

Summary of Antitrust Modernization Commission Hearing on Government Civil Remedies December 1, 2005¹

I. Opening Statements/Written Testimony

The speakers quite fairly summarized their prepared papers in the following order: (1) Commissioner Tom Leary, (2) John Graubert, (3) Steve Calkins, and (4) Kevin Arquit.

A. FTC Commissioner Thomas B. Leary. Commissioner Leary addressed merger enforcement issues. He argued that the FTC should decide up front whether to proceed in court or through administrative litigation, and then honor that commitment. This would solve any complaints about different merging standards. On 13(b), Leary noted that his earlier concerns had been lessened by the FTC's policy statement, although he urged the AMC to recommend that the FTC take steps to entrench that policy. Finally, he addressed the perennial topic of dual jurisdiction over the antitrust laws, which he viewed as a good thing. The worst outcome would be a single agency devoted to consumer protection.

B. John Graubert, Principal Deputy General Counsel, FTC. Graubert talked about the well established nature of the Commission's equitable monetary remedies. Nor are they duplicative – never has one proven to be duplicative, and, in any event, the Commission's policy statement calls for sensitivity on this point. The Commission uses its authority to benefit consumers, and there are a number of instances where consumers may not be able to recover.

C. Stephen Calkins, Professor and Director of Graduate Studies at Wayne State University Law School, and formerly General Counsel to the FTC. Calkins's written statement noted that he is on an ABA Task Force on AMC issues but was speaking solely in his personal capacity. He made three points: (i) The antitrust system's "bi-modal" penalties, where, for instance, DOJ has to choose between an injunction that can be considered a mere "slap on the wrist" and a criminal felony indictment, is far from ideal. It has unfortunate incentives: to use criminal authority when that is arguably a stretch; perhaps not to bother otherwise (note DOJ's bringing of only 2 1/2 civil cases a year); and perhaps to make orders more punitive than otherwise justified. There also can be a lack of deterrence, as suggested by the experience with physician cases, where follow-ons are conspicuously lacking and cases seem to be brought month after month with no let-up. (ii) Congress should leave 13(b) alone, because it can play a key role in competition cases and the arguments for partially repealing it are unpersuasive. (iii) There is good reason to give serious consideration to letting DOJ recover money civilly, either by DOJ's developing its own equitable authority or by Congress's enacting fine authority for DOJ and FTC.

D. Kevin J. Arquit, Simpson Thatcher & Bartlett, and formerly director of the FTC's Bureau of Competition. Arquit essentially said there is no need to use 13(b) for monetary relief in competition cases. Government orders can be frighteningly sweeping. Our antitrust system encourages follow-on litigation, and the states are playing a newly active role. There is no reason for the FTC to interfere. Beyond that, Arquit argued that the FTC's Section 13(b) was intended by Congress as a consumer protection provision and ought not to be used outside of that field. He warned about the risk of duplicative recoveries, pointing out that the strongest cases, on the merits, were the ones where follow-on

¹ *Disclaimer*: Stephen Calkins, a witness, was asked to report on the session to the best of his ability. He freely acknowledges that he was one of the witnesses and possesses no special ability to give objective reports of the views of others, particularly views with which he disagrees.

litigation was most likely, and noting that the FTC itself has written about the importance of using 13(b) for gap-filling (which means recovery for some consumers who otherwise would go without). He suggested that extending 13(b)'s use for monetary relief in competition cases beyond the three recent consent orders risked jeopardizing the Commission's consumer protection program.

II. Questioning

The lead questioning was by Commissioner Burchfield. Other commissioners present were Chair Garza, Vice-Chair Yarowsky, and Commissioners Jacobson, Kempf, Litvak, and Valentine. Every Commissioner participated in vigorous questioning. A few impressions are noted here.

Commissioner Leary's comments about preliminary injunctions (PI) attracted several questions. Leary was emphatic that he saw no basis for the FTC enjoying a different PI standard. Kempf challenged Leary's suggestion that the FTC could "solve" the issue of a separate PI standard on its own, without legislation. Leary responded that if the Commission foreswore follow-on administrative adjudication, there would be no basis for Commission lawyers arguing for special solicitude for an injunction to permit that adjudication. At some point, Kempf noted that any litigant seeking a PI can later proceed alternatively; left vague was what this meant for an FTC. When a questioner suggested that maybe the FTC simply should litigate in federal court, Leary defended the benefits of administrative adjudication. Calkins also pointed out that Commissioners of the ability of Leary can be attracted only if commissioners are engaged in important work such as adjudicating cases.

There did not seem to be a lot of support for Arquit's suggestion that Congress should be invited to address 13(b). There was vigorous give and take on the origins of that statute and about how accepted its use is in competition cases. Calkins argued that monetary equitable remedies had been endorsed by six or eight courts of appeal, that the same language applied equally to competition and consumer protection, and that, if it mattered, 13(b) became law because of energy crisis competition concerns. Arquit argued that all of those court of appeals cases were consumer protection cases, and that the key words in the statute originated in the Magnuson-Moss consumer protection act such that the statute should be read to authorize equitable relief only in competition cases. But it seemed that the Commissioners who addressed the issue were comfortable leaving the issue for the courts without rushing up to Capitol Hill.

The Commissioners did show some interest in thinking about creation of civil fines. Although Calkins described this option as creating fine authority for use by both agencies, Litvak suggested that although he did not like the idea of the Commission having authority to seek fines, he was intrigued about the bi-modal issue and the possibility that DOJ should be able to seek civil fines.

Yarowsky raised an entirely unrelated issue: the exemption of non-profits from coverage under the FTC Act. Arquit responded vigorously by arguing that this exemption was unwise and harmful. Calkins added that its ambiguity had resulted in substantial unproductive litigation. Graubert demurred in favor of an afternoon FTC witness, but Leary said that he agreed with Arquit and Calkins.

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