

ANTITRUST MODERNIZATION COMMISSION

DELIBERATIONS MEETING

Monday, May 8, 2006

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

Pursuant to notice, the meeting convened at 9:36 a.m.

PRESENT:

DEBORAH A. GARZA, Chairperson  
JONATHAN R. YAROWSKY, Vice-Chair  
BOBBY R. BURCHFIELD, Commissioner  
W. STEPHEN CANNON, Commissioner  
DENNIS W. CARLTON, Commissioner  
MAKAN DELRAHIM, Commissioner  
JONATHAN M. JACOBSON, Commissioner  
DONALD G. KEMPF, JR., Commissioner  
SANFORD 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

MARNI KARLIN, Counsel

ALAN MEESE, Senior Advisor

HIRAM ANDREWS, Law Clerk

KRISTEN M. GORZELANY, Paralegal

C O N T E N T S

**Discussion of Criminal and Civil Remedies Issues**

|                                     | <u>PAGE</u> |
|-------------------------------------|-------------|
| Welcome .....                       | 4           |
| Criminal Remedies Issues .....      | 13          |
| <u>Civil Remedies Issues</u>        |             |
| Government Civil Remedies .....     | 101         |
| Indirect Purchaser Litigation ..... | 155         |
| Treble Damages .....                | 220         |

These proceedings were professionally transcribed by a court reporter. The transcript has been edited by AMC staff for punctuation, spelling, and clarity. All Commissioner votes and views transcribed herein are subject to change or modification.

## P R O C E E D I N G S

CHAIRPERSON GARZA: Because I know that there are some people who have to leave promptly, and some have to leave a little bit before 5:30, let's get started right away.

I want to welcome everyone to the Antitrust Modernization Commission's first meeting to deliberate on findings and recommendations.

About 16 months ago the Commission met in this room to select the topics it would study to report to Congress and the President. We adopted an ambitious agenda broadly covering the antitrust waterfront, including ten general topics and 26 specific issues. We have received comments from 125 entities, including U.S. Congressmen, federal and state antitrust enforcers, foreign enforcers, the American Bar Association, the American Antitrust Institute, the U.S. Chamber of Commerce, the International Chamber of Commerce, the Business Roundtable, and many others. We held 12 days of public hearings, heard from 26 balanced panels of 110 witnesses from the enforcement, consumer, academic, business, and legal communities.

Today we begin the challenging but I think exciting task of formulating our conclusions. We've decided to begin

with the following three interrelated areas:

First, criminal remedies, specifically issues relating to the determination of fines under the Advisory Sentencing Guidelines; second, whether to recommend the creation of a civil fine authority for the DOJ and the FTC; and third, issues relating to private civil litigation, including issues related to indirect purchaser actions, treble damages, prejudgment interest, attorneys' fees, contribution, and claim reduction.

Essentially, we're considering whether our current system of private and public enforcement remedies in the U.S. is achieving optimal deterrence, neither chilling pro-competitive or competitively neutral conduct, nor failing to deter and stop conduct that is truly pernicious to a thriving competitive marketplace, and in an efficient manner.

It seems a particularly interesting time to be considering these matters given that the European community is currently engaged in its own evaluation of these issues in connection with a proposal to introduce a stronger element of private enforcement in the EC.

We've divided the time for deliberations today as follows: about 1.5 hours to begin with on criminal remedies;

1.25 hours for government civil penalties; two hours for indirect purchaser issues; and two hours for damages and other related civil litigation issues. Those are approximate times. We'll have to start and go through it and see if we need to make any adjustments.

Let me quickly go over a few process points. First, pursuant to the Federal Advisory Committee Act, our deliberations are being conducted in public. They're also being transcribed, but we will not be taking comments from the public during today's meeting.

Second, the Commissioners have had for their review all of the witness statements, transcripts of the hearings and the public comments submitted to date. For the benefit of the public, all of those materials are available on the AMC website.

In addition, AMC staff prepared two sets of documents for each of our three issue areas in order to assist the Commissioners in deliberations. The first set of documents contains memoranda summarizing the major arguments from the hearings and the public comments. The second set of documents contains discussion outlines setting forth possible findings and/or recommendations as appropriate, derived from

the comments and the testimony received. The discussion outlines are intended to help focus and facilitate the Commission's deliberations today. They are not intended to be exhaustive. They do not preclude any Commissioner from proposing, or the Commission from adopting, any findings or recommendations not listed by the staff in the memo.

The deliberations can be expected to narrow, improve, and/or spur additional or different ideas. I personally found them to be helpful in organizing my own thinking, but then in some cases I know I had ideas that were slightly different from those that were provided, and I expect that's the case for many or most other Commissioners and that that will be a subject of productive deliberations.

Commissioners also were invited to submit in writing any additional options they wish to have discussed today, but no Commissioner was required to submit anything in writing in advance.

Copies of the staff's memoranda and the deliberation outlines are available to the public on the table outside at the entrance, and they're also on the AMC website.

Finally, here's how we plan to proceed in order to

ensure first that each Commissioner has an adequate opportunity to express his or her views, and second, that we come out of today with a clear idea of where we are, for example, whether we have adopted consensus recommendations, possibly with variant views to be fleshed out by the staff working with the study groups, or having decided to direct the staff to seek additional information of public comment for the purpose of a further deliberation layer.

On the reasonable assumption that each Commissioner is familiar with the discussion outlines, we will begin by asking each Commissioner to indicate initially which if any options he or she endorses or would like to discuss further, and/or whether he or she would like the Commissioners to consider an alternative approach.

Thus, for example, in regard to private litigation issues one Commissioner might say that he or she believes the Commission should find the current system is working reasonably well and that there is insufficient evidence to recommend any change. A second might say that he or she finds the evidence shows a need for change, and supports change along the lines of one of the possible recommendations. A third might say that he or she is

undecided and would like to hear discussion of two or three options. A fourth might propose that private litigation is inefficient, and all enforcement jurisdictions should reside in the government. In other words, with respect to the deliberation outline, none of the above.

You might compare this process to jury deliberations, where the 12 jurors indicate their initial leanings in order to facilitate the discussion or what otherwise might be an unmanageable record so that we can actually arrive at a verdict within a reasonable period of time.

Because the process is intended to gain an initial understanding as to each Commissioner's views, I ask that each Commissioner keep his or her response very short. There will be time to expound later, but initially let's try to learn the basics of where we all are, where there is consensus or rough consensus and where the differences might be.

At this point, Commissioners should - and I'm talking about the initial three minutes - at this point Commissioners should focus on the broad concepts rather than wordsmithing the discussion outline. There will be time for

wordsmithing later once we determine where we are on the concepts.

Once we have assessed in a general way where there may be areas of consensus and disagreement, we'll have more open discussion to provide each Commissioner with an opportunity to explain his or her view or to put questions to other Commissioners or the staff.

Our purpose, of course, is to ensure that Commissioners understand each other's views, and that all views and alternatives are sufficiently developed, and that the staff and study groups understand their action items coming out of the meeting.

Andrew will try to facilitate the discussion to that end. To get the ball rolling, based on what we hear, the Commissioners' initial indications, he will begin by inviting Commissioners to elaborate on their views with respect to certain issues. Other Commissioners will also have an opportunity to comment. In order to ensure a clear transcript and an orderly discussion, and sufficient opportunity for each Commissioner to contribute to the discussion, I ask that each Commissioner attempt to limit his or her comments to a few minutes. In addition, each

Commissioner should wait to be acknowledged by Andrew, the Chair, or the Vice Chair, before speaking. These flags have been provided in order for you to indicate that you'd like to speak.

At an appropriate point I will call for a summing up by Andrew of where we are, e.g., whether there's a majority view to take a particular recommendation or recommendations, or whether further comment or information is desired before a decision. To ensure that all Commissioners understand what has been concluded and to provide sufficient guidance to staff, we need to be clear as to what recommendations, if any, the majority of the Commission wishes to make, and the basis for those recommendations - which Commissioners agree or disagree with a particular recommendation and the bases for minority or variant views so that they can be reflected in draft findings and recommendations.

As previously indicated, the Commission's final report will reflect both the majority view and differing opinions, so any Commissioner who is in the minority on a particular recommendation will have his or her views reflected appropriately in the Report's discussion of the

recommendations. Staff will work with all Commissioners to ensure that the report includes appropriate descriptions of minority views.

I promise not to go on at this length in our next deliberation meetings, but I wanted to get down on the record how we were going to proceed and why, for the benefit of the public as well as for our own benefit.

I would like to note that there is a quorum. All 12 Commissioners are present. That's what I should have said before I began yapping.

Now, unless there are any questions about how we're going to proceed, there is an order that you all have. It's a page that looks like this. Andrew applied some sort of algorithm to make sure that everything was eminently fair, and so that's the order that we're going to go in, and again, this is for you to indicate, in a few minutes, essentially where you are in general, beginning with criminal remedies. You should have the discussion outline. So if you could just indicate, beginning with John Jacobson, where you are in terms of the discussion outline, and of course, any other issue that you want to raise -

#### **Criminal Remedies Issues**

COMMISSIONER JACOBSON: Thank you. First, I want to acknowledge the staff's superb research memoranda. I think I speak for all of the Commissioners in commending the staff on a job extremely well done. Those are available to the public, and are much appreciated by me certainly.

I'll elaborate more when I get my three minutes later, but in summary, my view on criminal is that we were not presented with sufficient evidence to upset the 20-percent Sentencing Guidelines provision. That - and this is outside the recommendations - I believe, for reasons I will explain, that we absolutely have to propose an amendment to 3571(d) to provide that it is not applicable to the Sherman Act; and that if for some reason 3571(d) is retained, in violation of the Constitution, in my judgment, I would clarify its application to specify that it applies to the defendant's sales only.

MR. HEIMERT: Commissioner Burchfield?

COMMISSIONER BURCHFIELD: I am also not persuaded that any substantial revision to the Sentencing Guidelines is necessary, and I do not currently support any revision to the Sentencing Guidelines. I would support Recommendation No. 2 under 1-A, in which the AMC would endorse continued

discretionary limitation of criminal prosecution to hardcore cartel activity.

I would also endorse a recommendation that the 20-percent proxy could be rebutted by proof that the overcharge was lower or higher.

As to 3571(d), I would not support an amendment to that, and I would recommend that the Sentencing Guidelines' interpretation be left to the courts, but I would clarify our view that in the event of a contested proceeding, use of the Guidelines to exceed the Sherman Act's statutory maximum of \$100 million would require proof beyond a reasonable doubt of the necessary elements in accordance with the *Booker* and *Fanfan* decisions.

MR. HEIMERT: Commissioner Litvack?

COMMISSIONER LITVACK: Well, I guess I would, at least for this side of the table so far, make it unanimous in terms of no need for an amendment to the Sentencing Guidelines.

I do not similarly think there's any need for us, as Commissioner Burchfield suggested, to endorse and recommend continued discretionary limitation of criminal prosecution by the DOJ to hardcore cartel activity, not

because I have an objection to it, but rather because I think it's unnecessary. That is what the Department has historically done, and I don't think it's either necessary or wise to comment on that.

As to the 20 percent, I too would favor an amendment to make explicit that the 20-percent proxy could be rebutted by proof that the overcharge was either lower or higher. I don't see any other change beyond that.

And as to 3571(d), I want to hear more. I must confess I am absolutely on the fence on that one and do not have a view at this point.

MR. HEIMERT: Chair Garza?

CHAIRPERSON GARZA: Similar to other people, I don't think there's any basis for us to recommend at this point a change to the - or a substantial change to the Sentencing Guidelines, although I would recommend a statement by the Commission endorsing strongly and recommending the continued discretion of the Justice Department to limit criminal prosecution to hardcore cartel activity.

On the 20-percent proxy question, my feeling is that it should state it is not a rebuttable presumption for the purpose of defining - selecting the base fine, and I,

like Sandy, would like to hear more on the 3571(d) question.

MR. HEIMERT: Commissioner Warden?

COMMISSIONER WARDEN: I also would opt for No. 2 under 1-A, that is, that we recommend no change in the Guidelines, but endorse the limitation of criminal prosecution to hardcore cartel activity. Under B I agree with the proposal that the Sentencing Guidelines should be amended to make explicit that the 20-percent proxy may be rebutted by proof, higher or lower.

Considering 2-B in isolation from some more general amendment to 3571(d), I favor the first alternative, recommend no change - leave it to the courts, and I would like to hear more on Commissioner Jacobson's position and other views on amendment of 3571(d), but my initial view is that if it is retained, it should provide that it applies only to the loss caused by the particular defendant.

MR. HEIMERT: Vice Chair Yarowsky?

VICE CHAIR YAROWSKY: By the time I appear in this line I can say that a lot of my views have been expressed generally. No revision to the Sentencing Guidelines. I would go with Recommendation No. 2.

I also like the suggestion stated by Commissioner

Burchfield and seconded by others about a rebuttable presumption. I do want to discuss or listen to folks more about how that might work, not just from an evidentiary standpoint - we can create our burden and what it takes to rebut the presumption - but how the litigation would work, and empirically, what would that really mean? But I like the suggestion, and I am now very much interested in our discussion about 3571. Don't want to state a position yet until we have a further dialogue.

MR. HEIMERT: Commissioner Delrahim?

COMMISSIONER DELRAHIM: I too don't believe we need any changes to the Sentencing Guidelines. However, I think in AMC's statement endorsing recommending continued discretion and limitation would be useful.

One thing I would do that is related to the last statement is for upward adjustment - not, however, to the Sentencing Guidelines. I would like to recommend that we recommend a statutory change, a mandatory minimum of the maximum fines allowed for those who take the leadership role in a cartel. I think that will send a stronger statement than the advisory guidelines after *Booker*.

With respect to B, I agree that we should recommend

that the Sentencing Guidelines be amended to make explicit that the 20-percent proxy may be rebutted by proof that the overcharge was lower or higher.

For 2-A, I would recommend amending the statute to provide that it applies to loss caused by an entire antitrust conspiracy. I think, again, we should send a stronger signal, especially in criminal charges like this. The statute should be clear.

For 2-B, I think the AMC should recommend amending, again, the Guidelines to require use of actual gain or loss if proven under 3571(d).

MR. HEIMERT: Commissioner Valentine?

COMMISSIONER VALENTINE: On our first issue, 1-A, I would go with the emerging consensus that we not change Sentencing Guidelines, and that we nevertheless endorse and recommend continued discretionary limitation of criminal prosecution by the DOJ to hardcore cartel activity.

On question B, with respect to the use of the 20-percent proxy, I do think it is a useful proxy. I would support the emerging consensus on making it explicit that the proxy may be rebutted by proof that the overcharge was lower or higher, but I would like some greater precision as to what

lower or higher than that would be. It seems to me that the 20-percent proxy is based on an assumption of a ten-percent overcharge, in which case I would think we would be looking for proof that the overcharge was substantially and significantly lower or higher than ten percent.

And, finally, on Question 2, I guess I would need more. I am currently coming out for no change to the statute. I would be interested in hearing the unconstitutionality claims, and I think that's it.

MR. HEIMERT: Commissioner Carlton?

COMMISSIONER CARLTON: On the first item, I like the second opinion on 1-A, where there is no change to the Guidelines, but the AMC endorses and recommends continued discretionary limitation of criminal prosecution by the DOJ to hardcore cartel activity.

On Item 1-B, although I'd like to hear a little bit more of the discussion, my current inclination is that I would be amenable to increasing the 20-percent proxy in light of evidence that cartel overcharges are higher than what the Sentencing Commission thought when they promulgated their results.

Under Item 2, on 3571, I'm less certain. I'd like

to hear the discussion. My current inclination under 2-A is to go with the second opinion, that we amend to provide that it applies to the loss caused by an entire antitrust conspiracy.

My views on 2-B are similar to what I said earlier on 1-B, where I would consider increasing the 20-percent proxy.

MR. HEIMERT: Commissioner Shenefield.

COMMISSIONER SHENEFIELD: On 1-A I would favor retaining the Guidelines, but including an endorsement of the discretion on 1-B. I would be for the rebuttable option on the 20-percent proxy on 2-A. I think it should apply to the entire antitrust conspiracy.

And on 2-B I think we ought to require use of actual gain or loss for proving - for calculation of the Guidelines' fine range.

MR. HEIMERT: Commissioner Cannon

COMMISSIONER CANNON: On 1-A I also am thinking no change, although I would really like to talk more about what Makan has proposed or is thinking about in terms of additional culpability for a leadership role in a cartel. I think that's an interesting concept.

On B, on 20 percent, I do like the idea of it being a rebuttable presumption, but want to hear a little more about that.

On 3571(d), I think I'm agreeing with Dennis and some others in terms of it applying to the entire antitrust conspiracy. I think that's where I would come out on that.

On 2-B, I think leaving that alone would be okay. That's it.

MR. HEIMERT: Commissioner Kempf?

COMMISSIONER KEMPF: On 1-A I would check the second box, like others, with no change but endorsement of the discretion to be exercised in hardcore cartel activity. I also, like Commissioner Cannon, would like to hear more about Commissioner Delrahim's suggestion that there be a mandatory minimum for ringleaders, so you can count me on that as well.

On 1-B, I'm of a split mind. I believe that there should be a rebuttable presumption, but I'm less confident that it should be a 20-percent test, and there's some part of me that would check box 2, that would have the elimination of the 20 percent and have it be subject to proof of an actual amount. But if there is a presumption of whatever percent

maintained, then I certainly would want it to be rebuttable.

On 2, I think I'm with Commissioner Jacobson, who said he would confine it to an individual antitrust defendant - at least that's where I am.

And on 2-B, I want to hear more, but again, I'm inclined to use the second box, the one using actual gain or loss.

CHAIRPERSON GARZA: Would you, starting with 1, just summarize where -

MR. HEIMERT: All right. I'll do my best to summarize where we are. It appears that there's a fair consensus for the second option, which is no change to the Sentencing Guidelines, but the AMC should endorse and recommend continued discretionary limitation of criminal prosecutions by the Department of Justice to hardcore cartel activity.

There was some call for discussion of the first option, which is essentially the same as the second option, except without the additional endorsement of limitation. I think that two Commissioners, maybe three, indicated some leaning towards that.

CHAIRPERSON GARZA: Could you please indicate who

you think those were?

MR. HEIMERT: Yes. I think I took Steve Cannon and Sandy Litvack to lean towards the first, but again, this is what I'm hoping to get some clarification on.

COMMISSIONER JACOBSON: And me.

MR. HEIMERT: I'm sorry. Commissioner Jacobson as well.

The third option was not - no one indicated a preference for that - to recommend amending the Sentencing Guidelines to add a statement clarifying that the Guidelines apply only to hardcore cartel activity.

And the fourth option, Commissioner Delrahim and Steve Cannon had some interest in further discussion of adding an upward adjustment, not in the form of something in the Sentencing Guidelines, but rather in the form of a statutory amendment that would call for a minimum sentence for those who take a leadership role in cartel activity.

COMMISSIONER KEMPF: Yes, and I was on board on that as well.

MR. HEIMERT: And Commissioner Kempf as well.

CHAIRPERSON GARZA: And there might have been others.

MR. HEIMERT: And others may also be interested in that possibility.

COMMISSIONER KEMPF: Except I don't think it was ever articulated as an upward adjustment. I think it was articulated as a mandatory minimum.

MR. HEIMERT: I think that's correct, but perhaps, Commissioner Delrahim, you could articulate further your proposal, and we could have a little discussion on that and see where we go with that.

COMMISSIONER CANNON: I was going to say I'm not sure about a statutory proposal as opposed to an upward adjustment.

MR. HEIMERT: Fair enough, and we'll have some discussion.

Commissioner Delrahim, go ahead, please.

COMMISSIONER DELRAHIM: I think just a statutory clarification that would say that for those who take a leadership role in a cartel who do not - and by the way, they do not qualify for the amnesty program at the Justice Department either - there shall be a mandatory minimum.

MR. HEIMERT: Commissioner Jacobson?

COMMISSIONER JACOBSON: My question is, it's

frequently difficult to distinguish the ringleader from other participants, and my own experience is that the ringleaders, as often as not, get amnesty. And so I find that I like the idea in principle, but I find it difficult to articulate how we would put that into words that would be operative at the end of the day.

MR. HEIMERT: Chair Garza?

CHAIRPERSON GARZA: Actually, I was going to raise - make the point that Jon made. Although I did personally think for a while about this recommendation about an upward adjustment because it has some appeal, and did wonder - and maybe other people could tell me - when I went back to look at, at least how the memo described that the sentencing worked, it wasn't clear to me that it would ever matter, because if you adjusted the culpability score to reflect leadership in the alleged cartel - as I read it, the highest culpability score would give you a range of two to four for the multiplier and the multiplier's capped at four, so it wasn't clear to me that it would actually do anything to add culpability for being the ringleader. So I did sort of like the idea of whether there's something to do in amending the statute, but I do, like Jon said, wonder how you would

actually articulate that as a statutory standard.

MR. HEIMERT: Commissioner Shenefield?

COMMISSIONER SHENEFIELD: Just a question. How would you calculate the minimum?

MR. HEIMERT: Commissioner Delrahim?

COMMISSIONER DELRAHIM: The sentence or the fines?

COMMISSIONER SHENEFIELD: What it is you're proposing.

COMMISSIONER DELRAHIM: I think it would be - two points for the proposal. One is, the Guidelines are advisory now. There's nothing binding on any court. A judge could depart or grant anything he or she may wish. The second is with respect to whether or not they're ringleaders. The Justice Department will go through a particular analysis to determine whether or not - as part of the amnesty program, assuming they have come in for that, there is already some evaluation of whether or not they are, it would still be up to the Justice Department to go to court and prove whether they're ringleaders or not to qualify for the mandatory minimum.

What it will do is that, for those where there's evidence to do that - often it will be the threat, where

there is strong evidence that they are a ringleader, for them to plead to a lesser charge more quickly, and probably come forth with evidence a little bit faster. When you have that threat of the mandatory minimum in drug cases and other areas, it's not always that the mandatory minimum is used; however, it's used where there's strong evidence to threaten cooperation by the defendant.

MR. HEIMERT: Commissioner Valentine?

COMMISSIONER VALENTINE: I guess I would repeat the question. I still don't understand what the number is for a mandatory minimum. A statutory mandatory minimum is the -

COMMISSIONER DELRAHIM: The statutory maximum.

COMMISSIONER VALENTINE: You said mandatory minimum.

COMMISSIONER DELRAHIM: Right, but the statutory maximum would be the minimum for those who are leaders of a cartel.

COMMISSIONER VALENTINE: Regardless of size of the cartel, commerce affected, *et cetera, et cetera*?

COMMISSIONER DELRAHIM: That's a good question. I have not given much thought as far as the fines go. As far as the penalty, it would be - again, there would be some

prosecutorial discretion exercised by the Justice Department whether or not they would want to send one of the three members of a cartel of a windshield replacement company down in Lubbock, Texas out for a ten-year fine, or rather they would use the statute to get cooperation faster, just as they have exercised discretion and not bring in criminal Section 2 cases where they have the authority.

MR. HEIMERT: Commissioner Yarowsky?

VICE CHAIR YAROWSKY: Makan, I just thought it would be useful, because I know you were deeply involved in the amnesty legislation, to talk about how that interacts with a mandatory minimum for a ringleader. I mean, empirically, how often would you envision a ringleader could actually get amnesty and kind of defeat the thrust of this?

COMMISSIONER DELRAHIM: Well, the ringleader would not get amnesty.

VICE CHAIR YAROWSKY: That's out of the question completely?

COMMISSIONER DELRAHIM: Yes.

VICE CHAIR YAROWSKY: Okay.

MR. HEIMERT: Commissioner Burchfield?

COMMISSIONER BURCHFIELD: It seems to me that one

of the challenges, when dealing with the cartel activity, is to identify the ringleaders. Cartels are, by their nature, collegial, cooperative enterprises. And I wonder whether in the normal case you're going to have clear evidence that one company, rather than all the companies, were the ringleaders. Does "ringleader" mean the entity that first hatched the notion of the conspiracy? Does it mean the entity that was most involved in coordinating the activities of the conspiracy? Does it indicate the entity that gained the most from the conspiracy?

It seems to me it's very difficult to pin down who the ringleader would be, and by nature, I think the law treats anyone who joins a conspiracy as equally at fault. And so I'm - although I'm not completely decided on this issue, I do see some problems with the way it would be administered.

MR. HEIMERT: Commissioner Jacobson?

COMMISSIONER JACOBSON: Briefly, amnesty decisions, although they're tentative, are made when the first person comes in. If the first person that comes in is someone who could properly be characterized as a ringleader, the information that the Justice Department gets that will form

the basis for its further investigation is coming from someone who is a ringleader. That's what happens in the real world.

Having said that, I think all of us are sensing that there is value to punishing the ringleader more than anyone else. I don't see how you can say, you know, it's \$100 million minimum fine for a ringleader because of the windshield company you mentioned. And Chair Garza has pointed out that the culpability factors are capped at four. One way to go about it is to make being a ringleader a culpability criterion not subject to the cap of four, and perhaps subject to a larger cap of six. I think we would all like to do something here. I think playing with the statute is difficult, and I would throw that out for further discussion.

MR. HEIMERT: Commissioner Carlton?

