

ANTITRUST MODERNIZATION COMMISSION

COMMISSION MEETING

Thursday, July 28, 2005

Federal Trade Commission Conference Center
601 New Jersey Avenue, N.W.
Washington, D.C.

The meeting convened, pursuant to notice, at 9:08 a.m.

PRESENT:

Deborah A. Garza, Chairperson
Jonathan R. Yarowsky, Vice-Chair
Bobby R. Burchfield, Commissioner
Dennis W. Carlton, Commissioner
Makan Delrahim, Commissioner
Jonathan M. Jacobson, Commissioner
Donald G. Kempf, Jr., Commissioner
Sanford M. Litvack, Commissioner
John H. Shenefield, Commissioner
Debra A. Valentine, Commissioner
John L. Warden, Commissioner

ALSO PRESENT:

ANDREW J. HEIMERT, Executive Director and
General Counsel

WILLIAM F. ADKINSON, JR., Counsel

TODD ANDERSON, Counsel

ALAN J. MEESE, Senior Advisor

HIRAM ANDREWS, Law Clerk

KRISTEN M. GORZELANY, Paralegal

These proceedings were professionally transcribed by a court reporter. The transcript has been edited by AMC staff for punctuation, spelling, and clarity.

P R O C E E D I N G S

MR. HEIMERT: I would like to call the Antitrust Modernization Commission meeting to order.

I would like to note a quorum. We have ten Commissioners currently present, so we will begin the brief meeting.

Chair Garza?

CHAIRPERSON GARZA: The agenda for this meeting is consideration of a proposal to add an issue relating to criminal law and the Sentencing Guidelines. Jon Jacobson, as the antitrust representative of the Criminal Study Group, will you please present the proposed issues?

COMMISSIONER JACOBSON: Yes. Thank you, Madam Chairwoman.

The issue we propose for consideration is, should the statutes and guidelines establishing criminal fines for price fixing and related offenses be amended in light of the Supreme Court's decision in *Booker* and other developments?

We propose looking at the system of fines for a few very significant reasons. First, there are questions as to the current system that are important. Those questions are: Should we have a sentencing scheme, as we do today,

that does not make distinctions on the basis of culpability? The fine system in particular – and this is also true in the case of sentences for individuals – has no factor, as a practical matter, for culpability. In the case of corporate fines, the system is based on a percentage of sales, 20 percent of the defendant's sales multiplied by various factors set forth in the Sentencing Guidelines. Few, if any, of these factors have any direct relationship to culpability.

I'm not saying that is the wrong way, and the study group is not saying that is the wrong way to do it, but it is an issue. It is a fair question: Should culpability be a consideration in federal antitrust sentencing?

Second, if we are looking at fines calculated on the basis of 20 percent of the defendant's sales, which is the principal factor that you look to under the Sentencing Guidelines today, is that an appropriate way of measuring a fine in a criminal antitrust case? Twenty percent of sales not only is a factor that does not take into consideration culpability, but it also does not take into consideration profitability in a particular industry, such as in the *Vitamins* case, in which the purported margins that were

argued that were raised by the vitamin cartel were well in excess of 20 percent. One can imagine industries where margins are vastly lower, where 20 percent would be grossly disproportionate to the harm that a cartel in those industries would have caused. Again, we are not saying that 20 percent is wrong; we are saying that maybe it ought to be looked at, however.

Third is an important legal issue that is also out there and is open. That is, to get a fine in excess of \$100 million, the statutory device for doing that is 18 U.S.C § 3571(d). That statute says that the fine is either the amount stated in the basic statute here, \$100 million in the case of corporate fines, or "double-the-gain, double-the-loss" from the offense. It is unclear whether "double-the-gain, double-the-loss" means double-the-gain attributable to the defendant's sales, or double-the-gain, double-the-loss attributable to the sales of the entire conspiracy. There are legitimate arguments both ways on that.

So we have three issues of some magnitude in the sentencing scheme that are out there. When we first looked at these issues, we had anticipated that the *Booker* decision might have had an impact on the entire sentencing regime for antitrust cases. It turns out that that is not the case.

It is not the case for two reasons. One, under *Booker*, of course, the Sentencing Guidelines remain in place on an advisory basis. Second, under *Booker*, the Sentencing Guidelines are particularly important for fines that are less than the statutory maximum of \$100 million. So you have the same issue of percentage of sales and culpability post-*Booker* that you had pre-*Booker*.

Third, and most fundamentally, these issues are not capable of serious judicial or other review under the current system. As a practical matter, the Modernization Commission is the only body, and certainly, as today constituted, the best-situated body, to study and address these issues.

