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Antitrust Criminal Enforcement

FTC/DOJ Hearings on Section 2

Liability Coverage for Business Torts

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COVER: Hot Springs Store and Post Office, Big Bend National Park, Texas 2002, taken by Larry Gustafson, Dallas.

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Dear Section Members:

Beginning with this Fall edition of the *Journal*, the cover design is being revised slightly to give the reader an instant overview of each edition's contents. However, the revised design continues our tradition of including a photograph on the *Journal's* cover. The photograph gracing the Fall edition was taken by Larry Gustafson of Haynes & Boone's Dallas office.

On behalf of the Section, I want to thank Section members Leslie Hyman, Tom Caudle, and Glenn Harrison and Matthew Bell for contributing articles for the current edition of the *Journal*. In addition, I want to invite other Section members to submit articles for future issues. Check out the note from Journal editor Mike Ferrill for information about submitting articles.

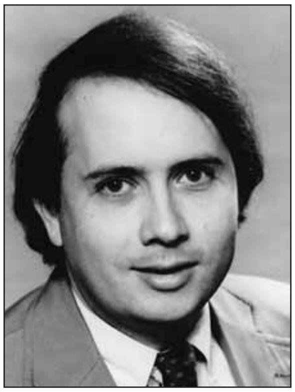
In addition to articles written specifically for the *Journal*, we will also consider (subject to space limits and copyright permission) reprinting articles published elsewhere that would benefit Section members. For example, this edition includes a reprint of FTC Chairman Deborah Platt Majoras's June 2006 remarks at the Opening Session of the Hearings on Section 2 of the Sherman Act sponsored by the Federal Trade Commission and the Antitrust Division of the Department of Justice. Please be on the lookout for articles you think would be good candidates for reprinting.

By the time you read this, the Section will have held its Second Annual Update on Antitrust and Business Litigation. Some portions of that program may find their way into future editions of the *Journal*. However, I want to encourage you to attend next year's Update in person. It's a great opportunity for CLE on subjects relevant to your practice and to meet with other Section members. Most importantly, our "Conversation with the Regulators" format allows attendees to hear first-hand from government officials with enforcement responsibilities in areas important to you and your clients.

In future editions of the Journal, I plan to talk about what your Section's Council is doing to improve the Section. In the meantime, please feel free to send me any ideas you may have to make Section membership more useful to you. You can contact me by mail (Fifth District Court of Appeals, 600 Commerce St., 2d Floor, Dallas, Texas 75202) or by e-mail (jim.moseley01@5thcoa.courts.state.tx.us). I look forward to hearing from you.

Justice Jim Moseley
Section Chair

FROM • THE • EDITOR



This issue of the Journal features the annual survey article on antitrust law by Leslie Hyman, remarks delivered by FTC Chairman Deborah Platt Majoras at the opening session of the FTC's and DOJ's June 2006 hearing on Section 2 of the Sherman Act, an article on criminal antitrust enforcement by Glenn Harrison and Matthew Bell and an article on general liability coverage for business torts by Tom Caudle.

As always, we solicit written contributions. Anyone interested in contributing an article should contact me at 112 E. Pecan, Suite 1800, San Antonio, Texas 78205 (210) 554-5282; (210) 226-8395 (fax), amferril@coxsmith.com.

A. Michael Ferrill
Editor

Antitrust Review 2005-2006

By Leslie Sara Hyman[1]

In the past year, the Supreme Court considered the applicability of the Sherman Act to price-setting by a joint venture, the requirement of "contemporaneous sales" under the Robinson-Patman Act, and the impact of a patent on a market power enquiry. The Fifth Circuit reviewed the meeting competition defense to Robinson-Patman Act liability, the continuing applicability of the per se rule to minimum resale price maintenance, and liability and sentencing in a criminal antitrust case. Unlike most recent years, this year had the Fifth Circuit affirming a plaintiff's victory. Texas courts examined the proof requirements for tying claims under the Texas Free Enterprise and Antitrust Act ("TFEAA") and antitrust standing under TFEAA, including whether standing may be challenged for the first time on appeal. In the Texas courts, the plaintiffs were not successful.

Tying: Market Power of a Patented Product

Illinois Tool Works, Inc. v. Independent Ink, Inc., __ U.S. __, 126 S. Ct. 1281 (2006)

A unanimous Supreme Court (less Justice Alito, who took no part in the consideration of the case) held that in all cases involving tying arrangements, the plaintiff must prove that the defendant has market power in the tying product. The Court further held that a patent does not necessarily confer market power.

The defendants were manufacturers of patented printheads and ink containers and unpatented ink who marketed the products together to original equipment manufacturers ("OEMs"), who in turn agreed to purchase ink exclusively from the manufacturers. The OEMs also agreed that neither they nor their customers would refill the containers. The plaintiff was a competing manufacturer who alleged that this marketing scheme constituted illegal tying and monopolization. The trial court granted the defendants summary judgment based upon the absence of evidence defining the relevant market or establishing the defendants' power within the relevant market.

The Federal Circuit reversed as to the tying claim. The court stated that it was bound by Supreme Court precedent that recognized a presumption of market power for a patented product.

The Supreme Court granted certiorari "to undertake a fresh examination of the history of both the judicial and legislative appraisals of tying arrangements." The justification for challenges to tying arrangements rests on a defendant's use of power in the market for the tying product to restrain competition in the market for the tied product. Recent decisions have moved away from the practice of relying on assumptions of market power and require a plaintiff to demonstrate actual market power in the tying product.

The presumption that a patent confers market power arose as part of the patent misuse doctrine, not in the antitrust context. The patent misuse doctrine provides an accused infringer with a defense if the patentee uses its patent to restrain competition beyond the scope of the patent grant. Early patent misuse decisions assumed that a patentee who tied the purchase of unpatented goods to the sale of patented goods was restraining competition. The decisions did not involve analysis of market conditions but instead presumed the requisite economic power to extend control over the unpatented goods. This presumption that a patent confers market power was utilized in *International Sale Co. v. United States*, 332 U.S. 392 (1947), in which the Supreme Court held without express discussion of market power or the patent misuse doctrine that the tying arrangement under scrutiny had an obvious "tendency . . . to accomplishment of monopoly."

The subsequent codification of the patent laws began to "chip away" at the presumption of market power. The codification included a provision that excluded from the patent misuse doctrine tying arrangements involving the sale of a patented product tied to a non-staple product that has no use except as part of the patented product or method. In 1988, Congress amended the Patent Act to eliminate the presumption of market power in the patent misuse context.

The Supreme Court believed this amendment to be determinative to its decision, holding that it would "be anomalous" to retain in antitrust cases a presumption of market power that arose from the patent misuse context when the presumption had been legislatively removed in the misuse context, particularly where the antitrust context carries with it a possible felony conviction and ten-year jail sentence. The Court also noted that since 1995, both the Department of Justice and the Federal Trade Commission had exercised their prosecutorial discretion such that no presumption of market power arises from the mere possession of a patent. Similarly, the vast majority of economic literature recognizes that a patent does not necessarily confer market power. Based upon the historical analysis of its own decisions, as well as the analysis of the academic and agency opinions, the Court concluded that tying arrangements involving patented products are unlawful only when supported by proof, not a presumption, of market power in the relevant market.

Price Setting by Joint Ventures

Texaco Inc. v. Dagher, __ U.S. __, 126 S. Ct. 1276 (2006)

Gasoline service station owners accused two oil companies, acting as a joint venture, of price-fixing. The Supreme Court held that it is not per se illegal for a lawful, economically integrated joint venture to set the prices at which it sells its products.

Defendants Texaco, Inc. and Shell Oil Co. teamed up in a joint venture called Equilon Enterprises, to refine and sell gasoline in the Western United States under the Texaco and Shell brand names. Equilon set a single price for both Texaco and Shell brand gasoline. Service station owners sued, alleging that by unifying gas prices under the two brands, the defendants had engaged in unlawful price-fixing that was a per se violation of section 1 of the Sherman Act. The plaintiffs did not argue that the defendants' actions were illegal under the rule of reason.

The district court granted summary judgment in favor of the defendants, holding that the per se rule did not apply and that the plaintiffs' decision not to seek recovery under the rule of reason doomed their claim. The Ninth Circuit reversed. The court characterized the defendants' argument as requesting an exception to the per se rule against price-fixing and then rejected that request.

A unanimous Supreme Court (less Justice Alito, who took no part in the consideration of the case) reversed. The Court acknowledged that horizontal price-fixing agreements are per se unlawful. The Court held, however, that Texaco's and Shell's price-setting actions were not that of competitors, but of participants in the Equilon joint venture. Quoting *Arizona v. Maricopa County Medical Soc.*, 457 U.S. 332, 356 (1982), the Court held that "[w]hen 'persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit . . . such joint ventures [are] regarded as a single firm competing with other sellers in the market.'" As such, the price-setting before the Court was actually done by a single entity and was "not price-fixing in the antitrust sense."

The Court held that Equilon's decision to sell gas under two brand names did not affect the analysis because a joint venture has the discretion to determine both the prices at which it sells its products and the brand names under which it sells them. In reaching its decision, the Court assumed that Equilon was a lawful joint venture because its formation had been approved by federal and state regulators and there was no contention that it was a sham. The Court noted that had the plaintiffs challenged Equilon itself, they would have had to show that its creation was anticompetitive under the rule of reason.

Finally, the Court rejected the Ninth Circuit's reliance on the ancillary restraints doctrine, which concerns the validity of restrictions imposed by a business venture on nonventure activities. The Court held that the doctrine was inapplicable because the business practice being challenged involved the core activity of the joint venture – the pricing of the goods produced and sold by Equilon. Further, even if the doctrine applied the pricing policy was clearly ancillary to Equilon's sale of its products.

Robinson-Patman Act: Contemporaneous Sales

Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc., __ U.S. __, 126 S. Ct. 860 (2006)

A dealer of specially-ordered heavy duty trucks sued Volvo, alleging that Volvo discriminated between dealers in its pricing. The Supreme Court held that a Robinson-Patman claim cannot be established against a manufacturer who offers its dealers different wholesale prices absent a showing that the manufacturer has discriminated between dealers contemporaneously competing to resell to the same retail customer.

Volvo manufactures heavy duty trucks that are sold by distributors to customers through a competitive bidding process. In the process, the retail customer describes its specific product requirements and invites bids from dealers. When a dealer receives the customer's specifications, it contracts Volvo and requests a discount off the wholesale price. Volvo decides on a case-by-case basis whether to offer a discount and, if so, what the discount will be. The dealer uses the Volvo discount in preparing its bid. Trucks are purchased from Volvo only if the retail customer accepts the bid.

Volvo's dealers are assigned to nonexclusive geographic territories. In the event that multiple dealers competed for a single customer, Volvo's policy was to provide the dealers the same discount.

Reeder was an authorized Volvo dealer that participated in the competitive bidding process. Volvo announced its intention to enlarge its dealer's territories, thereby reducing the number of dealers. Around the same time, Reeder learned that Volvo had given another dealer a discount greater than the discounts that Reeder typically received. This made Reeder suspect that it was one of the dealers targeted for elimination. Reeder sued Volvo alleging violations of the Robinson-Patman Act and the Arkansas Franchise Practices Act.

At trial, Reeder relied primarily on comparisons between discounts Volvo offered Reeder when Reeder was bidding against non-Volvo dealers and larger discounts Volvo offered to other dealers bidding against non-Volvo dealers for other sales in bidding processes in which Reeder did not participate. In four of the examples presented, Reeder was the successful bidder and purchased Volvo trucks. Reeder did not search for or present any evidence of instances when it received larger discounts than did other Volvo dealers in different bidding processes. Nor did Reeder conduct any statistical analysis as to whether it was disfavored on average compared to any other dealer or set of dealers.

Reeder did present evidence of two instances when Reeder bid against another Volvo dealer for a single customer. In one instance, Reeder initially was offered a smaller discount than its competitor. Volvo then increased the discount until both dealers had the same discount. Neither dealer won the bid. In the other instance, Volvo offered both dealers the same discount. After the customer selected the other dealer, the customer demanded a further price concession, to which Volvo agreed.

The jury awarded damages in excess of $1.3 million, which the district court trebled. The Eighth Circuit affirmed, holding that the four comparisons Reeder presented in which Reeder was the successful bidder were sufficient to render Reeder a "purchaser" under the Robinson-Patman Act. The court then determined that a jury could have reasonably determined that Reeder was "in actual competition" with favored dealers because Reeder and the favored dealers competed at the same functional level within the same geographic market. The court upheld the jury's finding of competitive injury and affirmed the damages award.

The Supreme Court reversed. The Court reiterated prior holdings that the Robinson-Patman Act proscribes price discrimination only when it threatens to injure competition, not simply every time that different prices are charged to different purchasers. The requisite competitive injury is marked by the diversion of sales or profits from a disfavored purchaser to a favored purchaser and a permissible inference of such injury may arise from evidence that a favored competitor received a significant price reduction over a substantial period of time.

The Court examined the evidence Reeder presented at trial and found it insufficient to establish competitive injury. The Court held that evidence of a price difference between the price offered to Reeder for bidding to one customer and the price offered to another Volvo dealer for bidding to a different customer fell short because it did not show discrimination between Reeder and other Volvo dealers for the same customers. The compared incidents were separated in time by as much as seven months and were not the result of a systematic study. The Court concluded that Reeder's evidence was insufficient to even support an inference of a favored dealer or set of dealers because it did not preclude the possibility that Reeder might have received a better price than one or more of the dealers in its comparisons.

The evidence Reeder presented of head-to-head bidding similarly failed to establish competitive injury because it did not show that Reeder was disfavored, let alone that the discrimination was substantial. The Court acknowledged that Reeder may have competed with other Volvo dealers for the opportunity to bid on a potential sale, but competition for the opportunity to bid is based on factors other than pricing. A dealer approaches Volvo for a price only after it has been selected to submit a bid.

The Court declined the invitation of the United States and Volvo to hold that this type of competitive bidding can never give rise to a Robinson-Patman Act claim. Instead, the Court decided the case on its facts "consistently with broader policies of the antitrust laws" of stimulating competition, rather than protecting competitors.

Robinson-Patman Act: The "Meeting Competition" Defense

Water Craft Management LLC v. Mercury Marine, 457 F.3d 484 (5th Cir. 2006)

Distributors of marine products sued a manufacturer of such products alleging price discrimination under the Robinson-Patman Act. After a bench trial, the district court entered judgment in favor of the manufacturer and the Fifth Circuit affirmed, holding that the manufacturer's pricing decisions were a good faith attempt to meet its competitor's prices.

Water Craft Management LLC and its founding members sold marine products, including outboard motors purchased from Mercury Marine. Water Craft's largest competitor was Travis Boating Center. For several years, Travis Boating Center had a sales agreement with outboard motor manufacturer Outboard Marine Corporation ("OMC") but not with Mercury Marine. Travis Boating Center was expanding rapidly, sometimes buying out Mercury Marine dealerships and converting them to Travis retail stores that did not carry Mercury Marine motors. Mercury Marine was thus losing market share to OMC in the region.

Mercury Marine approached Travis Boating Center several times attempting to sign Travis up as a distributor but Travis refused on the ground that Mercury's prices were not competitive with OMC's. Mercury Marine eventually offered Travis Boating Center product discounts. Water Craft sued, alleging that the discounts were greater than those available to Water Craft or other distributors in the area.

Mercury Marine responded that the discounts it offered Travis Boating Center were in response to OMC's prices and thus fell within the "meeting competition" defense. The defense is available when price discrimination results from price concessions made in good faith for the purpose of meeting a competitor's price. Mercury Marine presented evidence that it had relied on several different sources for its approximation of OMC's prices and attempted to corroborate that information by looking at boat pricing in the market and paying attention to industry gossip.

The district court found that Mercury Marine was entitled to the meeting competition defense. On appeal, the plaintiffs challenged the district court's factual finding that Mercury Marine had acted in good faith. The Fifth Circuit rejected this challenge. The court first analyzed caselaw recognizing that analysis of the meeting competition defense is fact specific, that good faith does not require absolute certainty that a price concession is being offered to meet an equally low price offered by a competitor, and that the concept of good faith is "'flexible and pragmatic, not technical or doctrinaire.'"[2] The court also cataloged several recognized indicia of good faith such as (1) whether the seller had received reports of similar discounts from several customers; (2) whether the seller was threatened with termination if it did not meet a discount; (3) whether the seller made efforts to corroborate the reported discount; and (4) whether the seller had prior experience with the buyer in question.

Applying these indicia to the evidence, the court agreed with the district court's finding that Mercury Marine could have acted in good faith. The court noted that had Mercury Marine investigated its competitor's pricing further, it might have exposed itself to risk of Sherman Act section 1 liability. The court held that meeting a competitor's price in order to win a new customer, when that customer had previously refused to do business, was logically related to the Supreme Court's recognition that the indicia of good faith include a buyer's price-related threats of termination. Under both scenarios, the final, lower price appears necessary to compete, rather than an attempt to undermine competition.

The Fifth Circuit also rejected the plaintiffs' argument, first advanced at oral argument, that as a matter of law Mercury Marine did not meet the competition because its prices to Travis remained above OMC's prices. The court held that not only was there was no support in the caselaw for the plaintiffs' theory that the "meeting competition" price could not exceed the competitor's price, but that such a theory was contrary to law. The key factor of the meeting competition defense is the seller's *intent* to meet a competitor's price, not the actual relationship between the prices. Granting the defense only to defendants who actually meet a competitor's price, and not also to those who attempt to compete by offering discounts short of the competitor's price, would limit the defense to those who discriminate more. For these reasons, the court held that the meeting competition defense is available if the defendant offered a discriminatory price in response to the competition even if the defendant knew that its discriminatory price was not as low as its competitor's price.

Resale Price Maintenance and the Per Se Rule

PSKS, Inc. v. Leegin Creative Leather Products, Inc., 171 Fed. Appx. 464 (5th Cir. 2006) (unpublished opinion)

In March, the traditionally antitrust defendant-friendly Fifth Circuit affirmed an antitrust plaintiff's victory in an unpublished decision, holding that a manufacturer committed a per se violation when it suspended all shipments to a retailer who refused to charge the manufacturer's suggested retail prices. The Fifth Circuit further held that the retailer had suffered antitrust injury and that the jury's award of $1.2 million in actual damages was reasonable.