COMMISSIONER CARLTON: I'm worried about how you define a ringleader. If you look at the theory of cartels, you know, obviously, someone has to initiate a conspiracy to get everybody to go along. On the other hand, the largest firm in the industry, by just passively listening, and then acceding to what someone is suggesting, will have the most

important role in solidifying the cartel and making it successful, so that it seems to me a little odd to be defining as the ringleader the person who initially makes the call, let's all get in a room, when in fact, that person has no ability to affect a price increase without the activities and cooperation of the others.

And then when you start looking at who is most important in allowing a cartel to exist, that becomes very complicated, and it would certainly depend upon your market shares, so although I sympathize with what Makan is saying - you obviously want to deter this type of activity - I'm very worried about the difficulty of assigning culpability just based on sort of either circumstantial evidence or who made initial contacts, versus who went along and who participated, and what their willingness to participate was, which might not involve as much of an outward show of interaction and communication.

So I'm hesitant, therefore, to agree that we can write something clearly that will define what a ringleader is in light of the economic incentives of people to consider participating in a cartel, and it's really the guy who's most important in a cartel that you really want to hammer, and

that will destroy the cartel. So that's why I have misgivings, although I agree with the sentiment.

MR. HEIMERT: Commissioner Warden?

COMMISSIONER WARDEN: I agree with what Commissioner Jacobson just said. I do think that in some situations it is possible certainly to identify a ringleader, and there are cartels in which the participants are what you might call near-equals, rather than being a dominant company whose accession is crucial. There are situations in which a company takes the lead, both in organizing and then administering the cartel. And I could either accept what the Chairman said in terms of that can be evaluated presently under culpability, or what Commissioner Jacobson said, which is increase from four to six if there's a ringleader.

In some situations there won't be a ringleader. One thing I do think should be clear, however, is that, if there is a ringleader, the ringleader is not eligible for amnesty.

MR. HEIMERT: Commissioner Shenefield?

COMMISSIONER SHENEFIELD: I just want to state publicly that I'm very much sympathetic to the point that you're trying to make. I don't think a statute is the right

way to do it. I think the issue is now adequately reflected in the culpability calculation, so I would not be in favor of changing that.

MR. HEIMERT: Chair Garza?

CHAIRPERSON GARZA: You know, I think that Dennis's point is well taken, and the point of others, that on the one hand it can be difficult to identify and define what a ringleader is, on the other, sometimes the most important person to the cartel could be the last one in, because obviously, anyone can disrupt the cartel and destabilize it, and so in some sense those who choose not to do that are the most important, more important than the ringleader, or alternatively, there could be someone in the conspiracy who is actively enforcing it in some sense against others.

So it seems to me, when I think about it, that it really should be a case-by-case determination made by a court based on the evidence as to whether there are significantly different degrees of culpability, and as long as the Sentencing Guidelines provide sufficient flexibility for the court to do that, I think it's probably sufficient. I would be thinking about it now, leaning against any sort of statutory change.

I hadn't actually given much thought to the question of whether or not leniency should be precluded for the ringleader, and again, how we would define that.

COMMISSIONER VALENTINE: It's part of -

COMMISSIONER SHENEFIELD: It is precluded.

CHAIRPERSON GARZA: It is?

COMMISSIONER SHENEFIELD: It is precluded.

MR. HEIMERT: Commissioner Litvack, did you -

COMMISSIONER LITVACK: There's nothing much to add. Everyone has said it already. The only point I would emphasize is the point the Chair just made, which is, it is often best just to leave some discretion with the district court judge. One of the problems I think with the Sentencing Guidelines at times was their rigidity, and these are things that really - to try to generalize, I think one of the prime benefits is the one Makan identified, in that it would help the Department to some extent in its efforts, but the price of that would, in my view, be too high.

MR. HEIMERT: Should we try to test whether there's consensus? Commissioner Kempf, would you like to say something on this topic, please?

COMMISSIONER KEMPF: Yes. While I concur with much

of what Commissioner Carlton has said about the difficulties of determining the various factors he identified, I did not take Commissioner Delrahim's proposal to encompass a minute spelling out of all those factors, but rather a quite simple one that would leave that to the court. That being the case, I would be prepared to endorse it, notwithstanding the difficulties that have been identified, and leave the resolution development to the courts over time.

MR. HEIMERT: Does anyone else have something they wish to comment on?

CHAIRPERSON GARZA: Don, I'm not sure I understood what you were saying about Makan's proposal? Can you -

COMMISSIONER LITVACK: During his comments, Commissioner Carlton said, well, gee, how do you identify the ringleader? Sometimes the ringleader may be the guy who started it, but it's a bigger participant who is critical to its success, *et cetera, et cetera*.

And I'm not proposing that the person who is bigger - and you actually made some of those comments as well - be tagged worse. What I'm saying is, if you can take the person who is the prime mover, big or small, essential or not, and deprive - and say to those who are thinking about instigating

a price-fixing conspiracy and leading the others along, to me, that's the person you want to come down harshest on, because I think that will deter the activity from getting started in the first place.

And as to how precisely you would say, well, there is no ringleader in this particular conspiracy, or there are two ringleaders, or it's too hard to tell, I would just think I would leave all of those kinds of issues to develop by the courts in their sound judgment, and just have a simple articulation that if there is a ringleader who can be identified, that ringleader gets a minimum penalty. It's not an upward adjustment; it's just some minimum penalty of X.

MR. HEIMERT: Commissioner Delrahim?

COMMISSIONER DELRAHIM: Let me just add, the legal judgment of somebody being a ringleader or not a ringleader is already being made by the prosecutor bringing the charge in the amnesty application. That first step is already made.

Now, what is that? I don't know what Scott Hammond considers the biggest player - maybe that's a good question to ask the Justice Department, and I don't know how many amnesty applicants they have rejected based on somebody being a ringleader.

That could be useful to the Commission's deliberation in the report I think. Perhaps that could be something that, Andrew, we should send over to the Justice Department. How many have they rejected? Is that something they could share with us?

But the point of the statutory proposal is they make that judgment. They're the ones who bring the case. They're the ones who will prosecute it, and all the statutory minimum will do is when you make that determination on whether to grant amnesty based on this criteria or not, that person, in addition, will be facing certain enhanced penalties, not left to the discretion of the judge or the Sentencing Guidelines, but as part of the negotiations to get cooperation, that is something that is there.

Now, if there were only mandatory minimums I would oppose it because that just ties the prosecutor's hand, because when you have the windshield installer down in Lubbock, Texas, the prosecutor will say, this is just not fair, and this happens repeatedly in other areas. When you have several fines, one including mandatory minimums, one that does not include that, but allows discretion to the prosecutors to provide evidence of cooperation or

recommendations for lesser penalties to a judge, that is when mandatory minimums are most effective.

MR. HEIMERT: Commissioner Litvack?

COMMISSIONER LITVACK: I would only wonder out loud if someone comes in, thinking that they're not or may not be deemed the ringleader and will get amnesty, but doesn't, and nonetheless cooperates, that's taken into account. Why would that person have any incentive if they're wrong and now they face the \$100 million statutory minimum? It's a double whammy. I think it goes the other way.

MR. HEIMERT: Vice Chair Yarowsky?

VICE CHAIR YAROWSKY: I think Commissioner Burchfield beat me, but -

MR. HEIMERT: Oh, I'm sorry. Commissioner Burchfield.

COMMISSIONER BURCHFIELD: I continue to struggle with how this would be administered. It seems to me that in a conspiracy, there can certainly be more than one ringleader. It strikes me that if there is this mandatory minimum, it will devolve into yet another bargaining chip for the prosecutors to use to get people to come to the settlement table. I don't think that's the intention of the

proposal, but I do see that as the way it's ultimately going to be used. And if it's used that way, if a prosecutor with three or four potential ringleader nominees in a particular conspiracy uses it in that way, then it's going to result in greater disparities and greater uncertainty in the Sentencing Guidelines than we currently have.

So both for the reason of difficulty of identifying a ringleader in a conspiracy and the related issue that it does provide prosecutors with settlement levers that they don't currently have, which could lead to greater disparities in criminal sentencing, I think I'm still quite skeptical of the proposal.

MR. HEIMERT: Vice Chair Yarowsky?

VICE CHAIR YAROWSKY: Thanks. Some of my questions were really in that line that Commissioner Burchfield took.

Makan, here's my question. We all like your idea, I think, as a general proposition, so we're trying to flesh it out. How does one define a leadership role or a ringleader? I mean, not that you have to answer that. I think if we want to follow this, we all need to think about this. I mean if you can answer it now - but I would be very leery about having a floating definition that could be

manipulated one way or the other. And I think you could have multiple roles. I mean that's what we heard from a few Commissioners on that side.

So do you have any sense of how we should pursue this now or as we move forward about trying to get our hands around it?

COMMISSIONER DELRAHIM: I think the initial comment would be the initiator. You would like to nip it in the bud, and the initiator would be my first choice of a definition. However, I would defer to some of the experts at the Justice Department and ask them which factors they consider in denying amnesty because of somebody being a ringleader. I do agree - and hadn't really thought about it - that somebody with a lot of market power who would be critical to keeping the cartel going is an important part of that. But would that person have ever come to the table had somebody else not initiated, and who should be more culpable?

Those are important policy questions that I really don't have an answer for except that the initiator is the one that, in my mind, at least right now, would be the first person I would hold most culpable.

If there's enough evidence to prove that beyond a

reasonable doubt, then that's what the Justice Department should have the burden of proving.

MR. HEIMERT: Vice Chair Yarowsky, if you wanted to follow up.

VICE CHAIR YAROWSKY: I just wanted to follow on that.

COMMISSIONER VALENTINE: Can I maybe cut this short? I think my proposal would be that Andrew take a quick call around the table and see where the consensus is coming out. If it's worth pursuing things, then I'm more than happy to listen and hear them out, but it may not be worth pursuing them.

MR. HEIMERT: Vice Chair Yarowsky, you have one follow-up question, and then I think we can do that.

VICE CHAIR YAROWSKY: I could say this when you make the rounds. My thought was that - not to defer other decisions that we all can make today and this morning, but perhaps what we might want to do on this is get the DOJ's opinion and then revisit it.

COMMISSIONER DELRAHIM: And then just being familiar from both sides of *Pennsylvania* on that process, I wouldn't ask them on the legislative proposal, I would ask

them how they view the leadership definition and what goes into that factor because otherwise it will be six months before we get any answer, and there will probably be no answer.

MR. HEIMERT: All right. Why don't we try to test some consensus here and see whether we should pursue further Commissioner Delrahim's idea on this, and perhaps also modified by Commissioner Jacobson's alternative, which if I understood it correctly would call for an additional adjustment within the Guidelines, not necessarily subject to the current multiplier rule, and we would not be choosing between those at this point, but rather to study further Commissioner Delrahim's proposal, Commissioner Jacobson's proposal, whatever other additional information we might need if there is a majority of Commissioners who are interested in pursuing that further, and then we can resolve, after we've developed it further, whether that is something we want to recommend, whatever that is.

COMMISSIONER CANNON: Andrew, are you talking about the statutory provision that Makan originally talked about, or with the Guidelines?

MR. HEIMERT: Well, Commissioner Delrahim's

proposal was a statutory modification. Commissioner Jacobson suggested that we do it within the confines of the Guidelines, rather than as a statutory matter. We could treat the two as separate proposals or as a unified proposal, at this point, seeking only further development that could then be decided upon between those two alternatives if there is some degree of consensus. But Commissioner Jacobson, I'm not sure - maybe you could state a little further your proposal and whether -

COMMISSIONER JACOBSON: Well, I'm actually going to withdraw it because on reflection, no one reaches the ceiling of the culpability factors under the Guidelines anyway. I do think, as Chairman Garza said, that it's adequately taken care of there. I don't think a statutory change, however desirable, is feasible, consistent with the Constitution, and so my view, after thinking about it, is no change.

I wouldn't mind seeing a letter go to the Justice Department, asking them if they think they've ever denied amnesty to someone on the basis that entity was the ringleader.

COMMISSIONER SHENEFIELD: They have.

[Laughter.]

MR. HEIMERT: All right. Well, then to answer your question, Commissioner Cannon, Commissioner Delrahim's proposal to have some form of statutory amendment that would provide a statutory minimum or enhanced penalties for a leadership role in a cartel, and that we'll have to flesh out, Commissioner. We'll speak with you - the staff will speak with you to develop that.

CHAIRPERSON GARZA: We're going to go around.

MR. HEIMERT: Yes, we're going to go around. If there's a majority here who would like to pursue that further.

So on the first question, which is, do the Sentencing Guidelines provide - why don't we go around quickly and find out from each Commissioner whether they're interested in pursuing that further, Commissioner Delrahim's proposal to be fleshed out, not as definitive. If you'd like to pursue it further, we'll pursue it further. If there's not a majority for that, we'll look at the other options we have and try to reach consensus on one of those recommendations. So we will just go around in the same order we started with.

Commissioner Jacobson?

COMMISSIONER JACOBSON: No.

MR. HEIMERT: Commissioner Burchfield?

COMMISSIONER BURCHFIELD: No.

MR. HEIMERT: Commissioner Litvack?

COMMISSIONER LITVACK: No.

MR. HEIMERT: Chair Garza?

CHAIRPERSON GARZA: No.

MR. HEIMERT: Commissioner Warden?

COMMISSIONER WARDEN: No.

MR. HEIMERT: Vice Chair Yarowsky?

VICE CHAIR YAROWSKY: Yes.

MR. HEIMERT: Commissioner Delrahim?

COMMISSIONER DELRAHIM: Yes.

MR. HEIMERT: Commissioner Valentine?

COMMISSIONER VALENTINE: No.

MR. HEIMERT: Commissioner Carlton?

COMMISSIONER CARLTON: No.

MR. HEIMERT: Commissioner Shenefield?

COMMISSIONER SHENEFIELD: No.

MR. HEIMERT: Commissioner Cannon?

COMMISSIONER CANNON: No.

MR. HEIMERT: Commissioner Kempf?

COMMISSIONER KEMPF: Yes.

MR. HEIMERT: If I have my count right, there were three yesses and nine noes. So we will not study further the possibility of a statutory amendment.

On the rest of the recommendations, perhaps we could go through and see where - if we do have a consensus on one of the other four possibilities. I think two of them from the discussion have already been ruled out, so I'll start with those just to make sure I've got that right, if you'll indulge me. And I'll ask each Commissioner raise his or her hand, and then I will call your name, and then you can put your hand down just so we make the count clear and accurate.

This is on the first question. Do the Sentencing Guidelines provide an adequate method of distinguishing between violations with differing degrees of culpability? For example, should the Guidelines provide distinctions between different types of antitrust crimes, e.g., price fixing versus monopolization.

One proposal is to recommend amending the Sentencing Guidelines to add a statement clarifying that guidelines apply only to hardcore cartel activity. Any

Commissioners in favor of that recommendation? I see no hands.

COMMISSIONER VALENTINE: He is referring to 1-A(3).

MR. HEIMERT: The third option on there.

COMMISSIONER VALENTINE: It might be simpler, Andrew, if you did talk about options 1, 2, 3.

MR. HEIMERT: Okay. I'll start with option one. We've now got that and there are no votes, so we'll take that as done. We'll go with option 1: No change to the Sentencing Guidelines is needed, and the Department of Justice - sorry - just no change to the Sentencing Guidelines is needed - you can see the whole thing. How many Commissioners are in favor of that recommendation? If you could raise your hands, please.

I see Commissioner Cannon, and Commissioner Litvack. Have I missed anyone?

All right. On the second possible recommendation, no change to the Sentencing Guidelines is needed, but the AMC should endorse and recommend continued discretionary limitation of criminal prosecution by DOJ to hardcore cartel activity.

I see Commissioner Shenefield, Commissioner

Valentine, Commissioner Carlton, Commissioner Kempf, Commissioner Delrahim, Commissioner Burchfield, Commissioner Warden, Commissioner Jacobson, Vice Chair Yarowsky, and Chair Garza.

So it appears we have 10 Commissioners in favor of that recommendation. And Commissioner Cannon and Commissioner Litvack had a different view. Do either of you care to say anything about your views further?

COMMISSIONER CANNON: No. I mean, actually, that would be just to -

COMMISSIONER LITVACK: I'm of the same mind as Steve. I don't feel violently about this at all. That's fine.

MR. HEIMERT: We'll so note in the final report, Commissioner Litvack and Commissioner Cannon. We'll adjust as possible.

And Commissioner Kempf, you had one further comment?

COMMISSIONER KEMPF: No. I would request that either or both of those two Commissioners give a little bit more explanation for their votes, since, as Commissioner Litvack said, this is not something that I'm passionate about

on B, and I could be persuaded to shift over to 1 if they were to make some argument that I found persuasive.

COMMISSIONER LITVACK: I have no argument to make. I think I said it initially. I just thought it was unnecessary, but I have no problem with it at all.

COMMISSIONER CANNON: No. And I feel the same way. It's essentially the same thing we're talking about.

MR. HEIMERT: We'll develop it in the report if you so request, and Commissioner Kempf, you'll have an opportunity at that point, if you think further about it and want to say something in the report about that, we can develop that further.

For the sake of completeness, the fourth option, recommend amending the Sentencing Guidelines to add an upward adjustment in the culpability score for organizations that take a leadership role. Does anyone favor that proposal? I think everybody has voted, so.

I see no hands, so I think we are complete on the first question.

Let's proceed then to the second question on the use of the 20-percent volume of commerce proxy. There appeared to be an initial consensus for the third option on

the list, but why don't we have a little bit of discussion about that? The third option is, recommend the Sentencing Guidelines be amended to make explicit that the 20-percent proxy may be rebutted by proof that the overcharge was lower or higher.

Who would care to start speaking on that? We have several flags in the air. I'll start with Vice Chair Yarowsky.

VICE CHAIR YAROWSKY: I just wanted to flesh this out a little bit. I'm very much attracted to it, but we're talking about a rebuttable presumption. Usually that's spelled out with greater specificity. We're in a criminal setting, so what are we all thinking about the standard to approve to get that rebuttable presumption in this situation? Is it preponderance? Is it clear and convincing?

COMMISSIONER JACOBSON: We're talking about the discretionary aspect of the Sentencing Guidelines in the world post *Booker*.

VICE CHAIR YAROWSKY: Right.

COMMISSIONER JACOBSON: So we're not talking about a fact that will be proven or disproved to a jury.

VICE CHAIR YAROWSKY: No. But what kind of quantum

of proof do we want in administering this, just preponderance?

MR. HEIMERT: Commissioner Valentine. Did you intend to have your flag up? Then Commissioner Carlton.

COMMISSIONER CARLTON: My turn. Since this is a little bit outside of my area of expertise, let me just say my understanding and if my understanding is wrong, I'd be interested in discussion. My understanding is that these are the guidelines used for criminal activity. The criminal activity we are talking about is hardcore cartels. When you engage in a hardcore cartel, by its very definition, there's no redeeming value to it. At the time you engage in that activity, you don't know whether it's going to be successful or not.

There is, by the definition of hardcore cartel, no redeeming social value. At the time you engage in the activity, you might want to know you're going to get clobbered with a large penalty regardless of whether the cartel is successful or not.

For that reason, it's not obvious to me that having an expected penalty at the time you engage in the illegal activity isn't what you want to do. That's my first point.

My second point is, as I understand how the Sentencing Guidelines came up with the 20 percent, it was based on an understanding in 1987 that, on average, the cartel overcharge was ten percent. My reading of the literature - and maybe the staff can inform me more on this - is that at least since 1987 surveys of cartels that are discovered seem to show overcharges that are higher than 10 percent, in which case I would be in favor not just of not having a rebuttable presumption for the reason I said, that is, *ex post* what happens to me doesn't matter as much as *ex ante*; you'd be deterred from the activity initially. And I'd combine that with a willingness to think that maybe we should increase the 20-percent proxy to some higher number that reflects the underlying logic of the Sentencing Commission, if we adjusted the Sentencing Commission's ten-percent overcharge for what the more recent empirical evidence shows.

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: I find Commissioner Carlton's views very interesting, and I want to think about them, but I think I would go now with keeping the 20 percent, making it rebuttable. Proof should be by a preponderance of the evidence. However, to alter the 20 percent, you should have

to prove a material variation.

MR. HEIMERT: Commissioner Shenefield.

COMMISSIONER SHENEFIELD: I would like to introduce a word to this discussion, and it is "ditto;" ditto what Mr. Warden just said.

MR. HEIMERT: Chair Garza?

CHAIRPERSON GARZA: I just wanted to explain why I was one of the few people who thought to go with B-1, and actually, I thought to go with B-1 and B-6. Similarly to the issues that Dennis raised, to me the 20-percent proxy is for the development of the base fine, and it does seem to me when we're talking about criminal cartel activity, which has no redeeming benefit to it, and they know - potential cartelists know *ex ante* that if they engage in the activity the baseline is going to be set at, in this case, at 20 percent of the total commerce affected. It just seems to me to be useful for deterrence. And I agree with what the Justice Department has said, which is that for this purpose there doesn't need to be, unlike in civil litigation perhaps, a direct correlation between the size of the penalty and the amount of the gain or loss to the cartelists. Rather, I think it's appropriate to just focus on the severity of the activity,

and the fact that this is activity we want to absolutely deter.

However, I do endorse recommending that the Sentencing Commission reevaluate and explain the rationale for the 20-percent proxy, in part because, as the ABA points out, it is discretionary - the Guidelines are advisory, and it would be useful for courts, I think, to understand where the 20-percent proxy comes from, and also, to Dennis's point, and a point made by other people, the empirical data that the Sentencing Commission relied on was rather scarce, and it is a bit dated, and there may be some better empirical data that would suggest, perhaps, that the proxy should be higher or lower, but I think it would be worthwhile to develop that further.

MR. HEIMERT: Commissioner Jacobson?

COMMISSIONER JACOBSON: I've never felt that one-size-fits-all works, because in *Vitamins* you could have an overcharge of 38 percent easily. If supermarkets cartelize, you're going to have an overcharge of 1 percent. The value of the 20 percent is that it is rough justice. It's rough justice in the context of guidelines that are now discretionary in any event. I wouldn't mind further study on

it, but I can't imagine that a generalized number would come up that's higher or lower than 20 percent. So that's a long way of saying ditto to Mr. Warden's remarks.

MR. HEIMERT: Commissioner Burchfield?

COMMISSIONER BURCHFIELD: In the context in which this is going to be relevant, which is that a defendant actually goes to trial on a cartel charge, it seems to me that the government would be put to its proof of twice-the-gain or -loss if it were seeking to apply 3571(d) in that circumstance or to apply the Sentencing Guidelines in that circumstance.

And as I understand the third recommendation under 1-B, effectively it is doing little more than recognizing the effect of the *Booker* and *Fanfan* decisions. In a contested decision, the 20-percent proxy is going to be contestable. The question then becomes who bears the burden of proof? I think it's the government, and I think it's subject to beyond a reasonable doubt, burden of proof. I think leaving the proxy in the Sentencing Guidelines at 20 percent allows the Justice Department to continue its effort to negotiate criminal pleas, as it is doing now. Criminal defendants maintain the risk that if they go to trial they could be hit

with considerably more than the Justice Department is offering, and this would recognize simply that in the current environment of *Booker* and *Fanfan*, the 20 percent is contestable once a criminal defendant goes to trial and loses on liability.

MR. HEIMERT: Commissioner Shenefield, I see your flag is up. Do you wish to -

COMMISSIONER SHENEFIELD: I think it might be worth clarifying before we get to the end of the road on this question, what would the standard of proof be? I've always proceeded on the assumption it was a preponderance of the evidence standard, where it's not an element of the crime. But if there's confusion about that, it would help me to get that resolved.

The concern I have, Chairman Garza, about your position is that it allows a cartelist to anticipate that the worst that can happen is that there will be a 20-percent proxy applied, and if it's a *Vitamins* kind of a context, then it becomes a cost of doing business calculation and you don't want to have that possibility in the cartelist's mind.

MR. HEIMERT: Chair Garza.

CHAIRPERSON GARZA: I think though what I was

thinking is that the 20-percent proxy is the base, right? So it's the starting point, if you will, and even under the Sentencing Guidelines, I believe that it becomes rebuttable because - someone should correct me if I'm wrong - if the overcharge is substantially higher or lower, that's taken into effect in the application of the fine, the determination of the actual fine level.

So it's not the case that it's never a factor for the court and that you can end up paying more. It's just that you know that that's the minimum amount that you're going to have to pay without having to put the government to any particular proof at that point, just to get at the baseline level.

And the 3571(d), I guess I'm a little bit confused about it, but I would like if someone could explain it clearer if it's possible to make me understand it. The 3571 only comes in, right, if the fine is over 100 million; is that right?

COMMISSIONER JACOBSON: Exactly.

CHAIRPERSON GARZA: And if the defendant admits to it, then also it doesn't come into play? So the government can get a settlement, and it can be above 100 million as long

as the defendant admits to that amount - the person's settlement - then this 3571(d) does not come into play?

COMMISSIONER JACOBSON: That's correct.

CHAIRPERSON GARZA: But if a defendant goes to trial and the government wants to seek more than the Sherman Act minimum, at that point the government has to plead and prove beyond a reasonable doubt -

COMMISSIONER JACOBSON: The gain or loss, not the 20 percent.

CHAIRPERSON GARZA: The gain or loss.