Why is that the case? The Justice Department has in place a very effective device that it uses in criminal cases. No one is suggesting that this be changed, but it does have an impact on one's ability to review these issues. That system is, you get the best deal if you get amnesty; you get the second-best deal if you are the first to plead guilty; you get the next best deal if you are the second, *et cetera*.

This creates an enormous pressure to accept the Justice Department's position in these cases and to

negotiate on the basis of 20 percent of sales, double-the-gain, double-the-loss from the entire conspiracy. And there are severe penalties associated as a practical matter with contesting the Justice Department's position on these issues. That is compounded by the fact that, in the current administration of criminal antitrust enforcement, the political appointees, the Assistant Attorney General in particular, tends to abstain from any consideration of criminal antitrust matters. Those are handled at the career level. Fundamentally, the ultimate decision-maker is the Deputy Assistant Attorney General for Criminal.

As a result, we have three issues that are serious issues associated with the sentencing scheme. They are not subject to political review within the Justice Department system. They're not subject to judicial review as a practical matter, because of the great penalties associated with contesting the Justice Department staff's position. They are issues that have never really reached the radar screen of the Sentencing Commission in any material way. We have here a Commission that is charged with studying the antitrust laws and determining whether they need to be modernized, reviewed, or remain the same.

So, for those reasons, we propose a one half-day

hearing on these issues, substantive consideration of the question that I posed at the outset, and a chapter, which may be brief, in the book addressing our conclusions on these issues. In my judgment, this would be an extremely effective use of this Commission's time and mandate.

CHAIRPERSON GARZA: All right. Does any Commissioner wish to put a question to Commissioner Jacobson or make a comment? Commissioner Litvack?

COMMISSIONER LITVACK: I tend to have some reservations here. I guess my main reservation is, it would seem to me that the question of whether the volume to be implicated is that of the defendant or of the whole conspiracy is a question that the courts are perfectly able to decide. And I do not know what we would be saying or doing unless we are going to decide not merely what is desirable, but what was meant.

You make the point – if I understand you correctly – that, as a practical matter, this is not going to get decided by the courts because of the various pressures that you point out in the negotiating process. But I listen and I say, yeah, but that's always the case. I mean, that is the nature of the negotiation. And, by the way, I think someday someone will come along and say, I do not care. I'm

going to test it. I do not think that's what it is, *et cetera*. It just seems to me that it might be the better course to let the courts decide it, rather than having this Commission do...what? I am not exactly sure.

COMMISSIONER JACOBSON: There are the other issues that I mentioned, Commissioner Litvack. In addition, there have been some cases on the double-the-gain, double-the-loss issue. They have been largely unreported cases. A majority of the small number of cases has gone adverse to the Justice Department. It has not changed the Justice Department's thinking. Somewhat like the Commissioner of Internal Revenue, they have non-acquiesced in those decisions. I think the prospects for getting a meaningful appellate decision on that one of the three issues are possible, but somewhat remote. In any event, that appellate decision, should it ever come, would benefit from the analysis of this expert body when evaluating those issues.

CHAIRPERSON GARZA: I also have reservations about adding these issues. I share Commissioner Litvack's view on the question. And I am a bit concerned that it seems like the real issue is a concern about the way that the Department of Justice is choosing to exercise its prosecutorial discretion. As Commissioner Litvack says,

that is always an issue in dealing with the government, so I am reluctant on that ground.

But there are a few other things that concern me. One is that when we first decided to wait and reconsider this issue, it was on the basis that we wanted to see whether *Booker* itself really changed anything or caused any problems that would be useful for us to address, and we wanted to see how that developed. These issues, most of them, seem to me not really to be directly related to the *Booker* decision.

The other thing is, I am not sure I see the compelling reason to look at it. I agree with you that these are serious questions and questions that will be subject to litigation probably, and debate. But my concern is that they do not rise to the level that people are concerned that what is happening now is fundamentally affecting the optimality of antitrust enforcement today. I mean, it is interesting that today we are talking about, on the civil side, issues of contribution and culpability and whatnot, and that will sort of mirror these. While we have not reached any conclusion on issues, it is interesting to me that we really have not seen from the testimony and the statements a great hue and cry that there is a need, in *per*

se cases, to deal with unfairness with the no-contribution rule or anything else. I'm not sure that I see why there is a compelling interest to deal with those issues in the criminal enforcement area where it seems as though there is a large degree of consensus that that is one place where antitrust enforcement is correct today.

COMMISSIONER JACOBSON: I'm reluctant to be the only speaker on this, but let me just make a couple of brief points. First, there was a thought pre-*Booker* that the 20 percent and Section 3571, double-the-gain, double-the-loss, would just go, that *Booker* would dispose of those issues entirely and send the whole scheme back to the drawing board, so to speak. The way the opinion is written, that is necessarily not the case. These issues are back in pretty much *in haec verba* to what they were before. In fact, the Deputy Assistant Attorney General has given a speech saying, basically, there has been no change.

