enhanced fee awards and in order to maximize its client's fee recovery, plaintiff's counsel should maintain accurate attorney and paralegal time records, describing the amount of time spent on and nature of each task performed. Defendant's counsel should educate the court on the trend toward limiting fee awards to the lodestar amount and should also challenge any fee application not adequately supported.

However, short of extensive fee application litigation, all counsel should consider settling the fee issue informally or resolving the issue with minimal court intervention. Informal resolution may benefit the defendant, because the plaintiff will eventually charge each hour it spends litigating the fee issue to the defendant. Likewise, assuming the parties can agree on the lodestar amount, a successful plaintiff will not likely fare much better with the court. Moreover, the district court itself will not relish the task of reviewing time records and will be much more receptive to resolving discrete legal issues raised by the fee application. To facilitate informal resolution, time records—especially the applicant's—should be exchanged. Counsel should also strive to

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135. *Blanchard v. Bergeron*, 489 U.S. 87, 93 (1989); *Hasbrouck*, 879 F.2d at 639; *Tic-X-Press*, 815 F.2d at 1423-24. *But cf.* *Pharr v. Housing Auth. of City of Prichard*, 704 F.2d 1216, 1217-18 (11th Cir. 1983); *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 718 (5th Cir. 1974).

136. *Venegas v. Mitchell*, 110 S. Ct. 1679 (1990); *Hamner v. Rios*, 769 F.2d 1404, 1409 (9th Cir. 1985).

137. *See supra* notes 124-129 and accompanying text.

agree on uncontested legal and factual issues, leaving only legitimately contested issues for judicial resolution. Thus, informal resolution, while not always possible, should be seriously considered.

### *E. Application for Award of Costs*

Section 4 of the Clayton Act provides that a person injured in his business or property by a violation of the antitrust laws shall be awarded "the cost of suit."<sup>138</sup> Federal Rule of Civil Procedure 54(d) provides, in turn, that "[e]xcept when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs."<sup>139</sup>

The "express provisions" of Section 4 have been held to supersede a court's discretion to deny a successful plaintiff its costs under Rule 54(d).<sup>140</sup> As such, an award of costs to a successful antitrust plaintiff is mandatory.<sup>141</sup> Conversely, because Section 4 makes no express provision for award of costs to a prevailing antitrust defendant, several courts have held that such award is discretionary and have denied costs to successful antitrust defendants.<sup>142</sup> In exercising its discretion to deny costs, one court has focused on several factors, including plaintiff's good faith in bringing the action, the necessity of defendant's costs, the closeness and difficulty of the case, any benefits rendered to the defendant, and the chilling effect that an award of costs might have on small businesses in their enforcement of the antitrust laws.<sup>143</sup>

Once entitlement to costs has been established, courts must next determine the scope of the cost award. Relying on the difference between "cost" under Section 4 and "costs" under Rule 54(d), one district court has allowed a successful antitrust litigant

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138. 15 U.S.C. § 15.

139. FED. R. CIV. P. 54(d).

140. *White & White, Inc. v. American Hosp. Supply Corp.*, 786 F.2d 728, 731 n.1 (6th Cir. 1986).

141. *Lewis v. Pennington*, 400 F.2d 806, 819 (6th Cir. 1968); *Seven Gables Corp. v. Sterling Recreation Org. Co.*, 686 F. Supp. 1418, 1423-24 (W.D. Wash. 1988).

142. *White & White*, 786 F.2d at 730-31; *Lewis*, 400 F.2d at 819. See also *Association of W. Ry. v. Riss & Co.*, 320 F.2d 785, 790 (D.C. Cir. 1963).

143. *White & White*, 786 F.2d at 730-33.

to recover not only court costs, but the entire "expense of prosecuting the suit to a successful conclusion."<sup>144</sup> However, most courts do not distinguish between antitrust and other civil actions, holding that the costs recoverable under Section 4 are limited to those costs recoverable by a prevailing plaintiff under 28 U.S.C. section 1920.<sup>145</sup> Under section 1920, the taxation of particular items of costs<sup>146</sup> is a matter within the sound discretion of the district court, but that discretion is not unfettered.<sup>147</sup> In applying section 1920 and Rule 54(d), a court must determine whether (1) the cost is specifically recoverable under section 1920 and other cost-related statutes, (2) the item of cost was reasonably necessary to the conduct of the litigation, and (3) the amount of the cost was reasonable.<sup>148</sup> The recoverability of numerous items of costs has been frequently litigated, with recent decisions focusing on expert's costs, costs for computer-assisted legal research, and, to a lesser extent, costs for extra document workers.

In *Crawford Fitting v. J.T. Gibbons, Inc.*,<sup>149</sup> the Supreme Court held that a federal court may not tax expert witness fees beyond

144. *Pitchford Scientific Instrument Corp. v. Pepi, Inc.*, 440 F. Supp. 1175, 1179 (W.D. Pa. 1977); *see also* *Refuse & Envtl. Sys. v. Industrial Servs. of Am.*, 732 F. Supp. 1209, 1220-21 (D. Mass. 1990).