COMMISSIONER JACOBSON: It's important to distinguish between the gain or loss component and the 20-percent component. You can only go above 100 million if you prove beyond a reasonable doubt the amount of gain or loss.

COMMISSIONER CANNON: Is it beyond a reasonable doubt?

COMMISSIONER JACOBSON: Yes. And the government concedes that. That's no longer in dispute. If the government is going to go above 100 million, they have to prove gain or loss beyond a reasonable doubt under 3571(d). That leads me to my other proposal, which we'll get to later, because I think that's very problematic.

Under 100 million you are dealing with the Sentencing Guidelines. You are dealing with the discretion of the court. It's not part of the indictment. It's not part of the proof at trial. It solely comes up in a contested case at the sentencing phase. What the burden of the proof there traditionally has been is a preponderance of the evidence. Nothing in *Booker* or *Fanfan* negates that because *Booker* and *Fanfan* come in only when you're going above the statutory maximum sentencing. So this is complicated, but it's important to keep that breaking point in mind.

MR. HEIMERT: Commissioner Valentine.

COMMISSIONER VALENTINE: I would say I would hope that that clarification has made it possible for us to again proceed with a quick consensus on this, and I would say ditto to the Warden-Shenefield-Jacobson approach.

MR. HEIMERT: Shall we proceed? Are there other Commissioners who would like to speak on this point?

CHAIRPERSON GARZA: Before we do that, I'd like just to get a recap on what the Jacobson-Warden-Shenefield approach is, just so we know what we're -

COMMISSIONER WARDEN: It's number 3, with proof by

a preponderance of the evidence, but a variation from the 20-percent proxy only if the proof shows there's a material difference.

COMMISSIONER VALENTINE: That is, the overcharge was materially lower or higher.

COMMISSIONER WARDEN: Correct.

MR. HEIMERT: So we'll go through all of those with option 3 being modified that there has to be a showing by preponderance, and that it's materially different than the 10 percent overcharge, which is doubled. Under the Guidelines it's 20 percent.

Commissioner Burchfield?

COMMISSIONER BURCHFIELD: A point of clarification: are you advocating that for both sentences above the statutory maximum of \$100 million as well as below, or just below?

COMMISSIONER VALENTINE: No. We're just on 1-B, just 1-B.

COMMISSIONER BURCHFIELD: These are the ones within the \$100 million.

MR. HEIMERT: Shall we proceed through the options and test where Commissioners are on that, and see whether

there's consensus for one recommendation?

COMMISSIONER CARLTON: Can I just ask a question of clarification?

MR. HEIMERT: Yes.

COMMISSIONER CARLTON: Maybe someone can answer this. As I understand, these are Sentencing Guidelines that are discretionary.

COMMISSIONER BURCHFIELD: That's right.

COMMISSIONER CARLTON: So that is it - let me just ask a question. Is it in the power of the court now to do what is being proposed?

COMMISSIONER JACOBSON: Yes. But departures from the Guidelines still need to be carefully explained. This would facilitate the careful explanation if the Guidelines were amended as proposed.

MR. HEIMERT: Anyone else wish to comment before we run through the options?

[No response.]

MR. HEIMERT: On the second question, which is question 1-B on the 20-percent volume of commerce, should that be changed in some way or another? Option 1 recommended the 20-percent proxy provides a reasonable basis for

reflecting the severity of antitrust violations. Any Commissioners in favor of that?

Chair Garza. Anyone else? That's it.

Possible recommendation 2, recommend that the 20-percent proxy be eliminated. Any Commissioners in favor of that?

I see no hands.

COMMISSIONER VALENTINE: Mr. Kempf isn't here, and he might have suggested that before, so I think you ought to just note that and come back.

MR. HEIMERT: We'll note that, and we'll hope he returns in time for that, and then get his vote when he comes back.

I saw no votes for that, with the proviso that Commissioner Valentine mentioned, that Commissioner Kempf may be interested in that one.

The third option, recommend that the Sentencing Guidelines be amended to make explicit the 20-percent proxy may be rebutted by proof that the overcharge is lower or higher.

Commissioner Kempf has returned. We went through the first two options, Commissioner, on 1-B, and Chair Garza

was interested in recommendation No. 1. No one was interested in recommendation No. 2.

CHAIRPERSON GARZA: The question is whether you are interested -

MR. HEIMERT: Are you interested in either of those two?

COMMISSIONER KEMPF: I am interested in No. 2. I also said my primary instinct is No. 3, but I would be interested in further discussion of the possibility of using the actual amount rather than 20 percent.

MR. HEIMERT: We've concluded the discussion for now. Why don't we proceed to option No. 3, which I just read, with the additional clarification that proof is by a preponderance of the evidence, and it's rebutted only if there is a showing that the overcharge is materially different from the 10 percent that's presumed in the Guidelines, and then doubled pursuant to the Guidelines' calculation of 20 percent. Could I seek a show of hands of Commissioners in favor of that? Keep them up until I've called your name, please.

Commissioner Shenefield, Commissioner Valentine, Commissioner Kempf, Commissioner Cannon, Vice Chair Yarowsky,

Commissioner Jacobson, Commissioner Warden, Commissioner Burchfield, Commissioner Litvack and Commissioner Delrahim.

On the fourth option, recommend that the 20-percent proxy be reduced. Anyone on that option? I see no hands.

The fifth option, recommend that the 20-percent proxy be increased.

Commissioner Carlton. I see no one else.

On the last recommendation, recommend that the Sentencing Commission reevaluate and explain the rationale for the 20-percent proxy.

Commissioners Warden, Jacobson, and Garza. I see no other hands. Oh, I'm sorry. Commissioner Kempf.

COMMISSIONER KEMPF: In other words, that's consistent with my thing about maybe scrapping it all together, and if I don't have any support for that, then I would support reexamining it.

MR. HEIMERT: All right. Commissioner Kempf, fairly noted. It will be noted in the record. Commissioner Delrahim and Cannon are both also interested in that recommendation.

COMMISSIONER CANNON: Can you vote for more than one?

MR. HEIMERT: I don't think that this option is mutually exclusive to the other options necessarily. Is that correct?

CHAIRPERSON GARZA: Right.

COMMISSIONER JACOBSON: Can we recall this under that basis?

MR. HEIMERT: We may, yes. Chair Garza?

CHAIRPERSON GARZA: Let me just try this: obviously, they're not mutually exclusive. I think they're complementary. But let's do it if there's confusion. I'm going to use the numbers. 1-B(1). Is there anyone other than me who endorsed that? Fine. So you've got me down there.

Then 1-B(2)? Commissioner Kempf.

1-B(3)?

COMMISSIONER: The whole gang.

CHAIRPERSON GARZA: No, no, not me. Not me, not Dennis.

MR. HEIMERT: Not Commissioner Carlton or Garza on that.

CHAIRPERSON GARZA: Everybody but Carlton and Garza.

1-B(4)? Nobody.

1-B(5)? Carlton.

And 1-B(6)? Okay. Everybody except for Burchfield, Litvack. Makan, are you up?

COMMISSIONER DELRAHIM: Up.

CHAIRPERSON GARZA: Shenefield and Valentine. And what are the numbers now?

COMMISSIONER JACOBSON: What was the count?

MR. HEIMERT: If I counted correctly, we had ten for the third option, and we had eight for the sixth option. The others had one or zero.

CHAIRPERSON GARZA: So what the staff will do then on this, when you go to develop a draft of the recommendations, you'll reflect that the majority view was three and six, and you'll also note the minority views.

MR. HEIMERT: Correct.

CHAIRPERSON GARZA: Okay.

MR. HEIMERT: All right. Should we proceed to the second question, the second set of questions? Should twice-the-gain or twice-the-loss, as provided in Section 3571, be calculated based on the gain or loss from all coconspirator sales or only on the defendant's sales?

COMMISSIONER JACOBSON: May I be bold enough to suggest that we consider whether there should be 3571(d) for antitrust first as opposed to after? Madam Chair?

CHAIRPERSON GARZA: Yes. Mr. Jacobson, can you elaborate more on your suggestion that you made earlier?

COMMISSIONER JACOBSON: Let me make clear that my suggestion would not in its entirety, change the maximum fine amounts that are available as a practical matter, because my suggestion is that 3571(d) be amended so that it is not applicable to Sherman Act prosecutions, but that at the same time, Section 1 of the Sherman Act be provided to increase the minimum fine to a figure of \$300 or \$500 million or even a billion dollars. We could talk about the number later, as a maximum fine.

The problem is the effect on constitutional rights, and as briefly as possible, let me articulate what I see as a problem. The only way that the Justice Department can now get a fine above what was \$10 million, now is \$100 million, is through 3571(d). *Booker* and *Fanfan*, however, make clear that, to the extent that the fine sought exceeds \$10 or now \$100 million, the gain or loss must be proven beyond a reasonable doubt.

No one in the real world, except in the most extreme circumstance, believes that you could ever prove gain or loss in a typical cartel case. Many of us are experienced in private damage litigation, including horizontal price-fixing cases. The number of the amount of damages is proven by experts; it's hotly contested.

Conceivably, you could have a bid-rigging case where the defendant would have bid four, but as a result of the cartel, bid six. So in theory there might be a case, but it's a truly unique circumstance whether you could ever prove gain or loss beyond a reasonable doubt.

Notwithstanding that, the Justice Department continues to take the position - this is noted in the research memorandum - that it will not negotiate a plea agreement with anyone - sorry for the squeaky voice - who wants to contest gain or loss - it's that I feel pretty strongly about this. So why, notwithstanding the fact that it's impossible to prove gain or loss behind a reasonable doubt, are companies routinely agreeing to plea agreements in excess of \$10 million? Most of the cases being done today are on the \$10 million regime or \$100 million. Why are people agreeing to that?

The answer is also in the March 30th American Bar Association speech given by Mr. Hammond, where he says, in very plain English at pages nine to ten, that if you agree to the plea agreement, it's a good thing, because they will prosecute fewer individuals, and the individuals they do prosecute will get better deals.

So even though that was denied at our hearing - you were all here, you remember it - it is obvious, and now virtually admitted, that DOJ trades people for money, and a surrender of their constitutional rights under the *Booker* case.

I just think that's a problem. And I don't think it can be argued that it's not a problem. The only question is, should the AMC do something about it? It's a fair argument that we could leave this question for the courts, and I respect that point of view. And you've heard me on the subject of leaving things to the court, and I think all of you know how strongly I feel that that's the right thing to do in most of what is on our agenda. But the problem here is I don't see this issue reaching the court, certainly not at the appellate stage, in our lifetimes. The coercive pressure to get a deal for your individuals is extremely strong. It's

been going on for years. No one has litigated this up to an appellate court. Few people have even thought about litigating it in a district court. Many people threaten it to DOJ, but if you threaten it, they say, "We won't negotiate with you."

So, hence, my recommendation is we just remove the unconstitutional aspects of antitrust criminal fines, remove 3571(d) from antitrust cases, allow minimum fines up to a much larger amount, and then get the sentencing regime back on a footing that's consistent with the Constitution.

MR. HEIMERT: All right. Commissioner Jacobson, that proposal somewhat enlarges what we have here, but I think it would be useful to go around the table and see where other Commissioners - what their thinking is on this very briefly, if they're inclined to continue to consider that, whether we study it further before we put it to a vote or develop precisely the proposal we can get to, but why don't we see where every Commissioner is? We'll just go in the order we've had for -

COMMISSIONER SHENEFIELD: Could I ask a question?

MR. HEIMERT: Certainly, Commissioner Shenefield.

COMMISSIONER SHENEFIELD: What would be the much

larger amount? Don't we have to fill in that side of the equation as well?

COMMISSIONER JACOBSON: I would say \$500 million. There's only been one fine ever at that level. I think we could have some cost-of-living escalators to it as we do with Hart-Scott-Rodino, but I think \$500 million would be the appropriate amount.

CHAIRPERSON GARZA: Let's just go around and give everyone a chance to ask a question or opine.

MR. HEIMERT: And if you care to specify an amount you would be comfortable with or not comfortable with, that would probably facilitate moving forward quickly.

Commissioner Burchfield?

COMMISSIONER BURCHFIELD: I would go with option 1 as stated here under 2-A, no change in the statute and leave the interpretive question to the courts.

CHAIRPERSON GARZA: Just to be clear, that includes

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COMMISSIONER BURCHFIELD: Yes.

CHAIRPERSON GARZA: Okay. If you could be clear about that, whether or not you want to - because Jon's made a proposal, and I think we would like to get a sense of where

people are in reacting to that proposal.

MR. HEIMERT: And then return to the discussion of the ones that we've set out, so whether we have that discussion in the mix of the other issues as well.

Commissioner Litvack?

COMMISSIONER LITVACK: I too would favor leaving it to the courts. And just to amplify a little bit, the problem that Commissioner Jacobson raises strikes me as a serious problem, but I am not sure that what he has proposed is necessarily the right solution for the problem. I am sure I don't know what the solution is, and it may well be that there is prosecutorial misconduct. It may well be that there are other things that can or should be done. I'm not sure that's so. But if it's not so, I am persuaded that changing this statute is not really the answer, and I'm not sure, when you come down to it, two points.

Number one, maybe it won't be quite as big a problem at \$100 million as it was at \$10 million. I recognize 500 is even bigger, but still, 100 is ten times where we were.

And secondly, I'm not sure what happens if you just - why we would change it only for antitrust, or why would

anyone? I mean, this opportunity for what I will term even, perhaps unfairly, as misconduct or pressure or whatever you want, can be used in a variety of situations not limited to the Antitrust Division. So it seems to me if there's a problem, then there's a solution that ought to be found, but it's not within the mandate of this group.

MR. HEIMERT: Chair Garza?

CHAIRPERSON GARZA: I think that Jon Jacobson's proposal is - the issues he's identified are significant, and the proposal is very interesting. If we were inclined to give it consideration, I think it would be worthwhile to request public comment on it, because we really didn't get very much comment squarely on this issue, although it was asked about in the hearing, so it would be very interesting to me to hear from the Justice Department and others. And there would be an issue as to what the numbers should be, and issue as to Sandy's question, which is how significant a problem is it conceivably when the Act is already at \$100 million.

So my inclination would be - or at this point would be not to recommend a change to the Sherman Act, but I wouldn't be completely averse to further considering it and

putting it out for public comment.

Otherwise, on 2-A - and I don't know if we're doing 2-B, we are getting kind of close to the end - but while I personally think it makes sense to use the entire antitrust conspiracy as a basis, I probably would go with 2-A(1).

MR. HEIMERT: Commissioner Warden?

COMMISSIONER WARDEN: I agree with a lot of what Chairman Garza just said. I hadn't thought about the issue that Commissioner Jacobson raised until today. I certainly haven't thought enough about it yet, and if there is a problem it probably goes beyond antitrust, may not affect every area, because losses may be more certain in some areas. So I wouldn't object to putting it out for public comment, and talking about it again if enough people here would like to do that.

If it is correct that you could never prove beyond a reasonable doubt the gain or loss, or almost never, as Jon said, then perhaps consideration should be given to increasing the maximum under the Sherman Act itself. Okay, that's where I stand on that.

With respect to what we have in 2-A and B, already written for us to consider, I believe that in 2-A, the third

recommendation should be adopted, that the calculation applies to the loss caused by the particular antitrust defendant.

If you have 20 companies in a cartel and you've got the full maximum that would be allowed under 2-A(2), your fine equals 40, or perhaps more, times the - now, that never happens in reality, but I don't think you should have statutory schemes that are unreal. And there is the possibility that excessive funds can be anticompetitive, because if the entire loss is imposed - and we'll discuss this more later today - on a single defendant, particularly one that's not terribly strong, you can have bankruptcies and exits from the market.

I accept the principle that says if you're a coconspirator you're liable for everything the conspiracy does, I just don't think it's a very good principle to apply in this circumstance.

Under B I vote for no change. The question should be left to the courts.

MR. HEIMERT: Vice Chair Yarowsky?

VICE CHAIR YAROWSKY: I'm starting with the presumption that 3571 should apply to the entire conspiracy,

and I do believe that on B we should leave it to the courts.

MR. HEIMERT: Vice Chair Yarowsky, on Commissioner Jacobson's proposal to repeal 3571 with respect to antitrust crimes and increase the Sherman Act fine, do you have any inclinations one way or another, whether further study is appropriate?

VICE CHAIR YAROWSKY: And I missed the discussion, which I apologize, for the last few minutes, but how do we operationalize that? I mean, I take your point. What I mean is, how do we further study this? We're not going to have much - Jonathan, I say that with respect - we're not going to have much case law develop between now and the time we can actually make recommendations. So I'm just looking for - I'm very concerned. I'm glad that you and Commissioner Burchfield mentioned - because, Bobby, earlier you kind of took us through a scenario where you'd actually call their bluff and go forward, and then what burden would be on them? But their bluff will probably rarely be called.

Jonathan, help us understand how to do this.

COMMISSIONER JACOBSON: Very briefly, it's because there will be no decisions by the time we make our report, or in my judgment, in our lifetime, that I support the

recommendation that I made. Having said that, I think it's a fair point that we have not received public comment. We did get some testimony on this, but I would fully endorse putting this out for public comment.

MR. HEIMERT: Commissioner Delrahim?

COMMISSIONER DELRAHIM: On the two questions before us, I think that the 3571 should apply to the entire antitrust conspiracy, and recommend amending the Guidelines to require use of actual gain or loss if proven under 3571. So that's 2-A and B.

With respect to Commissioner Jacobson's comments and proposals, as, I guess, my previous proposal suggested, I'm not too averse of a certain level of coercive pressure by the Justice Department in these types of cases, especially given the high burden of proof that they have. I think that if a defendant believes the statute is unconstitutional, the system allows for that challenge to occur, if they do believe they have a case, because I think the Justice Department's standard is very tough to prove. So I don't know if 3571(d) should be repealed for two reasons.

Now, if we're going to repeal that and put in some kind of a billion-dollar maximum damage, I can be persuaded.

However, I know the political realities - when we just try to move 10 to 100 - that that's not a likely possibility, and also if you move that to the maximum amount, what would be the Sentencing Guidelines' recommendations? How would you measure that? Do you use twice-the-gain, twice-the-loss within that range? So I'm a fan of 3571(d). I'll wait and see if the courts do rule it as unconstitutional because a defendant believes that it has a good case and the Justice Department cannot prove it beyond a reasonable doubt.

CHAIRPERSON GARZA: Makan, would you support putting Jon's proposal out for public comment, or not?

COMMISSIONER DELRAHIM: Sure.

CHAIRPERSON GARZA: You would?

COMMISSIONER DELRAHIM: Absolutely. I think we have nothing to lose with that.

MR. HEIMERT: Commissioner Valentine?

COMMISSIONER VALENTINE: Could I have a brief recap of how the first, I guess I didn't get votes actually - Jacobson, Burchfield, Litvack and Garza, how you voted on 2-A and 2-B. I just don't have any record.

COMMISSIONER JACOBSON: Well, I didn't vote, but if I had to, it would be the third bullet in A, and no change,

the first bullet in B.

CHAIRPERSON GARZA: I think that for 2-A(2), it was Delrahim, Yarowsky, Garza; and for 2-A(3) it was Warden and Jacobson.

COMMISSIONER VALENTINE: I'm sorry.

CHAIRPERSON GARZA: I had 2-A(2) -

COMMISSIONER VALENTINE: The entire conspiracy?

CHAIRPERSON GARZA: Yes. I thought that was me and Jon Yarowsky and Makan Delrahim. And then I had - I could be wrong - for 2-A(3) I had John Warden and Jon Jacobson. Is that right? And Bobby, you were?

COMMISSIONER BURCHFIELD: I was at 2-A(1).

COMMISSIONER VALENTINE: He was at 1.

CHAIRPERSON GARZA: 2-A(1).

COMMISSIONER VALENTINE: I thought you were there too. Okay, sorry.

COMMISSIONER WARDEN: I'm at 2-A(1).

CHAIRPERSON GARZA: And then 2-B(1), I think it was John Warden, myself, Jon Yarowsky, Bobby Burchfield, and Makan Delrahim. Is that right, for 2-B(1), recommend no change? That's what I have for scoring.

COMMISSIONER JACOBSON: Did you count me in that?

CHAIRPERSON GARZA: No. Where were you?

COMMISSIONER JACOBSON: On B I'm in the first bullet.

CHAIRPERSON GARZA: You are. Okay. So far, with respect to Commissioners that have spoken, everyone is 2-B(1).

COMMISSIONER WARDEN: You didn't have me, but, yes.

CHAIRPERSON GARZA: I'm sorry.

MR. HEIMERT: Commissioner Valentine, if you could speak your thoughts on these, including Commissioner Jacobson's proposal.

VICE CHAIR YAROWSKY: Madam Chair, I was 2-B(2). I'm sorry.

MR. HEIMERT: We'll take a formal vote after this, and we'll make sure we've got it all straight.

COMMISSIONER VALENTINE: But I was actually just asking for the recent re-tally that we just started. In any case, I would be interested in putting Mr. Jacobson's proposal out for public comment. I can't say that I'm likely to come out in favor of an antitrust-specific finding of unconstitutionality, but I'm certainly willing to listen.

Accordingly, I believe that for 2-A, the answer may

well be the second bullet. That would be consistent with the rule that all coconspirators are liable for the full gains or losses of a conspiracy, and quite frankly, with the civil side of joint and several liability, I actually will vote for leaving it to the courts.

And same with B(1), I would put the first one, leaving it to the courts.

MR. HEIMERT: Commissioner Carlton?

COMMISSIONER CARLTON: I'm a little unsure of whether we're having discussion now or a vote.

MR. HEIMERT: Well, I think we need to return to discussion of the two questions. We're trying to determine what to do with Commissioner Jacobson's proposal.

COMMISSIONER CARLTON: I'll discuss, and then I'll vote later when we have a recap.

MR. HEIMERT: We will have a separate formal vote.

CHAIRPERSON GARZA: Wait a minute. Dennis, I think at this point we had wanted to get everybody to establish, based on the discussion that's occurred so far, where you are on Jon Jacobson's proposal, and in particular, whether you agree with putting it out for public comment and further consideration, and also where you are on 2-A and 2-B.

COMMISSIONER CARLTON: Yes, that's what I interpreted it to be.

I think Jon's proposal raises interesting questions that I really haven't fully thought through, and for that reason, I'd like to consider it further. I think one of the desirable features of his proposal is that it simplifies things so you don't have one set of criteria under \$100 million and then another over \$100 million, and that's appealing to me. So for that reason, I think I would like to think about it further, and would be in favor of, you know, putting it out for public comment.

Now, my thinking on 2-A, I think I'd like clarification on what people think about when the loss applies to the entire antitrust conspiracy versus a particular antitrust defendant, as John Warden, the point he makes - does that mean that if there are 20 people in the cartel the Justice Department would get - or under these Sentencing Guidelines you would get 20 times the amount, or is there an offset? I'd like to just get clarification on that before I - and how that differs from joint and several liability that we're going to talk about later today.

And then on B, my thinking is I'm not sure why the

answer to B is very different from what the answer to 1-B should be. In other words, it's really not clear to me, again, why I would have different criteria above a threshold and below, which I think is one of the things Jon's proposal was getting at. So my thinking on 2-B is similar to my thinking on 1-B.

MR. HEIMERT: Commissioner Shenefield?

COMMISSIONER SHENEFIELD: On the Jacobson proposal, I find it intriguing, and I'm certainly in favor of putting it out for public comment, and indeed, wouldn't even like to suggest at this point that I would be against it. I would be very interested in hearing what people have to say.

On 2-A I would be in favor of having it applied to the loss caused by the entire conspiracy, since that seems to me to be the proper policy judgment.

On 2-B I would be in favor of 2, at least I'm minded to go in that direction.

As to leaving things to the courts, as I've said before, that just seems to me to be a copout. We've spent 2.5 years thinking about these things. Nothing we say is law just because we say it, but if we have a view as to what is intelligent, wise, and what our experience tells us makes

sense, we ought to favor the world with it. That doesn't mean the courts won't at the end of the day decide for themselves anyway. It just means that we've actually done some work.

MR. HEIMERT: Commissioner Cannon?

COMMISSIONER CANNON: I agree with Jon Jacobson, with some stuff, in terms of pursuing this further and why we need to do it. I remember the testimony that day, and it was essentially Tefft Smith versus Scott Hammond, and Tefft said essentially what you said, which is, there's a swap going on here, and Scott Hammond was incensed about it, and said, that's not the case, and was pretty indignant, and it was kind of laid on the table at that point and no one touched it after that.

I agree with Jon Shenefield about just saying, let's just leave this to the courts. I ask Jon Jacobson's question again, which is how likely it is that any court is going to rule on this, much less at the appellate level or at the Supreme Court level anytime soon, and I think the answer is probably not very likely.

And for that reason, I absolutely would endorse not only putting this out for public comment and see what comes

in, but I think the staff - we should get some work done on this, and do some more thinking on it, because, obviously, if Jon's proposal were to take root in the Commission, that would obviate the need for discussion of the rest of this. It wouldn't matter any more.

And I wonder, Jon Yarowsky, in terms of when we got to the \$100 million mark - it was only \$100 million because there was always the backstop of 3571, saying, we don't need to go any higher because in strange situations we may be able to - you know, you already have that for a higher fine.