Leegin manufactures the Brighton line of women's accessories, which it had been selling to the plaintiff, a women's clothing and accessories specialty store, since 1995. In 1997, Leegin instituted its "Brighton Retail Pricing and Promotion Policy," which included the direction that it would do business only with retailers that followed its suggested retail prices. Leegin later introduced a marketing initiative that rewarded retailers that promoted Brighton products in a separate section of their stores. This marketing initiative required retailers to pledge to follow the "Brighton Suggested Pricing Policy at all times."

The plaintiff placed its entire line of Brighton products on sale in contravention of the marketing initiative. Upon learning this, Leegin suspended all shipments of Brighton products to the plaintiff. The suspension resulted in a substantial decrease in the plaintiff's sales and profits because Brighton was the plaintiff's best-selling and most profitable line. The plaintiff filed suit against Leegin alleging that it had violated section 1 of the Sherman Act by entering into illegal agreements with retailers to fix the prices of Brighton products and by terminating the plaintiff as a result of those agreements. At trial, the jury found that Leegin and its retailers agreed to fix prices, which caused the plaintiff to suffer antitrust injury and lost profits of $1.2 million.

On appeal, Leegin challenged the application of the per se rule to its behavior, arguing that (1) the Supreme Court has not consistently applied the per se rule to vertical price-fixing; (2) its pricing policy did not result in competitive harm; and (3) the trial court erroneously excluded the testimony of its economic expert. The expert had intended to opine that economic conditions did not dictate application of the per se rule and that Leegin's pricing practices were procompetitive. The Fifth Circuit rejected all three arguments. The court first held that, while the Supreme Court has applied the rule of reason in some vertical price-fixing cases, it has never done so in a case involving a vertical minimum price-fixing agreement. Thus, binding Supreme Court precedent required application of the per se rule without regard to Leegin's claimed lack of competitive harm. The court also held that in cases involving the per se rule, expert testimony regarding competitive effects is irrelevant and thus, that the plaintiff's proffered expert testimony was properly excluded.

Leegin also challenged the plaintiff's proof of antitrust injury and the district court's failure to instruct the jury on the definition of antitrust injury. Again, the Fifth Circuit rejected the challenge, holding that no jury instruction was required because antitrust injury is part of the court's standing enquiry and that the plaintiff's termination and resulting inability to obtain its best-selling and most profitable product line constituted antitrust injury.

Leegin's final challenge was to the evidentiary basis of the jury's damages award, which was approximately 70 percent of the requested damages. The plaintiff's expert had calculated future lost-profits damages by averaging the amount of gross profits the plaintiff earned on Brighton products in the three years prior to the termination and multiplying that number by ten, which was the number of years the plaintiff estimated it would take to recover from the termination. The total was then discounted to present value. The average sales figure did not include any projected sales growth or any profits from non-Brighton sales made to customers who came to the store to purchase Brighton products. Leegin challenged the damages period and the sufficiency of the evidence for the calculation and argued that the damages model failed to account for mitigation of damages by selling substitute products.

The Fifth Circuit recognized that a jury's award of antitrust damages is reviewed under a relaxed standard. Applying the relaxed standard, the court held that the damages period was an issue for the jury, that future profits estimates based upon averages of past history were appropriate, and that the plaintiff's continued business selling women's clothing and accessories, even those that are similar to the Brighton products, did not negate the profits lost due to the loss of the Brighton line.

Criminal Antitrust Liability and Sentencing

United States v. Rose, 449 F.3d 627 (5th Cir. 2006)

In *Rose*, the Fifth Circuit affirmed a company president's conviction for conspiracy to "suppress and eliminate competition by fixing the price, rigging bids, and allocating customers for choline chloride, a B complex vitamin." The court vacated the defendant's sentence, however, and remand for resentencing.

Defendant Rose was the president of a choline chloride manufacturer, DuCoa, L.P. In 1997, when Rose became president, DuCoa, Bioproducts, Inc. and Chinook Group Limited accounted for 90 percent of the choline chloride sales in the United States. After the Department of Justice began a grand jury investigation into price-fixing of bulk vitamins, Bioproducts approached the DOJ and exposed a price-fixing conspiracy involving choline chloride. The ensuing investigation and indictments led to guilty pleas from five current and former officers of DuCoa and Chinook and the guilty plea of DuCoa.

Rose was indicted for conspiracy to violate section 1 of the Sherman Act, found guilty, and sentenced to 30 months imprisonment. The sentence included an enhancement for bid-rigging, an enhancement for affecting in excess of $15 million in commerce, and an enhancement for Rose's role in the offense as a manager or supervisor. On appeal, Rose challenged the sufficiency of the evidence to support his conviction, the district court's finding that he was a manager or supervisor, and the time period used to calculate the volume of commerce.

In affirming the conviction, the Fifth Circuit relied upon evidence showing that the three companies entered into an agreement to keep their respective market shares. In furtherance of the agreement, the competitors fixed prices for choline chloride announced in trade journals and used as a reference point in determining the price for various customers. They also decided which company would offer the lowest price for choline chloride at particular bidding opportunities.

Rose argued that the conspiracy no longer existed when he assumed office. Indeed, the court found that the companies did occasionally engage in competitive activity in disregard of their agreement and that at the time Rose became president of DuCoa, there had been increased disregard of the agreement and decreased communication between the competitors. Nevertheless, there was evidence that the outgoing president believed the conspiracy was still in place, met with Rose to explain the business to him, and believed that he openly discussed the conspiracy.

Similarly, Rose's immediate subordinate believed the conspiracy was still in effect when Rose became president. That employee testified that he discussed the conspiracy with Rose and that he and Rose were both present at meetings of the conspirators at which market allocation and pricing was discussed. The court concluded that the evidence presented at trial was sufficient to support the jury's verdict.

Turning to Rose's sentence, the Fifth Circuit held that the district court's factual finding regarding Rose's role in the offense was appropriate because once Rose knew of the conspiracy, he determined whether DuCoa would continue to be a part, had the authority to decide what bids would be submitted to customers, spoke for DuCoa at the meetings with the competition, and made decisions for DuCoa.

The Fifth Circuit agreed with Rose's challenge to the amount of commerce allegedly affected, however. Rose contended his involvement, if any, in the conspiracy did not commence until he attended his first meeting of the competitors. Although there was evidence that Rose was aware of the conspiracy when he assumed the presidency, the Fifth Circuit held that there was no evidence that he had knowingly joined or participated in the conspiracy at that time. Nor was there any evidence that Rose failed to stop a subordinate that he knew was participating. The earliest either situation could have occurred was when Rose began discussing the conspiracy with his subordinate. Because the court was unable to say that the resulting error in calculating the amount of commerce affected was harmless, the Fifth Circuit vacated Rose's sentence and remanded for resentencing.

TFEAA: Extraterritorial Reach

The Coca-Cola Co. v. Harmar Bottling Co., No. 03-0737 (Tex. October 20, 2006)

Royal Crown Cola distributors in a four-state region sued Coca-Cola and its distributors, alleging that certain of Coke's marketing agreements with its distributors unreasonably restrained trade and that Coke was liable for monopolization, and conspiracy and attempt to monopolize, in violation of the TFEAA and the antitrust laws of the other states in the region. The Texas Supreme Court held that TFEAA does not apply to injury occurring in other states absent a showing that the requested relief would benefit competition or consumers in Texas. The court also held that the Texas courts may not determine how another state's antitrust act applies to injuries in that other state.

Sodas are distributed to retail locations by bottlers. In the Ark-La-Tex region, which includes portions of Texas, Arkansas, Louisiana, and Oklahoma, the Coca-Cola bottler and its affiliates held 75-80 percent of the market for national brands of soda. The Pepsi-Cola bottler held 13-15 percent of the market and Royal Crown Cola bottlers held the remainder.

Soda manufacturers and bottlers use promotional agreements with retailers known as calendar marketing agreements ("CMAs"). CMAs typically provide that in exchange for payments and price discounts, the retailer will promote a wholesaler's product over competing products for a particular period of time. For example, a CMA might provide for particular advertising or store placement, that the retailer must price the distributor's products below competing products, or that the retailer cannot promote a competing product. CMAs are used throughout the soda industry and have withstood numerous antitrust challenges.

Coca Cola in the Ark-La-Tex region utilized CMAs with most retailers including every major retailer other than Wal-Mart. Coke's CMAs in the region prohibited or limited retailer advertising of competing national brands. The CMAs generally covered 42-52 weeks of the year even though in other regions Coke's CMAs often covered only 26 weeks. Coke's CMAs sometimes required retailers to price certain packages below competing products even when competitors' wholesale prices were below Coke's so that the retailers had to raise their prices for the competing products in order to comply. For some retailers, Coke's CMAs paid bonuses if the retailer agreed not to carry competitive flavors of root beer, orange, and grape sodas. Coke also occasionally required retailers to give more shelf space to Coke's root beer, orange, and grape products than was justified by the market share of those products.

Despite conceding that CMAs are not in themselves anticompetitive, the Ark-La-Tex Royal Crown distributors complained that Coke used its dominant position in the Ark-La-Tex region to negotiate CMAs with terms that suppressed competition. At Wal-Mart, where there were no Coke CMAs, competing bottlers had no difficulty getting shelf space and Coke products often sold for more than competing sodas. The plaintiffs presented expert testimony that Coke's use of its market share to force retailers into CMAs inhibited competition and negatively impacted the plaintiffs' sales. Among other things, the plaintiffs alleged that they were unable to introduce two products into the market without diverting shelf space from other Royal Crown products. The expert also testified that Coke was monopolizing or attempting to monopolize the soda markets served by the parties and was likely to succeed if not stopped. However, the expert neither opined on how Coke's CMAs affected price or output in the relevant market nor attempted to quantify the amount of competition foreclosed by the CMAs.

The jury found for the plaintiffs and assessed actual damages in excess of $5 million. Coke appealed, arguing that damages were inappropriate for conduct that occurred outside of Texas. The plaintiffs countered that the injuries incurred outside Texas were compensable under TFEAA because the injuries resulted from Coke's actions within Texas including business and policy decisions made at Coke's offices in Texas and contract negotiations handled in Texas. The plaintiffs also argued that the use of CMAs within a regional market that extended into Texas harmed Texas consumers.

The Texarkana Court of Appeals concluded that by its own terms, TFEAA applied to conduct "occurring wholly or partly within the State of Texas" and that Coke could not avoid the application of TFEAA to CMAs executed in Texas with Texas choice of law. The court held in the alternative that the judgment could be based on the alleged violations of the Arkansas, Louisiana, and Oklahoma antitrust statutes, which the court presumed were the same as Texas law in the absence of any contention that the statutes differed.

The Texas Supreme Court disagreed with both conclusions. The court first held that as a matter of statutory construction, the Texas legislature did not intend for TFEAA to be used to recover damages and injunctive relief for injury occurring in other states. In so holding, the court relied on the principle that a statute will be given extraterritorial effect only when such intent is clear. The court held that no provision of TFEAA extended the Act's purpose to promoting competition outside Texas or to redressing extraterritorial injury. The court also rejected the arguments that TFEAA applied because Coke engaged in the same conduct both within and without Texas and because Coke made decisions in Texas regarding CMAs used in other states.

Turning to the plaintiffs' claims under other states' antitrust laws, the Texas Supreme Court held that the principles of comity require Texas courts to defer to the courts of other states to enforce those states' antitrust laws. Even in the absence of any contention that the statutes differed, the court would not presume them to be the same because application of antitrust laws requires analysis of economic theory and social needs and values. Abstention is required the court held where, as here, the forum court must determine another state's policies in order to adjudicate rights claimed under that state's statutes. The court thus concluded that the trial court should not have heard the plaintiffs' claims under Arkansas, Louisiana, and Oklahoma law.

The court finally considered the plaintiffs' claims of injury in Texas from Coke's CMAs. Coke conceded that it had a 75-80 percent market share in the Ark-La-Tex region but contended that competition in the area was vigorous. Coke argued that there was no evidence of a substantial foreclosure of competition or a sufficient adverse impact on price, output, or choice. The record was "replete with evidence that Coke used its dominant market position to extract from retailers agreements with terms it might not otherwise have been able to obtain to promote its products with more favorable advertising and store displays and lower prices." The court held that this evidence established only that Coke's CMAs *could have* had anticompetitive and monopolistic effects, which did not entitle the jury to infer that the CMAs *did have* such effects. In the absence of evidence quantifying the effect of Coke's CMAs in any relevant market, or even evidence establishing that the market foreclosure was substantial, the plaintiffs' claims could not succeed.

Four justices dissented. Addressing the jurisdictional question first, the dissent agreed that Texas law cannot punish foreign conduct that was legal where it occurred and cannot govern foreign conduct that has no effect in Texas. But the plaintiffs pleaded alternatively that the antitrust laws of Arkansas, Louisiana, and Oklahoma were the same as TFEAA, an argument that Coke never denied, and that those states' laws outlawed the same conduct as TFEAA. The jury found that Coke unreasonably restrained trade and monopolized the relevant markets. The dissent concluded that as long as TFEAA and the other states' antitrust laws define these violations comparably, it did not matter whether or not the jury's findings were based on Texas law.

The dissent then criticized the majority's decision to treat the choice of law issue as a jurisdictional defect, particularly when Coke had argued only that Texas law does not apply to competition in other states and had neither argued that the trial court could not apply other states' laws nor provided any proof of those laws. Texas law provides that in the absence of proof of the law of another state, or judicial notice of that other state's law, the court is to presume that the other state's law is the same as Texas' law. Applying this principle, the dissent would hold that Coke had waived any claim that the antitrust laws of Arkansas, Louisiana, and Oklahoma were not the same as TFEAA. The dissent also compared the antitrust laws in question and concluded that they were manifestly similar.

The dissent also criticized the majority's reliance on the principles of interstate comity and abstention. Texas courts have generally deferred to comity when there is a conflict between parallel litigation, which was not the situation in the instant case. Indeed, Texas courts have adjudicated numerous claims involving the laws of another state on the presumption that the other state's laws were the same as Texas law.

TFEAA is intended to be construed in harmony with the federal antitrust laws and judicial interpretations of those laws. The dissent argued that the majority had failed to so construe it. According to the United States Supreme Court, applying American antitrust law extraterritorially is not a jurisdictional issue. Although the Sherman Act does not apply to conduct affecting only foreign markets, its reach is limited by a specific federal law. The Texas legislature has not passed a similar law limiting the reach of TFEAA.

Finally, the dissent argued that TFEAA itself precluded abstention because the Act expressly states that suits under TFEAA are not barred merely because the conduct complained of affects or involves interstate commerce. To the contrary, the Act states that TFEAA should be applied to the full extent consistent with the Texas and United States constitutions. The dissent would hold that in the absence of an argument that the judgment was unconstitutional, abstention was improper.

Turning to Coke's actions within Texas, the dissent argued that Coke's activities were so anticompetitive that no proof of harm to competition was required. The dissent agreed that Coke's paying for prime locations or shelf space equal to its market share did not violate the antitrust laws. However, the dissent would hold that Coke's requiring retailers to price competing sodas higher than its own was an agreement fixing minimum prices and thus was per se illegal price-fixing. The dissent would also hold that Coke's offer of a discount in exchange for an agreement not to carry competing brands was an illegal boycott under either a per se or a rule of reason analysis because was imposed by a firm with a dominant position in the relevant market, cut off competitors' access to necessary markets, and could not be justified by plausible arguments of efficiency or competition. Likewise, the dissent would hold that Coke's demand that retailers not advertise competing sodas was per se illegal.

Finally, the dissent believed that Coke was guilty of illegal monopolization. Specifically, the dissent would hold that Coke's monopoly power and the nature of the agreements, coupled with the pervasiveness and term length of those agreements, were sufficient to support a jury verdict of monopolization.

TFEAA Tying; The Per Se Rule and Foreclosure of a Substantial Amount of Commerce

RTLC AG Products, Inc. v. Treatment Equipment Co., 195 S.W.3d 824 (Tex. App.—Dallas 2006, no pet.)

In this case, the Dallas Court of Appeals affirmed summary judgment in favor of the defendants on the plaintiff's claims under TFEAA. The court held that the sole source agreement in question was not a per se violation of TFEAA and held that there was insufficient evidence of a substantial amount of commerce affected by the agreement.

This case arose out of the City of Dallas' Bachman Water Treatment Plant filter improvements project. Dallas County is one of 16 counties that have adopted uniform specifications for water and waste treatment facilities, including specifications for fabricated steel and stainless steel pipe, filters and valves. Plaintiff RTLC supplies the specified steel and stainless steel pipe. In the Dallas area, defendant Treatment Equipment is the authorized representative of the specified filters and defendant Municipal Valve is the representative of the specified valves.

Dallas County sought bids in the Bachman project. Treatment Equipment, Municipal Valve and defendant Piping Systems, Inc., which manufactures the specified pipes, agreed to submit a combined bid that packaged their representative components to general contractors bidding on the project. RTLC submitted a bid to the same general contractors for the pipe alone. The general contractors accepted the packaged bid and used it in their successful bid to Dallas County.

RTLC sued Treatment Equipment, Municipal Valve, and Piping Systems, Inc., among others, alleging tying in violation of TFEAA and various business torts. Treatment Equipment and Municipal Valve filed successful no evidence motions for summary judgment and RTLC appealed.

The Dallas Court of Appeals first addressed RTLC's argument that tying steel pipe to the sole source filters and valves is an arrangement that on its face has an anticompetitive effect and thus should be considered a per se violation of TFEAA. The court held that under the United States Supreme Court's recent decision in *Illinois Tool Works, Inc. v. Independent Ink*, Inc., __ U.S. __, 126 S. Ct. 1281 (2006), tying arrangements are not subject to per se analysis. Rather, liability requires proof of sufficient market power to restrain competition in the tied market. TFEAA is to be construed in harmony with federal interpretation of comparable federal antitrust statutes. The court thus rejected RTLC's argument.

