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NOTES

Redefining the "Cost of Suit" Under Section Four of the Clayton Act

The general American rule is that litigants must bear their own litigation expenses.[1] Section four of the Clayton Antitrust Act[2] provides, however, that a plaintiff who prevails in a private antitrust action may recover treble damages together with "the cost of suit, including a reasonable attorney's fee."[3] Until recently courts had uniformly interpreted the phrase "cost of suit" as allowing recovery only of those expenses traditionally referred to as "court costs"[4]

1. The traditional American rule on expenses denies their recovery absent statutory authorization. *See* Mills v. Electric Auto-Lite Co., 396 U.S. 375, 391-92 (1970) ("While the general American rule is that attorneys' fees are not ordinarily recoverable as costs, both the courts and Congress have developed exceptions to this rule for situations in which overriding considerations indicate the need for such a recovery." (footnote omitted)). The rationale is one of encouraging lawsuits:

> In support of the American rule it has been argued that since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponent's counsel.

Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967), *quoted in* F.D. Rich Co. v. United States *ex rel.* Industrial Lumber Co., 417 U.S. 116, 129 (1974). The reasoning behind the rule is that forcing a losing litigant to bear the increased liability represented by his opponent's expenses would discourage plaintiffs from seeking to vindicate supportable claims, and encourage defendants to settle rather than defend supportable positions because of the increased liability represented by expenses. *See, e.g.*, Farmer v. Arabian Am. Oil Co., 379 U.S. 227, 235 (1964). This rule stands in contrast to the modern English rule which requires expenses to follow the judgment. *See Fleischmann Distilling,* 386 U.S. at 717. But even that rule is, in origin, a statutory exception to the common law. *See* Statute of Gloucester, 6 Edw. 1, ch. 1. Some commentators have argued for wholesale abandonment of the American rule. *See, e.g.*, Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?,* 49 IOWA L. REV. 75 (1963); McCormick, *Counsel Fees and Other Expenses of Litigation as an Element of Damages,* 15 MINN. L. REV. 619, 643 (1931). In the federal system, 28 U.S.C. § 1920 is the statutory provision which controls most awards of expenses (making them "costs" within the nomenclature of note 4 *infra*).

2. Clayton Act, ch. 323, § 4, 38 Stat. 730, 731 (1914) (current version at 15 U.S.C. § 15(a) (1982)).

3. 15 U.S.C. § 15(a) (1982). The section 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 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.

4. *See* note 22 *infra.* For the sake of clarity, this Note adheres to the following nomenclature: "expenses" refers to all expenditures incurred in conducting a suit; "costs" refers to statutorily recoverable expenses only, *see* note 5 *infra;* costs will sometimes be referred to as "taxable costs"; "cost of suit" refers to the Clayton Act provision specifically. As an example, attorney's fees would be an expense but not part of costs unless explicitly made so by statute. This Note argues that "cost of suit" includes not only court costs normally recoverable and the attorneys' fees specified in the Clayton Act, but also additional expenses such as attorneys'

under the federal cost statute, 28 U.S.C. section 1920[5] by way of Rule 54(d) of the Federal Rules of Civil Procedure.[6] In August, 1982, however, the Fifth Circuit Court of Appeals abandoned this limitation in *Copper Liquor, Inc. v. Adolph Coors Co.*[7] and held that "the word 'cost' in the Clayton Act embraces all the ordinary and reasonable expenses of litigation."[8] The *Copper Liquor* court, in a brief and conclusory discussion, supported its holding by pointing out the anomaly that would result from awarding treble damages and attorneys' fees but not permitting recovery of the expenses incident to the litigation.[9] The court also found the new rule to be "consonant with congressional policy,"[10] though it did not discuss what specific policies were involved or vindicated thereby. The court's departure from precedent and the vagueness of its opinion call for a careful analysis to place the decision properly in the context of antitrust policy.

This Note explores the possible interpretations of the "cost of suit" provision and the policies which it implicates. It concludes that the *Copper Liquor* interpretation best advances the goals of the anti-

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airfares, meals, lodging, telephone and mail courier services. These expenses are normally billed separately from attorneys' hourly fees. *See* Copper Liquor, Inc. v. Adolph Coors Co., 684 F.2d 1087, 1098 (5th Cir. 1982).

5. 28 U.S.C. § 1920 (1982) provides:

A judge or clerk of any court of the United States may tax as costs the following:
(1) Fees of the clerk or 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 costs shall be filed in the case and, upon allowance, included in the judgment or decree.

28 U.S.C. § 1923 (1982) lists allowable maximum docket fees and costs for briefs in the federal courts. 28 U.S.C. § 1828 (1982) provides for interpretation services for criminal cases and for civil cases where the United States is a plaintiff in federal court.

Some items have been held recoverable as costs under § 1920 in addition to those expressly listed. For example, maps, charts, films, photographs, models and drawings reasonably necessary for use at trial; charges for taking of depositions reasonably necessary to the case; and transcripts of pre-trial proceedings which were reasonably needed for use at trial or on appeal. *See* Annot., 97 A.L.R.2d 138 (1964).

6. FED. R. CIV. P. 54(d) provides in pertinent part:

Except 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 . . . .

Rule 54(d) is merely the mechanism through which § 1920 is applied in the federal courts. It does not authorize recovery for items other than those for which § 1920 authorizes recovery.

7. 684 F.2d 1087 (5th Cir. 1982), *rehg. en banc as to other issues*, 701 F.2d 542 (5th Cir. 1983).

8. 684 F.2d at 1100.

9. 684 F.2d at 1100.

10. 684 F.2d at 1100.

trust laws set forth by Congress and the courts. Part I examines the development of the present controversy among the circuits. Part II analyzes and refutes the arguments which have been set forth in support of the traditional rule. Part III explores the policy considerations which underlie private treble damage actions and concludes that the *Copper Liquor* interpretation of the "cost of suit" provision serves them better than does the traditional rule.

I. Judicial Interpretation of "Cost of Suit"

Congress enacted the Clayton Act in 1914 to supplement the Sherman Antitrust Act of 1890.[11] In the first judicial interpretation of the Act's "cost of suit" provision, the Second Circuit limited recovery to traditionally allowed court costs.[12] Courts consistently applied the Second Circuit's narrow construction for nearly sixty years, until the Fifth Circuit rejected it in *Copper Liquor*. The circuits are now split between those adopting the traditional narrow construction[13] and those following the Fifth Circuit in abandoning the original rule and broadening the scope of the provision to include all expenses of litigation.[14]

A. *The* Straus *Standard*

In *Straus v. Victor Talking Machine Co.*,[15] the Second Circuit confronted the problem of reconciling section seven of the Sherman Act[16] and section four of the Clayton Act.[17] The former provided for recovery of "*costs* of suit" whereas the latter did likewise for "*cost* of suit." The court found the difference in language insignificant and held that Congress did not mean either phrase to include the expenses of suit.[18] The court's conclusion rested on two prem-

11. Sherman Act, ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-7 (1982)).

12. *See* Straus v. Victor Talking Mach. Co., 297 F. 791, 806-07 (2d Cir. 1924); *see also* notes 15-21 *infra* and accompanying text.

13. The traditional definition has been explicitly adopted by the Second, Sixth, Seventh and Ninth Circuits. It has been affirmed without comment in the First and Fourth Circuits. *See* cases cited at note 22 *infra.*

14. The Eighth Circuit has followed the Fifth, and the Third Circuit has affirmed a broader definition without comment. *See* cases cited at note 29 *infra.*

15. 297 F. 791 (2d Cir. 1924).

16. Sherman Act, ch. 647, § 7, 26 Stat. 209, 210 (1890), *repealed by* Act of July 7, 1955, ch. 283, § 3, 69 Stat. 282, 283.

17. Clayton Act § 4, 15 U.S.C. § 15(a) (1982) (original version at ch. 323, § 4, 38 Stat. 730, 731 (1914)).

18. 297 F. at 807. No case has been found pre-dating *Straus* specifically interpreting the expense provision of either act. According to Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & Econ. 365, 366 (1970), there were only 261 reported antitrust cases between 1890 and 1924. It is not unreasonable to assume that the issue simply was not litigated before *Straus.* Litigation at that time involved the delineation of the broad scope of antitrust law, not its details.