So I absolutely, at this point, would say, let's be affirmative on this. Let's do some work, as opposed to just seeing who may have some interest in this and what comes over the transom or through the door. So I think, Jon, in terms of how this is calculated, it's a terrific point we really need to give some thought to. So right now, I would say, let's do that.

And I think if that's the case, whether it's just to one conspirator or coconspirators will make no difference at all.

MR. HEIMERT: Commissioner Kempf?

COMMISSIONER KEMPF: Yes, a couple comments. No

one has urged us to leave things to the courts more than Commissioner Jacobson throughout this thing, and I just want to make one comment, that I have always thought it was not because he had wanted a copout, but rather, it reflected his belief that that was the wisest course of action to follow. So I don't put any stock in anybody saying we ought to leave this to the courts, other than that is a judgment on their part that that is the wisest course to follow.

Here he has a different suggestion. I'm intrigued with it. I have not read the speech in question. I would very much like to do so and to read not only what he quoted from it, but the context in which it appears, and go back and take a look also - that question came up both when the Assistant Attorney General and the FTC Chair were here as well, as in the earlier panel, and it was - it was even stronger than Commissioner Cannon describes it, the reaction, and there were also multiple sidebars going on throughout the room.

I would definitely be in favor of putting it out for comment, and also of the possibility of holding hearings as well, because there's such a dramatic gulf between the two positions, current and previous. I would probably be not in

favor of raising the fine above \$100 million. The leap from 10 to 100 is a tenfold increase, and with the prospect of treble damages on the horizon, I'm not sure a fine above \$100 million is warranted, regardless of the severity of the conspiracy and its impact. And I think the treble damage remedy provides for that, and \$100 million is a pretty hefty fine.

But I do want to consider all of those things in the context of arming myself with a lot more information.

There was one other thing I wanted to say. On the specific proposals, I would favor 2-A(3), loss by the defendant, and I'm not sure where I come out on 2-B. I think I'm in the second bullet, the use of actual gain or loss.

CHAIRPERSON GARZA: Can I propose, to try to wrap this up - based on where we are, that we have the staff work with the study group for criminal remedies to prepare a notice for - a request for additional public comment, and consider the possibility of having a hearing, and that we defer for now coming to a conclusion on 2 entirely until we have that additional work? Is there anyone who disagrees with that? Sandy Litvack?

COMMISSIONER LITVACK: Well, again, not violently,

but yes, I would disagree with it, because I'm not really sure what we are doing. So we're going to get public comment on what? Whether or not this should apply to antitrust only? Remember, this statute is not an antitrust statute. It applies to environmental fines. It applies to a variety of other things. And if there is a problem - and I keep saying "if there is" - for purpose of this conversation, I'm prepared to assume that - and I wasn't here the day that Deputy Assistant Attorney General Hammond said one thing and seemingly said another thing on March 30th. I'm willing to assume that, because if that's - if his testimony is that no, we don't do that, then we don't have a problem. If they do do that, maybe we do have a problem.

I come back, and I say I don't know what this Commission is going to do or recommend. Our mandate, in my judgment, is not that large. Now, I know it's easy to say, put it out for comments, and we'll have a hearing, and everyone feels, what's the harm? I guess the answer is, there is no harm. I just think it's not particularly fruitful.

CHAIRPERSON GARZA: Anyone else? Bobby?

COMMISSIONER BURCHFIELD: Let me just echo the

comments that Commissioner Litvack just made, and that is, not only would carving antitrust out of 3571(d) distinguish antitrust from the panoply of other federal crimes to which it applies, but amending the statute to say that it applies only to the loss caused by a particular defendant, or that it applies to the loss covered by the entire conspiracy, would be an antitrust-specific amendment to an omnibus statute.

My read of the statute - and I sense certainly the Justice Department's read of the statute - is that it sets the maximum fine that a defendant guilty of an antitrust crime can be subject to. The Sentencing Guidelines recommend to the court what the court will sentence that particular defendant to. It is by no means unusual in the context of criminal law that, if you take the Sentencing Guidelines, you're going to be subject to less than the maximum sentence that you could be subject to under the statute that governs the sentence for the crime.

From the standpoint of a lawyer who principally represents defendants, I have a lot of sympathy for the points that Jonathan has made, but I don't find them sufficiently unique in the antitrust context that we should upset the public policy of having a standard practice and a

standard statute that deals with corporate crimes, and make antitrust unique in that respect.

MR. HEIMERT: Commissioner Delrahim?

COMMISSIONER DELRAHIM: Ditto.

MR. HEIMERT: Commissioner Cannon?

CHAIRPERSON GARZA: Wait, wait, wait. Ditto. Just to be clear where we are, before this I think we had had ten Commissioners saying that they wanted to obtain further comment before we ultimately decided on Jon's proposal, and two not favoring that. Now, when you say ditto, does that mean that you're now thinking that we shouldn't consider it further and request public comment first?

COMMISSIONER BURCHFIELD: I should probably be more specific about my comment on the proposal for public comment. I agree with Commissioner Litvack. I'm not especially averse to that, but I just question whether it's fruitful at this stage in the Commission's deliberations and proceedings.

COMMISSIONER DELRAHIM: I think putting it out for comment would only help the record. We might have some kind of a recommendation. I'm not going to be convinced to change the public policy here, so I'm not opposed to getting further comment about possible constitutionality. My guess is that

it'll be half law school professors who will come out and say it's unconstitutional. The other half will find a reason to find that it's perfectly constitutional. So I would be intrigued by it, and I think it would be helpful to get the debate, but I don't think it's - I wouldn't be persuaded otherwise. I think these two questions before us can be studied, and we could have the staff begin preparing, based on the consensus of the body, because the only way that we would not recommend this - well, I just don't see them as being mutually exclusive, as otherwise repealing 3571(d), but I think these would be useful in the event that Congress decides not to repeal 3571(d). So regardless of what the answer is, these two questions are relevant.

MR. HEIMERT: Commissioner Cannon?

COMMISSIONER CANNON: Unless I misunderstand what Commissioner Jacobson is saying, I don't think it's, if this is unconstitutional, it's just unconstitutional for antitrust claims and whatever we would think about, decide, or look into would necessarily have that exclusion. Am I wrong about that?

COMMISSIONER JACOBSON: I view our agenda as being antitrust specific, so I would encourage further inquiry on

the question as it applies to the Sherman Act, and be agnostic on everything else.

MR. HEIMERT: Commissioner Warden?

COMMISSIONER WARDEN: I didn't understand Commissioner Jacobson to say the statute was unconstitutional, but rather to suggest that in reality, the constitutional burden of proof of beyond a reasonable doubt as to the loss caused or the wrongful gain, cannot be met in the antitrust bill. Perhaps it can in other areas of white-collar crime.

The thing that concerns me the most about what he said, and the reason I'd like further public comment, is this idea of trading money for people. I don't think that's the right approach to law enforcement, and if that's what's going on, I think we ought to take a position on that, particularly since I think the strongest deterrent to cartel activity is criminal punishment of individuals.

MR. HEIMERT: Commissioner Valentine?

COMMISSIONER VALENTINE: One last little comment. I have no problem proceeding with the votes. I think we've already largely done it, but I would note that I believe that 2-B, if in fact response to Commissioner Jacobson's inquiry

turns out to strongly suggest that there is no way of proving gain or loss, then anyone voting for 2-B(2), which is recommending use of actual gain or loss, might want to consider re-voting.

VICE CHAIR YAROWSKY: Ditto.

CHAIRPERSON GARZA: What we'd like to do is recap where we are and where the staff is going to go from here, and then take a short break and try to move on to our next issues.

Starting with 1, I believe - Andrew, can you tell me - was there consensus on 1-A(2)?

MR. HEIMERT: The consensus was for 1-A(2) and on -

CHAIRPERSON GARZA: Just wait on that. So on that, one, what the staff is going to do in terms of the draft recommendations and findings is to work with that as the majority, the consensus, the majority view, and also to reflect those minority views that there were, which I believe there were some, I think. There were some differences in -

MR. HEIMERT: There were.

CHAIRPERSON GARZA: So you'll work with that. And afterwards, Andrew, I'd like you to circulate something that just clarifies what you're doing and where we thought that

consensus was, and what the minority views are, and then the staff will consult with Commissioners as necessary to make sure that those views are developed.

Then on B, can you tell me where there was a consensus? Was there on B(3)?

MR. HEIMERT: B(3) and not quite as strong a consensus on B(6), but that also had a majority.

CHAIRPERSON GARZA: Those were the majority views. So again, you'll develop that as a majority view, and then duly develop as well and note the minority views.

On 2, do we have a clear consensus, putting aside for the moment Jon Jacobson's proposal? Just by count of Commissioners, do we have a consensus view on 2-A?

MR. HEIMERT: Would people like to discuss 2-A further, or should we put it to poll?

COMMISSIONER JACOBSON: What was the count? I thought we put it to a poll.

[Simultaneous discussion.]

MR. HEIMERT: If people would like to discuss 2-A further -

[Simultaneous discussion.]

MR. HEIMERT: We'll put it to a formal vote, okay,

and same for 2-B.

CHAIRPERSON GARZA: 2-A(1) by show of hands.

MR. HEIMERT: 2-A(1), Commissioners, please put your hands up. This is, recommend no change to the statute. When I call your name, please put your hand down.

Commissioner Litvack, Commissioner Burchfield, and Commissioner Valentine.

The second option under 2-A, recommend amending to provide that it applies to loss caused by an entire antitrust conspiracy. Commissioner Shenefield, Chair Garza, Vice Chair Yarowsky, and Commissioner Delrahim.

And the third option, recommend amending 3571 to provide that it applies to loss caused by the particular antitrust defendant. Commissioner Kempf, Commissioner Jacobson, and Commissioner Warden. Did I miss anyone?

COMMISSIONER CARLTON: I haven't voted.

MR. HEIMERT: I saw no vote from Dennis Carlton or Commissioner Cannon at this point.

COMMISSIONER CARLTON: Is that allowed? I'm sufficiently undecided based on the discussion.

CHAIRPERSON GARZA: It's allowed, but I'll tell you what we have then. We have a 3-4-3. What the staff will do

then is make its best effort to write up the rationale for each of the recommendations and circulate it, and then we'll proceed at a further time to see where we are. But since there isn't any other clear consensus, and we have two Commissioners who are withholding, let's have the staff write it up and circulate it. Is that all right with everybody?

COMMISSIONER CARLTON: Could I just raise the two things that are bothering me that maybe the staff's write-up could help?

CHAIRPERSON GARZA: Okay.

COMMISSIONER CARLTON: I think there are really two things. One, these fines don't displace treble damages for private actions, so already cartels that are hardcore will get higher-than-treble fines. And I didn't hear anything about that in the discussion, and maybe in the write-up it would be helpful to talk about the implication of that.

But secondly, I am concerned by the point John Warden raised, which is, if you have 20 coconspirators, are you going to get 20 times the typical overcharge if the typical overcharge is 20 percent? I'm just curious.

And then the problem with the last one about just applying it to the particular antitrust defendant, if the

biggest guy has pleaded guilty or somehow gets amnesty, does that mean the other coconspirators don't wind up collectively paying a fine that equals what the conspiracy has imposed?

So if those questions could be addressed, it might help my thinking.

MR. HEIMERT: Commissioner Cannon, anything, or just nothing at this point?

COMMISSIONER CANNON: No, nothing.

CHAIRPERSON GARZA: So the staff will do that then in developing these arguments, and specifically address the issues that Dennis has raised, and work with the criminal remedies study group to try to get that. And we'll talk later about a timeline for when we would hope to get that circulated.

COMMISSIONER BURCHFIELD: May I make one comment on 2-A(1) and (2)? At this point I can be persuaded perhaps - but while I would not at this point support an amendment to 3571(d), I would be amendable to an endorsement by the AMC that the 3571(d) fine, as applied to antitrust conspiracies, would cover the loss occasioned by the entire conspiracy.

MR. HEIMERT: All right. We're going to request public comment. We'll work with the criminal remedies study

group to develop questions for public comment under Commissioner Jacobson's proposal, and this is to resolve these questions that may, as Commissioner Valentine noted earlier, be subject to change, depending on where that issue comes out, and then we'll revisit it. But at least for now, this can get staff working on what our recommendations would be, and these may be lesser included recommendations, if you will.

So on 2-B there are two options. The first is, recommend no change to the statute or Sentencing Guidelines. Could I see a show of hands, Commissioners? Commissioner Litvack, Commissioner Burchfield, Commissioner Warden, Commissioner Jacobson, Vice Chair Yarowsky, Chair Garza, and Commissioner Valentine.

And then on the second option, recommend amending the Guidelines to require use of actual gain or loss if proven under Section 3571, a show of hands. Commissioner Kempf, Commissioner Shenefield, and Commissioner Delrahim.

And I think that again Commissioners Carlton and Cannon do not take a position on that, although we do have seven Commissioners in favor of the first option, so we'll make sure that Commissioners Cannon's and Carlton's views,

whichever they turn out, will be reflected in the report appropriately.

So we're now done with the criminal remedies portion of the deliberations. We'll resume with the government's civil remedies portion at 11:45. That's a ten-minute break. And we'll return and move through that. After Government Civil Remedies, we'll take a lunch break. We had hoped to do it at 12:45, but if government civil goes over, we'll take our lunch break then.

COMMISSIONER LITVACK: So all of us can be guided by that luncheon schedule.

[Recess.]

#### **Government Civil Remedies**

MR. HEIMERT: There are two sets of questions, if you will. One is on civil fines and the other is relating to the FTC's disgorgement policy. As we did in criminal remedies, we'll run through these quickly with each Commissioner stating his or her tentative position on each of the options, and then we will return for discussion as appropriate on each of the two subjects, and you see the order. We will begin with Commissioner Warden, if you could take a brief moment to give your thoughts on this issue.

COMMISSIONER WARDEN: On the first question, I believe that no additional authority should be given to obtain civil fines. And I guess they really should be called "civil penalties."

If civil penalties were authorized, I think they should be payable solely to the government, but as I will discuss in more detail this afternoon, if this authority exists and the civil penalty is sought by the government, I think the government should also seek in that case disgorgement of unlawful gains and that those gains as opposed to the penalties should be distributed to the public and that there should be no private action allowed.

The next question is the FTC. I don't have a strong view on this, but to the extent I do have a view, I would withdraw the authority to seek this - seek penalties, anyway. And if the relief is, in fact, disgorgement, again, I think that the money should be distributed to the injured parties and no private action allowed. Any penalties of a civil nature should accrue solely to the Treasury.

MR. HEIMERT: Commissioner Valentine?

COMMISSIONER VALENTINE: On 1, I believe that if we recommend creation of civil fine or penalty authority, it

should apply both to Justice and the FTC, and I would, in fact, recommend doing so, although I am somewhat concerned that while Chairman Majoras said she would be open to thinking about it, I don't think we've really gotten much of an indication from DOJ on where they are there.

If the civil fine/penalty authority were to be created - and, again, it would be for both of them, or neither, and I would say both - I've actually never heard of civil fines or penalties being distributed to victims. If that were possible, I think I would recommend that as an initial matter, and then if infeasible because the amounts were too small, I would recommend making it payable to the government. And then if, again, we were to create such authority, I would, on B, have it be offset by any damages payable by the defendant in parallel actions by states and private parties.

On number 2, I don't think that the FTC currently has that penalty authority that you are seeking to bar, Commissioner Warden, so I wasn't quite clear about what your recommendation was there.

COMMISSIONER WARDEN: Neither was I.

COMMISSIONER VALENTINE: Okay. But on 2, I would

firmly endorse the fourth option, which is that no change to 13(b) is appropriate. The Commission should endorse the FTC's current policy governing the circumstances in which it will seek monetary equitable relief, and I believe that is intended to apply to antitrust cases.

MR. HEIMERT: Commissioner Kempf?

COMMISSIONER KEMPF: I would have no additional authority to either the DOJ or FTC to obtain civil fines. If there were civil fines, then I would, in A, do 1, payable to the government; and in B, I'd have no effect on parallel things by defendant.

Number 2, I'm uncertain where I am. I'll come back and give you a sense of that later after I hear from others, in part because I am not sure what the current authority and practice are.

MR. HEIMERT: Commissioner Shenefield?

COMMISSIONER SHENEFIELD: My theme is to put the DOJ and the FTC on precisely the same footing and not to exacerbate what is already a fairly anomalous situation. So under 1, I would be for numbers 2 and 3, that is, to give them both civil fine authority. If such authority were created for both, it should be payable to the government.

That would be A-1. And fines should have no effect, B-1. And consistent with that, I would opt for 2 under 2, that is, there shouldn't be this outlier authority for the FTC unless it is also available to the Department.

MR. HEIMERT: Commissioner Cannon?

COMMISSIONER CANNON: On 1, I would go for no additional authority either to DOJ or FTC, which would make 3-A or B unnecessary to talk about. But if I had to ever decide, I would go for A-1 and B-1, and I think I would be agreeing with Commissioner Valentine on 2 - I guess that is 4 or D, however you want to call it. But I really want to hear more about that.

MR. HEIMERT: Chair Garza?

CHAIRPERSON GARZA: I would go with the first box under 1, no additional authority for either DOJ or FTC. However, if there were civil fine authority created, then I would go with A-1, payable to the U.S. government, and B-1.

And on 2, at this point, although I may change my mind, I would go with the last box, which is no change; the Commission should endorse the FTC's current policy, although I would probably be in favor of strong caution not to use it broadly.

MR. HEIMERT: Commissioner Litvack?

COMMISSIONER LITVACK: I am in total agreement with both Commissioners Cannon and Garza, and by way of recap, no additional authority for either DOJ or FTC. If I had to deal with a civil fine, I would go for A-1 and B-1. And like Chairman Garza, I'm sort of toward 4, but I want to hear more. And I might well favor some sort of cautionary comment as to how the FTC uses that authority.

MR. HEIMERT: Commissioner Carlton?

COMMISSIONER CARLTON: Similar. I would support no additional authority to either DOJ or FTC. If civil fine authority is created, I would, like John Shenefield said, want to know why DOJ and FTC should be treated differently. But if civil fine authority were created - and I'd like to hear why someone thinks that should be so - I would be in favor of A-1 and B-1.

On Item 2, I'd like to hear the discussion, but I am favoring the second proposal, if it applies to antitrust, that is, barring the FTC from seeking monetary equitable remedies in competition cases.

COMMISSIONER CANNON: I'm sorry. I guess I should say I don't have a strong feeling between the second one and

the third one; that is, I'd like to hear, based on the discussion, whether urging is enough or whether we should tell them not to.

MR. HEIMERT: Commissioner Delrahim?

COMMISSIONER DELRAHIM: No additional authority should be given. If additional authority is given for civil penalties, they should be given to both the DOJ and the Federal Trade Commission, just to keep them in parity. The fines should go to the U.S. government. Incidentally, they'll go to the Crime Victims Trust Fund, anyway, so technically all those monies and criminal fines that the Justice Department and others collect go over to - so perhaps maybe being clear that these civil fines also would go to the Crime Victims Trust Fund. And I think that if there were fines, this should have no effect on damages payable by defendants in the state actions or the private actions.

I just don't know enough about number 2. I'd like to just abstain from voting at this time until I see some of the reports.

MR. HEIMERT: Okay. Vice Chair Yarowsky?

VICE CHAIR YAROWSKY: Well, I think I take my place in kind of this slowly emerging consensus. No additional

authority. If fines do occur, are created, they should go to the government. Private litigation should not be affected.

On 2, I, too, need to learn more. I do remember at our hearing a number of questions were asked of former-Commissioner Leary, and if his general sense of where things are is, in fact, where they still are, then I probably would go and embrace number 4. So we need to chat about it a little bit, but I do make reference to his discussion when we had him here.

MR. HEIMERT: Commissioner Burchfield?

COMMISSIONER BURCHFIELD: On Question 1, I would vote for no additional authority. That question was asked of both Chairman Majoras and of Assistant Attorney General Barnett during the hearing. And my recollection is the same as recounted on the memo at page eight, that Assistant Attorney General Barnett said that he would prefer not to have that authority because it would dilute criminal enforcement activity or interfere with it. And Chairman Majoras seemed not to be enthusiastic about it either. If there were such authority, I would vote for A-1 and B-1.

On Question 2, I am inclined to alternative 4, perhaps with cautionary language that has been suggested

previously about sparing use of that disgorgement authority.

MR. HEIMERT: Commissioner Jacobson?

COMMISSIONER JACOBSON: I would not change the law at all, and I feel sufficiently strongly about it that I will not even address the subsidiary questions.

MR. HEIMERT: On Question 2 as well with disgorgement, no change?

COMMISSIONER JACOBSON: Yes. I would not - I vote for no change in the law on these issues.

COMMISSIONER KEMPF: Well, there're two "no changes."

CHAIRPERSON GARZA: There're two "no changes," Jon. The third one, or the fourth one?

COMMISSIONER JACOBSON: Okay. I recommend no additional authority for fines, no creation of civil fine authority that would add to existing remedies, no additional authority for the FTC, and the comments that I decline to address are the ones under "if civil fine authority is created," because I would not create such authority.

CHAIRPERSON GARZA: Jon, on 2, would you go with the third box or the fourth box?

COMMISSIONER JACOBSON: I'm sorry. I would check

the fourth box.

MR. HEIMERT: All right. The consensus on the first question appears to be not to create additional civil fine authority, but two Commissioners were interested in that possibility, so perhaps, Commissioner Valentine, you have your flag up; would you care to speak a little bit in favor of that possibility?

COMMISSIONER VALENTINE: I am happy to go along with the consensus here, I guess on the understanding that the Justice Department and FTC did not seem to be pressing for it hard. I still don't understand why they weren't, but that is a different issue.

But if I do that, I think I would like to make a very special plea on 2, which is that, again, 15 U.S.C. 53(b) is not an antitrust-only statute, and the FTC for decades has been seeking equitable monetary remedies under that statute in both competition and consumer protection matters. All the courts that have reviewed this have upheld it, and so if for some reason people do not want the FTC to be continuing to seek equitable relief in 13(b) cases on the competition side because, for whatever reasons, Justice declines to exercise probably its current existing power to do so, I would highly

urge that people vote more for 2-3 than simply barring the FTC from seeking equitable remedies in competition cases pursuant to 13(b) because that is going to have a very bizarre, unforeseeable impact on the consumer protection cases, where it is used very, very much.

MR. HEIMERT: Commissioner Shenefield, did you care to speak in favor of civil fines?

COMMISSIONER SHENEFIELD: Yes, it's just - I mean, people who know what I think about this know that I think having two agencies enforcing the same law borders on the ludicrous. But it is where we are, so that then the next step is: Why should it matter in which industry you happen to be when the question of penalty is being considered? It shouldn't matter. That's just pure luck of the draw. So that my entire view here is governed by the theme let's try to make the enforcement options for each of the agencies equivalent so that they are, in effect, the same agency, just operating slightly different procedurally. So that is sort of the underlying point.

Why civil fines? It isn't as common as it used to be, but there are still occasions where the most that the government, the Department of Justice for sure, can seek is a

prospective injunction. And that is in situations even in which, though they're not criminal, there is some degree of dereliction on the part of the companies involved.

I can imagine civil non-merger cases - for instance, monopolization cases - in which a civil fine would be completely appropriate, even though it's clear they're not criminal, and to have the government have to make a choice between criminal and, in effect, no penalty at all just seems to me to be wrong and, more than that, it's out of step with the rest of the antitrust enforcement world in which we live, because they virtually all have civil penalty or civil fine capabilities. So that is why I think one, there should be some kind of civil fine, civil penalty; two, if one agency gets it, they both should get it; and, three, any enforcement option inconsistent with that or unique to one but not belonging to the other should be done away with.

MR. HEIMERT: Commissioner Jacobson?

COMMISSIONER JACOBSON: Just a question. Are there cases that you can name or at least categorize where, in the absence of a civil fine, the victim would not be compensated by treble damages, thereby providing some monetary deterrent to the offender?

COMMISSIONER SHENEFIELD: I can't answer the question, but I don't think they're necessarily related. The treble-damage option and the fine or government penalty don't seem to me necessarily to be in the same category of considerations.

Is that helpful?

COMMISSIONER JACOBSON: It's not something I agree with, but I understand your point of view.

MR. HEIMERT: Chair Garza?

CHAIRPERSON GARZA: I had the same question that Jon had, and when you are thinking about government fines, I assume we're thinking now about deterrence rather than compensation. But we have always thought that treble damage actions in part are just for the deterrent effect. So I don't know that I agree. I had the same question Jon had, which is, so long as you do have treble damage actions out there, it's not clear to me what a government civil fine authority adds to that.

But I would be interested in hearing more from John Warden's proposal, which may related to this.

COMMISSIONER SHENEFIELD: Can I just answer your question? I mean, it does seem to me that the treble damage

option depends on a lot of factors that are extraneous to the government's consideration in asking for a penalty. There may be no lawyers to bring the case. For commercial reasons, it may not be sensible for people who are harmed to become plaintiffs. It's just an uncertain situation, and the government fine seems to me to sort of supply the lack.

CHAIRPERSON GARZA: But then what would you do? What if you did have a situation in which the government fines and then, very much like in the criminal situation, you do get follow-on civil actions? Would you do something to offset?