The court then examined the evidence supplied by RTLC in opposition to the summary judgment motions. The court described the elements of a tying claim under TFEAA as "(1) a tying [condition]; (2) actual coercion by the seller that forced the buyer to accept the tied product; (3) the seller must have sufficient market power in the tying product market to force the buyer to accept the tied product; (4) there are anticompetitive effects in the tied market; and (5) the seller's activity in the tied product must involve a substantial amount of interstate commerce."[3] The court held that RTLC's evidence of an impact on competition with respect to only a single buyer on a single project was not sufficient to warrant the concern of the antitrust law. Because RTLC did not meet is burden of producing a scintilla of evidence on this required element of its claim, the court held that summary judgment was appropriate.

Antitrust Standing Under TFEAA

Roberts v. Whitfill, 191 S.W.3d 348 (Tex. App.—Waco 2006, no pet.)

In the case the Waco Court of Appeals held in a matter of first impression, that antitrust standing under TFEAA can be challenged for the first time on appeal. The court found no antitrust injury, reversed a jury verdict in favor of the plaintiff, and rendered a take nothing judgment on her antitrust claim.

Roberts and Whitfill were partners in the telecommunications business who later became rivals. Both received services from a third party. Whitfill became convinced that she was paying more than Roberts was paying for the services. Whitfill sued Roberts and the third party alleging claims of preferential pricing and restraint of trade in violation of TFEAA and various tort and contract claims. The case was tried to a jury that found in favor of Whitfill, awarding $170,000 in compensatory damages, $50,000 in exemplary damages, and $79,000 in attorneys' fees. The trial court entered judgment against the defendants jointly and severally for $758,264.19, representing a trebling of the actual damages, attorneys' fees and costs, and against Roberts for the $50,000 in exemplary damages. Roberts appealed, arguing in relevant part that Whitfill lacked antitrust standing and that the damages awards were legally flawed.

The Waco Court of Appeals initially considered whether it could hear the standing question, which Roberts had raised for the first time on appeal. The court held that there was no reason to differentiate antitrust standing from standing in general, which can be raised for the first time on appeal. The court concluded that while it might be a better practice to raise antitrust standing in the trial court, a challenge to a plaintiff's antitrust standing may be made for the first time on appeal.

The court then considered whether Whitfill had established antitrust standing, applying the rule that a plaintiff does not have antitrust standing unless the economic injury to the plaintiff corresponds to an injury of the same type to the relevant market. Examining the pleadings, the court acknowledged that Whitfill claimed that Roberts and the third party had secretly agreed that Whitfill would be charged more than Roberts. She argued that this agreement significantly restrained trade because it provided preferential pricing to Roberts and that it suppressed and destroyed competition and had the effect of increasing prices. Whitfill also asserted that the agreement provided an unfair pricing advantage that prevented her from competing with Roberts and deprived customers of the benefits of competition. Whitfill claimed she had lost customers to Roberts because he offered price incentives that she could not match due the higher prices she was paying.

Turning to the record, the court held that there was no evidence of how the defendants' alleged misconduct or Whitfill's alleged injuries corresponded to an injury to consumers or competition in the relevant market. Whitfill had testified that Roberts' company was her only competition except in Tarrant and Dallas Counties. The evidence showed that at best one other company sold a similar service using similar software, that the market was slowing at the time of trial, and that Roberts' company had lost customers to another competitor. Without much substantive discussion, or acknowledgement that TFEAA does not have a price discrimination provision, the court concluded that Whitfill had not suffered an antitrust injury. The court found that Whitfill and Roberts had a dispute and that Whitfill did not make as much money as she expected to when they divided their business because she paid a "hosting fee" that Roberts was not required to pay but held that this was not antitrust injury. The court held that absent antitrust injury, Whitfill lacked antitrust standing, which deprived the trial court of jurisdiction over her antitrust claim. The court thus entered a take nothing judgment on the claim.

ENDNOTES

1 Ms. Hyman is a shareholder in the law firm of Cox Smith Matthews Incorporated. The author thanks Meagan M. Gillette, an associate with Cox Smith Matthews Incorporated, for her assistance in the preparation of this article.

2 457 F.3d at 489 (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 454 (1978)).

3 195 S.W.3d at 830.

Remarks of Deborah Platt Majoras

Chairman, Federal Trade Commission

"The Consumer Reigns: Using Section 2 to Ensure a 'Competitive Kingdom'"

Opening Session
Hearings on Section 2 of the Sherman Act
Sponsored by the Federal Trade Commission and the Antitrust Division, U.S. Department of Justice
June 20, 2006

Good afternoon. Along with my good friend and colleague, Assistant Attorney General Tom Barnett, I am pleased to welcome you to the opening of the joint FTC/DOJ hearings on Section 2 of the Sherman Act. We are privileged that two of our most distinguished antitrust scholars, Professor Dennis Carlton and Professor Herbert Hovenkamp, are here today. Both have made substantial contributions to how we analyze market conduct, and we are privileged to have this opportunity to hear their views.

At the start of any new endeavor, it is important to reflect on why we are undertaking it. Beginning in 1990, the McKinsey Global Institute, lead by founding director, William W. Lewis, undertook a twelve-year study of the economic performance of thirteen nations, seeking to understand globalization and, more fundamentally, the disparities between rich and poor. The study showed that levels of productivity made the difference between rich and poor nations. What, though, made the difference in levels of productivity? The answer, they found, was undistorted competition in product markets. In his book in which he reports the results of the study, Mr. Lewis says, "Most economic analysis ends up attributing most of the differences in economic performance to differences in labor and capital markets. This conclusion is incorrect. Differences in competition in product markets are much more important."[1]

McKinsey also asked why the highly productive United States has higher competitive intensity than other nations. Mr. Lewis sums up the answer by saying that, in the United States, "Consumer is king." More specifically, "[t]he United States adopted the view that the purpose of an economy was to serve consumers much earlier than any other society," and we continue to "hold this view more strongly than almost any other place."[2] He concludes that, in fact, "Consumers are the only political force that can stand up to producer interest, big government, and the technocratic, political, business, and intellectual."[3]

This is why we are here. The FTC and the Antitrust Division have the responsibility to ensure that competition in U.S. markets is free of distortion and that consumers are protected not *from* markets but *through* markets unburdened by anticompetitive conduct and government-imposed restrictions. This work is critical, indeed central, to the well-being of the American people. Over the past few decades, the United States has substantially deregulated critical industries, including transportation, telecommunication, and energy, to the substantial benefit of the U.S. economy. As government regulators give way to free markets, much of the responsibility for protecting competition shifts to competition agencies and courts. While competition is distorted when governments regulate or intervene excessively, it also is true that private actors can and do distort competition.

Breaking up cartels, preventing mergers that will substantially reduce competition, and halting conduct that goes beyond aggressive competition to distorting competition is vital to promoting vigorous competition and maximizing consumer welfare. We have developed a great deal of consensus regarding appropriate antitrust policy as it relates to cartels, mergers, and other horizontal conduct, as a result of which our enforcement has become more transparent and predictable, making it easier for market participants to make decisions.

Unilateral or "single-firm" conduct, however, still vexes. Even though we can find some respectable measure of consensus around principles that should apply, we find a range of opinions from knowledgeable people about how to apply those principles to enforcement in the market. The question of the proper test that our agencies should apply to conduct of a single firm with market power now has dominated antitrust debate for several years.

We are not alone. Across the globe over the past quarter century, economic systems in which the state owns firms and central planners set prices and levels of output have given way to market competition, where the forces of supply and demand determine prices and allocate resources. U.S. government officials and private citizens have worked hard to promote the economic and political benefits of free markets throughout the world. With attempts to introduce market economies have come new competition authorities, today numbering 100, when only 15 year ago, there were less than two dozen. Even countries that for decades have had nearly total state control over their economies, such as China, are now dedicating substantial resources to drafting competition laws and establishing competition agencies.

Currently, the issue of how to evaluate unilateral conduct is the most heavily discussed and debated area of competition policy in the international arena. Last week, FTC and DOJ officials attended the European Commission's hearing to review their policy under Article 82 of the EC Treaty, which addresses conduct by dominant firms. Officials from the FTC and DOJ also recently held discussions on monopolization issues with our colleagues in Japan, Mexico, and Canada. Two weeks ago, in the Competition Committee of the Organization for Economic Cooperation and Development ("OECD"), we discussed dominance issues in two sessions. And since the International Competition Network ("ICN") established a Working Group on unilateral conduct in May, the FTC, which will co-chair the group, has received expressions of interest from more countries wanting to be involved than in any other working group.

Why the strong interest? First, many nations are facing the challenge of converting from state-owned or supported monopolists to markets with more than one participant — no small challenge as we have learned in endeavoring to deregulate electricity markets. And, indeed, to enforcers in those nations, companies with market power are the primary evil to attack; conversely, they have not, to a large extent, had horizontal competitors to be as concerned about. Second, disagreement among competition authorities about how to treat unilateral conduct produces uncertainty in national and world markets, reducing market efficiency and imposing costs on consumers. And third, the analysis of unilateral conduct and identification of that which is anticompetitive presents unique challenges not present, or less present, in the core antitrust concern of conduct between competitors.

By now, these unique challenges are familiar. First and fundamentally, it is difficult to distinguish between aggressive, procompetitive unilateral conduct and anticompetitive unilateral conduct. As the U.S. Court of Appeals for the District of Columbia Circuit stated in its *en banc* decision in the *Microsoft* case: "The challenge for an antitrust court lies in stating a general rule for distinguishing between exclusionary acts, which reduce social welfare, and competitive acts, which increase it.[4] That is tough, because as Judge Diane Wood wrote for the Seventh Circuit, distinguishing between legitimate and unlawful unilateral conduct requires "subtle [] economic judgments about particular business practices."[5] While difficult, it must be done and done well. Antitrust challenges to legitimate single-firm conduct have substantial negative consequences for the market and thus consumers, as does the failure to challenge anticompetitive unilateral conduct.

Second, the process of distinguishing between permissible and impermissible conduct must be relatively consistent and transparent, so that firms can incorporate it into their decision-making. While there are relatively few findings of Section 2 liability, there nonetheless are a relatively large number of different types of such conduct that potentially raise competition issues.[6] The list includes: exclusive dealing, predatory and other forms of pricing, refusals to deal, tying, bundling, rebates, product design, misleading and deceptive conduct, and abuse of government processes, as well as variations on and among each. Developing clear and predictable antitrust standards, and determining how to harmonize them, is even tougher.

Third, while antitrust practitioners have had substantial success devising remedies for joint conduct, devising remedies for single-firm behavior presents significant difficulties. As Professors Areeda and Hovenkamp put it, "By contrast with [concerted conduct], unilateral behavior is . . . difficult to evaluate or remedy by any means short of governmental management of the enterprise."[7] It is not an easy thing to do in a way that defines clear obligations and does not restrict competition going forward.

Competition issues related to single-firm behavior likely will continue to implicate a substantial volume of commerce. A thorough examination of the application of the U. S. antitrust laws and economic theory to real-world single-firm conduct not only should advance the ball in the United States, but also will aid U.S. efforts to promote cooperation and convergence among competition authorities throughout the world. We have much to work with. Already, a number of experienced experts have proposed the adoption of a single test for evaluating nearly all types of potentially exclusionary conduct. Some argue for a test that focuses on the impact of the conduct on consumer welfare.[8] Others support analyzing whether the conduct involves the short-term sacrifice of profit.[9] Others support a "no economic sense" test, which asks whether the cost of engaging in the exclusionary conduct makes sense only because the conduct serves to eliminate competition.[10] Judge Posner has written that the inquiry should focus on whether the conduct excludes equally efficient rivals.[11] Still other practitioners and scholars oppose the adoption of a single unilateral conduct test, and instead favor consideration of different tests for particular types of potentially exclusionary conduct.[12]

Moving beyond U.S. borders, there is an even greater diversity of approaches to defining unlawful unilateral conduct. For example, the Australian Trade Practices Act states that a firm is prohibited from taking advantage of its substantial market power for the purpose of eliminating or substantially damaging a competitor, or deterring or preventing competitive conduct or market entry.[13] In

Japan, a firm may not make it extremely difficult for competitors to carry on business or enter the market.[14] Many jurisdictions, including several EC Member States, follow the EC model of enumerating a list of prohibited practices, including imposing unfair prices or trading conditions, limiting production, discriminating between customers, and tying.[15]

Proponents of various tests and approaches already have done a good job of laying out their relative merits; virtually all acknowledge that their preferred approach may not be perfect. At these hearings, I hope we can tackle the issue by starting with the conduct itself. The hearings will have panels that will focus on specific types of conduct that, at least to date, can implicate liability. We want the panels to discuss the conduct from the market perspective from the ground up, that is, examine why and when firms engage in it, how they do it, and what effects it produces for the firm, for other firms (customers and competitors), and for consumers. We should look at whether firms in competitive markets engage in the same conduct and, if so, examine why they do it.[16] We want these discussions, to the extent possible, to include knowledgeable business people or at least their advisors. From these discussions, we then should endeavor to develop signposts for when the conduct may harm competition and when it typically does not. From these signposts, it would be beneficial to draw some guiding principles. Only then should we turn to examining the current state of the law as it has been applied to such conduct and then to determining what workable legal rules can be applied to the specific conduct at issue for the panel. Perhaps at that point, we may examine what we have learned about workable legal rules for individual types of conduct and determine whether we can pull those together into a broader test or set of rules. Even if these hearings do not produce consensus on a universal test or set of tests, I am optimistic that they can identify relative consensus on a number of principles and on how to approach a significant fraction of the single-firm conduct we encounter.

In our discussions, we must be careful not to permit labels or semantic differences to get in the way; in some discussions that I have heard, I have wondered whether we are talking past each other. In addition, the debate must not become so academic that even if it could be resolved, it might not have much practical application in the marketplace. Indeed, when I spoke with a long-time antitrust practitioner about the debate last week, he said that while he thought Section 2 issues were important, the search for the "holy grail" test might just be something in which only about 27 people have an interest.

There is, in fact, substantial consensus about the core underlying principles and factors that should underlie any evaluation of unilateral conduct. Indeed, the fundamental antitrust guideposts for unilateral conduct are quite clear.

First, the only type of unilateral conduct that should implicate the antitrust laws is conduct that produces durable harm to competition, leading to higher prices, reduced output, lower quality, or lower rates of innovation. As much as we may value the success of particular companies, the health of such companies by itself is not the concern of the antitrust laws. To think otherwise, and focus the inquiry on harm to competitors, is not only bad and discredited economics, but would introduce an element of subjectivity into the antitrust laws that would significantly undermine their effectiveness across the board.

Second, there is consensus that antitrust standards that govern unilateral conduct must not deter competition, efficiency, or innovation. This is why we frequently worry about "false positives." Pervasive and aggressive competition, in which firms consistently try to better each other by providing higher quality goods and services at lower costs, is crucial to maximizing consumer welfare and economic growth. Thus, the antitrust laws should never condemn market power that is obtained through the development of superior products and services, regardless of how many competitors are driven from the market or whether it produces a monopoly. As Justice Scalia explained for a unanimous Supreme Court in the *Trinko* case:

> The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system . . . To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.[17]

Third, there is consensus that the standards for evaluating unilateral conduct must be clear and practical to administer. While big litigated cases receive the headlines and produce bar association programs, much of the value of sound competition policies comes from the promulgation of practical and straightforward standards that enable firms to avoid engaging in unlawful conduct, with minimal transaction costs. The most analytically sound antitrust principles will provide little real world value if firms cannot interpret them as they make business decisions. Similarly, tests for analyzing whether conduct is exclusionary must be practical for courts to interpret and apply.

While I want to emphasize that I will use these hearings to continue developing my thinking on these issues, I do approach them with, in addition to the broad principles, a number of other hypotheses. First, any legal framework needs to avoid second-guessing business judgments that were objectively reasonable at the time that they were made. An *ex post facto* examination of the hypothetical effects of alternative courses of conduct is likely to chill legitimate business behavior. Second, to be practical, any legal framework must be able to evaluate conduct that both generates efficiencies and produces anticompetitive exclusion. If we only had to worry about conduct for which the effects are obvious, we probably would not be here today. Third, any test or tests must account for the fact that certain types of unilateral conduct are significantly more likely to cause competitive harm than others. For example, most would agree that unilateral above-cost pricing at monopoly levels should never be condemned under the antitrust laws. Similarly, behavior that some commentators have termed "cheap exclusion" – such as the use of government processes to unlawfully extend the life of a patent – is generally viewed as unlawful exclusionary conduct.[18] This may mean that there can be no unitary test, or that we simply need a broad framework that can accommodate a spectrum or sliding scale for levels of likelihood of harm. Proposals have been made for how we might think about the distinctions that should be made, including Deputy Bureau of Competition Director Ken Glazer's proposal that we analyze conduct by distinguishing between conduct that is coercive or incentivizing.[19]

In *Microsoft*, the D.C. Circuit applied what I view as a sensible "weighted" balancing approach to Microsoft's conduct that is largely consistent with these three principles. Some have criticized the framework used in *Microsoft* as insufficiently structured or "unfocused,"[20] but I think that if we look at how it was actually applied, it may be a workable framework that incorporates principles for which there is wide consensus. Perhaps the same criticism could be applied to the Section 1 rule of reason analysis, but as applied to, for example, joint ventures, the balancing has been weighted in the right direction.

First, the *Microsoft* court did not attempt to substitute *ex post facto* its judgment for that of business judgments that were made *ex ante*, or to determine what actions might have been better overall for consumers. For example, the court did not base its findings on an *ex post* analysis of the impact of Microsoft's conduct on the prices charged to consumers.

The *Microsoft* court also demonstrated that to evaluate whether certain types of unilateral conduct violate the antitrust laws does require an examination of both likely anticompetitive and procompetitive effects. For example, the court analyzed the legality of a Microsoft license provision that prohibited OEMs from modifying the initial boot sequence. Microsoft did not dispute that the restriction limited competition against IE by preventing OEMs from promoting rivals' browsers. The court nonetheless held that the restriction was not an antitrust violation because it concluded that preventing the Windows desktop from ever being seen was a substantial alteration of Microsoft's copyrighted work that could produce harm that "outweighs the marginal anticompetitive effect" of the prohibition.[21] The Court performed this analysis across nearly two dozen types of conduct, examining both anticompetitive effects and procompetitive justifications, taking care to ensure not to chill procompetitive behavior.