Second, it is unlikely to hear a hue and cry from criminal antitrust defendants that they have paid too much in a fine for a couple reasons. One, they are not a popular audience. Two, it is not a great message to shareholders to say that the X dollars I just agreed to pay was really too much, but I was coerced into doing it. It goes back to my

basic point that these are issues; no one else is going to look at them.

A decision of this Commission not to look at them is not a substantive decision that what the Justice Department is doing is correct, which it may well be. But we should not kid ourselves that a procedural decision to pass on this is any different than a substantive approval of the process as it exists today.

CHAIRPERSON GARZA: Commissioner Burchfield?

COMMISSIONER BURCHFIELD: I support looking at this issue, and the reasons will echo Jonathan. But to elaborate on something that he has said, and respond to some of the comments that were made, it is the case in virtually all of the issues that we are addressing that the courts may ultimately get around to addressing these issues, or that Congress may ultimately get around to addressing these issues. But the purpose of this Commission is to, in an objective way that tries to take into account the interests of the prosecutors and the institutional interests of the law and the interests of the regulated community to evaluate those interests and put forward an objective neutral analysis. We may come out with the view that the Justice Department is pursuing this exactly correctly. But given

the ratcheting up in criminal fines over the last few years, and given the controversy that surrounded the *Booker* decision, and given some legitimate questions that had been raised about the way the Sentencing Guidelines treat the double-the-gain, double-the-loss provision in the statute, it seems to me to be a very important issue. The Justice Department has made clear that cartel enforcement is its highest priority. These are going to be issues that presumably are going to be increasingly at the forefront of antitrust enforcement over the next several years, and whether we end up agreeing with the Justice Department, or we end up making proposals for revisions, this is an issue that is significant, and in my view, it is going to become increasingly significant over time.

CHAIRPERSON GARZA: Commissioner Kempf?

COMMISSIONER KEMPF: I have the same reservations that the Chair and Commissioner Litvack have, but I would nonetheless support allocating a half-day hearing to this for reasons that Commissioner Jacobson outlined. That is, that by just taking a pass on it, we in effect are making a substantive decision. I may end up concluding that no action should be taken for the reasons that the two of you have raised as concerns and which I share as concerns. But

I would rather do that after hearing further thought on it than just by dusting it off the agenda.

COMMISSIONER LITVACK: I just wanted to clarify one thing. It may well be, as Commissioner Burchfield says, that the courts will end up commenting, deciding, or dealing with a number of the issues we are facing. The difference that I perceive here is that you have placed before us specific language and said, it is unclear; interpret it, and that is not our job. That is where I have a problem.

CHAIRPERSON GARZA: Commissioner Valentine?

COMMISSIONER VALENTINE: I ultimately am somewhat loathe to undertake additional issues, but I actually also am of the opinion of Commissioners Burchfield and Jacobson, that this is one that tends to not get much political light. The Justice Department does tend to get what it wants when it goes to Congress on these issues, and it is something that is often difficult to stand up to and defend on the other side.

On the other hand, if we are looking at issues of contribution, I, in a sense, come out differently from you. I think whether one has joint and several liability and contribution are issues that go not only to unintentional but also to intentional torts. I think when we think about

possibly trebling in contexts of class actions following these things, we are raising some of the issues as to what the proper and fair way to punish individuals and corporations is.

I think if we are doing all the other issues we are doing, I do not see how we cut this one off at the legs and not undertake it as well.

VICE CHAIR YAROWSKY: I will just be brief. I think this really goes to kind of an efficiency question about how many subject areas we can cover. There are so many areas about discretion with the enforcement agencies, as opposed to mandatory actions that they take, because there is a procedure or system that compels action.

My view on this is that I also, as Commissioner Kempf, think we could afford a half-morning or half-day hearing. Then, as with all of these subjects, we can make an independent decision about whether we want to go forward and actually address it in the report. I know there seems to be a sense of inevitability. If you start a hearing, that starts the chain, and then we will write a chapter in the report. I think we can make that judgment after the hearing if we want to do that or not. I guess I would come down to recommend a hearing.

CHAIRPERSON GARZA: The one thing I would say is that a half-day hearing is a lot more days of staff work and Commissioner work. I do think that, having had hearings, it will make it difficult not to address the question in the report.

You know, there are a lot of significant issues that have been proposed to us to consider that we have decided not to consider, in part because we have to make decisions as to how best to allocate our time. We have a very full plate now. So, part of what I look at is, how compelling is the need to do it? I agree that it would be nice for us to look at everything. And I agree that there is obviously a relationship between the criminal penalty system and the civil penalty system; they work together. But in addition to the other things I mentioned, I am concerned about the load, frankly, that it is putting on the Commission and our ability to treat it with the amount of resources that we need to properly develop it.