COMMISSIONER SHENEFIELD: No, I wouldn't. I would have it go into the fund that Makan related to.

CHAIRPERSON GARZA: But then, as Mr. Warden suggested, essentially - I think you suggested essentially barring additional private litigation.

COMMISSIONER SHENEFIELD: No, I wouldn't do that either.

CHAIRPERSON GARZA: Okay.

COMMISSIONER WARDEN: My vote for no additional authority was largely responsive to the testimony that Commissioner Burchfield referred to. I don't feel strongly

about this. What I do feel strongly about is that if the government acts - and this is more relevant to the treble damage issues we'll discuss this afternoon - if the government acts, whether by a criminal proceeding or by authority to seek a civil penalty, the government should, in that proceeding, seek disgorgement of unlawful gains in addition to the penalty or the criminal fine, and that remedy should be preclusive of private actions, and the disgorgement fund should be distributed to the injured parties, unless, as I think Makan said, the amounts are *de minimis*, in which case they should go to the Treasury.

I think the present treble damage system is extraordinarily inefficient, but that is for this afternoon.

If the FTC is to retain the authority to seek disgorgement, which then is given to the public, I think the Antitrust Division should have the same authority. And I gather from Commissioner Valentine she thinks it does have that authority. In either of those instances, I think the government's pursuing a remedy on behalf of injured parties for disgorgement should preclude private litigation. And if the government doesn't proceed, I think that is another matter.

MR. HEIMERT: Do any other Commissioners want to address the question of civil fine authority or shall we go through and take a formal vote on where we are on this?

[No response.]

MR. HEIMERT: I see no one wishing to speak, so why don't we just - we'll formalize it quickly on Question 1. Okay. On Question 1, which is the creation of civil fine authority, again, put your hand up, and when I speak your name, you can put it down.

Option 1, no additional authority should be given to either DOJ or FTC. Commissioner Delrahim, Commissioner Litvack, Commissioner Burchfield, Commissioner Warden, Commissioner Jacobson, Vice Chair Yarowsky, Chair Garza, Commissioner Cannon, Commissioner Kempf, and Commissioner Carlton.

On the second -

COMMISSIONER VALENTINE: I can't - I don't like all our options. I'm with John Shenefield in that I want them equal for both. If we are going to take away the equitable authority from the FTC, then I want them both to have civil authority. But I would move to go with A-1 and B-1. If we're not going to take the equitable authority away from the

FTC, I'd probably vote to give it to the DOJ, as Mr. Warden just suggested. So I'm not sure - sorry. Can I have a contingent vote?

CHAIRPERSON GARZA: Just to make sure, I think the memo had suggested that the DOJ already has the ability to get monetary equitable relief. Is that right? And so -

COMMISSIONER VALENTINE: It has never used it, although it actually - there was an interesting comment about the recent amicus brief filed.

CHAIRPERSON GARZA: Right, exactly. It has never used it, but had taken the position that it could if it wanted to. So -

COMMISSIONER KEMPF: I don't mind the FTC keeping it if it'll agree never to use it either.

[Laughter.]

MR. HEIMERT: We are going to address some of -

COMMISSIONER VALENTINE: I'll go with the 1-1, then. I'll be -

MR. HEIMERT: Okay, so - all right.

CHAIRPERSON GARZA: No additional authority.

MR. HEIMERT: Right, yes.

CHAIRPERSON GARZA: I think the notion that we can

discuss is whether any additional authority beyond whatever a court of equity may allow under the precedent that exists - whether there should be any statutory authority - which is what I think certain staff on the Hill had questioned to us - and I think their question to us came in part from observing what was happening in the European Union in *Microsoft* and other matters. And their question really was, should there be some sort of statutory authorization - forget the equitable relief - but should there be statutory authorization for either or both of the agencies?

COMMISSIONER VALENTINE: And there technically should be, because sometimes a slap on the wrist, an injunction, is just that - a slap on the wrist. It's no more. But - all right.

MR. HEIMERT: On the second and third options, recommend creation of civil fine authority for DOJ, Commissioner Shenefield, no one else.

And on the third option, which is, recommend the creation of civil fine authority for the Federal Trade Commission, Commissioner Shenefield and no one else.

CHAIRPERSON GARZA: Wait a minute. Let me just clarify something. I think where we are is that Commissioner

Shenefield and Commissioner Valentine believe that both agencies should have civil fine authority and that the remaining ten Commissioners all believe that neither agency should be given additional authority for civil fines. So I think unless anyone disagrees with that, why don't we take that as our conclusion and then move on? And then the question is whether we need to go to these at all.

MR. HEIMERT: Yes, I think, Commissioners Shenefield and Valentine, we'll work with you on any additional statement or portion in the report developing further what you would do as an alternative.

COMMISSIONER VALENTINE: Okay, and I will move to A-1 and B-1 to be consistent with Commissioner Shenefield on what we would do with the fine authority, which I think is what you do with it in any case, quite frankly.

MR. HEIMERT: All right. So let's proceed to discussion on the second question. Should Congress clarify, expand, or limit the FTC's authority to seek monetary relief under Section 53(b)? There were some Commissioners who were uncertain on this. It seemed that the consensus was leaning towards the fourth option, which was not to change Section 13(b) and to endorse the current policy governing the circum-

stances in which it will seek monetary equitable relief. If I correctly understood Commissioners Shenefield and Carlton, they were opting for number 2, but it was tentative. And I'm not sure - I may have it written down -

no one was on option number 3.

COMMISSIONER SHENEFIELD: Could I add a slight fillip to number 4 and see whether people think well of it? I would be willing to live with it if it said, the Commission should endorse the FTC, blah, blah, blah, and urge the Department to use its authority -

COMMISSIONER DELRAHIM: No.

COMMISSIONER SHENEFIELD: - in appropriate cases.

COMMISSIONER VALENTINE: I would second that.

COMMISSIONER WARDEN: I concur in that.

MR. HEIMERT: And urge the Department what?

COMMISSIONER SHENEFIELD: To use its authority - its similar authority in appropriate cases.

COMMISSIONER CANNON: What if some believe that the Department does not have that authority?

MR. HEIMERT: Perhaps we could have some other Commissioner views on whether to do it or not, whether we want to modify, as Commissioner Shenefield has proposed, not

only to confirm FTC's authority but that DOJ also undertake use of that authority to the extent we believe it has -

COMMISSIONER SHENEFIELD: Commissioner Delrahim implies that they don't have that authority. I would like to

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COMMISSIONER DELRAHIM: No, I said it's not - some

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COMMISSIONER SHENEFIELD: I'd like to understand whether they do or don't.

MR. HEIMERT: Vice Chair Yarowsky?

VICE CHAIR YAROWSKY: Yes, to pick this up, John, that's what I want to try to do, not that I'm the definitive authority on this. Let me tell you what I thought came out of our hearing. One, both agencies have broad injunctive relief powers. Now, what Commissioner Leary was worried about before the 2003 policy statement by the FTC - he was worried for a number of years, he said - was that in FTC-land they might use their equitable remedies of disgorgement and restitution in what he called "unclear cases" because of unfair competition, not synching up perfectly with antitrust cases, as well as when private damage remedies were not available - were available, already available.

So his test was, look, if there are clear violations under the antitrust laws, and private remedies are not available, then I have no problem with the FTC seeking equitable remedies, such as disgorgement and restitution.

COMMISSIONER VALENTINE: And he testifies to us that he was happy with the reformulating statement that is reflected in 2-4.

VICE CHAIR YAROWSKY: I agree.

COMMISSIONER VALENTINE: And so then, in light of the fact that the memo to the staff also said that DOJ itself has recently advanced - and I believe that, Makan, this may be since you left - a view of the government's authority to obtain equitable remedies under the Sherman Act in a Supreme Court cert. reply brief, I would be interested whether DOJ were willing to take essentially a position that is far more consistent with where the FTC has been.

MR. HEIMERT: Commissioner Delrahim, do you have any clarification you'd like to offer on this from your experience?

COMMISSIONER DELRAHIM: They have asserted that in a cert. petition. I just don't know if they do. I am perfectly comfortable and would urge the Commission urging

the government, whatever the heck the authority FTC thinks it has or DOJ thinks it has, they should both have the same authority or no authority. I'm not in favor of granting any further authority, but I think we should, one, wait and see if the Court rules that they do have this authority, rather than relying on the whims of whoever the Assistant Attorney General is or the FTC Chairman might be, that they might or might not have it. I think defendants and the public and the Congress should probably have some clearer understanding of what they're up against.

MR. HEIMERT: Vice Chair Yarowsky?

VICE CHAIR YAROWSKY: I was just then going to finish. That was my understanding based on what we hear about the FTC powers. The corollary of that was - and it's consistent with some desire on symmetry - what are the equitable powers of the DOJ? That's what I wanted to pin down a little. I know they have some reserve, obviously reserve equitable powers, but are there highly specific statements, just as the 2003 policy statement laid out what their equitable powers are, and then we would see if they're at least theoretically consistent or not. And that's really what the second part of my inquiry is.

MR. HEIMERT: Commissioner Carlton?

COMMISSIONER CARLTON: I am persuaded by what several Commissioners have said, that there's no reason to distinguish between the FTC and DOJ. What I'm a little unclear about is the distinction between the third and fourth proposal. In light of the staff's memo, what I understood the concern to be is that the FTC does have equitable remedies, and one concern that some people raised in the hearings is that if we do anything, we don't want it to impact their ability in certain, say, consumer deception cases to get equitable relief.

So what I'm struggling with is - maybe someone could explain a little more clearly to me so I'll understand it - what the precise difference between propositions 3 and 4 -

COMMISSIONER VALENTINE: This is under sub-heading little 2?

COMMISSIONER CARLTON: Under sub-heading 2, and also, just for the record, I think what I said when I went around the room initially is that I was unsure between 2 and 3. But that's -

CHAIRPERSON GARZA: Can we just answer Dennis'

question? The difference between 3 and 4, Dennis - 3 I think says, don't make any change to the statute because of the concern about the impact on the consumer protection authority that the agency has, but to urge, sort of in a precatory way, urge the FTC not to seek monetary equitable remedies in competition cases; whereas 4 was basically saying, don't change 13(b) and endorse the current position that the FTC has, that it will, on occasion, indeed seek equitable monetary relief in competition cases.

COMMISSIONER CARLTON: Okay. And then what I'd like further discussion of - if someone could explain what the circumstances in which that would be appropriate would be - In other words, the concerns Commissioner Leary raised seemed to resonate with me, and I'm trying to figure out -

CHAIRPERSON GARZA: And that's the reference to the FTC's current policy, which is actually an adopted policy, and that's the one that Leary said had resolved his concerns.

COMMISSIONER CARLTON: I see.

CHAIRPERSON GARZA: But the policy, referred to here, at least, is the existing written FTC policy as to when it will use 13(b) in competition cases.

COMMISSIONER CARLTON: I see.

COMMISSIONER VALENTINE: I don't have the exact text in front of me, and I don't know if it would be fair to put either John Graubert or Susan on the spot. It's largely saying that it's only in cases that are really clear antitrust violations. We're not going to be going for innovative new rule-of-reason types of cases. It sort of refines a small subset of pretty egregious cases. But I don't want to testify as to what the exact language is.

CHAIRPERSON GARZA: I don't think we're going to be taking any comments from the public in the meeting, so we'll have to clarify that some other way.

MR. HEIMERT: All right. Commissioner Kempf?

COMMISSIONER KEMPF: Yes. I didn't vote the first time through on this because I said I wanted to hear the discussion. Let me give you some reactions to the discussion.

From what I hear, there's a concern that the two agencies not be differently situated, but the conversation at least persuades me that they are not currently differently situated. The FTC has said, we do have this authority, and the courts apparently have gone along with them in the face of defendants who've said, gee, I don't see anything that

gives you this express authority. So I would think, in the absence of any express authority for either of them, they are similarly situated. One has tested its ability to pursue it in courts, and the other has not yet done so, although recently, apparently, DOJ has asserted that it does have the authority.

So I don't think there's any need for us to be concerned about getting them on similar footing. I believe, from the discussion I've heard, that they are on identical footing right now. They may have reacted to it differently, but their ability to seek it or inability to do so is similarly situated.

So I am then concerned, as I go down to item 4, which several people have at least preliminarily said they would be inclined towards, that I don't know what current FTC policy is. I heard Commissioner Leary, as has been recounted, and he expressed concerns that it ought not to be certain things. And -

COMMISSIONER VALENTINE: If I could just briefly clarify -

COMMISSIONER KEMPF: - if the policy were as he wished it were, then I would be comfortable with it.

COMMISSIONER VALENTINE: We do actually have it in our memo. I apologize. And just to clarify, our memo on page four says, "The FTC adopted a policy of seeking monetary equitable remedies for violations of the antitrust laws when (1) the 'underlying violation is clear,' (2) there is a 'reasonable basis for calculating the amount of a remedial payment,' and (3) the Commission believes action would add value 'in light of any other remedies available in the matter.'"

COMMISSIONER KEMPF: I don't see it in the memo. I probably have the wrong memo.

COMMISSIONER VALENTINE: The Civil Remedies Memo.

MR. HEIMERT: Page four.

COMMISSIONER JACOBSON: The descriptive memorandum.

COMMISSIONER KEMPF: All right. I'll find it.

MR. HEIMERT: Commissioner Burchfield, in the meantime, would you care to comment?

COMMISSIONER BURCHFIELD: I just have a question, if anyone could help me on this, and that is, why has the Justice Department not used this equitable power that it is now claiming to have? I must say I can think of a pretty broad range of authority that's more persuasive to me than a

statement made in a reply brief in a Supreme Court cert. petition.

MR. HEIMERT: Commissioner Burchfield, if I could just clarify something from the memo that maybe was not apparent, that was not an antitrust case in which they were asserting the authority. It was a RICO -

COMMISSIONER BURCHFIELD: It was the tobacco RICO case.

MR. HEIMERT: And they were asserting, as I understand it, expansive remedies under a disgorgement type of theory.

COMMISSIONER BURCHFIELD: I thought that was clear, and as I read the statement, it sounds as though that statement appeared in a string cite, which would give me - which, again, would lessen my reliance on it as great authority. But I'm just interested, first, if the Antitrust Division believes, firmly believes, that it has this authority and had so stated prior to that, why has it been so reluctant to use it over the years?

MR. HEIMERT: Commissioner Delrahim?

COMMISSIONER DELRAHIM: Commissioner Burchfield was getting exactly to the point. I was going to suggest, Madam

Chair, that you consider sending a letter to the Assistant Attorney General and to the FTC Chairman asking for them to state, for the purposes of our consideration of this exact issue, what they believe their authority is for the antitrust purposes and when they intend or anticipate, and under what conditions, to use such authority, if they believe they have that, and I think we would defer this particular issue until we get that in a week or two.

CHAIRPERSON GARZA: Now, Andrew, correct me if I'm wrong, but I think that we, in fact, did get specific testimony from the FTC on that question of the existence of their authority under 13(b), did we not?

MR. HEIMERT: I took their testimony and statement at the hearing to be - from Deputy General Counsel John Graubert's testimony was that the FTC believes it has that authority, has successfully asserted it in court, and has a policy implementing that authority, as Commissioners Valentine and Kempf were just discussing. So I think the FTC is clear on their position.

COMMISSIONER DELRAHIM: Was that view on behalf of the Commission, or on behalf of the individual testimony, as often is before these types of authorities? Could we ask

them to take a majority vote of the Commission for such a letter?

COMMISSIONER KEMPF: Let me add some information to this discussion, if I might.

CHAIRPERSON GARZA: Yes.

COMMISSIONER KEMPF: With Commissioner Valentine's assistance, I have now read this, and as some of you know, I've tried a significant number of 13(b) cases to verdict. And as I look at this, it refreshes my recollection on some of the research in connection with those.

I have read a number of these cases that address this question, and the court's discussion generally goes like this: In deciding whether the Commission has this authority, we look to what courts of equity have traditionally had an ability to do, and we find that one of the forms of relief that courts of equity historically - and a lot of them trace it back to England - have had an ability to do is award monetary relief in certain situations. And that's the way they've basically done it. They have not done a statutory analysis but, rather, have grounded it on what an ability to seek equitable relief encompasses. And I would think that that is going to be the Commission's basis, and that would be

the Justice Department's basis. We don't need a special rule; this is inherent in the ability of the government to secure appropriate - and fully covering the situation, equitable relief in situations where it goes in seeking equitable relief.

CHAIRPERSON GARZA: I think that is right, and, Makan, I'm a little bit disinclined to get a letter to the FTC, the only thing being that they did testify, and it seems to me that the Commission, by authorizing the seeking of relief of this nature and by promulgating guidelines as to when it will seek the relief, has implicitly basically said it has the ability to seek the relief. But regarding DOJ, again I think what Commissioner Kempf has said is correct. We can discuss whether we want to send anything to DOJ asking why it hasn't used the authority more, although I think we would only do that if there was some sort of consensus from the Commission that we were going to decide whether to urge them to use it more, as opposed to the question of whether they have the authority to seek from a court of equity that kind of relief.

COMMISSIONER SHENEFIELD: Could I say something?

MR. HEIMERT: Commissioner Shenefield.

COMMISSIONER SHENEFIELD: Thank you. I'm not at all persuaded that they have the authority. Regardless of what any given official says, I've never heard - I think this is inaccurate. I've never heard a single head of the Antitrust Division ever claim such authority. I know no cases have ever been brought. I doubt it has ever been mentioned in anybody's speech. I just have never heard anybody suggest that it has the authority in Sherman Act cases. Now, they might be forced to the logic that Commissioner Kempf has so correctly summarized, but it would be helpful to me, before coming to a final rest on a position here, to know whether they think they have the authority. And, therefore, I see no reason why we shouldn't ask the Antitrust Division, does it have the authority or doesn't it.

MR. HEIMERT: Commissioner Warden?

COMMISSIONER WARDEN: I agree with what Commissioner Shenefield just said. I also agree with him that the authority should be parallel, and if the DOJ doesn't have it, it should either be given it, or it should be taken away from the FTC. One or the other.

I note that when we were discussing civil penalties under Question 1, the question was posed as to whether those

penalties should reduce damages obtained in private actions. I didn't think they should because penalties are one thing and damages are another. The question, however, is far more pertinent to this.

COMMISSIONER VALENTINE: Yes.

COMMISSIONER WARDEN: My basic position is, if the government sues, it should seek and obtain complete relief, and there should be no private action thereafter. But at a minimum, any amount obtained in the form of disgorgement or restitution should be a complete credit before any trebling that might be allowed in any private litigation that was permitted.

COMMISSIONER VALENTINE: Yes, I would agree, and I

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MR. HEIMERT: Commissioner Jacobson - I'm sorry.

COMMISSIONER JACOBSON: Briefly, I would not send a letter. I think we know in good detail what the FTC's position is. I think we know in good detail what the arguments that have been made against the FTC are.

With regard to the Justice Department, I believe the Assistant Attorney General had no choice but to turn such a letter over to the Attorney General, who will then consult

with the people who brought the tobacco case and will get a letter regurgitating the footnote in the tobacco brief. So I really don't see any useful purpose in sending a letter. Either we like the policy the way it is or we don't. I think it's fine. Certainly there is no documented case of any instance where great injustice was perpetrated by the absence of this authority at the DOJ or by the presence of it at the FTC. And so I see no warrant to change anything.

MR. HEIMERT: Vice Chair Yarowsky?

VICE CHAIR YAROWSKY: Well, look, the DOJ has never really gone on the record, from what I can remember, as Commissioner Shenefield indicated, except once, and this was in the early 1990s when they came before the House Judiciary Committee and someone lobbed a question not so targeted as this but generated an answer that they had reserve power. I can't come up with the citation, but they said they had reserve equitable powers. Never specified what they were. It could be injunctive relief. It could be - beyond that do they have disgorgement, restitution? If they haven't done it empirically in their record, it's very hard for us to know.

Now, John, I know you said, you know, we may be given the runaround or have to go through chutes and ladders

to get an answer, but I think it would be useful for us to know, however we get the information - informally, formally - what they view their powers are.

And Commissioner Warden, I just want to address your concern. You know, what Commissioner Leary said was - one of his initial dissatisfactions with the policy was that it may have been a double recovery like that, but what he really said was, look, where the violations are unclear, and there's really no private remedy available for whatever reason, that's where he thought there could be a useful function. Debra Valentine is shaking her head, but -

COMMISSIONER VALENTINE: Not when the violation is unclear. I said when the violation is clear.

VICE CHAIR YAROWSKY: I said where his dissatisfaction was before the 2003 policy statement were in those two areas. Once he saw the 2003 policy statement, he thought those two areas were clarified, and he was content with the use of equitable powers as that was stated.

CHAIRPERSON GARZA: My flag is up.

MR. HEIMERT: I'm sorry. Chair Garza?

COMMISSIONER JACOBSON: I move that we call the question.

CHAIRPERSON GARZA: Yes, can I actually - right. That's what I was going to do. I'd like to call the question on the issue of whether or not to get a letter to the DOJ and FTC. But then I'd also like to have a discussion - get a sense of where people are in terms of the proposal that John Warden has made. So, Andrew, that's your job, but -

MR. HEIMERT: Okay. Why don't we - on whether to request from the Department of Justice a statement of their views as to whether they have authority to seek monetary equitable relief, similar or identical to the authority that the FTC has, putting aside whether they would adopt a policy like the FTC's, but just whether they think they have that authority or they think they do not, could I have a show of hands who would like to submit such a letter?

I see Commissioners Shenefield, Valentine, Carlton, Delrahim, Burchfield, Warden, and Yarowsky who would like to submit such a letter.

And for those opposed to submitting such a letter, Commissioners Kempf, Cannon, Litvack, Jacobson, and Garza.

So there're seven -

CHAIRPERSON GARZA: I may continue to lobby people before we send such a letter since my name will implicitly be

on it.

[Laughter.]

CHAIRPERSON GARZA: And it will be me that Tom Barnett goes to when he gets it.

MR. HEIMERT: All right. And -

COMMISSIONER JACOBSON: Hear, hear.

MR. HEIMERT: The second question you wanted to address was John Warden's proposal to - perhaps, John, you could articulate it again, just so we have some clarity on that proposal.

COMMISSIONER WARDEN: My proposal is that if an agency of the Federal Government sues for equitable monetary relief, disgorgement, restitution, or whatever, that, A, the monies recovered thereby should be distributed, to the extent practicable, to the victims of the wrongful conduct; and, B, private actions to recover by reason of that conduct should be precluded, the *parens patriae* having already acted. At the minimum - and this may be a separate proposition if the first is defeated - any monies recovered by the government should be credited against damages in any private action that is permitted prior to trebling.

VICE CHAIR YAROWSKY: We haven't had a discussion

on that, have we?

MR. HEIMERT: We'll have a poll on whether to do that.

CHAIRPERSON GARZA: We'll start with Debra. I think I would just get people's reactions.

MR. HEIMERT: Okay. So we'll ask for reactions, if you will, to that, briefly. Commissioner Valentine?

COMMISSIONER VALENTINE: I would at some point support the concept that if the government does seek - first of all, I think the government does, when it seeks equitable monetary remedies, to the extent practicable, try to return them to the victims. At least the FTC does. I think the next part of your proposal is complicated and gets us actually into this afternoon's discussion, and so if there were any way to defer whether one should recommend that there also be individual private cases, I think we should try to do that. But with respect to the last concept, which is, if the government were to recover and return the monies to the victims, that should be offset against any private relief, if there were private relief. I think that is also a concept that I would be willing to endorse and probably, I think, the FTC would be happy to abide by - well, before - that gets

more complicated before or after trebling, and that, again, turns on the stuff from this afternoon.

MR. HEIMERT: Commissioner Kempf?

COMMISSIONER KEMPF: There is some experience. The SEC has for a long time had recoveries that purport to give to victims. How well they do that is the subject of some debate. And against that, I would be in favor of keeping the present system of allowing private actions to address this. I think those would more likely be better on almost every front than substituting the government as a *parens patriae* rather than direct private actions or class actions.

COMMISSIONER VALENTINE: No attorney's fees.

MR. HEIMERT: Commissioner Shenefield?

COMMISSIONER SHENEFIELD: I would rather wait until this afternoon. I understand the principle motivating the proposal, and I'm in sympathy with much of it. But I'd rather wait until this afternoon to talk about it.

CHAIRPERSON GARZA: Are you moving to do that? Can we treat that as a motion to wait until this afternoon? And, John Warden, are you comfortable with that?

COMMISSIONER WARDEN: I'm entirely comfortable with that.

CHAIRPERSON GARZA: Does everyone agree with that?  
Okay.

MR. HEIMERT: All right. So then we'll stop taking views on that. We'll cover that this afternoon, and if we have to come back to this issue at some point down the road, we will.

COMMISSIONER CARLTON: Could I just make one related comment? I'm happy to speak to it this afternoon.

Some of the points John Warden just made echo in part what Commissioner Leary was worried about: namely, the interaction between monetary relief and private damages. And Commissioner Leary's position, as I understood it, was where private damage remedies exist, there may be no need for monetary relief. And what I'm concerned about, about the wording of Item 4, is that, as I understand it, Commissioner Leary's concerns were alleviated, I think are the words that the memo uses. I'd be more comfortable spelling out what we think we're endorsing with the FTC's current policy.