It is not surprising that the *Straus* court presumed that the Sherman Act provision meant

ises: first, if Congress had intended the Clayton Act provision to mean anything different than that of the Sherman Act, it would have indicated the distinction clearly; second, if "expense of suit" was meant, Congress would not have needed to add the phrase "including a reasonable attorney's fee" in both statutes since that fee would necessarily be a part of expenses.[19] Based on this analysis, the court refused to allow a prevailing plaintiff to recover stenographic expenses incident to the litigation as "costs."[20]

Although the specific holding as to stenographic expenses is no longer valid because of statutory revision,[21] the logic of the *Straus* court as to the meaning of "cost of suit" has endured.[22] The most recent exposition of this view is in *Illinois v. Sangamo Construction*

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only costs. The word costs has "a well understood, fixed and technical meaning." 20 C.J.S. *Costs* § 1, at 257 (1940). It refers to statutory costs, now codified in § 1920. However, "cost" and "costs" do not always mean the same thing; the word "cost" and the phrase "taxable costs" ("costs" within the nomenclature set out in note 4 *supra*) generally have quite different meanings. "'*Cost' may be considered as synonymous with 'expense'*." Hygienic Chem. Co. v. Provident Chem. Works, 176 F. 525, 528 (2d Cir. 1910) (emphasis added).

19. 297 F. at 807. This is contrary to the most reasonable interpretation of "including." *See generally* notes 33-41 *infra* and accompanying text.

20. 297 F. at 807.

21. *See* note 5 *supra.*

22. The Ninth Circuit adopted the reasoning of *Straus* in Twentieth Century-Fox Film Corp. v. Goldwyn, 328 F.2d 190, 223 (9th Cir. 1964). In addition to *Straus,* the court relied upon the decisions in Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561 (10th Cir. 1962), *cert. dismissed sub nom.* Wade v. Union Carbide & Carbon Corp., 371 U.S. 801 (1962), and Brookside Theatre Corp. v. Twentieth Century-Fox Film Corp., 11 F.R.D. 259, 265 (W.D. Mo. 1951), *modified on other grounds,* 194 F.2d 846 (8th Cir. 1952), *cert. denied,* 343 U.S. 942 (1952). Except for *Straus,* these are weak precedents. The Eighth Circuit did not address the issue in *Brookside Theatre* and the Tenth Circuit assumed without discussion that rule 54(d) applied in *Union Carbide* and relied on a nonantitrust case construing it. *Brookside Theatre* has since been effectively overruled. *See* note 29 *infra.*

The Sixth Circuit also adopted the *Straus* interpretation in Ott v. Speedwriting Publishing Co., 518 F.2d 1143, 1148-49 (6th Cir. 1975). It drew support from *Straus; Goldwyn;* Trans World Airlines v. Hughes, 449 F.2d 51, 81 (2d Cir. 1971), *revd. on other grounds sub nom.* Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 (1973); and 6 J. MOORE, W. TAGGART & J. WICKER, MOORE'S FEDERAL PRACTICE ¶ 54.71[3], at 1385 (2d ed. 1983) (merely collecting cases previously cited in this Note while arguing the plausibility of the opposing position at 1385-86).

Most recently, the Seventh Circuit approved of the *Straus* interpretation in Illinois v. Sangamo Constr. Co., 657 F.2d 855 (7th Cir. 1981). *See* notes 23-27 *infra* and accompanying text.

The First Circuit may be deemed to have adopted the *Straus* standard as well by its action in Farmington Dowel Prods. v. Forster Mfg. Co., 421 F.2d 61 (1st Cir. 1970). In that case the court affirmed in part and remanded in part the District Court's decision, 297 F. Supp. 924 (D. Me. 1969), without discussion of the issue of costs. The District Court adopted the *Straus* standard. 297 F. Supp. at 930.

Similarly, the Fourth Circuit has not addressed the issue specifically. However, it affirmed a decision of the Federal District Court in Maryland adopting the *Straus* interpretation without further discussion of the costs issue. Advance Business Sys. & Supply Co. v. SCM Corp., 287 F. Supp. 143, 162 (D. Md. 1968), *affd.,* 415 F.2d 55 (4th Cir. 1969), *cert. denied,* 397 U.S. 920 (1970).

The Second Circuit has reaffirmed its adherence to the standard as recently as Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 309 n.75 (2d Cir. 1979). *See also* Grumman Corp. v. LTV Corp., 533 F. Supp. 1385, 1390-91 (E.D.N.Y. 1982) ("["cost of suit"] does not include 'out-of-pocket' disbursements.").

Co.,[23] in which the Seventh Circuit held section four of the Clayton Act to be coextensive with the definition of costs in 28 U.S.C. section 1920.[24] The court indicated that facial dissimilarities between the two would not justify a departure from the American rule that litigants must bear their own expenses of litigation absent a clear expression of congressional intent to the contrary.[25] The court also found unappealing the lack of uniformity[26] which would result if the definition of costs was expanded for antitrust plaintiffs but not for other litigants serving the public interest as private attorneys general[27] under other statutes.

B. *The* Copper Liquor *Standard*

As stated above, the "reasonable expense of litigation" standard for "cost of suit" was first set forth by the Fifth Circuit in the *Copper Liquor* case.[28] The court urged that

> [D]espite these decisions [*Straus*, etc.] it is arguable that, as Professor Moore points out, "had Congress intended 'cost of suit' to include only taxable costs, it would have said so." The interpretation suggested by Professor Moore appears not only to be a logical reading of the statute, but also is consonant with congressional policy. Allowing a prevailing party treble damages and attorneys' fees but denying recovery for expenses incident to litigation would be anomalous. Accordingly we hold that the word "cost" in the Clayton Act embraces all the ordinary and reasonable expenses of litigation.[29]

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23. 657 F.2d 855 (7th Cir. 1981).

24. If *Straus* is correct, this conclusion logically follows. Once it is agreed that "cost" is the same as "costs" and that the latter means "statutory costs," the statute governing such costs obviously ought to control.

25. 657 F.2d at 866.

26. 657 F.2d at 866.

27. The use of private attorneys general is one of the primary policies that the antitrust laws are meant to serve. *See* notes 77-88 *infra* and accompanying text.

28. 684 F.2d 1087, 1100-01 (5th Cir. 1982), *rehg. en banc as to other issues*, 701 F.2d 542 (5th Cir. 1983).

29. 684 F.2d at 1100 (footnote omitted). Professor Moore's point, 6 J. MOORE, W. TAGGART & J. WICKER, *supra* note 22, ¶ 54.71[3], at 1385-86 (2d ed. 1981), is the very argument some of the courts relying on Moore's citation of cases in support of the *Straus* standard ignored. *See* note 22 *supra*. "Taxable costs" as used here is the same as "costs" in the nomenclature set out in note 4 *supra*.

The court went on to hold that § 1920 was the sole means of recovering the basic categories of costs listed therein. Any expenses in those categories not allowed by § 1920 may not be recovered as costs and must be borne by either the litigant or his attorney. The court then added the statement that "[t]he other expenditures not listed in § 1920 reasonably incurred in connection with this litigation are recoverable as attorney's fees." 684 F.2d at 1101. In light of the express holding that "cost of suit" includes such expenses, this statement is at best ambiguous and at worst simply wrong. When attorneys' fees are awarded in American courts, they are awarded on the basis of properly billable hours multiplied by the prevailing hourly rate in the district of the litigation and, in the proper circumstances, increased to reward counsel for the special complexity, contingent nature or public importance of the case. There is no place in such a calculation for nontime charges. *See In re* Folding Carton Antitrust Litig., 84 F.R.D. 245, 255-70 (N.D. Ill. 1979); *see also* Lindy Bros. Builders v. American Radiator, 487 F.2d 161,

The *Copper Liquor* standard rests on three grounds. First, a linguistic analysis of the statute suggests that if Congress had meant to include only normal statutory costs, it would have indicated its intention clearly. Second, it is anomalous to provide the prevailing plaintiff with treble damages and attorneys' fees, both rare awards in American courts, yet deny him the other expenses of litigation. Third, a more liberal interpretation of "cost of suit" serves the underlying policies Congress sought to abet with the antitrust remedies.