Commissioner Carlton?

COMMISSIONER CARLTON: I guess I agree with both the people who want to study it and the people who are fearful that our plate is too full. So, I really have a comment, or really a question. That is, many of these

concerns are intimately related to remedies that we are going to be talking about this afternoon. The memo does not raise a topic that seems intimately related to the question, and that is, the tradeoff between criminal and financial penalties as a deterrent measure. That seems like a very important topic that the remedy section that we are talking about this afternoon should deal with.

So my question is, rather than having a separate day of hearings, is it possible to include these as questions without having additional hearings? In other words, the topic that is raised, namely, the optimal deterrence in particular for certain types of antitrust violations, most especially cartels, seems like an appropriate topic that could be studied as part of the remedies chapter. It is not obvious to me that we need additional hearings. I am wondering if we can not just sort of slightly broaden the set of questions that we are addressing in the remedies section to include some of these without having hearings. That is the first question.

And the second part of the question is, in the memo it appears we are excluding the tradeoff between criminal and monetary fines, and I was not sure if that was intentional.

COMMISSIONER JACOBSON: I am not sure of the distinction you are making between criminal and monetary fines.

COMMISSIONER CARLTON: Jail and money.

COMMISSIONER JACOBSON: The focus of the memo was largely on corporate fines, which is just money. The culpability issue, as I mentioned, does affect both the individual sentences, jail, and the corporate fines. But the focus of the questions posed – and I think the question of largest uncertainty in the practice area today – is in the corporate fine area. The individual fines, although the Sentencing Guidelines do not provide for consideration of culpability factors in any meaningful way, seem to work out in a way that the Justice Department at least would say – and I do not think anyone could significantly rebut – does take into consideration culpability factors. Where you do not see that, at least I would submit, is on the corporate side.

On whether we have hearings as opposed to submitting questions on this, I guess my preference would be to have hearings. I believe we are covering the relevant remedies issues in today's hearing, so timing-wise it would be difficult to set up questions.

I understand the issue of staff time. I do think these issues are comparatively narrow and can be addressed quickly. If there is a problem of taking on too many issues, which is a subject I think you have heard me on before, I can name about 20 I would like to drop, but -

[Laughter.]

CHAIRPERSON GARZA: Commissioner Shenefield.

COMMISSIONER SHENEFIELD: All I would like to say is that, with respect to Don Kempf, I agree with him 100 percent.

COMMISSIONER JACOBSON: That has a way of changing Don's mind.

COMMISSIONER SHENEFIELD: We ought to just get on with this, have a hearing. Let's get it done.

CHAIRPERSON GARZA: Do any other Commissioners have comments?

Commissioner Delrahim, would you care to comment?

COMMISSIONER DELRAHIM: I support that. I mean it is something that - it is not an issue that the Justice Department does not think about. In my day job, at least currently, sitting on the appellate issues of a lot of these cases that come up, that is something we think about. But we thought about it a lot more prior to the legislation that

just passed that raised the penalties up to \$100 million, so there is less of an *Apprendi* issue, but I think it is a very legitimate issue.

My concern – and I think it an important one – is from the standpoint of, does it incentivize more conspirators to come to the Justice Department and blow the whistle on a cartel? Will it increase detection by having a narrower view of twice-the-gain, twice-the-loss, or what kind of an attribution to the gains or losses – is it all conspirators, or that particular one? And that's a legitimate question.

The concern is that you would go to Congress, and whatever the Justice Department wants, it will get, having dealt with this from the legislative side as well. So that is, I think, a legitimate issue. As Commissioner Valentine said, this is not necessarily a constituency that has a lot of voices. There is not a trade association for cartel conspirators, and if they do have one, they just do not have a lot of pull in Congress.

So that is the only concern from a practical standpoint. But I think it is a fascinating issue, especially post-*Booker*, and it is something to look at.

CHAIRPERSON GARZA: Commissioner Warden?

COMMISSIONER WARDEN: I favor having the hearing and adding the issue.

CHAIRPERSON GARZA: To make it formal, can I see, by a show of hands, those Commissioners who desire to have a hearing and pursue the issues as outlined?

[Show of hands.]

CHAIRPERSON GARZA: In that case, then let the record reflect that we shall do it. We will put it on the agenda.

I apologize to our panelists for the delay. We will try to make up for it and to give us all adequate time to cover the issues that we want to cover today.

I am sorry. Andrew tells me I need to actually adjourn the meeting. The meeting is adjourned.

Having done that, now we will shift into the hearings.

[Whereupon, at 9:37 a.m., the meeting was adjourned.]