Is it, in fact, the FTC's current policy that it will not seek monetary relief where private remedies exist? If that's so, I think that should be more explicitly, at least for me - maybe everyone understands the words "FTC's

current policy" to be covering that case. But I really am not sure I have an answer to the question of why either the DOJ or the FTC need this authority in the presence of the ability to have private damages. And that's where I am a little nervous on this proposal, and that's what I think John Warden's suggestion is trying to address - that tension.

MR. HEIMERT: Chair Garza?

CHAIRPERSON GARZA: You know, Dennis, I agree with where I think you are, and that was one of the reasons I had added that we ought to endorse the policy but caution about its use, because I think I share your concerns about needing to focus on the specific factors, and I have some doubt as to whether in most cases these factors would counsel in favor of bringing a case. But my own feeling was that there might be some case out there, and I would just be reluctant for us to say that there would never be a situation in which it wouldn't be appropriate for the equitable powers of a court to come into play.

But I think that's right, and we should consider having the staff, if 2-D is indeed sort of the majority view, to have the staff address the specific aspects of the FTC's policy.

MR. HEIMERT: Commissioner Kempf - I'm sorry. Vice Chair Yarowsky, did you have -

VICE CHAIR YAROWSKY: We can move on if everybody wants to. Again, I just want to clarify. We'll talk about this I guess this afternoon. But my clear sense from former Commissioner Leary's testimony was not that he was advocating in any way a race to the courthouse between the FTC and private litigants, and if the FTC got there first and had a disgorgement, that basically would extinguish all this private litigation because they already disgorged.

I think what he was saying is, where there's a vacuum - where there's a vacuole, and really, private redress is not possible, that would be the kind of situation where they'd go in. And obviously, if they did, it would take care of the duplicative recovery because there really wasn't a possibility for that original recovery in the first place.

I just wanted to just give my sense of what he said there.

MR. HEIMERT: Commissioner Kempf?

COMMISSIONER KEMPF: On the first go-round, two Commissioners, I think - Commissioners Carlton and Shenefield - registered support for 2-2, which would bar them. But I

think they did that, at least in part, on symmetry concerns rather than substantive concerns, perhaps believing that DOJ was already barred.

But I'm now torn between that one on substantive reasons and the way we have an emergence of 4 now, which is, the Commission should use this authority rarely and only generally in the following circumstances and then spell things out, as Commissioner Carlton put out. So I'm split between the two of those now, but I'm more comfortable with the fourth one, as Commissioner Carlton just articulated.

MR. HEIMERT: Commissioner Valentine, did you have something more you wanted to add?

COMMISSIONER VALENTINE: Yes. I think that in light of both the emerging concerns of some Commissioners and the willingness to consider other things of others, Chairman Garza's suggestion that the staff do a memo on what the FTC policy actually is would be helpful for people.

I do think, however, that with respect to their policy, where, in prong 3 they say that they will bring these cases seeking equitable monetary relief when they believe that action would add value "in light of any other remedies available in the matter" - what that means is they certainly

will take into consideration whether private actions are out there that largely would address the problem and appropriately reward victims.

I could imagine circumstances where there may be monies going to direct but not indirect purchasers, where they might think that could be an issue and there could be something that they could do in conjunction with the states. I could also imagine that there would be no private actions and they would think it would be appropriate, and/or if there were private actions, it is their policy to offset, as it is the SEC's policy.

So if all of those things - I mean, if those kinds of amplifications would help people, then I would be in support of your proposal, Chair Garza.

MR. HEIMERT: Commissioner Warden, did you wish to say something?

COMMISSIONER WARDEN: I don't want to delay this much longer, but picking up on what Vice Chair Yarowsky said, if the policy is to bring these equitable monetary actions only when there are not available effective damage awards, then they should be preclusive of private damage actions so that the respondent in the FTC proceeding doesn't find out

that some district judge down the line thinks there is an effective damage remedy.

MR. HEIMERT: Is that acceptable, Commissioner Valentine?

COMMISSIONER VALENTINE: I am not the FTC, but that is not my understanding of their policy.

COMMISSIONER BURCHFIELD: In fact, the memo reports on pages 16 and 17 that in some instances of disgorgement they have been followed by private litigation, and *Mylan* is the one that's cited there.

COMMISSIONER VALENTINE: And in that case, all the cases were consolidated and offsets were taken into consideration.

MR. HEIMERT: Commissioner Shenefield? And then we'll try to wrap it up.

COMMISSIONER SHENEFIELD: I just would not like to get lost in all of this. The idea is that if the Department has the power, it should use it in appropriate cases, and if it doesn't have it it should be given to it if the FTC retains it.

MR. HEIMERT: Why don't we try to go through these four options and see whether Option 4, as the discussion has

revealed - we'll call on staff to develop a little bit further the thinking and limitations that we might recommend the FTC adopt above and beyond what they already have recognized, I think, as a limited policy or a limited set of circumstances in which they will seek relief. But we will develop that along the lines that Commissioner Valentine was suggesting, and others as well, and Commissioner Warden and others, to try to reach, at a subsequent meeting, consensus on under what circumstances we think it would continue to be useful for the FTC to use the authority that it has. We will also send a letter or figure out, if we can, what DOJ's authority or view of its authority is on this matter, whether through a letter or otherwise. So Option 4 is modified in those ways and should be understood that way.

Options 1 through 3 remain the same, but why don't we go through formally to see where we are. So this is on Question 2, Should Congress clarify, expand, or limit the FTC's authority to seek monetary relief? Number 1 recommends statutory change to clarify authority. Any Commissioners in favor of that?

I see no hands.

Option 2 is to recommend statutory change to bar

the FTC from seeking monetary equitable remedies.

COMMISSIONER KEMPF: I'm for it if the DOJ concludes it doesn't have it and doesn't want it.

MR. HEIMERT: Okay.

COMMISSIONER WARDEN: I concur. I would agree with that.

MR. HEIMERT: Okay. Let me just - we have John Shenefield, Dennis Carlton, Don Kempf, Commissioner Delrahim, Commissioner Warden, and Commissioner Burchfield.

COMMISSIONER KEMPF: Possibly Burchfield.

MR. HEIMERT: And possibly - so we will continue to investigate this. This probably will need to be revisited depending on what the research reveals, but this is to get a sense of where we are and try to limit -

COMMISSIONER DELRAHIM: Send the Justice Department a letter.

COMMISSIONER KEMPF: My concern here is I don't think we're going to get a definitive indication from the Justice Department that they do not have that authority. It would probably be one of the first times in the history of the Republic that an agency has disclaimed authority to do -

MR. HEIMERT: Fair enough, Commissioner.

COMMISSIONER WARDEN: But you might get a definitive statement that they do have the authority, in which case that would be helpful.

MR. HEIMERT: Option 3, no change to 13(b) is appropriate, urge the FTC not to seek monetary equitable remedies in competition cases. Any Commissioners in favor of that proposal? I see no hands.

Option 4, no change to 13(b) is appropriate; the Commission should endorse the FTC's current policy, but with the limitations that we will develop, making specific limited recommendations. I see Commissioner Litvack, Commissioner Warden, Commissioner Jacobson, Vice Chair Yarowsky, Chair Garza, Commissioner Cannon, Commissioner Kempf, Commissioner Carlton, Commissioner Valentine, Commissioner Shenefield, and - oh, I'm sorry, Commissioner Delrahim, did you have your hand up on that one as well?

COMMISSIONER DELRAHIM: I did have that, subject to Commissioner Carlton's -

MR. HEIMERT: And Commissioner Burchfield. So all 12 Commissioners have approved continued investigation along the lines we've just discussed, and then six Commissioners already indicated some interest, depending on how that

research comes out, a possible bar to the FTC, but we really can't, I think, resolve that at this point, barring further additional thinking and research on this. So we'll take that up at a future meeting.

COMMISSIONER JACOBSON: I don't think all 12 agreed that further research is necessary. Maybe 11, but not this one.

MR. HEIMERT: Commissioner Carlton, did you have one more?

COMMISSIONER CARLTON: A clarification obviously to 4 will matter a lot.

MR. HEIMERT: Yes.

COMMISSIONER CARLTON: To determine -

CHAIRPERSON GARZA: All we're doing on 4 is getting a further memo from the staff so that we can more carefully discuss what kinds of limitations we think we would -

COMMISSIONER CARLTON: Yes, and I think we should also add it's clear that there is a close relationship between 4 and our discussion this afternoon.

MR. HEIMERT: Yes, and we'll take that up then as well, and I think that may - we'll have to see how that changes minds.

COMMISSIONER SHENEFIELD: I think there's one other piece of homework that needs to be done with respect to 4, and that is the letter or in some way determining whether, if at all, the Department will say whether it has this authority.

CHAIRPERSON GARZA: That we already, I think, voted on, agreed on, although it was 6-6.

COMMISSIONER SHENEFIELD: I was misled by your statement.

[Simultaneous conversation.]

CHAIRPERSON GARZA: 7-5? All right. Well, I think before we - to be frank with everybody, before I shoot off a letter to the Justice Department, I will consult with Tom Barnett, because there is some bit of awkwardness here. But I will talk to them, and then we'll get a letter out, and we'll see whether we get anything that's actually responsive.

COMMISSIONER JACOBSON: Well, what about a research memo in lieu of a letter based on what's out there? Would that -

COMMISSIONER SHENEFIELD: I think the point is, does the government have that authority?

COMMISSIONER DELRAHIM: Or the point is, does the

government think it has -

CHAIRPERSON GARZA: You take the position that you have the authority, and what may come back is either yes or no. Presumably they'll say yes.

COMMISSIONER DELRAHIM: Yes, probably.

COMMISSIONER CARLTON: At the very least, is there a proposal that we're going to vote on following up on John Shenefield's point that the AMC takes the position, either yes or no, that there should be no distinction between the authority the DOJ has versus the FTC?

CHAIRPERSON GARZA: We can do that. I mean, I thought that was -

MR. HEIMERT: We are going to address that. We can address that when we have the further information that we get - no?

CHAIRPERSON GARZA: No, wait, wait. As the Chair, I don't think that's what his point was. I think the issue is whether just to have clarification that the views of the Commissioners are - whichever way the Department of Justice question comes out, whether the view is that both agencies, to the extent that either agency has the ability to seek such equitable monetary relief, both agencies should have the

ability to do so. I think that was the question. And I think I know what the answer is, but can I just ask for a call of hands for those who agree with the principle that if either agency has that authority, both agencies should have it?

MR. HEIMERT: Are we showing hands or not on this?

COMMISSIONER VALENTINE: I agree with that principle, but I don't agree with the principle that if one agency says it doesn't, we take it away from both.

COMMISSIONER SHENEFIELD: It is precisely for that reason that I have the opposite view, that we shouldn't give it to either one. I would - for the considerations that Chair Garza has - that says, gee, if one of them says no, then I don't want to take it away from the other one, I would also say, well, if one of them says yes, we shouldn't give it to the other one. I'm very comfortable with a lack of symmetry here.

CHAIRPERSON GARZA: I think it's appropriate, given

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COMMISSIONER SHENEFIELD: All right. Well, let's have a show of hands.

CHAIRPERSON GARZA: Wait a minute. I think it's

appropriate, given the time and given the question, that when we get the research from the staff that indicates the research and through our question to the DOJ, what the DOJ's position is, then we can revisit this thing, rather than take it up piecemeal, alright?

COMMISSIONER CANNON: I never knew that antitrust was so similar to child rearing in my life.

[Laughter.]

MR. HEIMERT: All right. Well, the Commission will take a break for lunch. We will resume as quickly as we can, although we need a reasonable lunch break. It's now five 'til 1:00, so we'll say 1:25. We'll resume promptly then, and we'll adjourn until then. Thank you.

[Whereupon, at 12:55 p.m., the meeting was recessed, to reconvene at 1:25 p.m., this same day.]

[Whereupon, at 1:29 p.m., the meeting reconvened.]

#### **Indirect Purchaser Litigation**

MR. HEIMERT: At this point the Commission meeting is resuming.

The third topic of today is indirect purchaser litigation. All Commissioners see the questions that we sent out for public comment and the issues we'll be addressing.

And as we did earlier, we'll proceed through with each Commissioner asked to provide his or her initial views or indecision on a particular issue at this point, then calling for further discussion on each of the options. No need to specify all of the sub-options if you're not inclined towards the particular proposal. I think it will probably come out during the discussion, so we'll go back and formalize the votes.

We'll begin with Commissioner Shenefield, if you could give us your initial views on indirect purchaser litigation, please.

COMMISSIONER SHENEFIELD: For the sake of convenience, can we label the boxes under 1 and 2 as 1, 2, 3, and 4, and then the subparts as A, B, *et cetera*?

As to 1 and 2, I would support 4 -

CHAIRPERSON GARZA: 1 and 2 are just the same question, so I think "No statutory change is appropriate," Box 1, would be 1. "Recommend statutory change to preempt..." *et cetera*, that's 2. "Recommend that *Illinois Brick* be overruled by statute," which begins on the second page, that's 3. "Recommend a statute containing multiple elements," that's 4.

COMMISSIONER SHENEFIELD: Thank you very much.

Starting again, as to 1 and 2, I would opt for 4, but I would urge us to think very seriously of enacting preemption of state laws, but I'll go along with it even without that point. And if we were to go via 4, then I would be in favor of, on the final page, A-1, the "trifurcated" proceeding, and B-2, "Make no specific recommendations in this regard."

MR. HEIMERT: Commissioner Carlton?

COMMISSIONER CARLTON: I recommend that there be a statutory change to preempt the state laws that permit indirect purchasers to recover. And, in particular, I recommend preemption of all actions, both private and those brought by state attorneys general, unless - and this is something I'm adding - direct purchasers have not sued for some set amount of time, in which case the state attorneys general can sue.

CHAIRPERSON GARZA: Dennis, so that's - Option 2, "Recommend statutory change to preempt state laws that permit indirect purchasers," and then under that it would be the first box?

COMMISSIONER CARLTON: The last, the third.

CHAIRPERSON GARZA: Oh, I'm sorry. The last box, okay. Thank you.

COMMISSIONER CARLTON: You know, actually, why don't I ask - why don't you come back to me? Let me use this new form.

MR. HEIMERT: All right. We'll come back.

Vice Chair Yarowsky?

VICE CHAIR YAROWSKY: Okay. Well, I begin the discussion in a very similar place to Commissioner Shenefield. Taking number 4, I don't see anything about *Hanover Shoe*, so we may want to talk about that in the context of this particular itemization of components. So I think we need to talk about that.

I like that. That obviously funnels into the Class Action Fairness Act that just was passed in 2005. Dennis, in that respect, not that that changes anything you said earlier, but there is a carve-out for state AG suits there that doesn't go to all the points you brought up, but just to point that out.

So that's kind of the center of gravity that I would start with. I'd also be open about the recommendation about a trifurcated proceeding but need to talk about it some

more. And, B, no specific recommendations at this moment.

MR. HEIMERT: Commissioner Burchfield?

COMMISSIONER BURCHFIELD: I am also on 4, and with these modifications: I would add a *Hanover Shoe*-repealer. I would delete subparagraph (5), "allowing prejudgment interest to plaintiffs" - I would eliminate the proposal for prejudgment interest to plaintiffs on the grounds that in an indirect purchaser situation, the dispersion of the money will be such that determining who should fairly pay that prejudgment interest becomes imponderable, and I think the damaged parties will be made whole through the treble damages remedy.

I would make no recommendation with regard to trifurcated proceedings, and I would make no recommendations with regard to the class action certification.

MR. HEIMERT: Commissioner Valentine?

COMMISSIONER VALENTINE: I am also in favor of Option 4. I would, with others, include the *Hanover Shoe* repeal. And I think, to the extent that we could think about making as mandatory as possible the resolution of all claims in a single forum such that, in fact, state actions should be in federal court, if there are parallel federal cases and if interstate commerce is involved, things like that I would be

in favor of, but I'm willing to wait and flesh that out as we all hear more.

On the final subsets of 4, I am in favor of the trifurcated proceedings in A, and on B, I would go with number 2, no specific recommendations.

MR. HEIMERT: Commissioner Delrahim?

COMMISSIONER DELRAHIM: I like Recommendation 3; 3-A-1, that *Hanover Shoe* also be overruled by the statute; 3-B-1, that the legislation preempt state laws unless - I'd like to make a modification here - unless you have wholly intrastate action where the plaintiffs, defendant, and the activity occurred within that state, then the state law shall apply; and 3-C-2 - I think part of this will be resolved by the *Hanover Shoe* matter, but I would allow indirect purchasers to sue without regarding to direct purchaser lawsuits.

MR. HEIMERT: Chair Garza?

CHAIRPERSON GARZA: I'd agree with Makan.

MR. HEIMERT: Commissioner Cannon?

COMMISSIONER CANNON: Well, as between the two, I'd probably lean more toward 3 than 4, but I've got a couple things I'd switch around, but I want to hear the debate and

keep going.

MR. HEIMERT: All right. So we're up to Commissioner Jacobson.

COMMISSIONER JACOBSON: I ditto Commissioner Burchfield. The one qualification is that, although I would not provide for trifurcation in the statute, I would, in the report, urge the courts to trifurcate the cases.

MR. HEIMERT: Commissioner Kempf?

COMMISSIONER KEMPF: The reason I don't like 4 is that it has a lot of baggage that doesn't have anything to do with the issue, like prejudgment interest and the like. So I go to 3, and with some caveats.

I would in 3-A pick the first one, but I would strike the "and include a mechanism to allocate damages between direct and indirect purchasers." My view is the courts will sort that out; the parties will sort that out. It may be a fight that sorts it out, but I don't think that we need to come up with a mechanism. I think if you just overrule *Illinois Brick* and *Hanover Shoe*, the rest can be developed in the courts or through private negotiation.

B-1, and I would concur with Commissioner Delrahim's comment about it, was an intrastate only matter.

And C, I think I'd probably make no recommendation, but if I had to make one, I'd make C-2.

Just to address some of the things in 4, it sounds like too much of a structured society, all resolution of claims in a single forum, addressing removal, consolidation. It just goes into too much detail, in my judgment, and trifurcating proceedings and all that sort of stuff. Those kinds of things I think are all better worked out in the context of actual cases than by general fiat. I think it's much simpler and better to go back to a sensible regimen that would result from an overruling of *Illinois Brick* and *Hanover Shoe*. Right now we have a rule that says that people who are actually injured cannot recover and people who aren't actually injured can. And that strikes me as nutty, but it came about because of the order in which the cases were brought.

If we would reverse the two of those and then preempt in order to further correct the problems that have come about because some of the states have recognized that the current regime is silly, that would probably be sufficient and the rest would sort itself out.

MR. HEIMERT: Commissioner Litvack?

COMMISSIONER LITVACK: I would opt for number 3, overruling *Illinois Brick*. I would go for A-1, that *Hanover Shoe* be overruled. Under B, B-1, total preemption. And under C, which would obviate part of A, I would provide that indirect purchasers would sue only if no direct purchaser has sued. That would obviate part of A, quite obviously.

And just by way of very brief amplification, I am driven in good part by the fact that the notion to me of trifurcation as a trial lawyer just makes no sense whatsoever. Judges have a hard enough time with bifurcation. For us to talk about trifurcation - No judge is going to do it anyway.

MR. HEIMERT: Commissioner Warden?

COMMISSIONER WARDEN: I am in favor of number 3. Under 3-A, I'm in favor of number 1. Under 3-B, I'm in favor of number 1. I would make it explicit that the preemption would be of all state laws, even if they're titled unfair competition or consumer protection or whatever, addressing the conduct in issue, and I would have that preemption apply to both direct and indirect purchaser actions. I don't see why it should apply only to indirect. And I would also include a carve-out there for what I would call local

offenses. I'm not sure they'd have to be entirely intrastate, but certainly principally in a single state. I would allow state law to apply to that. Under C, I favor 2.

Some of the 4 options are applicable to 3, in my view, so I favor number 1 under 4-A and number 2 under 4-B. I also think there should be a consolidation for trial, a single federal forum. I don't know whether that's up here or in some other part of our discussion.

COMMISSIONER BURCHFIELD: I read 4, sub-3 as the effective overruling of the *Lexecon* case.

COMMISSIONER WARDEN: Okay. I'm in favor of that. Thank you. 4, number 3, but that doesn't mean that I favor 4. I favor big 3, and out of the little laundry list, some of which is irrelevant, as someone said - under 4 I would pick Item 3.

CHAIRPERSON GARZA: So you want resolution of all claims in a single forum to be added to 3?

COMMISSIONER WARDEN: Yes. I also want trifurcation added to 3.

MR. HEIMERT: All right. If I have this right, the consensus seemed to be between 3 and 4, and there was a relatively even split, although I think that there was a fair

degree of overlap once we get to the particulars of it, between those two.

I saw no one in favor of Option 1, which is, "No statutory change is appropriate." If someone does think no statutory change is appropriate, raise your hand or flag and speak.

COMMISSIONER KEMPF: I think you're premature. I think Commissioner Carlton said, "Come back to me," and I think before we summarize where we are, we ought to -

MR. HEIMERT: Okay. I was going to come back to him on the next one, because I thought he was on number 2, but you are correct, Commissioner Kempf.

So, Commissioner Carlton?

COMMISSIONER CARLTON: In comparing the two forms, the language is relatively similar. I think what I said earlier states my position. I would be in favor of 2. And then I would check the first box with the added caveat that only in the case in which direct purchasers have not sued -

MR. HEIMERT: Commissioner Carlton, maybe you could explain a little bit further your thoughts on that? I think you're the only Commissioner taking this approach at this point.

COMMISSIONER CARLTON: Yes, I thought *Illinois Brick* - well, let me start over.

The incentive to sue and recover damages - there are always multiple layers of damages in any economy with stages of production, and by concentrating the damages at the first level, you create the largest incentive to sue amongst those who are likely to be most knowledgeable. And my reading of the literature, the economic and legal literature on this, is that that's the appropriate way to create optimal deterrence.

Trying then to figure out who gets harmed as you go later and later down the stage of production turns out to be pretty complicated, and you can either measure the harm at the first level, or you can try and subdivide it.

Now, that does leave you in a situation in which sometimes people who get harmed, the ultimate purchasers, don't wind up getting compensated. And I understand why that bothers some people. On the other hand, if the goal of the antitrust laws is to deter, rather than to compensate victims, then concentrating on the direct purchasers seems like the most efficient way to accomplish that task.

In situations where the direct purchasers do not

bring a suit - and in the hearings there were several examples that people gave as to why that may not be the case - it does seem to me you may want to carve out an exception and in those situations allow someone to stand in the shoes of the indirect purchasers and sue. And that seems like an appropriate role for the state attorneys general, who seemed eager to take on that role.

It also seemed to me to relate to our discussion earlier this morning. If the FTC is stepping in to fill a gap and one of the gaps it thinks it wants to fill is this one I just described, then maybe we should figure that discussion into this one. I didn't think of the FTC as filling the gap; I thought of the state attorneys general as filling the gap.

MR. HEIMERT: Vice Chair Yarowsky?

VICE CHAIR YAROWSKY: Yes, I just need to say a few words, and then I'll be back. But a couple things.

I think, just for the discussion, we should bear in mind that, by some of these choices we may be suggesting amendments or alterations to the Class Action Fairness Act, which is fine, but let's just kind of remember what it has and what it doesn't have.

The reason I chose 4 in that regard, no preemption, was that the Class Action Act has a very strong preemption scheme that was created. So you have to have a case involving \$5 million or more of claims - that should be easy - a hundred or more plaintiffs, and minimal diversity, at least one plaintiff and one defendant in different jurisdictions.

So the way what we recommend will be digested through existing law - at least we should bear that in mind because that kind of influence - none of these choices really have all the different components in my mind. That's why I chose that one about no preemption.

The other thing to remember is that the state AGs, as I said, have a carve-out. Again, that's narrowly construed, so it has to be a very pure intrastate situation; that's already in the Act, so to the extent that is relevant, we should bear that in mind.

Thirdly, *Lexecon*. I think a couple things: one, I think we decided maybe a year ago we weren't going to touch *Lexecon*. It doesn't mean we can't re-decide that issue now. The reason being - and it's still operative, but it may also tell you how things are going with it - is that Congress is

grappling with it right now. And so my sense was if they were about to reach a decision or working on a decision, perhaps we would not want to intrude there if it was imminent. Their decision - what they're talking about is *Lexecon* for trial, not for damages. So pre-discovery, trial, but eventually it would go back to the referring courts - this is what Chairman Sensenbrenner and the Senate Judiciary folks were talking about - for a damage determination.

So to the extent we want to discuss *Lexecon*, we should make an affirmative decision, because we didn't have that.

Debra, you are shaking your head, but this was pursuant to a recommendation from the Judicial Conference. So just to kind of set that in -

COMMISSIONER LITVACK: I was going to ask why; why would anyone do that?

COMMISSIONER VALENTINE: Thank you.

VICE CHAIR YAROWSKY: That is from the Judicial Conference, okay? But anyway, I just wanted to point out those few points just as we discussed this.

MR. HEIMERT: Commissioner Shenefield?

COMMISSIONER SHENEFIELD: I would be happy to

accept 3 if it is reordered in the way that John Warden suggests, that is to say, 3 plus Item 4-3, resolution in a single forum, plus 4-B-1, trifurcated proceedings, plus 4-A-1, trifurcated proceedings, and 4-B-2, no specific recommendations with respect to class action certification.