Finally, the D.C. Circuit made clear that it did not consider all types of unilateral conduct to raise equal concerns under the antitrust laws. For example, the court stated that courts need to be very skeptical about claims that a dominant firm's design changes harm competition and, by implication, violate the antitrust laws.[22] As some commentators have observed, when the D.C. Circuit, later in its opinion, addressed the lawfulness of Microsoft's development of a Java interface tool that was incompatible with Sun's tool, the court appeared to suggest implicitly that an extensive balancing inquiry was not required.[23] The court ruled that Microsoft's development of the tool was lawful, holding that "[t]he JVM . . . allow[s] applications to run more swiftly and does not itself have any anticompetitive effect."[24]

One final note: I hope that our latest panel(s) on remedies will generate productive discussion. It simply is not possible to implement sound competition policy for single-firm conduct without giving careful thought to remedies. Despite their importance, the issues relating to remedies have not received extensive attention. Although the Microsoft case received "a bit" of notoriety, I have been struck by how few productive discussions of the DOJ remedy and the *en banc* D.C. Circuit decision accepting the DOJ's approach (while explicitly rejecting other proposed remedies), have actually occurred. While that may have stemmed from market dissatisfaction over the remedy, these hearings will give the Section 2 remedy issue the prominence it requires. After all, devising and drafting remedial provisions in monopolization cases can be more difficult than determining whether a violation has been committed.[25] Yet, if a workable remedy cannot be found, the case likely should not be brought in the first place.

At bottom, we must remember that antitrust is the means, not the end. Rather, the end is undistorted competition, driven by "King and Queen Consumer." The challenge is to keep the competition undistorted, without distorting it ourselves in the process. Thank you again for attending the opening of the Section 2 hearings. We look forward to your contributions.

ENDNOTES

1 William W. Lewis, The Power of Productivity: Wealth, Poverty, and the Threat to Global Stability 13 (2004).

2 *Id.* at 101.

3 *Id.* at 11.

4 *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001) (*en banc*).

5 *Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 397 (7th Cir. 2000).

6 *See Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) (citing *Microsoft*, 253 F.3d at 58).

7 4 Phillip E. Areeda & Herbert Hovenkamp, Antitrust law ¶ 1402 (2d ed. 2002).

8 *See* Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Test*, 73 Antitrust L.J. 311 (2006).

9 *See* A. Douglas Melamed, *Exclusive Dealing Agreements and other Exclusionary Conduct – Are There Unifying Principles*, 73 Antitrust L.J. 375 (2006).

10 *See* Gregory J. Werden, *Identifying Exclusionary Conduct Under Section 2: The "No Economic Sense" Test*, 73 Antitrust L.J. 413 (2006).

11 *See* Richard A. Posner, Antitrust Law 194-95 (Chicago 2d ed. 2001).

12 *See* Mark S. Popofsky, *Defining Exclusionary Conduct: Section 2, the Rule of Reason, and the Unifying Principle Underlying Antitrust Rules*, 73 ANTITRUST L.J. 435 (2006).

13 *See* Trade Practices Act (1974) at § 46, *available at* http://scaleplus.law.gov.au/html/pasteact/0/115/0/PA002400.htm.

14 *See* Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade, 1947, rev. 2005, at §§ 2 & 3, *available at* http://www/jftc.go.jp/e-page/legisltation/ama/amended_ama.pdf.

15 *See*, e.g., Getting the Deal Through: Dominance, *available at* http://www.gettingthedealthrough.com/main_fs.cfm?book=Dominance.

16 *See* Alden F. Abbott & Michael Salinger, *Unilateral Effects: A.U.S.Perspective*, 2 COMPETITION POLICY INT'L 3, 17-18 (2006).

17 *Trinko*, 540 U.S. at 407 (emphasis in original).

18 *See generally* Susan A. Creighton, D. Bruce Hoffman, Thomas G. Krattenmaker, & Ernest A. Nagata, *Cheap Exclusion*, 72 ANTITRUST L.J. 975 (2005).

19 *See* Kenneth L. Glazer & Brian R. Henry, *Coercive Versus Incentivizing Conduct, A Way out of the Section 2 Impasse*, ANTITRUST, Fall 2003, at 45.

20 *See* Herbert Hovenkamp, *Exclusion and the Sherman Act*, 72 CHICAGO L. REV. 147, 153 (2005).

21 *Microsoft*, 253 F.3d at 63.

22 *Id*. at 65 (citation omitted).

23 *See* Popofsky, *supra* note 12, at 446-47 (discussing the D.C. Circuit's analysis of Microsoft's Java tool).

24 *Microsoft*, 253 F.3d at 75 (citation omitted).

25 *See* paper submitted by United States to OECD Roundtable on Remedies and Sanction in Abuse of Dominance Cases (June 6, 2006), *available at* http://www/ftc.gov/bc/international/docs/AbuseRemediesUnitedStates.pdf.

Recent Enhancements in Antitrust Criminal Enforcement: Bigger Sticks and Sweeter Carrots

By Glenn Harrison and Matthew Bell***

Glenn Harrison

Matthew Bell

I. Introduction

R. Hewitt Pate, former Assistant Attorney General ("AAG") for Antitrust, has referred to criminal antitrust enforcement as "most important in the work of the Antitrust Division."[1] Integral to criminal antitrust enforcement is the Division's leniency policy, commonly called the Amnesty Program. Under this policy, qualifying corporations and individuals may avoid criminal prosecution in exchange for cooperation with antitrust prosecutors. The Amnesty Program has been called "the most effective investigative tool"[2] for anti-cartel enforcement, and is the most successful leniency program in the Department of Justice.[3] Congress recently passed legislation bolstering it.

On June 22, 2004, President Bush signed the Antitrust Criminal Penalty Enhancement and Reform Act of 2004[4] ("the Act"), which enhances maximum penalties for criminal antitrust violations and offers financial incentives for informers — including de-trebling civil damages for cooperating corporations involved in cartel conduct. The next day, Mr. Pate declared:

> The increase in criminal penalties will bring antitrust penalties in line with those for other white collar crimes and will ensure the penalties more accurately reflect the enormous harm inflicted by cartels in today's marketplace. The de-trebling provision of the Act removes a major disincentive for submitting amnesty applications, encouraging the exposure of more cartels, and making the Division's Corporate Leniency Program even more effective.[5]

Mere passage of the 2004 Act, however, did not automatically hand prosecutors bigger sticks. While the Act provided for tougher sentences when warranted - up to ten years incarceration, corporate fines of up to $100 million, and individual fines of $1 million[6] - these new provisions lacked the "teeth" needed to effectuate the will of Congress. This stemmed from the United States Sentencing Guidelines, specifically § 2R1.1, which did not provide sentencing ranges encompassing the increased terms of incarceration envisioned by the Act. On April 12, 2005, however, Scott D. Hammond, Deputy Assistant Attorney General ("DAAG"), Antitrust Division, testified before the United States Sentencing Commission concerning the Division's proposal to correct this imperfection. Hammond told the Commission:

> Our proposal would implement the increased Sherman Act maximum term of imprisonment enacted as part of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 ("2004 Act"). Congress determined that existing penalties do not do justice to the serious harm that antitrust violations cause the U.S. economy, and that prison sentences for antitrust defendants need to be increased. * * * The Guidelines methodology for calculating antitrust sentences has stood the test of time. With respect to criminal fines, Congress has twice passed tenfold increases in the Sherman Act maximum corporate fine–from $1 million to $10 million in 1990 and from $10 million to $100 million last year–in order to enable the Department to actually obtain the substantial fines provided by the Sentencing Guidelines. * * * Congress has now also determined that prison sentences for antitrust violations need to be increased, and it is looking to the Sentencing Commission to turn the new statutory maximum into sentencing reality.[7]

Passage of the 2004 Act and the Antitrust Division's subsequent proposal to amend § 2R1.1 are not the only recent events bearing upon antitrust criminal enforcement. Following adoption of the Act, the Supreme Court handed down its decision in *United States v. Booker*[8] regarding the constitutionality of the Sentencing Guidelines. Essentially, this decision rendered the Guidelines advisory rather than mandatory. But what does this mean for Congress' intent, as expressed in the 2004 Act, to enhance the punishments for antitrust violations? Testifying after *Booker*, DAAG Hammond put forward the Division's position on the decision's impact:

> [A]s to any suggestion that Congress never would have expressed such an intent had it been able to foresee the outcome in Booker, we flatly disagree. Booker certainly has raised a number of issues concerning the federal sentencing process and the Sentencing Guidelines, but questioning the fundamental soundness of the Guidelines themselves or the Commission's practices regarding promulgating and amending the Guidelines are not among them.[9]

While the Guidelines are now advisory, the Division considers them sound and the proposal to amend them to reflect the 2004 Act has gone forward. Yet, the decision in *Booker* raised issues. Following a brief review of criminal antitrust enforcement, this article examines the 2004 Act and the proposal to amend § 2R1.1, each in light of *Booker*, and discusses some of the uncertainties surrounding criminal antitrust sentencing.

II. Criminal Enforcement

In testimony before the House Judiciary Committee on July 24, 2003, AAG Hew Pate said: "Criminal enforcement remains a core priority, and we are continuing to move forcefully against hard-core antitrust violations such as price-fixing, bid-rigging, and market allocation. Cartel activity essentially robs U.S. consumers and businesses of many hundreds of millions of dollars annually."[10]

Sections 1, 2, and 3 of the Sherman Act[11] allow for criminal and civil penalties. Following case law and policy, the Antitrust Division decides whether to treat a matter as criminal or civil and only brings criminal prosecutions where the activity in question falls into the *per se* category of offenses.[12] Using federal criminal enforcement to punish and deter anticompetitive behavior can be traced back to passage of the Sherman Act in 1890, where a fine of five thousand dollars and imprisonment for one year were set as the maximum penalties for each violation. Over time, Congress has strengthened the criminal provisions of the Sherman Act. In 1955, Congress raised the maximum fine to fifty thousand for each violation. The Antitrust Procedures and Penalties Act of 1974[13] made violations of the Sherman Act felonies, increased the maximum fine to $1 million for corporations and $100,000 for individuals, and increased the maximum incarceration term to three years. Ten years later came the Criminal Fine Enforcement Act[14] which increased maximum fines for individuals convicted of a felony to $250,000. Next came the Sentencing Reform Act of 1984 ("SRA") together with the Sentencing Guidelines it spawned,[15] which was followed by the Criminal Fines Improvement Act of 1987. The 1987 Act statutorily re-authorized the alternative sentencing provision codified as Title 18 U.S.C. § 3571(d):

> (d) Alternative Fine Based on Gain or Loss. If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.[16]

In 1990, Congress again toughened antitrust criminal penalties by raising the maximum Sherman Act fine for a convicted corporation to ten million dollars and for convicted individuals to $350,000.[17] Following their adoption in 1987, prosecutors began employing the U.S. Sentencing Guidelines to calculate antitrust criminal fines. In essence, the Guidelines provide two different ways to calculate antitrust criminal fines for organizations.[18] In the first method, a company's base fine, and ultimately its Guidelines fine, is determined using its § 2R1.1 offense level. The second of these methods provides for calculating the potential fine based on the company's volume of affected commerce, which can result in fine calculations that exceed the Sherman Act maximum.[19]

Between 1991 and passage of the 2004 Act, three developments in criminal antitrust enforcement culminated in passage of the Antitrust Criminal Penalties Enhancement and Reform Act of 2004. First, the Division began negotiating corporate fines above the statutory maximums of the Sherman Act using the alternative fine provision of 18 U.S.C. § 3571(d).[20] Second, a revised version of the Antitrust Division's Corporate Leniency Policy was introduced in 1993. And third, as part of its policy initiative, the Antitrust Division began discussing the need for further increases in maximum criminal penalties.[21]

1. Corporate fines exceeding $10 million

Since 1987, the Antitrust Division has relied on § 3571(d) to negotiate fines well in excess of ten million dollars - the pre-2004 maximum under the Sherman Act. In fact, the Antitrust Division has obtained several fines in excess of $100 million, including a Department of Justice record $500 million criminal fine against F. Hoffman-La Roche in the Division's highly successful vitamins investigation. While the Division's use of the alternative sentencing provision, 18 U.S.C. § 3571(d), has produced fines which exceeded the Sherman Act maximum, employment of this ability has been confined to cases where sentencing is the result of a plea agreement. Such pleas usually stem from the Division's amnesty program.

2. Amnesty

The Antitrust Division's "amnesty" program, or corporate leniency policy, dates from 1978.[22] The pre-1993 policy provided that the first corporation to come forward and advise the Division of an antitrust offense was permitted to avoid prosecution, providing several criteria were met. The corporation seeking amnesty was eligible only if it came forward before the Division had knowledge of the illegal activity or before any investigation. The pre-1993 policy did not address leniency as to corporate officers, directors, and employees.

A revised version of the policy was introduced in 1993, which included major changes. First, the new policy grants amnesty automatically (known as "Part A" amnesty) to any corporation which reports illegal antitrust activity before an investigation has begun provided six conditions are met: (1) the Division has not received information about the illegal activity from any other source; (2) once discovered, the corporation acted promptly and effectively to end its participation in the activity; (3) the corporation is candid and complete in reporting and cooperates fully with the investigation; (4) the confession is truly a corporate act, not isolated confessions from individuals; (5) where possible, the corporation makes restitution to injured parties; and (6) the corporation did not coerce another party to participate in the illegal activity and was not the leader, or originator of the activity.

Secondly, the revised policy provides that if a corporation comes in after an investigation has begun, it can still obtain amnesty (known as "Part B" amnesty) if the Division had not yet uncovered evidence "likely to result in a sustainable conviction." So corporations failing to qualify automatically because the Division has an existing investigation may still qualify under Part B (also called Discretionary Amnesty). Part B has seven conditions: (1) the corporation is first to come forward and qualify; (2) at the time of reporting, the Division does not yet have evidence against the corporation likely to result in a sustainable conviction; (3) once discovered, the corporation acted promptly and effectively to end its participation in the activity; (4) the corporation is candid and complete in reporting and cooperates fully with the investigation; (5) the confession is truly a corporate act, not isolated confessions from individuals; (6) where possible, the corporation makes restitution to injured parties; (7) the Division determines that granting leniency would not be unfair to others considering the nature of the illegal activity, the reporting corporation's role in it, and when the corporation comes forward.

In those situations where a corporation is under investigation for participation in an illegal antitrust conspiracy (therefore ineligible for amnesty under Part A) and otherwise ineligible under Part B, and that corporation discovers the participation of its officers or employees in a *different* illegal antitrust conspiracy of which the Division is unaware, the corporation may be eligible for what has been called "amnesty plus." In short, if the corporation qualifies for amnesty and cooperates in the new, different investigation of which the Division is unaware, the Division will give full amnesty to the requesting corporation in the new investigation *and* will give the requesting corporation an additional benefit (e.g., fine reduction) in the calculation of its fine within the plea agreement resolving criminal liability as to the original investigation. This double benefit appears to have been an effective incentive to companies to self-report illegal antitrust conspiracies.

On August 10, 1994, one year after adopting the revised Corporate Leniency Policy, the Division announced a companion policy for individuals. This policy applies to all individuals who approach the Division on their own behalf, and not as part of a corporate confession or proffer.[23] To qualify, the individual must report illegal antitrust conduct not previously disclosed to the Division and he must be totally candid and provide full and continuing cooperation throughout an investigation. Further, the individual must not have been the originator or leader of the illegal conduct nor have coerced another party to participate.

The 1993 revisions provide access to amnesty to reporting companies *before and after* an investigation has begun, and enhance the benefits of reporting by including in the amnesty corporate officers and employees who fully confess and cooperate.[24] The results have been dramatic. Under the revised policy, the number of applications rose to a reported rate in 1998 of two per month, where it is today.[25] Amnesty works because it targets the fragile trust between criminal conspirators.

A successful cartel relies on trust. The Amnesty Policy is effective because it creates a "prisoner's dilemma." In game theory, a prisoner's dilemma is a strategic aim in which unilateral incentives to defect from the preferred solution result in participants receiving an inferior payoff. For example, suppose two accused prisoners are held incommunicado. Each is told that if he confesses and helps convict the other, he will go free and receive a reward. If he does not confess and is convicted by testimony from the other prisoner, he will receive the maximum sentence (e.g., ten years). If he confesses, but the other also confesses at the same time, both prisoners will receive a lesser sentence (e.g., four years). The options are:

(1) If *neither* prisoner confesses, *both* go free;

(2) If one (prisoner A) confesses first and testifies, prisoner A gets amnesty and B gets ten years;

(3) If both come forward at the same time, each gets 4 years.

This dilemma purposely undermines the trust between the prisoners. Hypothetically, game theory holds that because both prisoners have an equal incentive to confess, both will do so and receive the lesser sentence.[26] It is more often the case that one or another prisoner will lose trust[27] first and defect from the preferred solution by coming forward. In the same manner, the Amnesty policy seeks to undermine the trust among cartel members, encouraging defection.