II. Arguments Supporting *Straus* and Its Progeny

The courts adopting the statutory costs standard rely essentially on three grounds. First, they conclude from a linguistic analysis of section four of the Clayton Act that "cost" could not have meant "expenses"; otherwise it would have been unnecessary to add a provision for reasonable attorneys' fees. This textual analysis can be countered by that of *Copper Liquor*, which is the more supportable given the laws on cost in effect at the time the Clayton Act was adopted.[30] Second, the courts seek uniformity in the treatment of costs awards to parties acting as private attorneys general. However, there is currently little uniformity, and the *Copper Liquor* exception to the American rule on litigation expenses is narrow enough to

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167-68 (3d Cir. 1973), *vacated and remanded for recalculation of attorney's fees*, 540 F.2d 102 (3d Cir. 1964); *In re* Fine Paper Antitrust Litig., 98 F.R.D. 48, 81-86 (E.D. Pa. 1983). *But see* Henry v. Webermeirer, 738 F.2d 188 (7th Cir. 1984), in which the Seventh Circuit, somewhat anomalously considering its stoutly held position in *Sangamo*, held that attorneys' fees might include attorneys' out-of-pocket expenses. This anomaly may rest in the fact that the case interpreted 42 U.S.C. § 1988, the Civil Rights Attorney's Fees Award Act of 1976, which the court apparently felt should be interpreted more broadly than section four of the Clayton Act. Otherwise, this decision presents excellent arguments in support of the *Copper Liquor* standard.

The Eighth Circuit adopted the *Copper Liquor* standard in Alexander v. National Farmers Org., 696 F.2d 1210, 1212 (8th Cir. 1982), *cert. denied*, 103 S. Ct. 2108, 103 S. Ct. 2110 (1983). This case gave the first clear indication of what sort of additional expenses were included. In *Alexander*, the court permitted recovery for attorneys' airfares, meals, lodging, telephone and courier mail services. 696 F.2d at 1212. It should be noted that this ruling by the Eighth Circuit effectively overrules Brookside Theatre Corp. v. Twentieth Century-Fox Film Corp., 11 F.R.D. 259 (W.D. Mo. 1951), *modified on other grounds*, 194 F.2d 846 (8th Cir. 1952), *cert. denied*, 343 U.S. 942 (1952), on which later courts adopting the *Straus* standard partially relied. *See* note 22 *supra*. The *Alexander* court declined to specify whether the expenses should be treated as part of the "cost of suit" or as attorney's fees, perhaps reflecting the difficulty in deciphering the imprecise language of *Copper Liquor*.

In Pitchford Scientific Instruments Corp. v. PEPI, Inc., 440 F. Supp. 1175, 1178-79 (W.D. Pa. 1977), the court defined "cost of suit" as the expense of prosecuting the suit to a successful conclusion. Although the District Court provided no analysis or authority to support this characterization, the Third Circuit affirmed the decision without an opinion. 582 F.2d 1275 (3d Cir. 1978), *cert. denied*, 440 U.S. 981 (1979). This gives some indication that the Third Circuit would accept the *Copper Liquor* standard. Compare Skehan v. Board of Trustees of Bloomsburg State College, 501 F. Supp. 1360, 1388 (M.D. Pa. 1980) ("If Congress had intended [in 42 U.S.C. § 1988] to authorize the recovery of a plaintiff's personal expenses, it would have done so by language similar to that used in the Clayton Act.").

30. *See* notes 33-45 *infra* and accompanying text.

avoid harming the general rule.[31] Third, they find it significant that Congress has been silent in the face of almost sixty years of consistently narrow construction by the courts. There is, however, no significant reason to presume that this silence should be interpreted as ratification.[32]

A. Straus*'s Linguistic Analysis*

The conflict between the linguistic analyses utilized in developing the two standards is, on its face, seemingly irreconcilable. Both positions presume the conclusion desired and then assert that if Congress had intended something else, it would have said so.[33] There are, however, several reasons to dispute the *Straus* version of the statute. *Straus* concludes that the provisions of the Sherman and Clayton Acts with regard to costs are synonymous.[34] This is questionable not only because prior case law had attributed different meanings to the key terms in the two statutes,[35] but also because the phrasing of the Clayton Act provision supports the *Copper Liquor* standard. In addition, the *Straus* definition of both "costs" and "cost," if accepted, renders this portion of both acts redundant of other statutes and therefore meaningless.

Straus's unsupported presumption that the Sherman and Clayton Act expense provisions were intended to mean the same thing ignores the difference in language used by the two statutes.[36] It is indeed remarkable that the Second Circuit would find this difference insignificant since, fourteen years before *Straus,* that court expressly held that "cost" and "costs" were *not* synonymous in *Hygienic Chemical Co. v. Provident Chemical Works.*[37] In fact, the court in *Hygienic*

31. *See* notes 46-57 *infra* and accompanying text.

32. *See* notes 58-62 *infra* and accompanying text.

33. *Compare* text at note 19 *supra* with text following note 29 *supra.* The conclusory nature of the arguments on this issue is indicated by the brevity with which they are treated. *See, e.g., Straus,* 297 F. at 806-07 (one paragraph); Twentieth Century-Fox Film Corp. v. Goldwyn, 328 F.2d 190, 223-24 (9th Cir. 1964) (four paragraphs); Ott v. Speedwriting Publishing Co., 518 F.2d 1143, 1149 (6th Cir. 1975) (one paragraph); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 309 n.75 (2d Cir. 1979), *cert. denied,* 444 U.S. 1093 (1980) (one paragraph in a footnote); Illinois v. Sangamo Constr. Co., 657 F.2d 855, 865-66 (7th Cir. 1981) (three paragraphs); *Copper Liquor,* 684 F.2d at 1100-01 (three paragraphs); Alexander v. National Farmers Org., 696 F.2d 1210, 1212 (8th Cir. 1982), *cert. denied,* 103 S. Ct. 2108, 103 S. Ct. 2110 (1983) (two paragraphs). A good deal of the space in each case is devoted to recapitulation of prior decisions.

34. *See* notes 15-19 *supra* and accompanying text.

35. *See* notes 37-38 *infra* and accompanying text.

36. *Straus* relies on the absence of any distinction in the legislative history. 297 F. at 807. Drawing inferences from congressional silence is at best a risky proposition. *See* notes 58-62 *infra* and accompanying text. It is especially so here since Congress created an explicit difference in language in the two statutes.

37. 176 F. 525, 527-28 (2d Cir. 1910).

held that, under its facts, "cost" was synonymous with "expense."[38] Thus, prior to *Straus,* the Second Circuit espoused what is essentially the linguistic interpretation adopted in *Copper Liquor.*

The *Straus* court indicated that its view as to the synonymous meaning of the Sherman and Clayton Act provisions follows necessarily from the language used. The words at issue in the Clayton Act read "the cost of suit, including a reasonable attorney's fee."[39] The plain meaning of a phrase so constructed is that "cost of suit" must encompass something greater than attorneys' fees alone. *Straus* argues that it merely encompasses court costs *and* attorneys' fees.[40] However, court costs now provided by section 1920 "costs" do not *include* attorneys' fees,[41] nor is the term "costs" interpreted to include attorneys' fees absent a specific statutory authorization.[42] By using the word *including,* Congress indicated that the Clayton Act's "cost of suit" means more than "costs." If they had intended to limit reimbursement to "costs," the clear and proper expression would have been "costs of suit *and* a reasonable attorney's fee." Thus, there is no need to construe the Sherman and Clayton Act phrases as synonymous.