COMMISSIONER KEMPF: Let me add a clarifying question. What is trifurcated? It would be damages, liability - and what's the third one?

COMMISSIONER SHENEFIELD: It's liability, injury, and damages.

COMMISSIONER JACOBSON: Well, liability, total amount of damages, then the third stage would be individual allocation as between the directs and indirects.

CHAIRPERSON GARZA: Commissioners, I know as it gets longer into the day there's going to be a tendency to just talk. But for the record, we will need to ask to be acknowledged before speaking.

Thank you.

MR. HEIMERT: Commissioner Jacobson, you were up next, I believe.

COMMISSIONER JACOBSON: This is an instance where I think FACA really works against us, because I think the

differences among the group are minor, and in a less public proceeding could be worked out quickly and more efficiently.

The differences between 3 and 4, at least as articulated, are quite narrow, particularly if the option under 3 is 3-A, 3-A-1 is selected, we're really not talking a significant difference.

The main area that I see in terms of the difference between those who are supporting 3 and those who are supporting 4 is in the preemption of state law. The preemption of state law, there are two things that are important to recognize about that. One is, it's a hot-button issue with a lot of people. Now, if it's the right thing to do, I think the answer to that is, "Too bad." But if you can accomplish the same good through a less confrontational means, then why not do that?

And there is a more non-confrontational means, specifically, removability. If the case is brought in state court under state law but is removable and is consolidated into the same single federal proceedings, you obtain all the benefits of preemption without any of the negatives associated with it, because the law will still remain in all jurisdictions that a plaintiff can only get a single recovery

at the end of the day.

So, you know, I think what we ought to try to do is to propose a 3.5 that has the best of 3, and the best of 4, and avoids preemption but uses removal in its place.

MR. HEIMERT: Commissioner Delrahim?

COMMISSIONER DELRAHIM: Getting back to some of the differences between the Class Action Fairness Act - I think it does touch on this, but some of these may not be class action cases. They could be indirect purchaser cases that do not touch on that, and a lot of people would probably argue that the Class Action Fairness Act was probably not the best policy, but the best political reality that ultimately survived.

I think of the antitrust cases, you know, some of the suggestions with 3, 3.5, makes some sense. I don't think preempting state law where, you know, those that enter state actions in these antitrust cases would really touch on the Class Action Fairness Act as far as a procedural rule, because you have preemptions in many other areas of substantive law, and I think it makes a lot of sense in this area and a lot of people have testified to it.

MR. HEIMERT: Commissioner Burchfield?

COMMISSIONER BURCHFIELD: I come to this issue of indirect purchaser actions frankly having been much educated by what we've seen and heard during the hearings here. I'm reminded of the quotation from Thomas Hobbes: "Hell is truth seen too late." And certainly we are seeing hell in the judicial system as a result of these indirect purchaser actions.

I am troubled by the judicial inefficiency that we see as a result of these actions, by the potential - which some say is not realized, but there is a potential for multiple liability for the same offense, and also for the variation in remedies available to people based solely on where they live. With 30-some states having indirect purchaser actions and the other states not having indirect purchaser actions, we have a regime where there are multiple dimensions for unfairness.

My inclinations, as stated before, are to advocate Option 4 with certain modifications. I think for CAFA to be effective in this area, the *Lexecon* decision would have to be overruled. If the lawsuits are brought to the federal court only for purposes - and consolidated only for purposes of discovery and motions practice, that is not going to reap the

result we need.

Second, I would overrule *Illinois Brick* and *Hanover Shoe*. I am most persuaded that those should be overruled in the *per se* area, but, absent some strong reason to draw a line there, I would overrule them completely.

I would not preempt state law. The basis for indirect purchaser actions derive from some many different sources of state law; I think it would be difficult to enforce preemption. I think we need experience with a more reasoned approach to indirect purchaser actions as indicated in Option 4 by allowing these cases to be brought in federal court before we take the much more radical step of preempting a variety of different sources of state law.

And then, finally, I would allow the courts to determine how to use their procedures to promote efficient resolution. Mandatory trifurcation, as Commissioner Litvack said, is something that judges hate. They hate even bifurcation. Trifurcation we'll see a lot of judicial resistance to. It would be very burdensome and expensive, and I doubt we would look back in ten years and think it was successful.

I'm inclined against changes to class certification

rules for this unique situation, and for the reasons I said before, I would oppose prejudgment interest in these circumstances, which, as I recall, was a compromise "gimme" in the ABA proposal. I think if prejudgment interest makes sense in the antitrust law, it makes the least amount of sense here because, by definition, the damages had been dispersed among a variety of different defendants, and it is difficult to determine who should pay, who has held the money, and who has gained from the victim's loss.

So that states my position, and I think I've been clear before in what else -

MR. HEIMERT: Commissioner Kempf?

COMMISSIONER KEMPF: I'm going to enthusiastically embrace Commissioner Jacobson's suggestion that we look for something that takes the best of 3 and 4 and narrows it. As I heard Commissioner Burchfield speak - I mean, he was saying, here are the reasons I support 4, and he went through a long list of items from Proposal 4 that he would reject, which is why I rejected it in the first place and went to 3 instead. So I think Commissioner Jacobson may be right that there's a lot of common ground we could reach on that.

My other observation is this: I view this as an

extremely important high priority for us, and I think we substantially undermine it the more bells and whistles we put on it. So whether I'd favor prejudgment interest or am opposed to prejudgment interest, it's a hot-button issue, and when we include it, we lose support. Whichever way we were to go on it, we would lose support for the fundamental thing. The same with getting rid of the *Lexecon* decision, and I'm now persuaded that we could not include preemption but have a simplified, guaranteed removal that would have the same effect. I think Commissioner Jacobson persuaded me on that.

So I would encourage us to go about this - and I agree with those who have said trifurcation would be another hot button and would engender a lot of opposition. I think what we're doing is letting the perfect be the enemy of the good, and by tacking on a lot of wish-list items that, if we were grand kings of the universe, we might design a system that way. We ruffle too many people's feathers and undermine the prospect of overruling *Illinois Brick* and *Hanover Shoe*. So in the search for something that takes the best of 3 and 4, I would have a strong presumption that less is more.

MR. HEIMERT: Commissioner Warden?

COMMISSIONER WARDEN: There's a lot of good sense

in what Commissioner Kempf just said, and I take Commissioner Jacobson's point about the political difficulty of preemption and Commissioner Burchfield's point about the desirability of gaining experience before going as far as preemption. But I still favor preemption. States can, under an un-preempted system - certain state laws could call for recovery in situations that federal law would not call for recovery. States can include provisions for \$100 or \$1,000 minimum damage for each class member or plaintiff. You can have all kinds of problems, and if the past shows anything, it shows that these problems will come into being as soon as others are eliminated if we do not go all the way.

Preemption here I don't think really would conflict with the Class Action Act because we're talking substantive law here, and we're talking rules that would apply only to antitrust, not general procedural or jurisdictional rules. So that's where I am.

I think in terms of our debate and decision here, since, as many have said, there seems to be a large degree of consensus, maybe we ought to take a vote on - I'm sorry?

CHAIRPERSON GARZA: I think I'd like to talk before we take a vote.

COMMISSIONER WARDEN: No, no, no, I don't mean right now. Everybody's welcome to talk all they want, as far as I'm concerned. But I think the first thing we might want to vote on is whether people favor preemption or not.

CHAIRPERSON GARZA: I agree.

COMMISSIONER WARDEN: And then go on from there. I certainly agree with the comment made that prejudgment interest has nothing to do with this. That's a whole separate part of our deliberations under another heading. And, you know, the fact that the ABA decided to throw it in doesn't mean it ought to be part of what we're talking about.

MR. HEIMERT: Chair Garza?

CHAIRPERSON GARZA: Thank you. The reason I said I wanted to talk - I agree with you that it would be useful, because I do think preemption of state law is one area where we differ. I don't agree with John that FACA works against us or anything. I think that it's a legitimate thing to talk about, and I have no problem talking about the preemption issue in a public forum. Eventually, it's going to have to be talked about if somebody does any reform.

COMMISSIONER JACOBSON: John, not me.

CHAIRPERSON GARZA: You.

COMMISSIONER JACOBSON: I didn't say that.

CHAIRPERSON GARZA: Okay. All right. I'm sorry. I thought you said FACA worked against us. But, in any event, the question I have - I wanted to explain why I think preemption was important. Part of it is what John Warden said. But the other thing is, what I'm not sure about is - one of the things that strikes me in this kind of litigation is the estoppel question, that basically plaintiffs have the benefit of it, and I'd be concerned about that. And you mentioned, Jon Jacobson, that there could be removal. But how would that work? How would that work so that you wouldn't have the situation of having state actions that were being tried separately? How would removal take care of - do everything that preemption would do?

COMMISSIONER JACOBSON: You would provide for the removal of any state claim based either on a state antitrust law or other state statutory or common law provision seeking recovery for overcharge attributable to an agreement among competitors. And I think that would capture everything that Jon is talking about.

Once you've all removed it into federal courts in the same proceeding, you have provisions that preclude

plaintiffs from splitting their cause of action post-judgment, and I think you achieve all the good with none of the detritus associated with it.

CHAIRPERSON GARZA: And you don't need to overrule *Lexecon*, or would you need to?

COMMISSIONER JACOBSON: I think that's a separate question, what you do with the trial. I understand - you know, Jon has always been hostile to this, but I want to make clear for the record that when we took on the *Illinois Brick* set of issues, we made clear that we were going to look at *Lexecon* in this particular context. I personally think it's a no-brainer that, limited to this context of indirect purchaser/direct purchaser litigation, *Lexecon* must be overruled.

CHAIRPERSON GARZA: Yes, but just for antitrust cases.

COMMISSIONER JACOBSON: Just for these types of antitrust cases, at a minimum.

MR. HEIMERT: Commissioner Litvack?

COMMISSIONER LITVACK: Well, I do agree that it seems that the main, if not disagreement at least issue, is the preemption question. Everyone seems to agree that in

some form or another it's good to get it all in one forum. Whether you can do that as Jon suggests or you have to do preemption, I guess is the issue. But perhaps more basic, at least to me, as I listened to this - is: Are we not faced with the question - and isn't this part of it? Are we recommending what we think will be done? Or are we recommending what we think is right? Do we live in a real world? Are we limited to the practical realities? Or are we going to suggest what we think, if we were kings of the world, would be the right thing to do?

I don't know the answer to that, but I think it's here, and I guess I would propose the following as a thought: I don't know why - I'm not as familiar as probably almost anybody here is with how these commissions generally operate, but I don't know why you can't put forward, or we couldn't, true, if we felt - alternatives. In other words, in a perfect world, I'll state it this way, you go for preemption. Failing preemption, you would go for removal, and so on and so forth.

And one last point, because I want to emphasize something I and Commissioner Burchfield and Commissioner Kempf said earlier, and I don't want to go too far, but on

this question of trifurcation, really, apart from the fact that I don't think any judge is going to want to trifurcate - they don't want to bifurcate - put that aside for a moment. If you're thinking about the system, do we really want to propose three-pronged trials with juries sitting there? I mean, like we don't have enough problems in the jury system as it is. We are going to come in and suggest that they do it three times?

We complain about, at least those who try cases complain about, the qualities of juries you get in these cases in the first place. What would you get if we were to recommend trifurcation?

I really feel that that is such an impractical suggestion as to indicate we have no appreciation for what's going on in the judicial system. And I would really urge us not to do that.

MR. HEIMERT: Commissioner Shenefield?

COMMISSIONER SHENEFIELD: Much of what Sandy said I agree with. I would restate it this way: If I were writing this part of the report, I would say the Commission is united in wanting to reverse *Illinois Brick* and *Hanover Shoe*. If it's true, I would then go on to say the Commission believes

that preemption as far as possible of conflicting state laws ought to be achieved. Obviously, if it's not possible, it isn't possible.

Fourth, and perhaps more controversially, I would reverse *Lexecon*, and it seems to me that then the question is, what do you propose, if anything, as a follow-up?

I believe it would make sense to endorse 4-3, which says, if possible, you would try to achieve as much of a resolution of all claims in a single forum, full stop. I don't feel that it's necessary to go through trifurcation, although you and I might differ as to whether it makes sense or not. But if we wrote the report to sort of capture that essence, it seems to me we may have very substantial unanimity.

MR. HEIMERT: Chair Garza?

CHAIRPERSON GARZA: You know, that makes good sense to me, but I would say that in my perfect world, I would probably opt for what Dennis outlined. However, I don't think that that's politically feasible, and, therefore, my second perfect world would be something along the lines of what we've been talking about, with the object being to eliminate the litigation hell that now exists and try to get

this stuff all in a single forum, if possible.

MR. HEIMERT: Commissioner Warden?

COMMISSIONER WARDEN: I agree basically with what Sandy said, although not on the trifurcation point.

What I wanted to respond to was a statement by Commissioner Jacobson that if we go the removal way - or the preemption way, what we would be preempting is state law having to do with claims for overcharges arising from concerted action among competitors. I think that's what he said, as well as I can remember it. I don't think we should be so limited.

The direct and indirect purchaser issue comes up in monopolization cases also, and the same rules should obtain.

MR. HEIMERT: Commissioner Valentine?

COMMISSIONER VALENTINE: I also would like us all to get to a resolution here because I do think this is a place where we could make a difference. And I do think we have agreement on John Shenefield's first point of repealing *Illinois Brick* and *Hanover Shoe*.

I guess I am coming out a bit more on the Burchfield-Jacobson theory of not trying to completely preempt state laws; certainly allow state indirect purchaser

actions where it involves only intrastate commerce, with which I think we may well have a consensus. And rather than preempt, which will be pretty unsuccessful, I think, because, as Bobby said, we've got consumer protection, unfair trade, and "baby FTC acts" out there, that we try to work on removal to the greatest extent possible to a single forum. I actually would support overruling *Lexecon*. I also would agree with folks that on the pre-judgment interest, we could easily pass on that and get to that when we do it as a general issue. And perhaps a way of addressing the trifurcation is in no way to say it should be in there as a statutory matter, but leave it to the report to suggest efficient, judicially manageable ways to, in fact, work out the damage - total number and allocation of damages among the various parties.

MR. HEIMERT: Commissioner Jacobson?

COMMISSIONER JACOBSON: Just briefly, where I think we have consensus - and I'm going to call this - since 3-1/2 didn't get any traction, I'm going to call this 3 prime. And 3 prime would be, one, overrule *Brick*; two, overrule *Shoe*; three - and this is where we'll need the discussion - all state cases, accepting John Warden's point, seeking damages

for overcharges attributable to facts that would lead to an antitrust violation are removable to federal court. That would mean no preemption. And, fourth, that the proceedings would be adjudicated in a single forum with a limited *Lexecon* repealer attributable to these cases; that part of this would be no legislative change on pre-judgment interest, trifurcation, or class certification.

MR. HEIMERT: Commissioner Carlton?

COMMISSIONER CARLTON: I seem to be out by myself on this one, but let me just raise two things. Most of the discussion has been talking about judicial economy, and I think I would like to reiterate that one of the goals is not just to adjudicate efficiently, but to get the right amount of deterrence, and that the - there's an article by Landes and Posner in the University of Chicago Law Review that goes through the reasons why direct purchasers create - by focusing attention just on them, you create better incentives than if you bring in indirect purchasers. And I think it's easy to fall into thinking that, oh, the same number of people will bring lawsuits, we're just going to divvy up the pie in a different way, it's a fairer way. But, in fact, empirically there was support in that article, if I recall

correctly, to show that that didn't happen and that, in fact, you do get more prosecutions by concentrating incentives among direct purchasers. At the testimony, Laddie Montague said exactly the same thing. And according to my notes, he said that an erosion of the award to direct purchasers will reduce their incentive to participate, and that in his mind, they're crucial to successful prosecution.

So I think, you know, all of these discussions - and I'm sympathetic to them - for judicial economy make sense, but I'm worried that in thinking through your trade-off of what's fair versus what creates the right incentives, people are underestimating the importance of creating the correct incentives.

MR. HEIMERT: Commissioner Kempf?

COMMISSIONER KEMPF: I'm going to shift my support from 3-1/2 to 3 prime, but with a couple caveats. One of the reasons I support it is because the removal language that Commissioner Jacobson is suggesting that would be fine-tuned achieves effective preemption to the extent we need it and want it here. So while it does not speak in words of preemption, it is not a total preemption, particularly when you make clear, for example, it doesn't pick up intrastate

things. It achieves what our objective is, and so when I'm looking at this, I'm saying, How do we get this very important thing through? And who are our enemies? And they're going to be two people. They're going to be state attorneys general who don't want to see state law preempted and who have oftentimes good communication with the Senators and Congresspersons, and, secondly, those who believe in a federalism, dual enforcement regimen, which is a lot of state people in particular, and who don't want to have everything sacrificed for perceived efficiencies that might result - which leads me to question whether in our desire to get something that makes sense here, that is also likely to achieve our objectives. we really need to have on the repeal of *Lexecon*. I don't think we do.

To me, if you have a case that's consolidated in Arizona and it involves a combination of class actions and opt-out cases all sitting there together, it might be more economical to allow the presiding judge to dispose of on the merits the opt-out cases, but it's no big deal if the opt-out cases from Minnesota are sent there and the ones from Illinois are not back there. It's just not a big deal.

So I wouldn't burden this with what in my view is

an unnecessary desire to do that. I would be very comfortable if we were to address a number of these issues in some later subsequent session as to, you know, whether we think *Lexecon* should be overturned or not, but I wouldn't make it part of an indirect purchaser thing. An indirect purchaser one is simple and straightforward, and the only things I think we need to make it work are overruling of *Illinois Brick*, overruling of *Hanover Shoe*, and a simple and comprehensive removal provision.

MR. HEIMERT: Chair Garza?

CHAIRPERSON GARZA: Well, I was going to say that I like Jon's formulation. *Lexecon*, I realize that there's controversy about it, which I don't fully understand. But if people thought that it were possible to achieve the objective of getting everything as much as possible consolidated without getting into the *Lexecon* fight, I would be for signing on to that kind of proposal. But I do hope that the report would also include something along the lines of what Dennis was saying, which I agree with, that but for what's been created by the numerous repealer statutes, I really don't think that it's the best thing from the standpoint of deterrence, which I think is more important than

compensation. I don't think it's the best thing to have all the indirect purchaser litigation in there.

Again, I'm driven by the fact that it's there anyway because of the repealer statutes.

MR. HEIMERT: Commissioner Burchfield?

COMMISSIONER BURCHFIELD: I would support the 3 prime proposal as well, and I had one comment and one question about it.

The comment is that it sounds as though the removal provision that you proposed - and I understand it's a draft; it's subject to further thought - but would it be your intention to make it broader than just indirect purchaser litigation? Would it also allow removal of any state action that looked like a federal antitrust violation?

COMMISSIONER JACOBSON: Well, believe it or not, yes to both questions. The indirect purchaser issue arises in overcharge cases. John correctly points out that overcharge cases are broader than the horizontal cases. You may have a monopoly overcharge case, as in *Microsoft*. The concept would be to take any state statute premised on, or any state proceeding premised on, an overcharge-recovery theory, pleading facts that would look like an antitrust

violation but are alleged as a consumer protection violation, for example, or a consumer fraud provision, and to make those removable. I think that requires some skill in the drafting, which I don't pretend to have, certainly after, you know, ten minutes of trying to scribble something here, but that would be the intent behind it.

COMMISSIONER BURCHFIELD: And the second question is, I am assuming that the removal would apply only to private actions, not state attorney general actions. And I will say I would be less inclined to support a proposal that would allow state attorneys general representing their sovereigns to be brought into federal court involuntarily. But as to private actions, I am sympathetic and supportive of the effort that you're making.

COMMISSIONER JACOBSON: I honestly haven't thought about it because the reality is that they sue in federal court whenever they can, and so the problem just has not arisen that frequently.

I would be inclined - well, let me address Dennis' question also in this. I think deterrence is very important. I think compensation of victims is terribly important. But I think fairness is unbelievably important for the

administration of the antitrust laws, because if the companies think the law is fundamentally unfair, instead of trying to comply with it, they're going to try to figure out ways to evade or avoid it. And I think having a system that is fundamentally fair is conducive to compliance with the law rather than something that everyone thinks is messed up and that they'll look for ways to avoid. So I think those three aspects have to be looked at, not just deterrence.

And I think being able to avoid a single-base proceeding by state attorneys general - I would want to think about it further. But my own view would be that they should be in federal court with everyone else.

COMMISSIONER BURCHFIELD: And just to indicate my view on that, it seems to me that as the state attorney general representing the sovereign, they should be able to choose their forum, and those cases are not typically the ones that are cited. In fact, they're rarely cited, at least so far as I can see, as the problem that we're trying to correct here. The problem is the private - is the indirect purchaser class actions that follow on the direct purchaser class actions and create the panoply of issues that we have, I think, shown appropriate concern about.

MR. HEIMERT: Commissioner Warden?

COMMISSIONER WARDEN: I do believe that *Lexecon* should be included in 3 prime. I do believe that state attorneys general should be included in those required to litigate federally. And despite discussing 3 prime, I continue to favor preemption.

MR. HEIMERT: Commissioner Carlton?

COMMISSIONER CARLTON: I'll be brief, but listening to Commissioner Burchfield's comments led me to slightly modify my view, which may not matter since I'm all alone. But I would allow indirect purchasers to sue. I had previously said I'd allow the state attorneys general to sue if the direct purchasers had not sued. I think I'd add to that that I might allow indirect purchasers to sue too, but I'd want to think that through so that there wouldn't be duplicative actions - that is, I think there can be a gap in which direct purchasers don't sue, and that should be remedied in some way.

And then I just want to respond very briefly to what Commissioner Jacobson said. I agree with virtually everything he said, with one exception. If you strive for fairness and, as a consequence, you have less deterrence,

then what that means is that you're not deterring cartels that are raising the price, and we know all cartels don't get deterred or caught. So you wind up overcharging people and you're not able to even observe it because they get through. So, although I agree with the concept that it appears unfair, the reason I put such emphasis on deterrence is, if I can deter a few more cartels, then that lowers price for everybody who's buying that product, and that can be a tremendous benefit to the economy. There is a trade-off between the two.

MR. HEIMERT: Commissioner Kempf?

COMMISSIONER KEMPF: I just want to address a question that Chairman Garza posed and then turn a question in turn to Commissioner Jacobson. You had asked, what was wrong with having people all in a single forum? And I would go to the *Lexecon* case itself. There was someone who said, gee, I was defamed in Illinois. I brought a case in Illinois, and they sent me out for consolidation to Arizona, where the Keating thing was centered for pre-trial purposes. And at the end of it, the judge said, we're going to have the trial here now. And he said, gee, I don't want to be here for the trial; I'm from Illinois. What they did happened in

Illinois; I was damaged in Illinois; I like people in Illinois; I like judges in Illinois; I want to have my case heard back there.

I don't find that a problem, especially in our federalist system.

And so I then say to myself - so that's the answer to your thing. The question I have for Commissioner Jacobson is, I can see a decision that says let's not - a case that had nothing to do with *Illinois Brick*, nothing to do with *Hanover Shoe*, which, by the way, encompasses the *Lexecon* case itself, and I can see saying, gee - and *Lexecon* was not an antitrust case - we ought to get rid of *Lexecon* for everything except antitrust cases, or we ought to get rid of it for everything including antitrust cases, or we ought not to get rid of it for anything, or we ought to get rid of it only in these kind of cases and not those.

But I see no tie-in to the indirect purchaser doctrine, and so I'm wondering why you would include this as part of 3 prime when, to my way of thinking, it may be a good idea or a bad idea, but it has nothing to do with the indirect purchaser doctrine.

COMMISSIONER JACOBSON: Very briefly, it's because

the cases do involve, if they're litigated - these cases are settled. But if they're litigated, you do have to address liability, total overcharge, and split, and it's very difficult to do that, particularly if you don't have trifurcation if the cases are remanded at some unspecific state of the proceeding to the court of origin.

So I think that as a practical matter there is a huge efficiency issue associated with whether you have or don't have a *Lexecon* repealer.

Having said that, if the Commission wanted to agree on all the other prongs of the proposal and just say, we'll leave *Lexecon* to more generalist minds than ours, I would not strongly object to that.

COMMISSIONER KEMPF: But let me ask you a follow-on question and ask you to comment. Your argument proves too much, because what you're also saying is that if there's a class action in five opt-out cases, they have to be tried together. In other words, suppose you have no issue of going back; they're all filed in the same forum. Unless you try them all together, you have the identical set of varying outcomes that you talked about.

COMMISSIONER JACOBSON: You don't because you don't

have a mandated split of the damages involving the companies. The opt-out gets its own damages. When you have indirect and direct purchasers in the same case, unless you're going to have multiples of three, which no one supports, you have to have a split. That requires that both sides of the split be there.

Again, I don't feel as strongly about this as the other prongs, but I think there's a high value to having it all in a single forum.

MR. HEIMERT: Commissioner Cannon?

COMMISSIONER CANNON: I knew I shouldn't have yielded to Don.

[Laughter.]