Since 1993, the Division's Amnesty program has succeeded on several fronts. First, the Division witnessed an increase in the number of requesting companies. More importantly, the increase in organizational fines resulting from reported cartels skyrocketed dramatically.[28] Cartel investigations since 1997 have involved a variety of products and industries, with anticompetitive acts affecting more than ten billion dollars in U.S. commerce.[29] Prior to 1997, the

Division averaged roughly $29 million in criminal fines collected annually.[30] In 1997 and 1998, the Division collected in excess of $200 million in fines each year.[31] Then, in 1999 (fiscal year) the Division secured a whopping $1.1 billion in criminal penalties, including the single largest criminal fine in U.S. history – $500 million against F. Hoffmann-La Roche in the international vitamins price-fixing cartel. F. Hoffman-La Roche's co-conspirator, BASF, is number two, having paid $225 million that same year. The prosecution of the graphite electrodes cartel alone resulted in three defendants paying nine-figure fines.[32] It is estimated that since 1997, the Amnesty Program has brought in a total of more than two billion dollars in criminal fines.[33] With staggering results like this, it is easy to understand why Antitrust officials refer to the Amnesty Program as "the most effective tool for cracking cartel activity."[34]

In his 2003 statement to the House Judiciary Committee, AAG R. Hewitt Pate highlighted the program with these words:

> This policy, while allowing leniency for one participant in the cartel, has tremendous benefits to enforcers and consumers. First, the mere possibility that one of the cartel members will get leniency if it is the first to come in to the Division works to prevent cartels from forming in the first place, because businesses have an increased risk they will be targeted for prosecution as a result of a fellow cartel member reporting on their illegal activities subjecting them to heavy criminal fines and incarceration of their culpable executives. Second, even if a cartel does form, the benefits associated with the leniency policy lead to destabilization of the cartel by creating a powerful incentive for a company to report the cartel to antitrust authorities. Third, having a member of the cartel provide evidence to authorities helps ensure that prosecutions of the cartel are likely to be more successful than without such cooperation. Fourth, companies targeted for prosecution as a result of a particular grant of leniency not infrequently seek to negotiate a plea agreement and seek to obtain more lenient treatment than otherwise by reporting on activity of an unrelated cartel.[36]

2. Legislative Efforts to Enhance Penalties

In 2003, R. Hewitt Pate acknowledged the large fines achieved in recent years yet connected the importance of increasing all criminal penalties to the Division's priority of criminal antitrust enforcement:

> While the increasing jail sentences and huge multi-million dollar fines that have characterized international cartel prosecutions are vitally important, the Antitrust Division does not limit its enforcement to those cases; we also prosecute multiple cases that, while seemingly small, are significant to the victims and to our overall efforts at deterrence. We are determined to bring antitrust violators to justice; and we also want the level of our enforcement activity, including the fines and sentences, to send a powerful and unmistakable deterrent message to those in our country and around the world who would victimize American consumers and the American marketplace. For that reason, I believe it is time to consider whether it is appropriate to increase the penalties associated with criminal antitrust violations. I look forward to working with this Committee on that issue.[36]

Mr. Pate's call for stiffer penalties did not go unanswered. That same year, Congress began considering bills to enhance penalties for antitrust violators.

III. The 2004 Act

Legislative History

The bill that included the Antitrust Criminal Penalties Enforcement and Reform Act of 2004, House Bill 1086, did not initially address antitrust criminal penalties. Introduced on March 5, 2003 by F. James Sensenbrenner (R-WI 5th), together with seventeen co-sponsors (eight Democrats, nine Republicans), House Bill 1086 was titled the "Standards Development Organization Advancement Act of 2003."[37] The bill was received, read twice and referred to the Committee on the Judiciary of the U.S. Senate.[38] On May 19, 2003, Senator Orrin Hatch (R-UT) and Senator Patrick Leahy (D-VT) introduced Senate Bill 1080, entitled the "Antitrust Improvement Act of 2003" which proposed raising the maximum term of imprisonment for an individual who criminally violates the antitrust laws from three years to ten years and raising the maximum fine for a corporation from ten million dollars to $100 million. Senate Bill 1080 was thereafter referred to the Senate Judiciary Committee. On October 29, 2003, Senator Michael DeWine (R-OH) introduced Senate Bill 1797, entitled the "Antitrust Criminal Penalty Enhancement and Reform Act of 2003."[39] Senate Bill 1797 addressed the Leniency Program, proposed increasing penalties for criminal antitrust violations and proposed amending the Tunney Act.[40]

Senate Bill 1797 proposed two modifications: first, it increased criminal penalties for violating the Sherman Act by incorporating the same increased penalties found in Senate Bill 1080, with one exception.[41] Second, Senate Bill 1797 proposed de-trebling civil damages for individuals or corporations who participate in the Division's Leniency Policy program. Addressing the leniency program provisions of the bill, Senator Herb Kohl (D-WI) said:

> The leniency program rewards the first member of a criminal antitrust conspiracy to admit its crime to the Justice Department by granting the wrongdoer criminal amnesty. This is an important tool for law enforcement officials to detect and break up cartels that fix prices and limit supply in our economy. This new provision will give the Justice Department the ability to offer those applying for leniency the additional reward of only facing actual damages in civil suits arising out of the antitrust conspiracy, rather than the

treble damage liability to which they would otherwise be subject.[42]

Following its introduction, Senate Bill 1797 was referred to the Senate Judiciary Committee.[43] One difference from Senate Bill 1080 was that Senate Bill 1797 included a five-year sunset provision.[44] On November 6, 2003, House Bill 1086 was reported by Senator Hatch to the Committee on the Judiciary.[45] The bill's only amendment was essentially Senate Bill 1797.[46] On April 2, 2004, the Senate passed the modified House Bill 1086 by unanimous consent.[47] On June 2, 2004, the House concurred by voice vote with the Senate's amendments to House Bill 1086 and the resulting bill was adopted and sent to the White House.[48] On June 22, 2004, President Bush signed into law House Bill 1086, a composite bill which included the Antitrust Criminal Penalty Enhancement and Reform Act.[49]

Increased Criminal Penalties under the Act

A. Bigger Sticks

Section 215 of the 2004 Act raises the stakes dramatically for those who participate in anticompetitive behavior. Prior to 2004, the Sherman Act capped criminal fines at ten million dollars for organizations and $350 thousand for individuals.[50] The 2004 Act increases ten-fold the maximum allowable corporate fine, boosting the amount to $100 million.[51] Individuals also face significantly stiffer monetary penalties of up to $1 million.[52] As noted above, these increases are the latest in a series of penalty enhancements enacted since the Sherman Act's inception on July 2, 1890.[53]

1. Organizational Fines

Since 1987, the Antitrust Division has had the ability to argue for fines larger than the Sherman Act maximum by relying on the alternative fine provision in 18 U.S.C.A. § 3571(d), which permits penalties equal to twice the pecuniary gain or loss resulting from the offense,[54] and since passage of the SRA, the Sentencing Guidelines provided for fines over the Sherman Act maximums.

After *Booker*, it is likely that prosecutors will need to prove gain or loss beyond a reasonable doubt in order to obtain the higher maximums provided for by the "alternative sentencing provision" of 18 U.S.C.A. § 3571(d).[55] Fortunately, because the 2004 Act increased the statutory maximum fine, the government, in all but the very largest of cases, will be able to rely directly on the Sherman Act and avoid the calculations required by § 3571(d) for offenses continued on or after June 22, 2004.[56]

2. Individual Penalties

Individual offenders sentenced under the 2004 Act will face prison terms of up to ten years.[57] Senator Hatch explained the need to make the punishment fit the potential enormity of antitrust crimes:

> The Sarbanes Oxley Act passed last year raised the criminal penalties for a number of white collar offenses, but did not do so for antitrust criminal violations. An antitrust price-fixer who defrauds consumers for a total of five million should be subject to a penalty which is more consistent with the penalty scheme for other white collar offenses.[58]

3. "Over-sentencing?"

It may be suggested that cartels will now be over-fined or over-punished in the aggregate. The opposite may be accurate. The fact that quite a few major cartels have been uncovered in recent years appears to prove that cartels have, in fact, been under-deterred. Ample scholarly literature exists that cartels do significantly increase prices, and suggests that the ten percent price increase presumed in the U.S. Sentencing Guidelines, from which the Guidelines' twenty percent loss estimate is derived, is quite conservative.[59] As the OECD noted in its 2002 policy brief on Hard Core Cartels Harm and Effective Sanctions, cartels cause significant worldwide harm of many billions of dollars per year.[60] The brief concluded that while there is an uneven trend toward more rigorous cartel sanctions, larger sanctions are still required to achieve effective deterrence.[61] In the U.S., the recent increase in penalties should address the problem of under-deterrence.

The system contains ample safeguards against "over" punishment. Already, the system allows the government to take ability to pay into account in negotiating recommended fines.[62] Also, courts take ability to pay into account in imposing sentence.[63]

B. Sweetening the Carrots: Cooperation Incentives

The Act sweetens incentives for antitrust violators to cooperate under the Antitrust Division's leniency program. Previously, a corporation that shielded itself from federal criminal liability with a leniency agreement could still be jointly and severally liable for up to three times the damages caused by every member of a cartel in private and state antitrust suits.[64] The Act, however, limits civil liability of qualifying corporations to single damages attributable to its sole share of commerce affected by the antitrust violations.[65]

1. Pre-1993 weaknesses

There were at least four risks associated with applying for corporate leniency before 1993: (1) not being first; (2) rejection; (3) civil exposure; (4) risk in other jurisdictions. First was the chance that the corporation may not have been the "first in the door" and, as shown above, there was no provision for rewarding the "second" or later applicant.[66] Under today's policy, while a corporation may come in after an investigation has begun under Part B of the policy, the corporation must still be "first in the door" in order to qualify for discretionary amnesty.[67] However, today a corporation can, under certain circumstances, qualify for "amnesty plus,"[68] which serves to ameliorate this risk to some degree.

Secondly, the corporation faced the risk that amnesty might not be granted, in that before 1993, amnesty was not automatic, but discretionary. This risk was eliminated when, following the 1993 revisions, amnesty became automatic in type A situations (before an investigation has begun) for qualifying applicants.[69]

Third, any corporation contemplating applying for amnesty had to be aware of the fact that any immunity from criminal prosecution did not mean immunity from civil sanctions.[70] The first inkling of a federal investigation into an industry or a particular firm can trigger civil lawsuits. Persons injured by antitrust cartel behavior remained free to claim civil treble damages under the Clayton Act.[71] Nothing in the 1993 amendments to the Antitrust Division's Corporate Leniency Policy minimized this risk.

Fourth, a putative applicant for amnesty had to assess the likelihood that it would be investigated by other jurisdictions as a result of it becoming publicly known that the applicant was involved in criminal activity. This created the risk of additional penalties. Again, nothing in the Division's 1993 amendments minimized such exposure.

Of these four risks, the risk of treble damages under the Clayton Act appeared to be the greatest deterrent to applying for amnesty after 1993.[72] Treble damage actions and the existence of joint and several liability may have even served as a deterrent to organizations which have considered reporting violations to antitrust agencies outside of the United States. Clearly, cooperation anywhere might still result in civil damage suits in U.S. courts.[73] In addition, shareholder derivative suits, and possible disqualification from bidding on various contracts are unaffected by acceptance into the Amnesty Program.

In a direct attempt to lessen the risks associated with the decision to apply for amnesty, Congress chose to increase the incentives for participants in illegal cartels to cooperate with antitrust prosecutors. This has been accomplished by statutorily limiting cooperating companies' civil liability to actual rather than treble damages in return for the company's cooperation in both the resulting criminal case as well as any subsequent civil suit based on the same conduct.

Senator Hatch described the situation in a news release dated April 2, 2004:

> Though this program has been successful, a major disincentive to self reporting still exists - the threat of exposure to a possible treble damage lawsuit by the victims of the conspiracy… This provision addresses this disincentive to self-reporting. Specifically, it amends the antitrust laws to modify the damage recovery from a corporation and its executives to actual damages. In other words, the total liability of a successful leniency applicant would be limited to single damages without joint and several liability. Thus, the applicant would only be liable for the actual damages attributable to its own conduct, rather than being liable for three times the damages caused by the entire unlawful conspiracy.[74]

2. Amnesty under the 2004 Act

a. Section 213(a):

Section 213(a) of the Act is the provision addressing the disincentive to self-reporting posed by civil lawsuits:

> In any civil action alleging a violation of section 1 or 3 of the Sherman Act, or alleging a violation of any similar State law, based on conduct covered by a currently effective antitrust leniency agreement, the amount of damages recovered by or on behalf of a claimant from an antitrust leniency applicant who satisfies the requirements of subsection (b), together with the amounts so recovered from cooperating individuals who satisfy such requirements, shall not exceed that portion of the actual damages sustained by such claimant which is attributable to the commerce done by the applicant in the goods or services affected by the violation.[75]

b. The New Carrots

Section 213 of the Act "de-trebles" damages for the amnesty applicant. So, in addition to immunity from government prosecution, the successful applicant may be exempt from civil treble damage liability. Besides "de-trebling," a second incentive to cooperation is the removal of joint and several liability from the cooperating defendant in subsequent civil litigation. Coupled with de-trebling, the net effect of the Act is to substantially increase the exposure of non-cooperating conspirator defendants in the event a major conspirator self-reports and becomes eligible for the benefits of the Division's amnesty policy. For example, three corporations (A, B, and C) conspire to fix prices and the commerce affected by the conspiracy is $100 million (the "entire conspiracy amount"). Company A holds a ten percent share of the market and decides to self-report under the Amnesty Program. Assuming Company A qualifies, Companies B and C remain jointly and severally liable for the total amount of damages caused by all three companies (for example, $30 million), less actual damages attributable to Company A (for example, if $1 million of actual damages are attributable to Company A then Companies B and C remain jointly and severally liable for $30 million minus $1 million, or $29 million) in any subsequent private civil antitrust litigation.

(1) Requirements of Section 213(b)

For a participant in the Division's amnesty program to qualify for the potential civil "carrots," the antitrust leniency applicant or cooperating individual must satisfy the requirements of Section 213(b) of the Act. This section provides, essentially, that the court in which the civil action is brought must determine that the applicant or cooperating individual "has provided satisfactory cooperation to the claimant with respect to the civil action."[76] Subsections (b)(1) through (b)(4) elaborate on the term "cooperation."

Section 213(b)(1) requires that the amnesty candidate provide to the private claimant a "full account" of all facts known to the applicant "that are potentially relevant to the civil action."[77] Subsection (b)(2) requires the applicant to furnish "all documents or other items potentially relevant to the civil action that are in the possession, custody, or control" of the applicant "wherever they are located."[78] With respect to cooperating individuals, subsection (b)(3)(A) requires the applicant to make "himself or herself available for such interviews, depositions, or testimony in connection with the civil action as the claimant may reasonably require"[79] and that the applicant responds

> completely and truthfully, without making any attempt either falsely to protect or falsely to implicate any person or entity, and without intentionally withholding any potentially relevant information, to all questions asked by the claimant in interviews, depositions, trials, or any other court proceedings in connection with the civil action.[80]

In the case of an organizational antitrust applicant, subsection (b)(3)(B) requires that the applicant use its "best efforts to secure and facilitate from cooperating individuals covered by the agreement the cooperation described in" subparagraph (3)(A).[81]

Clearly, the supervising judge of the civil action has the key role in determining whether the amnesty candidate has qualified for the benefits of Section 213(a) of the Act, specifically de-trebling of damages and removal of joint and several liability; and the ultimate determination as to the effectiveness of Section 213(a) appears to depend on the court's willingness to undertake the role of arbitrating inevitable disputes over the extent of an applicant's "cooperation." Further, it appears that the civil litigation plaintiff ("claimant") has a role in determining whether the applicant has cooperated enough to be eligible for de-trebling and removal from joint and several liability. Additionally, to the extent a claimant desires to hold an additional defendant fully liable, the claimant may mendaciously oppose a finding of satisfactory cooperation. Obviously, the effectiveness of section 213 will depend on the results of actual cases.

3. Guidance

The 2004 Act allows leniency applicants to limit liability to single damages and avoid joint and several liability in return for cooperating with civil plaintiffs – but the Act does not provide guidance as to when courts should make the single damage/non-joint and several liability determination. Clearly, in the majority of cases, the private plaintiff is not going to be litigating the leniency applicant's damage liability; there will have been a negotiated settlement. Therefore, the likelihood that the applicant would qualify for single damage/non-joint and several treatment if the case went to trial simply becomes a factor in arriving at the settlement amount, and the parties will negotiate over how much cooperation the applicant will provide and when it will be provided.

In the small number of cases in which there is litigation involving the leniency applicant, the Act provides that an applicant qualifies for single damage/non-joint and several treatment if the court determines that the applicant "has provided" satisfactory cooperation to the plaintiff. It would seem that judges cannot make that determination until after the cooperation has been given. It is reasonable to expect that the large de-trebling benefit of the 2004 Act to potential leniency applicants will outweigh the unlikely possibility that they will end up litigating their damage liability before a judge who will apply the cooperation standard in an unreasonable manner.

4. Amnesty Terms: Section 212

Section 212 of the Act specifies various terms related to the Antitrust Division's leniency policy, including "Antitrust Leniency Agreement,"[82] "Antitrust Leniency Applicant,"[83] "Claimant,"[84] and "Cooperating Individual."[85] None of these definitions appears controversial.

5. Rights and Liabilities Not Affected: Section 214(1) - (3)

Section 214 of the Act expressly addresses three issues. First, the Act continues to allow the Antitrust Division to seek stays or protective orders in civil actions preventing cooperation from impeding the Division's criminal investigation and prosecution. Second, the Act does not establish a right to challenge leniency-agreement decisions made by the Division. Third, the Act leaves intact the joint and several liability of the coconspirators other than the amnesty applicant.

C. Expectations

By increasing an individual's maximum sentence and fine, the 2004 Act creates a powerful incentive for individuals to cooperate and seek personal amnesty. Personal liability for fines of up to $1 million and potential incarceration of 120 months should give antitrust criminals reason to pause before refusing cooperation. For these reasons, the Division believes that the 2004 Act will be effective. The 2004 Act would appear to fit with the Division's broader goal of encouraging self-reporting. Moreover cartels, which are inherently unstable by nature, should be destabilized further by the 2004 Act's 'sweetening' of the carrots given to amnesty applicants.

The incentives to participate in anticompetitive cartels must be weighed against the Act's enhancement of consequences. The de-trebling provision makes self-reporting more attractive to conspirators because it affords the opportunity of reduced civil liability together with the assurance of non-prosecution. Also worthy of note is the fact that the cooperator's competitors will simultaneously suffer increased exposure to civil damages as they find themselves saddled with joint and several liability for all damages caused by the conspiracy, less only actual damages caused by the cooperating defendant to the plaintiffs.

The fact that an executive contemplating participation in an illegal cartel now faces the possibility of ten years in jail should provide a powerful deterrent to such participation.[86]

Also, the higher maximum prison terms have the potential to more noticeably affect managers of multinational corporations working abroad. In the event jurisdiction is obtained, these individuals face the possibility of conviction by U.S. courts and incarceration in the United States. Given this bigger "stick," the chance of obtaining individual amnesty should provide an equally attractive "carrot."

