

October 1, 2004

Deborah A. Garza
Chair
Antitrust Modernization Commission
Fried, Frank, Harris, Shriver & Jacobson, LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Re: Proposed Agenda Items for AMC

Dear Commissioner Garza:

I am Professor of Law at St. John's University School of Law and of counsel to Morgan, Lewis & Bockius LLP in New York City. I have worked in the antitrust field for nearly 30 years. I was pleased to have heard your talk at the ABA Antitrust Section Post-Annual Meeting at the Sagamore in August and write pursuant to your request for suggestions.

As a threshold matter, I believe that the AMC should undertake a comprehensive review of antitrust statutes, procedures and enforcement policies. This is not to suggest that radical change is needed, although some change is clearly necessary; rather the Commission should address what is working as well as what needs repair. Specifically, the AMC should address the following areas:

A. Remedies

1. The continuing need for mandatory treble damages;
2. The desirability of contribution and claim reduction in antitrust cases;
3. Equitable remedies in monopolization cases, including guidance for the granting of structural relief in monopolization cases to address the difficult issues raised by *Microsoft* and "the New Economy."
4. The continuing viability of *Illinois Brick* and *Hanover Shoe*.
5. The harmonization of intellectual property and antitrust doctrines.

B. Procedural Issues

1. Creating a jurisdictional vehicle for bringing all antitrust cases – federal and state – arising from a common nucleus of operative fact before a single federal judge so as to avoid multijurisdictional, multidistrict litigation.
2. Repeal of *Lexecon*.
3. Measurement of attorneys' fees.
4. The role for specificity in pleading in antitrust cases.

C. Exemptions

1. The baseball exemption
2. McCarran – Ferguson
3. Capper – Volstead
4. The State Action Doctrine
5. *Noerr – Pennington*
6. NCRA
7. Recent exemptions for standard setting
8. Local Government Antitrust Act of 1984.

D. International Issues

1. The FTAIA
2. Harmonization of enforcement policies and substantive rules with agencies abroad.
3. Cooperation with foreign authorities, including bilateral and multilateral agreements.

E. Substantive doctrine

1. Repeal of Robinson-Patman
2. Tying
3. Resale price maintenance
4. Standards for proof of conspiracy
5. Standards for applying the “Rule of Reason”

F. Mergers

1. Formal division of labor between the DOJ and FTC in merger review.
2. Hart-Scott-Rodino thresholds.
3. Issues created by multijurisdictional review in cross-border mergers.
4. States role in mergers.

5. Merger review by agencies other than DOJ and FTC

G. FTC

1. The continuing need for an antitrust function at the FTC.
2. Granting broader remedial authority to the FTC.

H. Agency Guidelines

1. The need for guidelines.
2. Whether agencies actually follow their guidelines.

Thank you for this opportunity to express my views.

Sincerely,

Edward D. Cavanagh

EDC/fec

cc: Andrew J. Heimert
Executive Director and General Counsel