

# Antitrust Modernization Commission Summary of Civil Remedies Hearings

July 28, 2005

The Antitrust Modernization Commission (AMC) held hearings on the topic of Civil Remedies on Thursday, July 28, 2005. The two panels: (i) *Damages Multiplier, Attorneys' Fees and Prejudgment Interest*, and (2) *Joint and Several Liability, Claims Reduction and Contribution*, presented the Commission with a wide spectrum of views on civil remedies issues. The first panel's discussion focused primarily on treble damages and whether there were any categories of conduct for which detrebling would be appropriate. The second panel's discussion centered on the fairness of joint and several liability without claims reduction or contribution.

The session revealed some interesting perspectives from both academics, practitioners, and the bench. With respect to treble damages, the majority of the panel favored maintaining the status quo, while the minority urged the Commission to recommend detrebling at least in those cases where the conduct might reasonably benefit competition. In the second panel on joint and several liability, claims reduction and contribution, there was a more decisive split between those practitioners that customarily represent plaintiffs and those that customarily represent defendants.

The following discussion attempts to summarize each panelist's written testimony and views expressed at the hearing. In addition to a summary of positions, this document will also highlight any significant questions raised by the AMC and the panelists' responses.

## I. Summary of Written Testimony From Panel No. 1.: Damages Multiplier, Attorneys' Fees and Prejudgment Interest

### A. David Boies. Attorney from the law firm of Boies, Schiller & Flexner, L.L.P.

Mr. Boies's opening statement addressed the continued need for treble damages in order to deter violations of antitrust laws, deprive violators of the benefit of their illegal conduct, compensate victims, and give incentive to private parties to pursue violations that otherwise go undetected by government authorities. Although opponents of treble damages claim that trebling is unfair and encourages inefficient behavior, such claims are unsupported according to Mr. Boies. The antitrust laws and treble damages do play an important part in deterring illegal conduct. To do away with treble damages without further study of the effects these changes would have on deterrence, compensation and incentives for private action would be premature. Ultimately, if treble damages were eliminated, other simultaneous changes would be necessary to fully compensate victims and deter violators.

B. Edward D. Cavanagh. Professor of Antitrust Law since 1982 at St. John's University School of Law in New York City

Professor Cavanagh's positions on the three panel topics can be summarized as follows: (1) across-the-board detrebling is not appropriate, rather Congress should continue to carve out circumstances in which detrebling is appropriate; (2) the present system for attorneys' fees should be maintained, and attorneys' fees should not be awarded to prevailing defendants; and (3) the current scheme for prejudgment interest should be upheld.

C. Robert H. Lande. Professor of Law at the University of Baltimore School of Law and Director of the American Antitrust Institute

Professor Lande asserts that the opponents of treble damages rationalize detrebling through a series of "myths," which he attempts to debunk. In Professor Lande's view, treble damages in antitrust cases are rarely more than single damages because the lack of prejudgment interest, combined with the length of a typical antitrust litigation and the time value of money, lead to damages that are much less than trebled. Second, Lande asserts that a defendant has never been subject to duplicative treble damages (or sixfold damages) in suits by a direct and indirect purchaser.<sup>1</sup> Third, Professor Lande rebuts the claim that overdeterrence is the product of disproportionate payouts for antitrust violations compared with the modest damages caused by the harm. Fourth, Lande disagrees with the idea that detrebling for certain types of violations would not undermine enforcement. He thinks detrebling in rule of reason cases would lead to underdeterrence and would cause tremendous uncertainty in light of the inconsistent application of per se and rule of reason analyses.

D. Abbott Lipsky. Attorney from the law firm of Latham & Watkins, LLP.

Mr. Lipsky observed that the mandatory treble damages rule is being amended through congressional action that creates exceptions for specific forms of conduct. Mr. Lipsky advocated legislation for detrebling in cases involving collaboration between competitors, where the competitive effects are ambiguous and potentially beneficial. Treble damages and the award of attorneys' fees to successful plaintiffs were enacted for a variety of asserted purposes, including deterrence and compensation purposes. In cases where the conduct is frequently beneficial to competition and only rarely harmful, the incentives provided by treble damages and a variety of other procedural and evidentiary devices are likely to have led to overdeterrence. Although Mr. Lipsky recognizes a movement toward

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<sup>1</sup> Professor Lande's prepared statement discounts Michael Denger's prepared statement for the AMC hearings of June 27, 2005, regarding his client's payment of amounts exceeding 100% of U.S. sales in the form of fines, settlements and litigation expenses in the context of the vitamin cases.

creating specific exceptions to the treble damages rule, a coherent legislative approach would provide greater uniformity and consistency for an antitrust policy.