145. *Ott v. Speedwriting Publishing Co.*, 518 F.2d 1143, 1149 (6th Cir. 1975); *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190, 223-24 (9th Cir. 1964); *Arthur S. Langenderfer, Inc. v. S.E. Johnson*, 684 F. Supp. 953, 960 (N.D. Ohio 1988); *see also* *Royal Crown Cola Co. v. Coca-Cola Co.*, 678 F. Supp. 875 (M.D. Ga. 1987).

146. Section 1920 provides:

A judge or clerk of any court of the United States may tax as costs the following:

- (1) Fees of the clerk and marshal;
- (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
- (3) Fees and disbursements for printing and witnesses;
- (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
- (5) Docket fees under Section 1923 of this title;
- (6) Compensation of court appointed experts, compensation of interpreters and salaries, fees, expenses, and costs of special interpretation services under Section 1828 of this title.

A bill of cost shall be filed in the case and, upon allowance, included in the judgment or decree.

147. *Weihaupt v. American Medical Ass'n*, 874 F.2d 419, 430 (7th Cir. 1989); *Guinasso v. Pacific First Fed. Sav. and Loan Ass'n*, 100 F.R.D. 264, 265 (D. Or. 1983).

148. *Illinois v. Sangamo Constr. Co.*, 657 F.2d 855, 864 (7th Cir. 1981); *Arthur S. Langenderfer*, 684 F. Supp. at 960.

149. 482 U.S. 437 (1987).

the statutory thirty dollars per diem limits contained in 28 U.S.C. sections 1821 and 1920.<sup>150</sup> The vast majority of pre- and post-*Crawford Fitting* decisions have likewise held that expert fees exceeding thirty dollars per trial day may not be awarded as part of the "cost" of suit under Section 4.<sup>151</sup> Some courts have allowed recovery for the cost of computer-assisted legal research—either under the theory that the costs recoverable in an antitrust action exceed costs recoverable in other civil litigation<sup>152</sup> or under the now-discredited notion that a district court may award expenses not specifically recoverable under section 1920.<sup>153</sup> However, there is now persuasive authority refusing to allow recovery of computer-assisted legal research as an item of costs because it is not specifically included in section 1920 and because those expenses should be absorbed by attorneys' overhead and fees.<sup>154</sup> Finally, while not pointing to any statutory basis for doing so, one court has indicated that the expense of hiring extra document workers for a single case may be taxed as costs, but the ongoing cost of secretarial employees performing the same task may not.<sup>155</sup>

Antitrust actions may require significant outlays of cost. Parties must frequently retain expert accountants to address liability issues, including cost and pricing, as well as damage issues, including calculation of lost profits and lost going-concern value. Similarly, expert economists will often be called upon to justify or discredit a party's business practices. Assuming experts must be retained, *Crawford Fitting* renders the single largest item of

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150. *Id.* at 439, 441.

151. *See, e.g.*, *Reazin v. Blue Cross and Blue Shield*, 899 F.2d 951, 980-81 (10th Cir. 1990); *Barber & Ross Co. v. Lifetime Doors, Inc.*, 810 F.2d 1276, 1282 (4th Cir. 1987); *Seven Gables Corp. v. Sterling Recreation Org. Co.*, 686 F. Supp. 1418, 1421 (W.D. Wash. 1988); *Arthur S. Langenderfer, Inc. v. S.E. Johnson*, 684 F. Supp. 953, 960-62 (N.D. Ohio 1988). *But see* *Hasbrouck v. Texaco, Inc.*, 631 F. Supp. 258, 268 (E.D. Wash. 1986), *aff'd in part and rev'd in part on other grounds*, 879 F.2d 632 (9th Cir. 1989).

152. *Pitchford Scientific Instrument Corp. v. Pepi, Inc.*, 440 F. Supp. 1175, 1178-79 (W.D. Pa. 1977).

153. *Independence Tube Corp. v. Copperwell Corp.*, 543 F. Supp. 706, 723 (N.D. Ill. 1982).

154. *Berkey Photo v. Eastman Kodak Co.*, 603 F.2d 263, 309 n.75 (2d Cir. 1979); *Arthur S. Langenderfer*, 684 F. Supp. at 961; *Ortega v. City of Kansas City, Kan.*, 659 F. Supp. 1201, 1219 (D. Kan. 1987), *rev'd on other grounds*, 875 F.2d 1497 (10th Cir. 1989); *Litton Sys. v. American Tel. and Tel. Co.*, 613 F. Supp. 824, 836 (S.D.N.Y. 1985).

155. *Hasbrouck*, 631 F. Supp. at 268-69.

trial expense essentially unrecoverable and further indicates that, absent a clear statement by Congress, recoverable cost items will be limited to those set forth in section 1920. Accordingly, antitrust counsel and, in particular, plaintiff's contingent fee counsel should strike definitive arrangements with their clients concerning the payment of expert's fees. More generally, an understanding of which items of costs will not be recoverable will be crucial in determining how an antitrust action should be financed.

#### IV. Conclusion

This Article has attempted to provide a guideline to and overview of post-trial motion practice in private antitrust cases brought in federal court. To that end, it has focused on the full array of post-trial motions, including those that may affect the jury's verdict and those that have an impact on the size of an antitrust judgment. Because of the high stakes and complex legal and factual issues involved in most antitrust actions, a solid working knowledge of the law governing post-trial motions is indispensable to the antitrust practitioner.