Even if the two phrases are treated as synonymous, they should arguably be given the broad reading of *Hygienic Chemical*[43] rather than the narrow, traditional definition of "costs." The narrow construction of "costs" would contravene the rule of statutory construction which requires that effect be given to all provisions of a statute to avoid redundancy.[44] Accepting the two phrases as synonymous, the Clayton Act then worked no change on existing law. The meaning to be given the phrase is that given at the time of the Sherman

38. 176 F. at 528. *Hygienic* construed the terms as part of a private contract rather than a statute. This is not grounds, however, for a meaningful distinction, nor did the *Straus* court attempt to make one. The contract in *Hygienic* dealt with precisely the issue of allocation of court costs and expenses of litigation. It makes no sense for the identical terms to be interpreted one way in a private contract and a different way in public law. Such a distinction could result ultimately in separate legal lexicons for public and private documents, a result wholly at odds with the consistency and predictability the law seeks.

39. 15 U.S.C. § 15(a) (1982).

40. 297 F. at 807.

41. *See* note 5 *supra.* When both the Sherman and Clayton Acts were passed, court costs were governed by R.S. § 983, Act of Feb. 26, 1853, ch. 80, § 3, 10 Stat. 161, 168, the forerunner of 28 U.S.C. § 1920. That provision likewise did not provide for recovery of attorneys' fees.

42. *See* notes 47-57 *infra* and accompanying text.

43. Hygienic Chem. Co. v. Provident Chem. Works, 176 F. 525, 528 (2d Cir. 1910).

44. *See* Montclair v. Ramsdell, 107 U.S. 147, 152 (1882). Courts now tend to cite the principle more for *intra*statutory construction than *inter*statutory construction. *See, e.g.,* Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307-08 (1961); United States v. Menasche, 348 U.S. 528, 538-39 (1955). In the *inter*statutory situation the argument that a provision such as "costs of suit" was a mere reminder to the courts might have more force. But in the present context this view seems quite dubious. Courts uniformly awarded costs to the prevailing party. *See* text at note 45 *infra.* There was no need whatever for a reminder. To depict the provision as such is to assume that either Congress was partially obtuse or it considered the courts so.

Act, 1890. At that time Congress had in effect a law for the federal court system which awarded specific costs to the prevailing party in a litigation as a matter of course.[45] Since they were automatically recoverable, there was no need for Congress, in the Sherman Act, to add the phrase "costs of suit" at all if what was meant thereby were the already recoverable costs. It is reasonable to conclude that something different was meant which must have been in excess of "costs." If "costs of suit" and "cost of suit" are not so interpreted the inclusion of either phrase by Congress is rendered superfluous to the "costs" statute.

Therefore, whether the Sherman and Clayton Acts are construed consistently or independently on this issue, the *Straus* court's interpretation fails and the linguistic analysis provides no support for interpreting "cost of suit" as "costs" only.

B. *The Uniformity Argument*

One of the reasons for retaining the *Straus* standard upon which the court in *Sangamo*[46] placed heavy reliance is the desirability of treating exceptions to the American rule as to expenses[47] in a uniform manner, especially in instances where the parties seeking reimbursement act as private attorneys general.[48] This argument is unconvincing for several reasons.

First, such a rule suggests a rigid approach to the assessment of costs. This is strikingly inconsistent with the flexibility and discretion traditionally afforded courts in this area. Section 1920 itself is not, by its wording, mandatory.[49] Nor have the courts limited that section to its literal language in terms of precisely which expenses are recoverable under it.[50] Moreover, despite the American rule and the limits of 28 U.S.C. section 1920, the courts have a recognized discre-

45. The Fee Bill of 1853, ch. 80, 10 Stat. 161 (1853). This statute was the predecessor of current code sections such as 28 U.S.C. § 1923 (1982). It provides:

> [t]hat, in lieu of the compensation now allowed by law to attorneys . . . in the United States courts . . . the following and no other compensation shall be taxed and allowed. But this act shall not be construed to prohibit attorneys . . . from . . . receiving from their clients . . . such reasonable compensation for their services, *in addition to taxable costs,* as may be . . . agreed upon between the parties.

(Emphasis added). This statute then enumerated a long list of such charges. The statute is plainly mandatory within its coverage and sharply distinguishes between "costs" and attorneys' fees. Even if the statute were not dispositive, the normal practice of the courts at the time was to award limited costs to the prevailing party. *See generally* Payne, *Costs in Common Law Actions in the Federal Courts,* 21 VA. L. REV. 397 (1935).

46. Illinois v. Sangamo Constr. Co., 657 F.2d 855 (7th Cir. 1981).

47. *See* note 1 *supra.*

48. *Sangamo,* 657 F.2d at 866. The idea of plaintiff as a private attorney general is one of the key policies underlying the antitrust laws. *See* notes 77-88 *infra* and accompanying text.

49. "A judge or clerk . . . *may* tax as costs . . . ." 28 U.S.C. § 1920 (1982) (emphasis added).

50. *See* note 5 *supra.*

tion to award expenses including attorney's fees and more in some instances.[51] Rigid uniformity defeats the policy of permitting such flexibility, and it further hampers courts in their efforts to interpret cost statutes in a manner consistent with different congressional objectives.

The second reason that uniformity is an unpersuasive argument is that it is not at all clear that Congress intended different cost-shifting statutes to be given the same interpretation. Congress certainly has not used the same language in all of these statutes.[52] Relatively

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51. Mills v. Electric Auto-Lite Co., 396 U.S. 375, 391-92 (1970); *see also* Sprague v. Ticonic Bank, 307 U.S. 161, 164-66 (1939); Buford v. Tobacco Growers' Coop., 42 F.2d 791, 792 (4th Cir. 1930); Gazan v. Vadoco Sales Corp., 67 F. Supp. 568 (E.D.N.Y. 1934). The Supreme Court has expressly held that a degree of discretion remains in the court to tax expenses beyond the explicit language of the statute. In Farmer v. Arabian Am. Oil Co., 379 U.S. 227, 235 (1964), the Court said:

> We do not read that rule [54(d)] as giving district judges unrestrained discretion to tax costs to reimburse a winning litigant for every expense he has seen fit to incur in the conduct of his case. Items proposed by winning parties as costs should always be given careful scrutiny. Any other practice would be too great a movement in the direction of some systems of jurisprudence that are willing, if not indeed anxious, to allow litigation costs so high as to discourage litigants from bringing lawsuits no matter how meritorious they might in good faith believe their claim to be. Therefore, the discretion given district judges to tax costs should be sparingly exercised with reference to expenses not specifically allowed by statute. Such a restrained administration of the Rule is in harmony with our national policy of reducing insofar as possible the burdensome cost of litigation.

The *Sangamo* court had applied *Farmer* to the issue of the award of expert witness fees, holding them strictly governed by 28 U.S.C. § 1821 (1982) which sets fees for all witnesses. 657 F.2d at 855, 864-65. The *Sangamo* court did not, however, give *Farmer* any consideration in its interpretation of "cost of suit." There are probably several reasons for this choice. First, *Farmer* is a breach of contract suit, not an antitrust suit. To extend its interpretation of rule 54(d) to the latter is to presume that the limitations of rule 54(d) control in antitrust cases and to ignore entirely the dispute over the proper interpretation of "cost of suit." Since rule 54(d) merely applies 28 U.S.C. § 1920 (1982), such a presumption allows § 1920 to govern in antitrust cases. Second, the danger that *Farmer* is seeking to guard against — discouraging legitimate litigation through fear of being mulcted in expenses — does not arise in an interpretation of § 4 of the Clayton Act. That section provides only for the recovery of "cost of suit" by a *prevailing* plaintiff. There is no possibility that a losing plaintiff would suffer from a more liberal interpretation since there is no basis on which the provision could be made reciprocal. Far from being a disincentive to litigating one's claims, this interpretation serves as a positive incentive to do so. Third, such an argument would presume that the court in an antitrust case is as narrowly constrained in terms of discretion as in other civil actions. This is by no means necessarily true. *See* notes 61-62 *infra* and accompanying text.