E. Stephen Susman. Attorney from the law firm of Susman Godfrey, L.L.P.

Mr. Susman advocates maintaining the status quo with respect to treble damages and attorneys' fee remedies under the antitrust laws. Mr. Susman reflected on the proposals made in 1980 when he spoke before the American Bar Association's Antitrust Section Spring meeting on a panel entitled "A Reassessment of Antitrust Remedies." On that panel virtually all of the same issues arose that were addressed by the panelists' statements before the AMC. Mr. Susman believes that, since that time, nothing original has been proposed that would give weight to changing the current remedies system. Finally, Mr. Susman does find fault with the current system in that it limits the availability of prejudgment interest awards. He favors amending the current law to allow for prejudgment interest.

## II. Highlights from Panel No. 1 Questions and Answers:

- A. With respect to the award of attorneys' fees, does not the fact that defendants must spend millions of dollars in some cases and then have a case thrown out on summary judgment warrant awarding attorneys' fees to the defendant?
- Cavanagh – The one-sided award of attorneys' fees is necessary to protect the incentive for private parties to bring antitrust actions.
- B. Assuming that the Commission were to recommend the repeal of *Illinois Brick*, would it be necessary to enact a preemption provision as well?
- Under the Supreme Court theory that it was appropriate for the states to expand remedies for indirect purchasers, the Commission would have to conclude that the federal law allowing indirect purchaser suits is sufficient.
- C. Does the panel think that detrebling might be appropriate in follow-on class action suits because the need to provide incentives for private causes of action is mute?
- The panelists were divided with respect as to whether detrebling in this circumstance would be appropriate.
- D. Although the inclination of the AMC may be to leave treble damages alone, the flurry of anticompetitive conduct in the past few years

suggests that treble damages are not enough of a deterrent. If this is true, should we detreble or increase the multiplier?

- Boies – Treble damages do have an effect, but it is not enough to prevent all anticompetitive conduct. It would be a mistake to leave the question of which multiplier to use up to the judiciary.
- Susman – The reason for the flurry of unlawful corporate conduct is that defendants continue to have the ultimate advantage.
- Lipsky – Before we consider enhancing the damage award to make it greater than threefold damages, a study should be conducted to determine why people continue to violate the antitrust laws in the face of such dramatically increased criminal penalties.

E. Does the existence of treble damages create a judicially-imposed higher standard for plaintiffs to get over the summary judgment phase of a case?

- Cavanagh – Judges often make cost/benefit analyses at the outset of cases because antitrust actions typically involve complex issues, are time intensive and expensive.
- Lipsky – The treble damages line should be drawn in accord with *Polygram*'s differentiation between per se and rule of reason cases.

F. Would detrebling for follow-on suits conflict with the incentives in place for the amnesty program?

- Susman – Detrebling should be considered in follow-on class action suits, but not in individual suits. The threat of a class action suit may be enough of a deterrent without the need for treble damages.

G. Is there a particular class of antitrust offenses which are on the rise and for which greater deterrence is necessary?

- Boies – Price fixing is one area where there is a lot of activity, but not necessarily more than at any other point in time. It seems that still there is not adequate deterrence, but that enforcement has gotten better.
- Susman – The Commission should focus on monopolization cases because companies are aware of when they have a market share in the “red zone” such that they need to be extra careful about the conduct that they engage in. When these companies do “bad things,” the damages should clearly be trebled.

### **III. Summary of Written Testimony from Panel No. 2: Joint and Several Liability, Claims Reduction and Contribution**

#### **A. The Honorable Judge Frank Easterbrook.**

Judge Easterbrook spoke about the impact of joint and several liability in antitrust suits – their greatest effect is that some defendants pay more because other co-defendants settle early. Joint and several liability without contribution can lead to excessive damages, but claim reduction and contribution only work properly if each participant’s market share can be determined. Determining each defendant’s market share can lead to further litigation, which is more expensive than litigation of the claims on the merits. Judge Easterbrook’s final recommendation is to avoid realigning liability after the trial on the merits.