D. Potential difficulty

How the de-trebling provision will operate in practice is vague. Amnesty applicants are entitled to limit civil exposure to actual damages "attributable to the commerce done by the applicant in the goods or services affected by the violation"[87] once the court presiding over the civil suit determines "that the applicant or cooperating individual . . . has provided satisfactory cooperation to the claimant with respect to the civil action."[88] The statute goes on to list mandatory aspects of cooperation, such as divulging all known facts and furnishing all documents that are potentially relevant to the civil action. While the actual determination of satisfactory cooperation seems straightforward, an amnesty applicant's ability to take advantage of the de-trebling provision will be subject to the discretion of the trial court that, in turn, is reliant upon the plaintiff when determining whether applicant has cooperated with the plaintiff. Some potential applicants may decide that unanswered questions about what constitutes satisfactory cooperation render the de-trebling provision less enticing. For example, it is unclear whether amnesty cooperators would be required, as part of the duty to furnish all potentially relevant documents "that are in the [cooperator's] possession, custody, or control . . . wherever they are located"[89] to provide otherwise privileged documents. Additionally, the amnesty cooperator may be unable to reap the designed benefits of the 2004 Act without receiving express agreement of the civil plaintiffs as to the completeness of its cooperation efforts.

a. Recent case

In January 2005, Judge Savage of the Eastern District of Pennsylvania decided *Stolt-Nielsen S.A. v. United States*, 352 F. Supp. 2d 553 (E.D. Pa. Jan. 14, 2005), which involved the Division's Corporate Leniency Program, and enjoined the indictment of a company and one of its employees. This was the first time that the Division sought to remove a company from the leniency program. The decision to remove Stolt was based on Division policy, announced in 1998, stating that once it is discovered that the reporting company was involved in an antitrust crime, the company was obligated to take prompt and effective action to terminate its role in the conspiracy. The Division asserted that the company in question had failed to undertake such action and had provided the Division with false and misleading information. The District Court disagreed. This has not altered Division policy: neither the conditions for eligibility into the leniency program, how the Division implements the program, nor the conditions under which the Division will revoke conditional leniency have been amended. The district court's decision in this case has been appealed.

E. Sunset provision

Experimental in nature, the de-trebling provision of the 2004 Act is subject to a five-year sunset clause. Renewal of the recovery limitations would be expected if de-trebling proves itself an effective incentive for cartel conspirators. Should the experiment fail and the de-trebling provision lapse, however, the enhanced fines and imprisonment terms would remain.

IV. Amending § 2R1.1

A. Proposed Amendments to § 2R1.1

The 2004 Act's increase of allowable prison terms lacked corresponding amendments to guideline 2R1.1; unadjusted, the guideline only produced sentencing ranges reflecting the previous three-year maximum under the Sherman Act.[90] It is clear that Congress sought to rectify the disparity of potential sentences for antitrust crimes when compared to similarly serious white-collar offenses such as wire and mail fraud.[91] Therefore amendments within § 2R1.1 raising the offense level and volume of commerce adjustments became necessary after June 22, 2004 in order for courts to sentence individuals convicted of antitrust offenses to incarceration terms at or near the ten year maximum when warranted.

In testimony before the Sentencing Commission, the Division supported amending § 2R1.1, by increasing the base offense level in § 2R1.1(a) and by adjusting the volume of commerce table in § 2R1.1(b)(2) upward. With respect to the base offense level, the Division proposed an increase in the level to thirteen. In addition, because the existing volume of commerce table in the Guidelines (2R1.1(b)(2)) did not provide for effective punishment of violations affecting greater than $100 million in commerce (which has been the existing highest volume of commerce adjustment under 2R1.1(b)(2)(G) since 1991), the Division proposed adjusting the table in 2R1.1(b)(2) upward[92] and presented a revised table[93] to the Commission. With regard to increasing the base offense level to thirteen, DAAG Hammond testified:

> We believe that this is a necessary first step to reflect the serious nature of antitrust violations and the harm caused by them, to punish antitrust offenses proportionally to other sophisticated white-collar offenses, and to deter others from committing antitrust offenses. *** However, a modest increase to the base offense level is insufficient to reflect the more than tripling of the Sherman Act statutory maximum or the reasons for that change.[94]

Hammond compared the offense levels for an amended § 2R1.1 with the offense levels provided in the existing § 2B1.1 for wire and mail fraud offenses which carry twenty year statutory maximum terms of incarceration, because one of the reasons Congress increased the Sherman Act maximum was to obtain greater comparability in sentences between these similar white-collar crimes.

> As the legislative history of the 2004 Act notes, the increased penalties "reflect Congress' belief that criminal antitrust violations are serious white collar crimes that should be punished in a manner commensurate with other felonies." 150 Cong. Rec. H3658 (daily ed. June 2, 2004).[95]

Comparing the offense of fraud with criminal antitrust offenses, Hammond showed the increasing disparity between fraud sentences under the current Guidelines and antitrust criminal offenses, wherein the sentences for fraud become much more severe:

> Fraud offense levels increase rapidly with loss and reach level 14, which is above our proposed base offense level of 13 for antitrust violations, for offenses causing loss greater than $70 thousand. This is equivalent to an antitrust violation affecting $350,000 in commerce. * * * [U]nder the current version of § 2R1.1 an antitrust violation affecting more than $100 million in commerce receives an offense level of 17, while a fraud violation causing a loss greater than $20 million has an offense level of 28, a difference of 11 offense levels. We believe that the revisions to § 2R1.1 that we propose appropriately narrow the gap between antitrust and fraud violations in light of the new Sherman Act maximum penalty and congressional intent to foster greater proportionality between antitrust and fraud offenses.[96]

Hammond stated that Congress' intent behind the 2004 Act was to more severely punish cartel violations with very high volumes of commerce - higher than the current § 2R1.1(b) top adjustment at $100 million:

> We believe these suggested amendments appropriately implement the intent of Congress when passing the Act. One of the principal congressional purposes behind increasing the Sherman Act maximum was to acknowledge and punish cartel violations with very high volumes of affected commerce – higher than the current $100 million top adjustment. That is why the adjustments for affected volumes of commerce up to "more than $40,000,000" are one level while adjustments for affected volumes of commerce beginning at "more than $80,000,000" are two levels. In other words, while increases in levels of punishment are warranted for antitrust offenses across-the-board, the need for greater deterrence of the largest offenses justifies the two-level increases beginning with violations affecting commerce greater than $80 million. In addition, our proposal acknowledges the greater absolute amounts of harm caused by the larger violations.[97]

Illustrating individual sentencings under the 2004 Act and § 2R1.1, Hammond provided an example implementing the 10-year maximum penalty provided by Congress for antitrust violations and showing that under the proposal the most serious offenders are sentenced toward the higher end of the spectrum:

> [A] defendant guilty of participating in a cartel violation affecting more than $1 billion in commerce would receive an offense level of 28 before any adjustments. Such a defendant who did no more than enter a timely guilty plea, and thus qualify for a three-level downward adjustment for acceptance of responsibility, would receive an offense level of 25, punishable by a possible sentence of 4 years and 9 months in prison, or less than half the statutory maximum. On the other hand, the ringleader of a $1 billion plus cartel who refused to accept responsibility, went to trial and was convicted, and received a four-level upward adjustment for aggravating role in the offense would have an offense level of 32, and would be incarcerated for the statutory maximum.[98]

Generally speaking, the proposed table was intended to reflect the new realities in antitrust criminal enforcement. Since 1991, the Antitrust Division has prosecuted a number of antitrust violations affecting more than $100 million – and even more than $1 billion – in commerce. Hammond asserted that the volume of commerce table should be amended to reflect this new reality. Beginning with the year 1996, Hammond recited a list of cases involving defendants where the volume of commerce affected by their activity exceeded $100 million: ADM, $150 million and $350 million; Ajinomoto Co., $122 million; Haarmann & Reimer Corp., $400 million; UCAR International, Inc., $713 million; SGL Carbon AG, $485 million; Showa Denko Carbon, Inc., $325 million; Mitsubishi Corp., $175 million; F. Hoffmann-La Roche Ltd., $3.280 billion; BASF, $1.460 billion; Takeda Chemicals Industries, Ltd., $361 million; Eisai Co., Ltd., $194 million.

> High volume of commerce cases continue to be prosecuted. Among the more recent examples, in 2004, Bayer AG pled guilty to participating in an international conspiracy to fix the price of rubber chemicals, with a volume of affected commerce of $233 million. Also in 2004, as part of an ongoing investigation of an international conspiracy to fix prices of dynamic random access memory (DRAM) – a commonly used semiconductor memory product providing high-speed storage and retrieval of electronic information for a wide variety of computer, telecommunication and consumer electronic products – Infineon Technologies AG pled guilty with a volume of commerce of $1.05 billion. . . . Clearly, this history justifies adding additional adjustments for volume of commerce between the current $100 million top and $1 billion.[99]

At the low end of the table, the Department's proposal eliminated existing adjustments for "more than $400,000" and "more than $2.5 million" in affected commerce. In essence, the Division took the position that an offense affecting $1 million in commerce today is similar in impact to an offense affecting $400,000 in 1991, and that the interval between $1 million and $2.5 million no longer captures the significant increase in harm that it did fourteen years ago.

Describing the interaction between the proposed § 2R1.1, the 2004 Act and the Division's Amnesty policy, Hammond told the Commission:

> I would also like to point out that the increased Sherman Act statutory maximums provided in Section 215 of the 2004 Act were designed to work in conjunction with the enhancements to the Antitrust Division's leniency program set out in Sections 211-214 of the Act. Congress determined that increasing antitrust penalties while providing increased incentives to cooperate with the Department would result in more effective detection and deterrence of antitrust violations. We fully agree with that determination. The Department believes that with the tools at our disposal both outside the Guidelines, such as the Antitrust Division's leniency policy, and inside the Guidelines, such as substantial assistance departures and acceptance of responsibility adjustments, higher levels of punishment for antitrust violations as set out in our proposal will lead to increased deterrence, greater cooperation with government prosecutors and strengthened enforcement of antitrust laws.[100]

B. Actual Amendments to § 2R1.1

Although not amended exactly as proposed by the Antitrust Division, the Commission's adopted version of section 2R1.1 differed only slightly from the Division's proposed version.[101] The first difference between the Division's proposed amended version of § 2R1.1 and the version that the Commission actually adopted was that the Commission chose to use a base offense level of twelve rather than thirteen.[102] This decision appears to have been made because the base offense level for a fraud involving sophisticated means is twelve,[103] and amending § 2R1.1 to also have a base offense level of twelve provides for penalties proportionate to and coextensive with those for violations of § 2B1.1. In its commentary, the Commission wrote that the amendment "responds to congressional concern about the seriousness of antitrust offenses and provides for antitrust penalties that are more proportionate to those for sophisticated frauds sentenced under § 2B1.1." The Commission added that the "higher base offense level ensures that penalties for antitrust offenses will be coextensive with those for sophisticated frauds sentenced under § 2B1.1."[104]

The second difference between the Division's proposed version section § 2R1.1 and the Commission's adopted version of § 2R1.1 is that the Commission added an additional volume of commerce adjustment at the top end.[105] This meant that the adopted version added two units to the offense level when the volume of commerce exceeded $1.5 billion, making it an offense level of twenty-eight.[106] The proposed version had an offense level of twenty-eight for a volume of commerce exceeding $1 billion.[107] This additional volume of commerce adjustment at the top end was put in place by the Commission to provide "greater deterrence of large scale price-fixing crimes."[108] Even with the additional volume of commerce adjustment in the adopted version of § 2R1.1, its adjustment levels and the corresponding volumes of commerce still track very closely with those of the proposed version of § 2R1.1.56

V. Booker

The Supreme Court's decision in *Booker* has raised several issues which may impact implementation of the 2004 Act and the amendments to § 2R1.1. As of March 30, 2005, the Division has had nine post-*Booker* sentencings.[110] In eight of the nine, the court sentenced according to the Guidelines (although every sentence was not a Guideline range sentence because of reductions for substantial assistance or ability to pay downward departures).[111] These sentences included an $84 million fine and $10.5 million fine imposed under the alternative fine statute (the synthetic rubber cases — DuPont Dow Elastomers and Zeon Chemicals) and a thirty month jail sentence for an individual convicted at trial (Dan Rose).[112]

The Burden of Proof after *Booker*

Regarding fines greater than $100 million under the alternative fine provisions, there appears to be an issue regarding the appropriate burden of proof of the amount of gain or loss attributable to the defendant. In litigated cases where a fine above the Sherman Act maximum (now $100 million) is sought, the Division will allege the amount of gain or loss in the indictment and will be prepared to prove that amount to a jury beyond a reasonable doubt.[113] Strong incentives would still exist, however, for corporations to agree to specific fines under the alternative fine statute, 18 U.S.C. § 3571(d), in plea agreements, including: (1) the certainty of an agreed-upon fine, (2) substantial assistance fine reductions, (3) non-prosecution coverage for some executives, (4) favorable plea agreements for other executives, (5) possible limitations in the scope of the offense charged or attributable commerce where the company reveals conduct the Division has not yet uncovered, and (6) the opportunity for amnesty plus for revealing an additional cartel.

In the event a corporate case goes to trial where the Division seeks a fine above the Sherman Act maximum, it can be expected that there will be dueling experts regarding gain or loss. The plain language of the statute indicates that the gain or loss referred to in section 3571 refers to the *gain or loss attributable to the entire cartel*, not just gain or loss attributable to the defendant.[114] This should lessen the burden in proving gain or loss.

B. The twenty percent presumption after *Booker*

Since *Booker* rendered the Sentencing Guidelines advisory, all of the sentencing factors set out in the Guidelines for calculating an appropriate sentence can still be determined by the judge.[115] While judges no longer are obliged to sentence according to the Guidelines, the *Booker* Court noted that district courts "must consult those Guidelines and take them into account when sentencing."[63] In any event, the twenty percent presumption is not a fact that increases a defendant's sentence but a determination by the Commission that the relevant sentencing fact for computing antitrust fines for organizations is the "volume of affected commerce" rather than "loss."

C. Certainty in Criminal Enforcement after *Booker*

Although the Guidelines are now advisory rather than mandatory, the Division will continue to seek Guidelines sentences. The Guidelines have promoted consistency in sentencing, and in almost all of the Division's post-*Booker* sentencings, courts have continued to impose sentences consistent with the Guidelines. While most commentators and defense attorneys have focused on the greater ability of judges under *Booker* to sentence below Guidelines ranges,

Table 1.
COMPARISON OF
PROPOSED § 2R1.1 AND CURRENT § 2B1.1.

Current § 2B1.1		§ 2R1.1 as Proposed		§ 2R1.1 asAmended	
Loss	Offense Level	Volume of Commerce	Offense Level	Volume of Commerce	Offense Level
Base	6	Base	13	Base	12
More than $200,000	18	More than $1,000,000	14	More than $1,000,000	14
More than $1,000,000	22	More than $5,000,000	15	More than $10,000,000	16
More than $1,000,000	22	More than $10,000,000	16	More than $40,000,000	18
More than $2,500,000	24	More than $20,000,000	17	More than $100,000,000	20
More than $7,000,000	26	More than $40,000,000	18	More than $250,000,000	22
More than $7,000,000	26	More than $80,000,000	20	More than $500,000,000	24
More than $20,000,000	28	More than $160,000,000	22	More than $1,000,000,000	26
More than $50,000,000	30	More than $320,000,000	24	More than $1,500,000,000	28
More than $100,000,000	32	More than $640,000,000	26		
More than $200,000,000	34	More than $1,000,000,000	28		

defendants should be reminded that *Booker* gives judges a concomitant ability to sentence *above* Guidelines ranges.

IV. Conclusions

Awarding a more enticing first-place prize and magnifying the penalties for all other participants, the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 makes winning the "race to the prosecutor" more critical than ever. This remains true even after the *Booker* decision. Ironically, it can be said that today the question facing those who conspire to avoid competition in the marketplace is whether or not to win the contest for amnesty.

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ENDNOTES

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2 Scott D. Hammond, Director of Criminal Enforcement Antitrust Division, U.S. Department of Justice, Detecting and Deterring Cartel Activity Through An Effective Leniency Program, Presentation at the International Workshop on Cartels 10 (Nov. 21-22, 2000), http://www.usdoj.gov/atr/public/speeches/9928.pdf [hereinafter Hammond, Detecting and Deterring].

3 Scott D. Hammond, Director of Criminal Enforcement Antitrust Division, U.S Department of Justice, A Summary Overview of the Antitrust Division's Criminal Enforcement Program, Presentation at the New York State Bar Association 5 (Jan. 23, 2003), http://www.justice.gov/atr/public/speeches/200686.htm [hereinafter Hammond, Summary Overview].

4 Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, 118 Stat. 661, 665-69.

5 Press Release, U.S. Department of Justice., Assistant Attorney General for Antitrust, R. Hewitt Pate, Issues Statement on Enactment of Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (June 23, 2004), http://www.usdoj.gov/opa/pr/2004/March/04_at_184.htm.

6 Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, 118 Stat. 661 (codified as amended in scattered sections of 15 U.S.C.). These maximums will apply only to offenses committed after June 22, 2004.

7 Scott D. Hammond, Deputy Assistant Attorney General Antitrust Division, U.S. Department of Justice, Prepared Testimony Before the United States Sentencing Commission Concerning Proposed 2005 Amendments to § 2R1.1 1, 2 (Apr. 12, 2005), http://www.ussc.gov/hearings/04_12_05/Hammond.pdf [hereinafter Hammond, Testimony].

8 543 U.S. 220 (2005).

9 Hammond, Testimony, *supra* note 7, at 3.

10 *Antitrust Enforcement Agencies: The Antitrust Division of the Department of Justice and the Bureau of Competition of the Federal Trade Commission*, 108th Cong. 9 (2003) (statement of Hew Pate, Assistant Attorney General for the Antitrust Division of the Department of Justice).

11 15 U.S.C.A. §§ 1-3 (West 1997 & Supp. 2005).

12 *Per se* offenses include price fixing, bid rigging, and horizontal customer or market allocation. *See* U.S. v. Heffernan, 43 F.3d 1144, 1145-46 (7th Cir. 1994).

13 Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, 88 Stat. 1706, 1708 (1974).