52. *See* 7 U.S.C. § 210(F) (1982) (Practices of Stockyard Owners) and 7 U.S.C. § 499g(b) (1982) (concerning perishable agricultural commodities) ("a reasonable attorney's fee to be taxed and collected as part of the costs of the suit"); 11 U.S.C. § 330(a)(1) (1982) (a debtor's attorney in bankruptcy proceedings may recover "reasonable compensation for actual necessary services rendered."); 15 U.S.C. § 1640(a)(3) (1982) (concerning obligor's right to rescind certain credit transactions) and 15 U.S.C. § 1989(a)(2) (tampering with automobile odometers) ("the cost of the action together with [a reasonable attorney's] fee as determined by the court"); Education amendments of 1972, Pub. L. No. 92-318, § 718, 86 Stat. 369 (1972) (race discrimination in public schools) ("a reasonable attorney's fee as part of the costs.") (repealed 1978); 29 U.S.C. § 107(e) (1982) (injunctions in labor disputes) ("including all reasonable costs (together with a reasonable attorney's fee) . . ."); 29 U.S.C. § 216(b) (maximum work hours) ("reasonable attorney's fee to be paid by the defendant, and costs of the action"); 33 U.S.C. § 928(a)(b) (1982) (This act, dealing with carriers that operate on navigable waters refusing to pay employees' claims for compensation, provides for recovery by a prevailing plaintiff of a reasonable attorney's fee and certain *specific* expenses.); 33 U.S.C. § 1365(d) (1982) (providing standing to

few sections of the United States Code use the precise formulation found in section 4 of the Clayton Act.[53] To insist on a uniform interpretation for all of these formulations (or even only those arising in private attorney general situations) is to presume that Congress used different constructions as a mere caprice.[54] This view seems inappropriate, at best. One extreme solution would be to interpret all cost-shifting statutes uniformly according to the *Copper Liquor* standard,[55] but this view suffers from the same inflexibility and denial of discretion to Congress and the courts that is inherent in *Sangamo*'s construction.[56] The better view is to consider the award of expenses as a continuum with the American rule at one end and the *Copper Liquor* standard at the other.[57] Other cost-shifting situations are lo-

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any citizen to bring suit in connection with water pollution) and 33 U.S.C. § 1415(g)(4) (1982) (providing for penalties for ocean dumping) ("costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines that such award is appropriate"); 35 U.S.C. § 285 (1982) (remedies for patent infringement) ("The court in exceptional cases may award reasonable attorney fees to the prevailing party."); 42 U.S.C. §§ 2000a-3(b) (1982) (discrimination in public accommodations) and 42 U.S.C. § 2000e-5(k) (1982) (equal employment opportunities) ("a reasonable attorney's fee as part of the costs . . ."); 42 U.S.C. § 3612(c) (1982) (fair housing) ("Court costs and reasonable attorney fees in the case of a prevailing plaintiff: *Provided*, that the said plaintiff in the opinion of the court is not financially able to assume said attorney fees."); 42 U.S.C. § 4911(d) (providing standing to any citizen to bring suit with regard to noise pollution) ("costs of litigation (including reasonable attorney and expert witness fees)"); 45 U.S.C. § 153(p) (railway labor) ("a reasonable attorney's fee . . . as a part of the costs of the suit"); 47 U.S.C. § 206 (1982) (carrier liability for damages) ("a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case"); 49 U.S.C. § 11705(3) (1982) (rights and remedies of persons injured by carriers) ("a reasonable attorney's fee as a part of the damages . . . . The district court shall tax and collect that fee as a part of the costs of the action.").

53. *See* 12 U.S.C. § 1975 (1982) (recovery for tying arrangements in banking); 15 U.S.C. § 15a, 15b(1), 15c(a)(2) (1982) (Clayton Act as amended); 15 U.S.C. § 26 (1982) (injunctive relief for antitrust violations); 15 U.S.C. § 72 (1982) (antitrust violations resulting in dumping of foreign goods); 15 U.S.C. § 298(b), (c) (1982) (fraud with regard to import and export of precious metals); 15 U.S.C. § 4016(b)(1), (2) (1982) (business injury by exporters acting under a government issued Certificate of Review); 18 U.S.C. § 1964(c) (1982) (civil remedies against the use of funds obtained by racketeering activity in interstate commerce); 46 U.S.C. § 1227 (1982) (antitrust in shipping). All may be generally categorized under the rubric of antitrust.

The more usual formulation in other statutes awarding attorneys' fees, *see* note 42 *supra*, is "a reasonable attorneys' fee as part of the costs of the suit."

54. *Cf.* notes 33-46 *supra* and accompanying text.

55. Some courts have given indications of going this far when a statutory exception explicitly shifts costs. The Fourth and Eleventh Circuits have said that when a statute expressly authorizes cost-shifting (usually by a declaration that attorneys' fees are recoverable), the limits of § 1920 do not apply. *See* Dowdell v. City of Apopka, 698 F.2d 1181, 1188-89 (11th Cir. 1983); Wheeler v. Durham City Bd. of Educ., 585 F.2d 618, 623 (4th Cir. 1978). *Dowdell*, at least, relies in part on Alyeska Pipeline Serv. Co. v. Wilderness Socy., 421 U.S. 240 (1975). In that case the Court refused to find a power in the federal courts to set aside the "American rule" as to costs and fees without an expression of congressional intent when based only upon a court finding that a party was acting as a private attorney general. Since, however, the antitrust statutes express a congressional intent to induce plaintiffs to act as private attorneys general, *Alyeska* does not stand in the way of cost shifting in antitrust litigation.

56. *See* notes 47-51 *supra* and accompanying text.

57. The placement of the *Copper Liquor* standard at the one extreme is strongly reinforced

cated in between according to congressional intent and the policies they serve.

Clearly, the uniformity argument in support of the *Straus* standard, although appealing at first blush, cannot withstand analysis.

C. *The Argument from Congressional Silence*

The sole remaining support for the *Straus* standard is fifty-eight years of congressional silence in the face of the interpretation placed upon "cost of suit" by *Straus*. Two reasons undermine reliance on such silence. First, it is not at all clear that Congress has ever considered the issue of what is meant by "cost of suit" since *Straus* was decided.[58] Although Congress passed three major antitrust acts since the Clayton Act, none of these considered the "cost of suit" provision in any detail, if at all.[59] This lack of consideration is not particularly surprising, since recovery of expenses is a relatively small part of the overall antitrust recovery scheme. The treble damage award together with the award of the reasonable attorney's fee constitute

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by clear congressional intent to discourage the conduct proscribed by the antitrust laws. This is most evident in the award of treble damages. *See* Part III *infra*.

58. The Court is loath to rely on congressional silence in the absence of express consideration of the specific issue, *e.g.*, by consideration of a bill or amendment. *See* Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955) ("Re-enactment — particularly without the slightest affirmative indication that Congress ever had the [decision in question] before it — is an unreliable indicium at best."); Toucey v. New York Life Ins. Co., 314 U.S. 118, 140-41 (1941) ("Only a few . . . episodic utterances [by courts] furnish a tenuous basis for the exception which we are now asked explicitly to sanction. . . . It is indulging in the merest fiction to suggest that the doctrine . . . was so obviously and firmly a part of the texture of our law that Congress in effect enacted it through silence." The doctrine involved dealt with the powers of federal courts to enjoin state court proceedings.); Helvering v. Hallock, 309 U.S. 106, 119-21 (1940) ("To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities."). *Cf.* Bob Jones Univ. v. United States, 103 S. Ct. 2017, 2032-33 (1983) (congressional silence taken as acquiescence because Congress had an "acute awareness" of the issue); Herman & MacLean v. Huddleston, 459 U.S. 375, 385-86 (1983) ("In light of this well-established judicial interpretation, Congress' decision to leave § 10(b) intact suggests that Congress ratified the cumulative nature of the § 10(b) action"); Merrill Lynch Inc. v. Curran, 456 U.S. 353, 381-82 (1982) ("[I]t is abundantly clear that an implied cause of action . . . was part of the 'contemporary legal context' in which Congress legislated in 1974. In that context, the fact that a comprehensive reexamination and significant amendment . . . left intact the statutory provisions under which the federal courts had implied a cause of action is itself evidence that Congress affirmatively intended to preserve that remedy."); Freed & Polsby, *Race, Religion, and Public Policy:* Bob Jones University v. United States, 1983 SUP. CT. REV. 1, 8-10 (discussion of *Bob Jones* followed by authors' criticism of the Court's theory of congressional ratification through legislative inaction on the ground that such inaction is ambiguous).