#### **B. Lloyd Constantine. Attorney from the law firm of Constantine Cannon P.C.**

Mr. Constantine’s position is that joint and several liability are integral to deterring antitrust violations and rarely inhibit beneficial business initiatives or lead to overdeterrence. As a result, the joint and several liability provisions should remain unchanged.

#### **C. Michael Hausfeld. Attorney from the law firm of Cohen, Milstein, Hausfeld & Toll, P.L.L.C.**

Mr. Hausfeld took the position that the Commission should urge Congress to make no change in the current joint and several liability provisions. The current law deters conspiratorial conduct, preserves a victim’s right to compensation, and encourages private enforcement. Congress has signaled its desire to enhance the criminal and civil penalties associated with antitrust violations through enactment of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, which increases prison time and civil penalties for wrongdoers, while granting leniency and amnesty to those admitting to violations through the corporate leniency program. Prohibiting contribution actually encourages settlements between plaintiffs and defendants, thereby alleviating a substantial burden on the courts. Finally, allowing for claim reduction would also discourage plaintiffs from agreeing to partial settlements and ultimately burden the courts even further.

#### **D. Don Hibner, Jr. Attorney from the law firm of Sheppard, Mullin, Richter & Hampton, L.L.P.**

Mr. Hibner advocates for an amendment to Section 4 of the Clayton Act to allow for contribution from any party that is jointly liable for damages under the Clayton Act. Contribution should be allocated based on the market share of the conspirator's product in the relative market, the conspirator's level of participation in the conspiracy for which damages are awarded, and the benefit each conspirator realized from the anticompetitive conduct. The rationale behind this type of amendment is basic fairness and promotion of efficiencies, which otherwise might be inhibited by overdeterrence.

E. Harry Reasoner. Attorney from the law firm of Vinson & Elkins, L.L.P.

Mr. Reasoner asserted that there are instances where the application of joint and several liability is unwarranted because it creates unfairness. But before the law is changed, it is important to consider the effect that an amendment would have on deterrence. Therefore, Mr. Reasoner recommends that the Commission study the present effects of the joint and several liability system, and the potential effects from amending the current system to include claim reduction and contribution, before amending the status quo.

#### **IV. Highlights from Panel No. 2 Questions and Answers**

- A. What is the benefit from further study of other areas of the law with respect to joint and several liability?
- It would seem that, under a system that eliminated joint and several liability, a plaintiff would have to be well-financed to bring an antitrust suit and recover from each individual plaintiff.
- B. Have there been any examples of new laws that deal with joint and several liability?
- Easterbrook – CERCLA is one existing model that allows for contribution, but this is a perfect example of the wrong way to amend the joint and several liability provision. That being said, in the interest of judicial economy, a claim reduction system would be preferable to a contribution system.
- C. What is the impact of contribution, claim reduction, and joint and several liability on the present amnesty system?
- Hibner – An allocation system should be considered where it is possible to obtain the market shares of each party through assessment of their contribution to the harm.
- D. If the greatest risk of price fixing activity lies in lower level sales people rather than senior executives (and senior executives are the

ones who typically seek antitrust counsel), is not joint and several liability more likely to deter rule of reason conduct or per se conduct?

- Constantine – Joint and several liability actually has a significant deterrence effect on all anticompetitive conduct.

E. Claims reduction is permitted today under sharing agreements, so why is it proper to deny claims reduction to more competitive defendants who cannot agree on a sharing agreement?

- Easterbrook – Judge Easterbrook is generally skeptical of sharing agreements because they contradict the principle that competitors should be discouraged from cooperating and forming agreements.

F. Would you support or oppose claim reduction?

- Easterbrook – When the joint and several multiplier interacts with treble damages, the result may be unfair in the context of competitor suits. But in the case of cartels whose conduct goes undetected one out of two times, treble damages should not be reduced.

G. Would anyone favor treble damages only in cases of “hard-core” violations?

- Constantine – Some of the most damaging antitrust violations occur in the context of rule of reason cases, therefore, no.
- Hausfeld – I would favor eliminating treble damages in the context of non-price vertical restraints.
- Easterbrook – The best form of deterrence is through damage multipliers.