14 Criminal Fine Enforcement Act of 1984, Pub. L. No. 98-596, 98 Stat. 3134, 3137 (repealed in 1987).

15 To effect this, Congress passed Pub. L. No. 98-473, 98 Stat. 1995 (1984).

16 Criminal Fines Improvement Act of 1987, Pub. L. 100-185, 100 Stat. 1280 (codified as amended in 18 U.S.C. § 3571).

17 Antitrust Amendments of 1990, Pub. L .No. 101-588, 101 Stat. 2880 (codified at 15 U.S.C. § 1 (2000)).

18 *See* U.S. Sentencing Guidelines Manual § 2B1.1(b)(9)(C) (2004) (amended 2005). Under § 8C2.4(a), the base fine for organizations is the greater of three alternatives:

(1) the amount derived from the table in § 8C2.4(d) corresponding to the offense level determined under § 8C2.3; (2) the pecuniary gain to the organization; or (3) the pecuniary loss from the offense caused by the organization to the extent the loss was caused intentionally, knowingly, or recklessly.

Id.

For alternative (1), the base offense level under Chapter Two at § 2R1.1. is first determined ("12" for Antitrust offenses) and then adjusted (upward if necessary for bid-rigging and/or according to increases in the amount of commerce attributable to the defendant); the offense level is then used to calculate the base fine according to the table found in § 8C2.4(d); multipliers are derived from a culpability score which is determined according to § 8C2.5; applying the multipliers to the base fine produces the guideline fine range; or, for alternatives (2) and (3) the base fine is determined as the pecuniary gain to the defendant or the pecuniary loss to any person other than the defendant (§ 8C2.4(a)(2) or (3)); and multipliers are derived from the culpability score which is determined according to § 8C2.5, and applying the multipliers to the base fine produces the guideline fine range. *Id*.

19 *See* U.S. Sentencing Guidelines Manual § 8C2.4 (2004) (amended 2005) (providing that *pecuniary loss* may be used as the base fine for organizations). Section 2R1.1(d)(1),(2), provides that for antitrust offenses, in lieu of pecuniary loss, an amount equal to twenty percent of the volume of commerce affected by the offense may be used for the base fine. *Id*. Depending on the defendant's culpability score, this base fine may be reduced by as much as twenty-five percent (when the minimum antitrust multiplier of 0.75 is used) or raised by as much as a factor of four in calculating the maximum fine. *Id*.

20 *See* 18 U.S.C. § 3571(d) (2000). Under this provision, courts are not required to calculate pecuniary loss or pecuniary gain if making such a determination would unduly complicate or prolong the sentencing process. *Id*. Nevertheless, parties negotiating sentences may need to approximate loss in order to determine their potential maximum fine under § 3571(d). *Id*.

Section 2R1.1(d)(1) provides that twenty percent of the volume of affected commerce is to be used in lieu of the pecuniary loss under § 8C2.4(a)(3) when calculating a guidelines fine. *See* U.S. SENTENCING GUIDELINES MANUAL (2004) (amended 2005). Use of § 2R1.1(d)(1) to estimate pecuniary loss in negotiating sentences under 18 U.S.C. § 3571(d) has become commonplace.

21 *See, e.g.*, Gary R. Spratling, Deputy Assistant Attorney General, U.S. Department of Justice, The Trend Towards Higher Corporate Fines: It's a Whole New Ball Game—A Presentation at the American Bar Association's Criminal Justice Section's Eleventh Annual National Institute on White Collar Crime (Mar. 7, 1997), http://www.usdoj.gov/atr/public/speeches/4011.pdf. [hereinafter Spratling, Trend]; *see also* Gary R. Spratling, Deputy Assistant Attorney General, U.S. Department of Justice, Are the Recent Titanic Fines in Antitrust Cases Just the Tip of the Iceberg?—A Presentation at the American Bar Association's Criminal Justice Section's Twelfth Annual National Institute on White Collar Crime (Mar. 6, 1998), *available at* http://www.usdoj.gov/atr/public/speeches/212581.pdf.

22 *See* Robert E. Bloch, The Antitrust Division's Amnesty Program—A Presentation at the American Bar Association's Section of Antitrust Law's Criminal Antitrust Law and Procedure Workshop (Feb. 23-24, 1995), http://www.mayerbrownrowe.com/publications/article.asp?id=841&nid=6. From 1978 until 1993, seventeen corporations applied for corporate amnesty and ten qualified, with four of those ten granted between 1978-87; six applications were denied and one was pending on August 10, 1993. *Id*.

23 See ANTITRUST DIVISION, U.S. DEP'T OF JUSTICE, CORPORATE LENIENCY POLICY (1994), *available at* http://www.usdoj.gov/atr/public/guidelines/lencorp.htm. The 1993 Corporate Leniency Policy sets out conditions for leniency for directors, officers, and employees who come forward as part of a corporate proffer or confession. *Id.*

24 *See* Bruce H. Kobayashi, *Antitrust Agency & Amnesty: An Economic Analysis of the Criminal Enforcement of the Antitrust Laws Against Corporations*, 69 Geo. Wash. L. Rev. 715, 729-30 (2001) (providing a table listing the factors considered under the 1978 policy, compared to the conditions for leniency under Parts A & B of the 1993 policy).

25 *See* Hammond, Summary Overview, *supra* note 3, at 5; As recently as the first quarter of 2003, however, amnesty applications at the Division have been received at a rate of more than four per month. *Id*.

26 The dilemma resides in the fact that each prisoner has a choice between only two options, but cannot make a good decision without knowing what the other will do. If both prisoners are rational, they will never refuse to confess. Rational decision-making means that you make the decision which is best for you whatever the other actor chooses. Suppose prisoner A decides to confess, then it is rational for prisoner B to confess, too: neither A nor B prisoner gains much, but choosing not to confess would mean prisoner B is stuck with a ten year sentence. Suppose prisoner A decides to remain silent. Then it is rational for prisoner B to confess; prisoner B will gain anyway from A's silence, and will gain more by confessing; here, too, the rational choice is to defect. So, if both actors are rational, both will decide to defect. This seeming paradox can be formulated more explicitly through the principle of suboptimization. *See*, Francis Heylighen, *The Problem of Suboptimization*, http://pespmc1.vub.ac.be/SUBOPTIM.html (last visited Feb. 26, 2006).

27 Giving new and important meaning to the term "trust buster."

28 Gary R. Spratling, Deputy Assistant Attorney General Antitrust Division, U.S. Department of Justice, Making Companies An Offer They Shouldn't Refuse: The Antitrust Division's Corporate Leniency Policy - An Update, Presentation at the Bar Association of the District of Columbia's 35th Annual Symposium on Associations and Antitrust 3 (Feb. 16, 1999), http://www.usdoj.gov/atr/public/speeches/2247.pdf.

29 Hammond, Summary Overview, *supra* note 3, at 1.

30 *Id*. at 4.

31 *Id*.

32 *Id*.

33 Anthony V. Nanni & Franklin M. Rubinstein, *It's Time to Confess: New statute and case law boost DOJ's efforts to encourage cooperation*, LEGAL TIMES, July 12, 2004, at 24.

34 Hammond, Detecting and Deterring, *supra* note 2, at 10.

35 R. Hewitt Pate, Assistant Attorney General, Antitrust Division, Antitrust Enforcement Oversight, Statement before the Committee on the Judiciary,United States House of Representatives 9 (July 24, 2003), www.usdoj.gov/atr/public/testimony/201190.pdf.

36 *Id* .at 7.

37 H.R. 1086, 108th Cong. § 1 (2003). This bill was Congress' attempt to promote and facilitate the standard setting process and amend the National Cooperative Research and Production Act (NCRPA). This bill was reported by voice vote on May 7, 2003. Thereafter, the House of Representatives passed House Bill 1086 on June 10, 2003, by voice vote. 149 CONG. REC. H5104 (June 10, 2003).

38 S. 1799, 108th Cong. (2003). Senate Bill 1799 was introduced on October 30, 2003 by Senator Patrick Leahy (D-VT) with one co-sponsor, Senator Hatch (R-UT). This bill was entitled the "Standards Development Organization Advancement Act of 2003," had the same wording as House Bill 1086, and was introduced by Leahy and Hatch to be a companion to House Bill 1086.

39 Antitrust Criminal Penalty Enhancement and Reform Act of 2003, S. 1797, 108th Cong.

40 The Tunney Act is section 5 of the Clayton Act, as amended, and is codified at 15 U.S.C.A. § 16 (West 1997 & Supp. 2005). S. 1797 § 201 proposed amending the Tunney Act to require that "The Court shall not enter any consent judgment proposed by the United States under this section unless it finds that there is reasonable belief, based on substantial evidence and reasoned analysis, to support the United States' conclusion that the consent judgment is in the public interest." S. 1797 § 201, 108th Cong. (2003). This article only addresses those provisions of S. 1797 relating to *criminal* antitrust enforcement and does not address reforms to the Tunney Act within S. 1797 or within House Bill 1086 as passed.

41 S. 1797 § 105. The bill added another specific increase in the maximum fine for individuals, raising it from $350 thousand to $1 million.

42 149 CONG. REC. S13517 (daily ed. Oct. 29, 2003) (statement of Sen. Kohl).

43 *See* Antitrust Criminal Penalty Enhancement and Reform Act of 2003, S. 1797, 108th Cong.

44 *Id*. at § 101(a).

45 H.R. 1086, 108th Cong. (1st Sess. 2003).

46 *See id*. at § 201(a).

47 150 CONG. REC. S3610 (daily ed. Apr. 2, 2004).

48 *See* 150 CONG. REC. H3654 (daily ed. June 2, 2004). Title I of the final bill incorporated the Standards Development Act of 2003. Title II of the final bill included the Antitrust Criminal Penalty Enhancement and Reform Act of 2003 (now 2004), which contained the terms of Senate Bill 1799 and encompassed the Tunney Act Reform as Subtitle B.

49 *See* Standards Development Organization Advancement Act of 2004, Pub. L. No. 108-237, 118 Stat. 661.

50 15 U.S.C. § 1 (2000).

51 *Id*.

52 Standards Development Organization Advancement Act of 2004, Pub. L. No. 108-237, 118 Stat. 661. Section 215 of the 2004 Act uniformly amends Sections 1, 2, and 3 of the Sherman Act with maximum fine enhancements of $100 million and one million dollars for organizations and individuals, respectively, and with increased maximum imprisonment terms for individuals of ten years.

53 15 U.S.C. § 1 (2000).

54 18 U.S.C. § 3571(d) (2000). The alternative fine provision permits assessment of fines beyond statutory maximums when imposition of a lesser fine would allow the defendant to profit from its conduct or would not be commensurate with the harm inflicted.

55 *See* Apprendi v. New Jersey, 530 U.S. 466, 490-91 (2000) (holding that any fact that increases the penalty beyond the maximum allowed by statute must be proved beyond a reasonable doubt).

56 See § 215, 118 Stat. at 668.

57 *Id*.

58 149 CONG. REC. S6626-01 (May 19, 2003) (statement of Sen. Hatch).

59 *See, e.g.*, Christopher R. Leslie, *Trust, Distrust, and Antitrust*, 82 TEX. L. REV. 515 (2004).

60 ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), HARD CORE CARTELS – HARM AND EFFECTIVE SANCTIONS (May 2002), http://www.oecd.org/dataoecd/30/10/2754996.pdf.

61 *Id*.

62 *See* U.S. SENTENCING GUIDELINES MANUAL §5E1.2(d)(2) (2004) (amended 2005).

63 *See* U.S. v. Atl. Disposal Serv., 887 F.2d 1208, 1209 (3d Cir. 1989).

64 Antitrust Criminal Penalty Enforcement Act, *supra* note 4 at 666.

65 *Id*.

66 This is not to say that there was or is *no* consideration given to persons who agree to cooperate early in an investigation despite the fact that they don't qualify for amnesty or amnesty plus.

67 *See* Daniel J. Bennett, *Killing One Bird with Two Stones: The Effect of Empagran and the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 on Detecting and Deterring International Cartels*, 93 GEO. L. J. 1421, 1438 (2005).

68 "Amnesty plus" may apply if a corporation is involved in more than one anti-competitive cartel. *See id*. at 1439.

69 *See id*. at 1437-39.

70 U.S.C. § 15 (2000).

71 *See id*.

72 Even so, after 1993 many corporations assessed the risks and opted for amnesty. *See* U.S. DEPARTMENT OF JUSTICE, STATUS REPORT: CORPORATE LENIENCY PROGRAM, at http://www.usdoj.gov/atr/public/criminal/8278.htm (last visited July 8, 2005). The automatic amnesty provision within the 1993 revised policy appears to have accounted for corporations' increased interest in amnesty.

73 Generally speaking, activity underlying antitrust claims in U.S. courts must be shown to have harmed domestic commerce in some way. Under § 7 of the Sherman Act, 15 U.S.C. § 6a, (the Foreign Trade Antitrust Improvements Act of 1982), the Sherman Act does not apply to conduct unless that conduct has a direct, substantial, and reasonably foreseeable effect on domestic trade or commerce, American imports, or American exporters. On June 14, 2004, the United States Supreme Court, in F. Hoffman-LaRoche, Ltd. v. Empagran S.A., 542 U.S. 155 (2004), ruled unanimously that American antitrust laws do not apply to conduct that allegedly causes independent harm outside the United States as the sole basis of a legal claim brought in the United States. The Supreme Court declared that its decision in *Empagran* was consistent with the United States' interest in avoiding unreasonable interference with the legitimate sovereign authority of other nations. It concluded that Congress would not have intended for the Sherman Act to bring within its reach independently caused foreign injury. In so ruling, the Court vacated the judgment of the D.C. Circuit Court of Appeals, and remanded the case for additional proceedings consistent with its opinion. On remand, the D.C. Circuit Court of Appeals affirmed the district court's decision to dismiss the Sherman Act claim for lack of subject-matter jurisdiction under the Foreign Trade Antitrust Improvements Act. Empagran S.A. v. F. Hoffmann-LaRoche, Ltd., 417 F.3d 1267, 1269 (D.C. Cir. 2005).

74 Press Release, Senator Orrin Hatch, Senate Passes Bill to Improve Antitrust Laws (Apr. 2, 2004), *available at* http://hatch.senate.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=1013&Month=4&Year=2004.

75 Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, 118 Stat. 661, at 667.

76 *Id*.

77 *Id*.

78 *Id*.

79 *Id*.

80 *Id*.

81 *Id*.

82 *Id*. at §212(2). "The term 'antitrust leniency agreement,' or 'agreement,' means a leniency letter agreement, whether conditional or final, between a person and the Antitrust Division pursuant to the Corporate Leniency Policy of the Antitrust Division in effect on the date of execution of the agreement."

83 *Id*. at §212(3). "The term 'antitrust leniency applicant,' or 'applicant,' means, with respect to an antitrust leniency agreement, the person that has entered into the agreement."

84 *Id*. at §212(4). "The term 'claimant' means a person or class, that has brought, or on whose behalf has been brought, a civil action alleging a violation of section 1 or 3 of the Sherman Act or any similar State law, except that the term does not include a State or a subdivision of a State with respect to a civil action brought to recover damages sustained by the State or subdivision."

85 *Id*. at §212(5). "The term 'cooperating individual' means, with respect to an antitrust leniency agreement, a current or former director, officer, or employee of the antitrust leniency applicant who is covered by the agreement."

86 Scott D. Hammond, Director of Criminal Enforcement Antitrust Division, U.S. Department of Justice, When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You Put A Price Tag on an Individual's Freedom?, Presentation at The Fifteenth Annual National Institute on White Collar Crime 8-9 (Mar. 8, 2001), http://www.atrnet.gov/subdocs/7647.htm. As an example of courts taking a tougher stance toward white collar defendants, Bernard Ebbers, the former chairman of WorldCom, was sentenced to twenty-five years in prison for fraud. Ken Belson, *WorldCom Chief Is Given 25 Years for Huge Fraud*, N.Y. Times, July 14, 2005, at A1.

87 Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, 118 Stat. 661, at 666.

88 *Id*.

89 *Id.*

90 Presently, § 2R1.1 provides a Base Offense Level of twelve for antitrust violations, and adjustments based upon volume of commerce permit up to a seven-level increase. Absent amendments, the Act's stiffer penalties will not be realized. *See supra* text accompanying note 48.

91 *See supra* text accompanying note 48.

92 Hammond, Testimony, *supra* note 7, at 3 (the Department's written comments submitted March 25, 2005 contained specific proposals for amending § 2R1.1). In addition to increasing the base offense level to thirteen, the proposal suggested amending the volume of commerce table to cumulatively add one additional offense level for antitrust violations that affect more than $1 million, $5 million, $10 million, $20 million and $40 million in commerce, and by two offense levels for violations that affect more than $50 million.

93 *See* center column *infra* Table 1.

94 Hammond, Testimony, *supra* note 7, at 4.

95 *Id.* at 8-9.

96 *Id.* at 10.

97 *Id.* at 7

98 *Id.* at 8.

99 *Id.* at 5-6.

100 *Id.* at 11.

101 *See* center and right columns *infra* Table 1.

102 *See* U.S. SENTENCING GUIDELINES MANUAL § 2R1.1 (2004) (amended 2005); *see also* Hammond, Testimony, *supra* note 7.

103 UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL § 2B1.1(b)(9)(C) (2004) (amended 2005).

104 *Id.*

105 *See* § 2R1.1; *see also* Hammond, Testimony, *supra* note 7.

106 *See* § 2R1.1.

107 Hammond, Testimony, *supra* note 7.

108 § 2R1.1(a), cmt. n.2, *supra* note 102.

109 *See infra* Table 1.

110 Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement Antitrust Division, U.S. Department of Justice, Antitrust Sentencing In The Post-Booker Era: Risks Remain High For Non Cooperating Defendants, Presentation Before the American Bar Association Antitrust Section Spring Meeting 1 (Mar. 30, 2005), http://www.usdoj.gov/atr/public/speeches/208354.htm.

111 *Id.*

112 *Id.*

113 *Id.*

114 *See* Spratling, Trend, *supra* note 21, at 5.

115 *See* United States v. Miller, 417 F.3d 358, 362 (3d Cir. 2005) (holding that a district judge may make sentencing findings pertinent to the guidelines by a preponderance of the evidence).

116 *See* United States v. Booker, 543 U.S. 220, 264 (2005).