Even if Congress had been aware of an issue and remained silent, this would not prevent the Court from reconsidering the matter if it felt the issue had been wrongly decided. *See* James v. United States, 366 U.S. 213, 220 (1961).

59. *See* Robinson-Patman Act, ch. 592, 49 Stat. 1526 (1936) (codified at 15 U.S.C. 13-13c (1982)) (concerned with price discrimination); Act of July 7, 1955, Pub. L. No. 84-137, 69 Stat. 283 (amending 15 U.S.C. §§ 12-16) (the Clayton Act) (allowed the United States to recover for injuries to its business or property); Hart-Scott-Rodino Antitrust Improvements Act, Pub. L. No. 94-435, 90 Stat. 1383 (1976) (codified in various parts of title 15) (allowed, *inter alia*, recovery of attorneys' fees in injunction cases, made changes in antitrust actions).

the major portion of the plaintiff's incentive to litigate.[60] Since Congress did not fundamentally reconsider either of these items at the time of these acts, there is no reason to expect that Congress would have reconsidered the "cost of suit" provisions.

Second, Congress may not have considered revision of the standard to be a legislative responsibility. Congress grants the courts "an authority they have in no other branch of enacted law" in the field of antitrust,[61] virtually the authority to create a common law of antitrust. The statutes have tended to be short and general leaving interpretation to the courts.[62] Considering this delegation, it is not surprising that Congress would leave adjustments of this relatively insignificant clause to the courts. Given the fact that the Supreme Court has never authoritatively interpreted the "cost of suit" clause, this argument seems especially persuasive.

In sum, none of the arguments advanced in support of *Straus* compels acceptance of that standard. An examination of the policies served by the antitrust laws is helpful in choosing the correct interpretation of the "cost of suit" provision of section four of the Clayton Act. As will be argued in the following part, the *Copper Liquor* interpretation is most consistent with those policies.

III. The Policies Behind the Section Four Remedies and the "Cost of Suit" Provision

The legislative histories of the Sherman and Clayton Acts,[63] the

60. *See* H.R. Rep. No. 499, 94th Cong., 2d Sess. 19, *reprinted in* 1976 U.S. Code Cong. & Ad. News 2572, 2588. The relative inconsequentiality of the expense portion of recovery could also explain Congress' treatment of "cost of suit" and attorneys' fees in the 1955 Act which awarded the United States actual damages and the "cost of suit" when suing for injury to its property and business. That act denied the United States treble damages on the theory that the government did not need such an incentive to enforce the laws. S. Rep. No. 619, 84th Cong., 1st Sess., *reprinted in* 1955 U.S. Code Cong. & Ad. News 2330. The Senate Report did not even see fit to mention the denial of the attorney's fee to the government, evidently believing that this was relatively insignificant as an incentive compared to the treble damages. Since, as H.R. Rep. No. 499, *supra,* points out, the attorney's fee is seen as the bulk of the expenses of litigation, it is not hard to conclude that "cost of suit" was never considered. This conclusion is especially persuasive when one considers that the government does not incur the expenses a normal plaintiff would. The government has attorneys available in all districts so travel and lodging expenses would necessarily be unreasonable. Furthermore, the government must pay the salaries of those attorneys whether or not it sues.

61. United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 348 (D. Mass. 1953).

62. Congress has never stepped in to tell the courts that they have gone too far in allowing antitrust recoveries or remedies. In fact, the contrary is the case. In each of the three acts cited in note 59, *supra,* Congress expanded the antitrust remedies. The Clayton Act itself was a response to a perceived narrowing of the Sherman Act by the courts.

63. Although neither the House nor the Senate reports accompanying the Sherman and Clayton Acts state a clear purpose for these remedies, *see* H.R. Rep. No. 1707, 51st Cong., 1st Sess. (1890); S. Rep. No. 698, 63d Cong., 2d Sess. (1914); H.R. Rep. No. 627, 63d Cong., 2d Sess. (1914), such purposes are expressed in the debates on the bills. *See, e.g.,* 21 Cong. Rec. 1767-68 (remarks of Sen. George); 2456 (Sen. Sherman); 2612 (Sen. Regan); 2615 (Sen. Coke); 3147 (Sen. George) (1890); 51 Cong. Rec. 9073 (Rep. Webb); 9270 (Rep. Carlin); 16274-75

cases,[64] and the commentators[65] all indicate that treble damages and the other remedies provided in section four of the Clayton Act promote not only the policy of compensation[66] for the injured party, but also the policy of deterring violations. Deterrence is enhanced in two ways. The treble damages and attorneys' fees remedies, of course, serve as an *in terrorum* device to discourage future unlawful conduct. In addition, these remedies enhance deterrence through more pervasive enforcement of the antitrust laws — a result of the added incentive for private attorneys general to bring suit against alleged violators. As the following discussion illustrates, the *Copper Liquor* "reasonable expense of litigation" interpretation of "cost of suit" serves these policies better than the "statutory costs" interpretation of *Straus*.

A. *Section Four Remedies as Punitive Measures*

Trebling damages serves, at least in part, as a punitive measure against the violator.[67] By forcing the violator to make good by a factor of three the actual injury done to the specific plaintiff, section four acts to deter one who has already violated the laws from doing

(Rep. Webb); 16317-19 (Rep. Floyd); 15818-21 (Sen. Reed); 10042-46 (Sen. Norris) (1914). The purposes of the remedies are perhaps more clearly and authoritatively expressed in S. REP. No. 619, 84th Cong., 1st Sess., *reprinted in* 1955 U.S. CODE CONG. & AD. NEWS 2328 in connection with an amendment to the Clayton Act.

64. *See, e.g.*, American Socy. of Mechanical Engrs., Inc. v. Hydrolevel Corp., 456 U.S. 556, 574-76 (1982) (treble damages serve to punish, to deter and to compensate); Texas Indus. Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 639 (1981) ("The very idea of treble damages reveals an intent to punish past, and to deter future unlawful conduct . . . ."); Illinois Brick Co. v. Illinois, 431 U.S. 720, 746 (1977) (treble damage action to deter, to punish and to compensate); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485 (1977) (the treble damage provision is primarily a remedy though it also serves to penalize and deter); Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968) (the purpose of treble damage actions would be frustrated by allowing violators to retain the fruits of their illegality); Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968) ("[T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating . . . violation of the antitrust laws.").

65. *See, e.g.*, 2 P. AREEDA & D. TURNER, ANTITRUST LAW, § 331, at 149-50 (1978); K. ELZINGA & W. BREIT, THE ANTITRUST PENALTIES: A STUDY IN LAW AND ECONOMICS 63-77 (1976); Blair, *Antitrust Penalties: Deterrence and Compensation,* 1980 UTAH L. REV. 57; Loevinger, *Private Actions — The Strongest Pillar of Antitrust,* 3 ANTITRUST BULL. 167 (1958); Parker, *Treble Damage Actions — A Financial Deterrent to Antitrust Violations?,* 16 ANTITRUST BULL. 483 (1971); Wheeler, *Antitrust Treble Damage Actions — Do They Work?,* 61 CALIF. L. REV. 1319 (1973).

66. Plainly, to award a prevailing plaintiff all of his reasonable expenses of litigation as part of the "cost of suit" provides a fuller and more accurate compensation for the harm done him by the breach of the antitrust laws. The main benefit, however, of such increased and more accurate compensation is to leave the noncompensatory portions of the treble damage award untouched by such expenses and so preserve the deterrent effect of that portion of the award. For this reason the analysis here focuses exclusively on the deterrent policies behind the antitrust laws.