General Liability Coverage For Business Torts

By Thomas D. Caudle[1]

I. Introduction

The "personal and advertising injury" section of commercial general liability ("CGL") policies owned by most businesses have some limited application to various "business torts." In that regard, the Coverage B insuring agreement in the current standard CGL coverage form provides:

> **COVERAGE B. PERSONAL AND ADVERTISING INJURY LIABILITY**
>
> 1. Insuring Agreement:
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. …
>
> b. This insurance applies to "personal and advertising injury" caused by an offense arising out of your business but only if the offense was committed in the "coverage territory" during the policy period.[2]

The same coverage form defines "personal and advertising injury" as follows:

> 14. "Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:
>
> a. False arrest, detention, or imprisonment;
>
> b. Malicious prosecution;
>
> c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
>
> d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
>
> e. Oral or written publication, in any manner, of material that violates a person's right of privacy;
>
> f. The use of another's advertising idea in your "advertisement"; or
>
> g. Infringing upon another's copyright, trade dress or slogan in your "advertisement."

A. The requirement of "damages"

The Coverage B insuring agreement provides coverage for the insured's legal obligation for "damages" to which the insurance applies. Additionally, it imposes on the insurer a duty to defend suits seeking "those damages." As such, Coverage B does not include the defense of or coverage for suits seeking only injunctive relief.[3] At the same time, the insuring agreement's "*legally* obligated to pay as damages" language has not translated into a complete bar of coverage for equitable remedies, and suits for some forms of disgorgement or restitution or accounting for profit have sometimes qualified under the insuring agreement.[4]

B. The duty to defend

As a general proposition, when deciding if a liability insurer has a duty to defend, one should look at the alleged facts that show the origin of the claimed damages, and not the legal theories. That remains the rule as to Coverage B, even though many "personal and advertising injury" offenses are specific common-law torts.[5]

C. "During the policy period"

The Coverage B insuring agreement provides that the insurance only applies when the defined offenses are "committed during the policy period." Accordingly, courts have generally found the insuring agreement satisfied at the time when the insured committed or allegedly committed the offense in question, rather than when injury resulted from the offense. Some case law, however, has blurred this bright line. For example, in *American Guarantee & Liability Insurance Co. v. 1906 Co.*,[6] the Fifth Circuit construed the term "offense" to mean a completed tort. In other words, an offense or completed tort existed when a claimant had a legal right to sue for damages, which in turn required the existence of a harm for which courts would impose civil liability.

II. Selected Coverage B Offenses, and Their Potential Coverage for "Business Torts."

A. Misuse of advertising ideas and infringement of copyright

Recall that the current CGL coverage form includes the following:

14. "Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:

f. The use of another's advertising idea in your "advertisement"; or
g. Infringing upon another's copyright, trade dress or slogan in your "advertisement."

By comparison, some pre-1998 versions had presented the offenses as follows:

1. "Advertising injury" means injury arising out of one or more of the following offenses:

c. Misappropriation of advertising ideas or style of doing business; or
d. Infringement of copyright, title or slogan.[7]

Both groups of offenses require any covered injury to arise out of the offenses committed in the course of advertising the named insured's goods, products or services. Where that causal nexis existed, then under the pre-1998 coverage forms, courts frequently construed the "misappropriation" offense to include coverage for trademark and trade dress infringement.[8] Additionally, a few cases recognized coverage under the "misappropriation of advertising ideas" offense for theft of trade secrets so long as the trade secrets related to marketing or solicitation of business.[9] And of course, the "infringement" offense would afford coverage for claims of copyright infringement – again so long as the infringement occurred in the course of the named insured's advertising.[10]

With the advent of the current coverage form, coverage for copyright and trade dress infringement remains intact. However, any potential for coverage for trademark infringement or misappropriation of trade secrets is now eliminated by express exclusion.[11]

B. Malicious prosecution

In one published opinion applying Texas law, the Houston court of appeals limited coverage under the offense of "malicious prosecution" to the common law tort.[12] However, unpublished Texas case law, as well as case law from other jurisdictions, have sometimes recognized more expansive coverage. For example, in *Martin's Herend Imports, Inc. v. Twin City Fire Insurance Co.*,[13] the Southern District of Texas construed the "malicious prosecution" offense to apply to an abuse of process claim involving an alleged wrongful seizure of goods and records under 15 U.S.C. § 1116(d). In the wrongful seizure counterclaim at issue in that matter, the claimant alleged the insured had in bad faith obtained a seizure order "based on an apparent knowing and intentional ex parte misrepresentation of facts to the Court." Moreover, courts have found coverage under the offense of "malicious prosecution" when the facts involved such a prosecution, even though the theory of recovery involved a different tort or statutory remedy.[14]

C. Wrongful entry, wrongful eviction, or invasion of the right of private occupancy

The issue might arise as to whether the wrongful entry/eviction group of offenses reaches suits involving, for example, the lockout of a business partner when the relationship sours, or for clandestine recording of another's acts via hidden cameras or other recording devices. Texas courts have been reluctant to recognize coverage under those instances. For example, in *Potomac Insurance Co. v. Peppers*,[15] the Southern District of Texas considered a number of claims arising out of less than cordial conclusion of a sexual and business relationship. Part of the allegations included the lockout of the claimant from the office he shared with his ex. The claimant did not assert a wrongful eviction claim, but the ex's attorney (who apparently participated in the lockout), sought coverage based on that offense. The court did not preclude the possibility that such lockouts could amount to a covered "wrongful eviction." The court, however, held that the claimant had not alleged his removal from the office was "wrongful," nor had he alleged damage because of the removal itself; rather, the alleged damages were for the insureds' alleged conversion of his personal property.[16]

By comparison, an Illinois court in *International Insurance Co. v. Rollprint Packaging Products, Inc.*,[17] held that the eviction of an employee from his office as part of pattern of alleged discrimination and retaliation against him came within the "wrongful eviction" offense. The court held that the policy provision did not require a vested or legal interest in the premises for coverage to apply. It should be noted that the policy in that matter apparently included the 1986 version of the coverage form, which simply defined the offense as "wrongful entry into, or eviction of a person from a room, dwelling or premises that the person occupies."

Many courts nationwide have restricted the scope of the "wrongful entry" group of offenses to contexts *such as* tenancy situations where the insured has a superior right of occupancy or inhabitation in the premises versus the claimant.[18] Others, however, have not done so, even when construing the more current versions with the "owner, landlord or lessor" text in the definition of the offense. For example, in *American Guaranty & Liability Insurance Co. v. 1906 Co.*,[19] the Fifth Circuit found coverage under the "invasion of right of private occupancy" prong of the offense for the claims of several young females who were surreptitiously videotaped disrobing in dressing rooms in a photographic studio owned by a corporate insured.[20]

D. Publication of material that slanders or libels a person or organization, or disparages their goods, products or services

Courts have generally restricted the scope of the libel and slander offenses to those defamation torts – a claim that merely alleges injury to reputation in connection with some other tort will not qualify for coverage.[21] There have, however, been occasional exceptions to this general rule.[22]

Some courts have rejected a construction of the offense that would encompass slander of title-type claims.[23] Again, however, authority exists for a contrary position.[24] Note that even if the "personal and advertising injury" offense extends to slander of title claims, it should not reach slander of title of realty claims, since realty is not a "good, product or service" for purposes of the offense.

Some case law directly holds that the disparagement offense is not limited to the common law tort.[25] On the other hand, allegations of the common law tort or its elements should certainly satisfy the requirements of the offense. In Texas, the tort of "business disparagement" includes the elements of "disparaging words, falsity, malice, lack of privilege, and special damages."[26] Conceptually, it appears to be a species of tortious interference, or at least it can be said that a tortious interference can be accomplished by conduct that amounts to business disparagement.[27] Consequently, depending on the facts, there could be some possibility of "personal and advertising injury" coverage for tortious interference claims that include allegations of the disparagement of the claimant's goods, products or services.

III. Conclusion

The "personal and advertising injury" provisions appearing in the Coverage B section of standard CGL coverage forms attempt to provide tailored coverage for liability an insured business may face for specifically defined and identified conduct. Although the outer limits of that coverage continue to develop and be defined in litigation around the nation, clearly some of the conduct covered by the provisions can encompass liability for what many would classify as "business torts."

ENDNOTES

1 Of counsel with the Dallas firm of Mateer & Shaffer, LLP. Mr. Caudle adapted and updated this paper from a paper and speech he presented at an Advanced Insurance Law Course sponsored by the State Bar of Texas.

2 Insurance Services Office, Inc. ("ISO") form no. CG 00 01 10 01.

3 *See* Feed Store, Inc. v. Reliance Ins. Co., 774 S.W.2d 73 (Tex. App. – Houston [14th Dist.] 1989, writ denied).

4 Compare Owens-Brockway Glass Container, Inc. v. International Ins. Co., 1994 WL 559267 (E.D. Cal., Mar. 24, 1993) (settlement in satisfaction of judgment in patent infringement suit for past royalties qualified as "damages") *with* Bank of the West v. Superior Court, 833 P.2d 545, 552-58 (Cal. 1992) ("damages" does not include restitution/disgorgement of money obtained by means of violations of California's Unfair Business Practices Act).

5 *See* Cornhill Ins. PLC v. Valsamis, Inc., 106 F.3d 80, 85 (5th Cir.) (pleading a claim labeled "invasion of privacy" did not create duty to defend when the facts plead did not constitute cognizable "invasion of privacy"), *cert. denied*, 522 U.S. 818 (1997); St. Paul Fire & Marine Ins. Co. v. Green Tree Fin. Corp., 249 F.3d 389, 394 (5th Cir. 2001) (suit for unfair debt collection practices sufficed to allege the elements of an invasion of privacy claim).

6 273 F.3d 605, 617-18 (5th Cir. 2001).

7 *E.g.*, ISO form no. CG 00 01 01 96.

8 *See* Gemmy Indus. Corp. v. Alliance Gen. Ins. Co., 109 F. Supp. 2d 915, 920-21 (N.D. Tex. 1998) (dicta), *aff'd*, 200 F.3d 816 (5th Cir. 1999); Bay Elec. Supply, Inc. v. Travelers Lloyds Ins. Co., 61 F. Supp.2d 611, 617 (S.D. Tex. 1999). *But see* Advance Watch Co. v. Kemper Nat'l Ins. Co., 99 F.3d 795 (6th Cir. 1996) (trademark infringement was not a "misappropriation of advertising ideas or style of doing business"); Nationwide Mut. Ins. Co. v. Mortenson, 222 F. Supp. 2d 173, 185-86 (D. Conn. 2002) (trademark and trade dress infringement would not qualify for misappropriation offense).

9 Sentex Sys., Inc. v. Hartford Accident & Indem. Co., 93 F.3d 578, 580 (9th Cir. 1996); Kinko's, Inc. v. Shuler, 645 N.W.2d 855 (Wis. App.) (table, text available at 2002 WL 1308174), *rev. denied*, 650 N.W.2d 841 (Wis. 2002); Tradesoft Technologies, Inc. v. Franklin Mut. Ins. Co., 746 A.2d 1078, 1087 (N.J. Super. 2000).

10 King v. Continental Western Insurance Co., 123 S.W.3d 259 (Mo. App. 2003) presented an interesting twist on the causal nexis. In that matter, the insured homebuilder used the claimant's copyrighted plans in building a home. The insured placed a 2X3 foot sign in the front yard of the copyright infringing home, with the insured's name thereon. In the coverage litigation, the insured successfully offered expert testimony that the advertisement/solicitation was not just the sign, but was also the house itself – *i.e.*, prospective new home buyers would go in the infringing house to inspect the construction and then contact the builder to build their new home.

11 What might then be covered under the "use of another's advertising idea" offense may be debatable; plainly, however, its scope appears quite narrow.

12 *See* Pennsylvania Pulp & Paper Co. v. Nationwide Mut. Ins. Co., 100 S.W.3d 566, 573-75 (Tex. App. – Houston [14th Dist.] 2003, pet. denied) (holding that the offense of "malicious prosecution" was limited to the common law tort by that name, and that a DTPA §17.50(c) "bad faith" counterclaim against the insured did not allege the common law tort since it did not assert two of its six elements).

13 2000 WL 33795043 (S.D. Tex., Mar. 21, 2000).

14 *See* Employers Mut. Casualty Co. v. Cedar Rapids Television Co., 552 N.W.2d 639 (Iowa 1996) ("malicious prosecution" offense applied to claims of tortious interference with existing contract in connection with insured's filing of petition with FCC seeking denial of a license assignment in connection with the proposed sale of the claimant television station to a third-party purchaser); Ethicon, Inc. v. Aetna Casualty & Sur. Co., 737 F. Supp. 1320, 1333 (S.D. N.Y. 1990) (Sherman Act judgment for bad faith prosecution of patent litigation was covered "malicious prosecution" offense).

15 890 F. Supp. 634 (S.D. Tex. 1995).

16 *Id.* at 647; Butler & Binion v. Hartford Lloyd's Ins. Co., 957 S.W.2d 566, 569 (Tex. App. – Houston [14th Dist.] 1995, writ denied) (constructive expulsion of lawyer from law firm by restricting access to clients, reassigning work, and reducing compensation was not a wrongful eviction); *see also*

Mid-Continent Casualty Co. v. Camaley Energy Co., 364 F. Supp. 2d 600, 608 (N.D. Tex. 2005) (Coverage B not implicated by allegation of "constructive eviction" arising out of the insured's drilling of a well on the claimants' mineral lease pursuant to a contract with the claimants, when it carelessly allowed the well bore to deviate on to a neighboring property).

17 728 N.E.2d 680, 689-90 (Ill. App. 2000).

18 *See* Decorative Center v. Employers Casualty Co., 833 S.W.2d 257, 261-63 (Tex. App. – Corpus Christi 1992, writ denied) (construing "right of private occupancy" prong); *cf*. Hettler v. Travelers Lloyds Inc. Co., 190 S.W.3d 52, 57 (Tex. App. – Amarillo 2005, pet. denied) (expulsion/lockout of business partner did not amount to wrongful eviction when ousted partner-claimant did not allege any co-tenancy, joint leasehold or other interest in the premises).

19 273 F.3d 605 (5th Cir. 2001).

20 *See also* First Newton Nat'l Bank v. General Casualty Co., 426 N.W.2d 618, 627 (Iowa 1988) (loss of farms and homes due to foreclosure); Town of Goshen v. Grange Mut. Ins. Co., 424 A.2d 822, 824 (N.H. 1980) ("invasion of right of private occupancy" was satisfied by allegation that planning/zoning board "created economic hardships that destroy the viability of the [plaintiff's subdivision development] project").

21 *See, e.g.*, C.O. Morgan Lincoln-Mercury, Inc. v. Vigilant Ins. Co., 521 S.W.2d 318, 321 (Tex. App. – Fort Worth 1975, no writ); Nutmeg Ins. Co. v. Pro-Line Corp., 836 F. Supp. 385, 387-88 (N.D. Tex. 1993).

22 *See, e.g.*, CNA Casualty v. Seaboard Sur. Co., 222 Cal. Rptr. 276, 281 (Cal. App. 1986, rev. denied) (allegations in antitrust suit of insured's misrepresentations regarding the claimant's "business, property and rights" was potentially covered as libel, slander or other disparaging material); Bankwest v. Fidelity & Deposit Co., 63 F.3d 974, 981 (10th Cir. 1995) ("publication of disparaging material" offense was broad enough to include publication of any false statement – *i.e.*, insured's letter to other banks incorrectly stating that they were estopped from loaning the claimants ad ditional monies – that harmed the claimant's pecuniary interests, even if statements did not themselves directly attack the claimant's character or reputation); Towne Realty, Inc. v. Zurich Ins. Co., 534 N.W.2d 886, 891 (Wis. App. 1995) (libel/slander offense alleged even though claimants did not expressly allege a cause of action for libel or slander, when they did allege their reputations had been maligned, thereby implying publication of some false or misleading statements about them, and that they could no longer engage in their chosen profession, which when coupled with the allegations of maligned reputations, suggested that their services had been disparaged), *aff'd in part, rev'd in part on other grounds,* 548 N.W.2d 64 (Wis. 1996); Tews Funeral Home, Inc. v. Ohio Casualty Ins. Co., 832 F.2d 1037, 1044 (7th Cir. 1987) (allegations of false, misleading, defamatory and disparaging statements about the claimants' business, products and services potentially alleged tortious interference, antitrust, libel per se and libel per quod causes of action covered under a policy insuring liability for damages for "libel, slander, defamation … [and] unfair competition").

23 *See* Truck Ins. Exch. v. Bennett, 61 Cal. Rptr. 2d 497 (Cal. App. 1997) (although "[t]he term 'disparagement' refers to the twin torts of trade libel and slander of title," nonetheless refusing coverage for slander of title, holding instead that the "personal injury" offenses were directed to injuries to reputation, and not to pecuniary losses due to the reduced vendibility of property).

24 *See* Royce v. Citizens Ins. Co., 557 N.W.2d 144, 148 (Mich. App. 1996) (coverage for tort of "slander" under Michigan homeowners policy included torts of slander of a person's reputation, and slander of title of property); Atlantic Mut. Ins. Co. v. J. Lamb, Inc., 123 Cal. Rptr.2d 256, 270 (Cal. App. 2002) (holding that allegations that the insured contacted the claimant's customers and falsely accused the claimant of violating the insured's patent was a covered disparagement, noting that "injurious falsehood, or disparagement … may consist of the publication of matter derogatory to the plaintiff's title to his property, or its quality, or to his business in general") (quoting Nichols v. Great Am. Ins. Cos., 215 Cal. Rptr. 416, 419 (Cal. App. 1985, rev. denied)).

25 *See* Winklevoss Consultants, Inc. v. Federal Ins. Co., 11 F. Supp. 2d 995, 999 (N.D. Ill. 1998) (defining disparagement offense as "a statement about a competitor's goods which is untrue or misleading and is made to influence the public not to buy").

26 Hurlbut v. Gulf Atl. Life Ins. Co., 749 S.W.2d 762, 766 (Tex. 1987); *cf.* Lamar Advertising Co. v. Continental Casualty Co., 396 F.3d 654, 664 (5th Cir. 2005) (observing that Louisiana law "does not recognize disparagement as an independent tort," but other jurisdictions equated it with "defamation of the quality of goods or services," and proceeding to analyze coverage claim against framework of elements of defamation under Louisiana law).

27 *See* Prudential Ins. Co. of Am. v. Financial Review Servs., Inc., 29 S.W.3d 74, 81-83 (Tex. 2000).

NOTES

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