67. *See* note 64 *supra*. The Tax Code also recognizes that at least two-thirds of the damages are punitive. *See* Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 427 (1955).

so again.[68] Despite some provisions of the law which may be viewed as detracting from this goal of punishment,[69] the sheer magnitude of a treble damage award imposes a severe sanction on the violator and provides a strong incentive not to err again.[70]

If the punitive nature of damages awarded *ex post* discourages further misconduct by the party so punished, the award of damages has a deterrent effect *ex ante* as well. This award serves as a sword of Damocles over the head of a would-be violator merely by threatening liability for such damages. Although the use of damages in this way has been criticized as a policy,[71] there seems little room to

68. It could be argued that this portion of the treble damages is not as much a punishment as a way effectively to make up for the damages that will not have to be paid to injured parties who never brought suit. This argument presumes that only plaintiffs representing one-third of actual damages arising from the violation will ever succeed in recovering. As Judge Posner has pointed out, there is no evidence to support the validity of this or any particular multiple for this purpose. R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 226-27 (1976). This fact, coupled with the fact that no court or legislative authority appears to rely on it, may justify disregarding the presumption that only a fraction of potential plaintiffs sue in favor of the presumption that the excess over actual damages is in fact a punitive measure for the specific violation tried by the instant plaintiff. The deterrent effect would, of course, become less as the number of parties who failed to sue or failed to prevail in a suit increased. The government has, therefore, attempted to encourage plaintiffs to sue. *See* notes 77-88 *infra* and accompanying text.

69. The provisions of I.R.C. § 162(g) (Prentice-Hall 1984) are often cited as undercutting the deterrent effect of the treble damage award. This section allows corporate defendants to deduct as a business expense the full amount of an antitrust award or settlement unless there has been a criminal conviction for the violation involved prior to the award or settlement. *See* Parker, *supra* note 65, at 495-96; Wheeler, *supra* note 65, at 1322-23.

The refusal of courts to allow recovery of interest on an antitrust award for the period between injury and judgment also detracts from the deterrent effect of the antitrust remedies. This allows the violator the free use of the money and thus gives him an incentive for delay. *See* Parker, *supra* note 65, at 487-92; Wheeler, *supra* note 65, at 1323.

It is also possible that a jury, aware of the trebling provision, will reduce its award to balance the total damages awarded to the injury. *See* Note, *Controlling Jury Damage Awards in Private Antitrust Suits,* 81 MICH. L. REV. 693 (1983).

However, the fact that there are flaws in carrying out the intent to deter through punishment or that, in some situations, other policy considerations may outweigh that intent, does not detract from the basic goal.

70. The award of multiple damages is rare in American law. Where it does occur, it is seen as punitive and exemplary in nature to discourage further misconduct. *See* 22 AM. JUR. 2D *Damages* § 236 (1965). Attorney's fees awarded under a statute are viewed in the same light.

71. *See, e.g.*, Landes, *Optimal Sanctions for Antitrust Violations,* 50 U. CHI. L. REV. 652 (1983); Note, *Unestablished Businesses and Treble Damage Recovery Under Section Four of the Clayton Act,* 49 U. CHI. L. REV. 1076, 1083-84 (1982), and sources cited therein. The gist of the argument is that there is some level of damages that would be self-defeating to exceed because of the chilling effect on legitimate activities that would result. If the damages arising from an antitrust violation are too great, companies considering future business activity and calculating their possible costs will overreact to the risk of an adverse judgment by operating with excessive caution. As a result they will forgo legitimate activities near the margin of antitrust law to reduce the risk of ruinous damages. That this may have been of some concern to Congress from the outset might be inferred from the fact that while they considered several damage multiples less than three in drafting the Sherman Act, they considered none greater. *See* K. ELZINGA & W. BREIT, *supra* note 65, at 64-66.

The primary concern in recent literature, however, is not over-deterrence but making existing deterrence more effective. *See* note 72 *infra. See also* Note, *Class Actions for Punitive Damages,* 81 MICH. L. REV. 1787, 1794-95 n.46 (1983).

argue that it would not achieve the desired result in theory. The greater the amount a rational economic actor must pay as punishment for a violation in absolute terms, even when discounted by the probability of being caught, the greater the probability that the actor will avoid the risk altogether.[72]

The award of attorney's fees under the Clayton Act[73] is plainly in line with the punitive nature of treble damages and their deterrent effect. Attorneys' fees are rarely awarded under American law and the fact that they are awarded under the Clayton Act is indicative of a special interest in preventing the behavior proscribed therein.[74]

The *Copper Liquor* interpretation of "cost of suit" promotes the policy of negative deterrence that underlies the other section four remedies. In terms of both the *ex post* deterrence of proven violators and the *ex ante* deterrence of future violations, the larger the sum recoverable from a violator, the more averse he will be to risk being caught and sued. The award of attorneys' fees is one step in that direction. Adoption of the "reasonable expense of litigation" standard is a second. Not only will the violator have to reimburse treble the actual damages, he will also have to bear all the plaintiff's costs incurred in proving and assessing the liability.

The most significant policy objection to the adoption of this standard is the possible chilling effect which a greater recovery might have on legitimate activity.[75] This objection, however, is not persuasive. Even if overdeterrence does exist it is unlikely that the award of expenses of litigation is the culprit. While the expenses associated with a suit are large enough that reimbursement would encourage enforcement, they are small enough in comparison to the other costs of losing an antitrust suit that they will not interfere with legitimate activity. The major portion of the award will be the treble damages and attorneys' fees, both of which are already recoverable.[76] More-

72. One of the major criticisms of present antitrust policy is that the deterrence is not brought home to the real decision makers in a business since the managers do not pay or suffer from the payment of the trebled damages in many situations (*e.g.*, where they own no stock). As a result they are not subject to the risk aversion theory set out in the text. *See, e.g.*, K. ELZINGA & W. BREIT, note 65 *supra*, at 126-29; Blair, note 65 *supra*, at 62-69. This observation, however, does not invalidate the idea of risk-aversion as a useful tool in deterring antitrust violations. It simply calls for a reform to make the deterrence more effective by affecting the decision makers directly.

73. 15 U.S.C. § 15 (1982).

74. Attorney's fees are almost never open to a court to award as a matter of discretion. They are considered a matter for express statutory authorization. *See* 20 C.J.S. *Costs* § 218 (1940); 20 AM. JUR. 2D *Costs* § 72 (1965). *See also* note 52 *supra*.

75. *See* note 71 *supra*.

76. *See* H.R. REP. No. 499, 94th Cong., 2d Sess. 19 (1976), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 2588. Moreover, a business calculating the risk of future conduct is unlikely to include expenses of litigation in its calculation since these are substantially within its control through its power to settle. A business would normally look only at the treble damage award and the possible compensable injuries that might result from the conduct.

over, if a chilling effect exists, it is primarily derived from uncertainty as to what conduct is and is not prohibited. The solution is to define better the conduct that is to be deterred. Retention of as strong a deterrent as possible for that conduct which is to be proscribed is, in any event, desirable. Awarding plaintiffs their full, reasonable expenses of litigation would help provide that deterrence.

B. *Section Four Remedies as a Plaintiff's Incentive To Enforce the Law*

Treble damages provide an incentive for businesses and individuals to act as private attorneys general to enforce the antitrust laws.[77] This incentive operates in two ways. First and most significantly, recovering treble damages may produce something of a windfall to the plaintiff,[78] which should spur him to act in defense of his rights. Second, treble damage recoveries make "the remedy meaningful by counterbalancing 'the difficulty of maintaining a private suit against a combination such as is described' in the Act."[79]

The Supreme Court's devotion to the policy of promoting antitrust enforcement through the maintenance of plaintiff's incentives is unyielding. The Court has repeatedly interpreted the statute to provide the maximum incentive to sue even in the face of other conflicting policies. For example, the Court has eschewed a "clean-hands" doctrine for plaintiffs in antitrust actions saying, "The plaintiff . . . may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition."[80] It has set aside the usual rule of agency and held the principal liable for punitive damages arising from the acts of the

77. *See* Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972). The use of private attorneys general is a device to save the government the cost of enforcement. By permitting and inducing private parties to bring actions for antitrust violations, the government gets fuller enforcement without having to undertake all of the investigations and suits itself.

78. Indeed, the treble damage award has been attacked on just that ground. *See, e.g.*, Bernard, *The Actions of the Antitrust Plaintiff: Law, Policy and a Modest Proposal*, 16 DUQ. L. REV. 307, 322-23 (1977-78) (the situation provides a perverse incentive to suffer the injury for a time in order to get the opportunity for a treble damage action); *Report of the Antitrust Selection Committee on Legislation of the New York State Bar Association: Definition of Cases Appropriate for Treble Damages*, 54 N.Y. ST. B.J. 395 (1982) (urging only actual damages be awarded where the defendant could not reasonably have known it was violating the law).

79. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 486 n.10 (1977) (quoting Sen. Sherman at 21 Cong. Rec. 2456 (1890)). The thrust of this argument is that the type of violation may be difficult to prove and complex to present and so will require more extensive preparation and will necessarily have a lower chance of success. Trebling damages helps to indemnify the plaintiff for that risk by increasing the expected recovery. Thus, even when the chance of recovery is discounted by the lower probability of success, it will serve to spur prosecution unless the probability of success is less than one third of what would otherwise be pursued. This acts as an incentive to both the plaintiff and his attorney if the latter is working, as is usual, on a percentage basis.

80. Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968). *See also* Bernard, note 78 *supra*, at 314-24.

agent when it held a nonprofit organization liable for treble damages for injuries caused by a member even though the organization (the principal) had obtained no ill-gotten gains.[81] The Court has also allowed standing to a plaintiff who has passed the costs of the injury done to it on to its own customers.[82]

Clearly, the *Copper Liquor* standard for "cost of suit" would add to the potential incentive available to an injured plaintiff. A would-be plaintiff would have even more reason to vindicate her claim against an antitrust violator under the *Copper Liquor* standard since her reasonable litigation expenses would in no way deplete her eventual recovery.[83] In light of the various countervailing policies rejected by the Supreme Court in favor of the incentive to sue,[84] this argument is especially strong. Only the rigid retention of the American rule on expenses serves as a counter-argument. But, this rule is already substantially undermined in antitrust suits by the award of attorneys' fees.[85] To provide the fullest effect to the incentive, all provable, reasonable expenses should be awarded in addition to the treble damage incentive recovery.

Of more concern is the idea of "counter-balancing the difficulty of maintaining suit." There are two possible interpretations of this phrase. The most likely is that the plaintiff must be provided with sufficient incentives to enforce the antitrust laws, as has been discussed above.[86] The second possibility is that a portion of the treble damages may have been intended to defray expenses of litigating. However, even if this were the case,[87] a strong argument may be

81. American Socy. of Mechanical Engrs., Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982).

82. Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968). The holding in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), addresses a somewhat different issue. In that case the consumers to whom the injury had been passed were denied standing to sue though the firm which had passed the injury through to them retained its standing. This decision rested on countervailing considerations. Most important, no doubt, was the fear of opening the courts to a huge number of suits and squandering judicial resources. In addition, the Court emphasized the difficulty of proof as to how much was passed through to each customer. Finally, if the middleman recovers, he can pass the *recovery* through to his customers just as he did the injury. Thus, injury alone is insufficient to justify standing but it is vital that someone have standing in order to sue and so deter the activity. Deterrence is, therefore, of greater importance than compensation.

83. It is interesting to note that this problem was recognized in Ott v. Speedwriting Publishing Co., 518 F.2d 1143 (6th Cir. 1975), which adopted the *Straus* rule. That court stated: "We do not believe that recovery of the costs allowable under 28 U.S.C. § 1920 . . . would be sufficient incentive for a plaintiff with a very small claim to bring an antitrust action after denial of class action status." 518 F.2d at 1149. Evidently the Sixth Circuit was content to let the injuries of plaintiffs with small claims who are unable to obtain class certification go unremedied.

84. *See* notes 80-82 *supra* and accompanying text.

85. *See* notes 47-57 *supra* and accompanying text.

86. *See* note 79 *supra* and accompanying text.

87. The argument advanced in note 79 *supra* that the purpose is to make up for the lower probabilities of prevailing in a difficult cause of action is at least as plausible. Furthermore, if expenses are to be made up by part of the treble damages award, addition of the phrase "cost

made that under present circumstances expenses may not be fully or adequately covered. Of a treble damage award, one-third is for actual damages. Recovery of that amount provides no greater incentive to the plaintiff than he would have had in the absence of the treble damage remedy. Furthermore, this portion of the recovery is taxable if the income it replaces was taxable.[88] Since there was no income tax at the time of passage of the Sherman or Clayton Acts, this bites into the recovery the enacting Congresses intended. Of the remaining two-thirds, half or more may go to the plaintiff's attorney depending on the fee arrangement.[89] Further, the fee arrangement may not cover expenses of litigation. In that event, plaintiff then retains less than one-third of the total award as her added incentive.

These factors go a long way to erode the incentive intended in the antitrust acts. The *Straus* interpretation of "cost of suit" contravenes congressional intent to leave the incentive portion of a recovery unscathed.[90] The "reasonable expense of litigation" standard at least partially redresses this situation by increasing the total recovery from which these deductions may be made.

CONCLUSION

The *Copper Liquor* "reasonable expense of litigation" definition of "cost of suit" for antitrust recovery is preferable to the *Straus* standard. On the one hand, none of the arguments advanced on the part of the *Straus* rule withstand analysis. The linguistic analysis on behalf of the *Straus* rule is unsound both on the ground of congressional intent and with reference to the very precedents of the *Straus* court itself. The uniformity argument can be accommodated with-

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of suit" is redundant and leads to double recovery since these expenses would then be reimbursed both by the treble damage award and the "cost" provision.

88. Commissioner v. Glenshaw Glass Co., 348 U.S. 426 (1955).

89. Most antitrust litigation is done on a contingency fee basis without regard to the "reasonable attorney's fee" set by the court. *See* K. ELZINGA & W. BREIT, *supra* note 65, at 74. Indeed, there is some indication that it is not unusual for the attorney to claim the whole of the court-awarded fees *and* a percentage of the full damage award, perhaps as high as 35%. *Id.* At least one court has indicated that the trial court should take a careful look at such fee arrangements with regard to the governing professional responsibility rules. *See* Farmington Dowel Prods. Co. v. Forster Mfg. Co., 421 F.2d 61, 87-88 (1st Cir. 1970). But courts are not likely to do so unless the client complains — a major difficulty in the enforcement of all the professional standards.

In theory, the deterrent created by treble damages is effective no matter who actually collects the multiple damages. Illinois Brick Co. v. Illinois, 431 U.S. 720, 746 (1977). However, in practice other considerations intervene. To be an effective incentive the damage award must accrue to the plaintiff since he is the only one who may bring the suit and thus make the deterrent functional. Moreover, to accept that the deterrence is effective and acceptable in the hands of the attorney raises extensive problems of solicitation on his part. The attorney may be spurred improperly to seek cases involving the treble damage award with the risks of unnecessary litigation, barratry and maintenance that such activity might involve. *Cf.* Model Code of Professional Responsibility, EC 2-8, DR 2-103 (1980).

90. *See* notes 80-82 *supra* and accompanying text.

out doing violence to its purposes. The argument from congressional silence is dubious because of its tenuous nature and because Congress has not considered the issue in such a way as to make that silence compelling.

On the other hand, an analysis of the policy goals the antitrust statutes seek to serve results in a clear preference for the *Copper Liquor* "reasonable expense" rule. Increasing the level of plaintiff's recovery increases the deterrent effect both on those who have violated the laws and on would-be violators by raising the price they must pay for their misconduct. It also increases the incentive for the plaintiff to enforce the antitrust laws by bringing suit.

Thus, the *Copper Liquor* standard is the definition best designed to obtain the results the antitrust laws seek to fulfill. It ought not be precluded on the basis of the dubious reasoning of past decisions.