COMMISSIONER CANNON: You know, I want to associate myself in some significant respects with Commissioner Carlton on this, because he really does put his finger on it. When you start talking about kind of certainty here and you do talk about deterrence, compensation, and fairness, I think it's pretty clear to me that truly, the further you get away from the direct harm that's caused, the less likelihood or the less chance you really are going to compensate everyone fairly. And that's how I think about it.

On the other hand, when you do that, you can also argue that the further down the chain it goes, really, the less deterrence it's going to be, because as you point out, Dennis, I think correctly, those who have perhaps - obviously, the most directly injured and harmed have the greatest incentive to sue.

And I've heard a lot of arguments and discussion about why direct purchasers decide not to sue. You know, it's hard to really have a great feel for every particular case as to why that may or may not be the case. But it's still something of consequence.

I remember, as I know John and Sandy and others do, when *Brick* came down and there was a real flurry in the Congress to get it repealed. And, actually, I think it was in the fall of 1980 that there was a compromise that was pretty much agreed upon, except the folks who were pushing for repeal thought that it didn't go far enough. And John, I can't remember exactly what the elements of that compromise were; maybe you do remember them.

COMMISSIONER SHENEFIELD: I was out of that business by that time.

COMMISSIONER CANNON: Yes. But it was there. You

know, we probably wouldn't be having these discussions today and in quite the vein we're having them if, in fact, you don't have these intervening 30 state statutes that have come along to do that.

So what we are really talking about here is not - I don't see anybody terribly happy about trying to wade through all these procedural niceties, especially when - I agree with you guys, talking about trifurcation - I just can't fathom that; it seems impossible to do.

But I don't think we would be sitting here having this - and I'm close on this issue as to whether to vote for any repeal with any of these things, because I'm just not sure it's going to get us where we want to be.

But, again, I think we're doing our best to try to kind of manage an existing problem or make - everyone acknowledges in terms of litigation, to try to get something - some improvement in this situation. So I kind of agree with Dennis on this, but I understand what the practicalities are.

MR. HEIMERT: Commissioner Shenefield?

COMMISSIONER SHENEFIELD: I have a question for Jon Jacobson and then a comment. How would you characterize the

difference between a broad removal statute and a preemption statute? What's the practical difference with these cases?

COMMISSIONER JACOBSON: Well, I think the text is the same other than the consequences, and the practicality is that the claim can still be advanced. It just has to be advanced in federal court together with the existing price-fixing cases that presumably will be pending there.

Preemption would mean that the claim couldn't be brought at all, that the state would have no authority to legislate in the area. I don't think the practical consequences would be different, but I think the emotional aspects of removing an authority that the states had not only had but exercised since the 1870s would be considerable and would meet with resistance that I fear would obscure the benefits of an otherwise sound proposal.

COMMISSIONER SHENEFIELD: Okay. My comment is this: I'm less worried about what's happened since the 1870s, and I figure the states have had to deal with preemption before in other areas and will deal with it here if it's the right answer. But that said, I would be willing to support whatever you now call in your proposal. If it is true, as you seem to be saying it is, that the broad removal

power is practically the same as preemption, but only so long as it also includes resolution of all claims - the possibility of the resolution of all claims in a single forum - to me, unless you do that, you've missed a large part of the problem.

COMMISSIONER JACOBSON: The *Lexecon* piece.

COMMISSIONER SHENEFIELD: Well, I'm mindful of what Don has said about *Lexecon* in other areas. For antitrust claims of the kind we're talking about, that is, overcharge cases, you've got to get it done in a single forum; otherwise, you're wasting your time.

MR. HEIMERT: Commissioner Warden?

COMMISSIONER WARDEN: I think it should be clear that when we talk about overruling *Lexecon*, we're only talking about antitrust, and perhaps not the entirety of antitrust, although most of it - and not a case - I'm not fully familiar with the multidistrict situation in *Lexecon*, but I can't imagine that the defamation had anything to do with much else in that matter. And those cases may be correctly decided under existing law; that is, there may be no reason for a change. But here I think there is.

As to the point about deterrence and the better

situation of direct purchasers only, in an ideal world I think that might well be so, but I think it's far less practicable to think about doing away with indirect purchaser standing than to have preemption coupled with federal standing for indirect purchasers. I just don't think that's in the cards. And the only reason I would vote to give indirect purchasers federal standing is to accomplish the goal of getting all this in one place.

MR. HEIMERT: Commissioner Valentine?

COMMISSIONER VALENTINE: Something of a complement to what Commissioner Warden was just saying, which is, in the interest of us all trying to get on board for doing something here to really solve an incredibly messy situation today, for those who are worried about pure deterrence in a very principled way, which would normally be probably that those closest to the action would have the greatest incentive to sue, and the further down the chain you go, the more mediation and lack of immediate incentive to sue - I think these cases are very different in that the indirect purchasers aren't just innocent consumers; there are very sophisticated plaintiffs' lawyers out there representing them, and, quite frankly, most of these cases are following

federal government actions. And when you saw the Justice Department start bringing cartel cases and announcing cartel settlements, you saw a huge spike in district court cases by direct purchasers and in state courts by indirect purchasers. And there is - you know, Judge Ginsburg would say there's such an obvious correlation. I don't think we're worried - I mean, in fact, usually we're hearing that there's too much deterrence, overdeterrence - I don't think we're worried about not enough deterrence here. I think here we really are worried about an extremely multifaceted, crazy situation where things are going on in 30 forums and we're trying to get to one.

MR. HEIMERT: Commissioner Delrahim?

COMMISSIONER DELRAHIM: Once we finish up some of this very helpful debate, might I just suggest, procedurally, that we move to a vote on repeal of *Illinois Brick* and *Hanover Shoe* and take that in order, and then address the issue of preemption, and then, perhaps, after that, a separate vote on removing all claims to a single forum, and then address the *Lexecon* issue? And I think one of the other proposals by the ABA was changing some of the procedural rules for removal. We can go on that and get a sense of

where we all might be, and then we can continue to debate. But I think what might be consensus on several of these - we could have a pretty good proposal for consideration by folks who later will pick this thing to death yet again before enacting any changes.

MR. HEIMERT: Vice Chair Yarowsky?

VICE CHAIR YAROWSKY: I don't want to back anyone up, but, Jonathan Jacobson, could I -

COMMISSIONER JACOBSON: I always wanted to testify at one of these hearings, and today I'm getting my opportunity.

[Laughter.]

VICE CHAIR YAROWSKY: But what I want to hear you speak a little more about is removal. I am greatly leery about preemption, a broad, blanket preemption, especially when there could be pure state-connected claims. And that troubles me a lot. That's the first point. So I want to hear how we can resolve it.

The second point is - and I like what Makan has just suggested, that we may want to do this in some kind of sequence because there are other issues we haven't talked about that are tricky - choice of law. When you have 30 or

40 different cases and you consolidate them in a single forum, a federal judge is required to find the nexus and to apply state law.

Now, at some point in time, will a judge apply 30 state laws if he or she has to? That's why I kind of like the simpler model that Commissioner Kempf has said about let's resolve the big issues and then see what we can do on some of these other issues.

Again, going back to preemption and removal.

COMMISSIONER JACOBSON: As I indicated when you were out, I think as a practical matter, there's no distinction between the effects of removal and preemption; there are technical distinctions. One of them you pointed out, which is that the case would be in federal court on a different theory. At the end of the day, the plaintiff is going to elect the treble damage remedy in any event, so the antitrust is going to subsume all the other state theories.

With regard to Makan's suggestion, just very quickly, I think his proposal on voting is good. I would just couple preemption with removal so that, you know, we're not voting on those two sort of alternatives seriatim but, rather, at the same time.

MR. HEIMERT: Commissioner Kempf?

COMMISSIONER KEMPF: Two quick things.

First of all, when Commissioner Jacobson was talking about there being some virtue in a statute that the community views as fair, I understood him to be saying that one of the benefits of that is that it leads to increased deterrence out of respect for law viewed as sensible.

Second, I am intrigued with what Commissioner Shenefield said and am more comfortable with that than I am with what we talked about earlier, specifically when he said, gee, I want it to be in a single forum, and I don't care about *Lexecon*. What I'm saying is that that is similar to having removal instead of preemption. It would be possible, I believe, to craft this thing in a way that has absolutely no mention of the *Lexecon* case, but instead speaks in terms of resolving these kind of cases and would leave untouched 95 percent of what *Lexecon* covers, and if other people want to address that in different forums, fine, and it wouldn't take on the question of whether we're interfering with the Supreme Court, interfering with the federal system, and make it much more confined to our sphere of activity.

COMMISSIONER JACOBSON: I think everyone agrees

with that principle.

MR. HEIMERT: Should we, as Commissioner Delrahim was suggesting - why don't we call it an informal sort of polling for now to see where we are and to see if there's further debate or whether staff needs to draft up some possible language or further description, whether it be removal or preemption, on some of these other aspects?

I think that - and obviously, jump in if I've got this wrong - The first question is whether to overrule *Illinois Brick* and *Hanover Shoe*. The second question is - do we want to lay out all four different things we want to talk about? Or should we just cover those?

COMMISSIONER JACOBSON: That's a good one. Why don't we start with that one.

MR. HEIMERT: Okay. So why don't we start with overruling *Illinois Brick* and overruling *Hanover Shoe*. Hands in the air for everyone. I see Commissioners Shenefield, Valentine, Kempf, Delrahim, Litvack, Burchfield, Warden, Jacobson, Vice Chair Yarowsky, and Chair Garza in favor of that.

Those opposed to overruling *Illinois Brick* or *Hanover Shoe*? I see Commissioners Carlton and Cannon.

CHAIRPERSON GARZA: The only caveat to mine is that, as I said before, although I agree with the overruling, I would hope to join with them in articulating this other option as well.

COMMISSIONER CANNON: That's what I want to say. That's why I voted that way. I really want to have further discussion of this.

MR. HEIMERT: And we'll discuss that, and obviously working forward on this, we can work with that approach as well, as part of the report, and for those who want to say something along those lines.

So then we have the next question, preempting state law versus removal, and I guess the third alternative would be neither of those. But why don't we go with preemption, then removal, and then neither of the above and test that.

So the first option is preemption of state law in addition to overruling *Illinois Brick*. I see Commissioner Shenefield, Commissioner Delrahim, Commissioner Litvack, and Commissioner Warden.

COMMISSIONER DELRAHIM: Except for the wholly intrastate -

MR. HEIMERT: The wholly intrastate caveat, but

we'll get the clarification, the details on that as we work through it. Does that change a vote?

CHAIRPERSON GARZA: Yes. I think so. There's a difference between preemption and preemption with a carve-out.

MR. HEIMERT: Okay. We want preemption with a carve-out, the carve-out being if it is a wholly intrastate matter -

COMMISSIONER DELRAHIM: That's right.

COMMISSIONER WARDEN: I would phrase it "principally an intrastate matter."

MR. HEIMERT: "Principally" or "wholly" - comfortable with that?

All right. Let's try again - preemption of state law except for principally or wholly intrastate matters? Commissioner Shenefield, Commissioner Delrahim, Commissioner Litvack, Commissioner Warden, and Chair Garza.

A removal statute that would remove any claim for antitrust or antitrust-like recovery under state law would be removable at the defendant's election. Have I characterized that more or less correctly?

COMMISSIONER JACOBSON: In overcharge cases.

MR. HEIMERT: In overcharge cases. Let's see a show of hands on that, please.

COMMISSIONER SHENEFIELD: Is it either/or or can -

CHAIRPERSON GARZA: I don't think so.

COMMISSIONER WARDEN: No. It's not either/or.

MR. HEIMERT: It's not either/or, necessarily.

Commissioner Shenefield, Commissioner Valentine, Commissioner Kempf, Commissioner Delrahim, Commissioner Litvack, Commissioner Burchfield, Commissioner Warden, Commissioner Jacobson, Vice Chair Yarowsky, and Chair Garza.

COMMISSIONER VALENTINE: Then the issue is - who was the other?

MR. HEIMERT: Neither preemption nor removal. Is there a Commissioner who prefers that alternative?

Commissioner Cannon had indicated that.

COMMISSIONER CANNON: Someone's got to anchor that.

MR. HEIMERT: Fair enough.

COMMISSIONER CARLTON: I didn't vote since I didn't vote to repeal.

MR. HEIMERT: Okay. Commissioner Carlton has not -

COMMISSIONER LITVACK: And I did not vote because I didn't vote for repeal. So am I -

MR. HEIMERT: You can vote or not vote as you choose.

COMMISSIONER LITVACK: I would have raised my hand for parts of both the first and second options.

MR. HEIMERT: All right. We'll make sure that the report ultimately reflects your views.

The third question is a *Lexecon* repealer that is limited to antitrust claims -

COMMISSIONER JACOBSON: Limited to these indirect purchaser-associated claims.

MR. HEIMERT: Correct. Okay. Thank you, Commissioner Jacobson, for that clarification. Is anyone - do we want a scope clarification on that?

CHAIRPERSON GARZA: I think the other thing is Don Kempf's suggestion that you don't need to even utter the word "*Lexecon*." You could have something that basically says, like the ABA proposal, try to resolve all claims in a single forum, and leave it to a later day as to how that gets -

MR. HEIMERT: Okay. So we'll have - and the ABA proposal allowing or requiring that all claims be resolved in a single forum, and whatever statutory change is deemed appropriate to accomplish that, is the nature of the

recommendation.

VICE CHAIR YAROWSKY: In overcharge -

MR. HEIMERT: In antitrust overcharge cases. All right. A show of hands in favor of that. Commissioner Delrahim, Commissioner Litvack, Commissioner Burchfield, Commissioner Warden, Commissioner Jacobson, Chair Garza, Commissioner Shenefield, Commissioner Valentine, and Commissioner Carlton.

All those not in favor of that? Commissioner Kempf, Commissioner Cannon, and Vice Chair Yarowsky.

CHAIRPERSON GARZA: Trifurcation.

MR. HEIMERT: All right. Trifurcation. Is this to encourage or to require trifurcation? Is that proposal -  
[Simultaneous conversation.]

MR. HEIMERT: All right. Three options: require trifurcation, recommend courts consider it where possible, and no recommendation one way or the other on trifurcation. Any other options that should be added to that? Okay.

COMMISSIONER SHENEFIELD: And this is not either/or.

MR. HEIMERT: This is not necessarily either/or, yes. Okay. Require trifurcation? Commissioner Shenefield.

I see no other hands.

Recommend or encourage courts to consider and use trifurcation where possible. Commissioner Shenefield, Commissioner Valentine, Commissioner Warden, and Commissioner Jacobson.

No recommendation on trifurcation in any regard one way or the other. Commissioner Carlton, Commissioner Kempf, Commissioner Cannon, Commissioner Litvack, Commissioner Delrahim, Commissioner Burchfield, Vice Chair Yarowsky, and Chair Garza.

Standards for class action certification.

CHAIRPERSON GARZA: This is Recommendation 4-B-2.- it's 4-B-1 versus 4-B-2.

COMMISSIONER VALENTINE: I missed the votes on that last one.

COMMISSIONER JACOBSON: I thought that was voted down.

MR. HEIMERT: All right. Well, yes, we'll take up the question of - it's 4-B, recommend adjustments to the treatment of class action certification or make no specific recommendations in this regard, and I think the consensus had been make no specific recommendations, but we'll test that.

Anybody in favor of recommending adjustments in the treatment of class action certification? I see no hands.

Make no specific recommendation? I see all 12 Commissioners' hands up.

On the question of prejudgment interest, the consensus was to defer that until the discussion in the next session when we cover that.

MR. HEIMERT: Commissioner Warden?

COMMISSIONER WARDEN: I just have a question. Those who voted not to provide for and encourage the use of trifurcation without requiring a judge to do it, how do you expect the single forum to resolve all these claims other than by something that - I mean, it's an awful name, trifurcation, but - and there has to be some means by which overall damages are determined and then divided among the claimants.

MR. HEIMERT: Chair Garza?

CHAIRPERSON GARZA: The reason I voted against it is I just think it's for the courts to figure out how they want to handle it, although I will comment that when people talk about how complicated it would be to have a trifurcated proceeding, although I've never been involved in any one, I

have to giggle a little bit because the whole thing is a complicated mess whether you do it in a third proceeding or in the middle. It's just going to be a mess. I think those who recommended trifurcation had in mind *Franklin* - and I think that was in the testimony, that you'd never get there. You'd basically settle it before you'd have to have a trifurcated proceeding. Or else you would have one, and it would be like Judge Easterbrook had said it was in the CERCLA cases he had, where he would finish the litigation but then have a whole separate litigation to parse it out between everybody.

But I guess I'd refrain from saying anything because I don't know enough about it and figure that the courts - every court will have to make the decision.

COMMISSIONER WARDEN: Thank you.

MR. HEIMERT: Commissioner Kempf?

COMMISSIONER KEMPF: I've actually gone to verdict in about a half-dozen bifurcated cases - no trifurcated ones - and, oddly enough, only one was my idea. The others were all the judges' ideas. And what they basically said was, gee, I can save some time for me and the jury by bifurcating this, and if the defendant wins on liability then we won't

have to stick around for a damage trial. But when a case is not bifurcated, the judge says if you find liability, you must then turn to damages; but if you don't find liability, you just don't pay any attention to the second half of my instructions and don't fill out the second half of the jury form.

And I would think that if you trifurcated or quadrifurcated, or whatever, it would just be an extension of the same procedure.

MR. HEIMERT: Chair Garza?

CHAIRPERSON GARZA: The one thing I would say is that I think it's unfortunate we didn't get the views of any judges on this issue, because we've got the views of the plaintiffs' bar, we've got the views of the defense bar, and we have our own views, but we really haven't gone out and asked some judges who have been involved in these proceedings what they think would work. And I don't mean to suggest this in order to hold up where we are, but I still wouldn't mind having staff contact some judges and kind of run these things past them and see what they think.

COMMISSIONER LITVACK: May I suggest that if we do that, we try - and maybe we already have - to do that with

district court judges rather than court of appeals judges, who have very different views of what goes on down below?

COMMISSIONER CANNON: And you might get easier and faster answers if you'd take some folks who are now retired, like Sam Pointer, for instance.

COMMISSIONER LITVACK: Sure, that's a good idea.

COMMISSIONER KEMPF: Well, except you want - I don't think you want specialized judges like Judge Pointer. You might include him, but you also want just run-of-the-mill, everyday judges.

The other thing that the judges say is there is a second opportunity to settle if we have a bifurcated case, so that's another reason they always give you for it.

COMMISSIONER DELRAHIM: One other possibility might be to make that request to the Judicial Conference or the Administrative Office of the U.S. Courts, who now have a very capable head now who is experienced.

VICE CHAIR YAROWSKY: And they'd be ready to answer this question, just because they had to gear up for the Class Action Act. The other thing is the State Chief Justice Association. If we're removing all these from state court, we might want to talk to them as well. And I can certainly

tell staff who to call.

MR. HEIMERT: Chair Garza?

CHAIRPERSON GARZA: So can I move, then, that we consider doing a couple of things? Maybe, one would be having the staff draft up what it is that we've come out of this with, and possibly putting it out for public comment, but also making an effort to talk to the Judicial Conference or these other entities to get their reactions specifically, just so we can have a feedback loop on it.

COMMISSIONER KEMPF: Write it and then send it immediately off for public comment. Then it would be circulated to the Commissioners with a short, like, 48-hour shot clock just in case some of us look at it and say, well, this isn't what we did at all.

CHAIRPERSON GARZA: That goes without saying.

MR. HEIMERT: Commissioner Burchfield.

COMMISSIONER BURCHFIELD: I would also like to propose that, before contacts are made with the Judicial Conference or with the Judiciary, the Commission be given some advanced notice of who is going to be contacted and the questions that are going to be put to them.

COMMISSIONER WARDEN: Let me just second that.

MR. HEIMERT: Chair Garza.

CHAIRPERSON GARZA: Yes. And I think, obviously, staff will work, in the first instance, with the relevant study group. And then we can just have something to alert the Commissioners and make sure that people are going to have contacts.

COMMISSIONER KEMPF: I have some serious questions about sending the thing to a large group or even a small group of state court judges that says, gee, we're thinking about removing large chunks of your jurisdiction; let us know what you think

[Laughter.]

COMMISSIONER JACOBSON: Hallelujah will be the general response.

CHAIRPERSON GARZA: Just so the staff knows, then, you have an action item, then, to work with the study group to come up with a plan, people to be contacted and drafting up the questions and/or the proposals for public comment.

MR. HEIMERT: Indeed.

CHAIRPERSON GARZA: All right, then.

MR. HEIMERT: Well, it's shortly before 3:00. We'll take a break until 3:15, and we'll resume deliberating

at that point.

[Recess.]

### **Treble Damages**

MR. HEIMERT: We'll resume with the last topic for the day. We've got four topics; treble damages, prejudgment interest, attorney's fees, and then the combined issue of joint and several liability, contribution, and claim reduction.

We're going to take the last of those four first to discuss and see whether we can get through that. It's now 3:15, so we'll see if we can get through that and then have time for the other part. But if we don't, we'll at least accomplish having gone through contribution. And we'll be adjourning by 5:00, if not sooner.

So, we have joint and several liability, contribution, and claim reduction. As we have done on previous topics, we'll go through each Commissioner to indicate tentative views. Just indicate them on that, no need to get into treble damages, prejudgment interest, or attorneys' fees; we'll do that in a separate round.

And for this, we'll begin with Commissioner Kempf.

COMMISSIONER KEMPF: The real traction on this

occurred in the 1970s when the Forest Products Industry was subjected to huge treble damage lawsuits in virtually every product they made, and it led to what was called the Strom Thurmond-Birch Bayh Bill, and various iterations of that have been reintroduced year after year ever since then.

I was active in those and testified before Congress back in the '70s at some time. It became a real serious problem in that industry, and would be for similar industries where the number of participants in the industry is quite large, and the marked share of each is quite low. The volume of commerce is quite large, and the margin per unit is quite low.

So, a few pennies can lead to gargantuan industry-wide damages that leave everybody quivering in their boots. It was a perception that the plaintiffs had wisely used that to their advantage and whip-sawed people with the fear that they would be left holding the bag as a small group or sole defendant facing enormous potential liabilities that would, literally, break the company.

In any event, that experience leaves me the following reactions on seven; no on 1, no one 2, yes on some combination of 3 and 4, but I would basically mirror what was

in the old Thurmond-Bayh legislation. And then at the bottom, I would have no on 1, yes on 2, and no on 3.

COMMISSIONER VALENTINE: I'm sorry. Could you explain how you're voting on 3 and 4 on your 7? I didn't quite understand that.

COMMISSIONER KEMPF: Yes. I would vote on something that really is a combination of the two. It would retain joint and several liability. The plaintiff can sue whomever he wants. He can sue one rich defendant if he wants to and he doesn't need to sue small ones, for example, where he says, you know, it is just a pain in a behind to have them all involved in a case. I don't want all that stuff. I'm going to sue five firms and leave it go there. It's a claim reduction, or carve-out, it's sometimes called. I would definitely include that and I don't recall, off of the top of my head, what the precise provisions of that legislation were; I just remember spending huge amounts of time on it at the time and I would probably want to go back and revisit that.

COMMISSIONER VALENTINE: Okay. So, you're voting for 4 for claim reduction, but you're not sure about 3 for contribution?

COMMISSIONER KEMPF: That's correct. There were some provisions on that, and I want to revisit those, just because I remember having invested huge amounts of time on it then. I thought we ended up with a pretty sensible legislative proposal. It was very bipartisan.

MR. HEIMERT: Commissioner Litvack.

COMMISSIONER LITVACK: I would favor retention of joint and several liability, but recommend a change that would provide for claim reduction such that the remaining liability - it's number 4 - would be reduced before trebling. And if that were accepted, I would vote for number 2 below: each defendant's allocated share equal to its market share or gain from the violation.

MR. HEIMERT: Commissioner Cannon.

COMMISSIONER CANNON: Commissioner Kempf did a pretty good job of saying how all that came about and what happened.

Actually, Don, you know, that legislation started with Birch Bayh, from Indiana.

COMMISSIONER KEMPF: Yes.

COMMISSIONER CANNON: He was the original chief sponsor of that, and then it migrated over to Senator

Thurmond when he became chairman of the committee, and it remained bipartisan. The thing that really derailed it and - in my opinion, it would have been law today - is the whole fight over pending cases, if you remember that.

COMMISSIONER KEMPF: Yes.

COMMISSIONER CANNON: And in fact the committee at that time came up with a compromise that said it would apply to pending cases unless it would be manifestly unjust to do so. Remember that, Jon?

VICE CHAIR YAROWSKY: Yes. I do.

COMMISSIONER CANNON: Yes.

VICE CHAIR YAROWSKY: *Schooner Peggy*.

COMMISSIONER CANNON: Yes. I remember all of that. And *Richmond School Board*, if you remember that case.

Anyway, so I was obviously on the staff at the time and worked for Senator Thurmond and was in the middle of all of that and, I think, Don has got a pretty accurate rendition of what happened and the factors that caused it not to be passed. I may be wrong about this, but I think that while there have been several attempts to pass this in later Congresses, none of them were really significant in the sense of making great progress in the process.

COMMISSIONER KEMPF: I think that's right. I think at the time when it was the Bayh-Thurmond legislation it came within an eyelash of getting passed.

COMMISSIONER CANNON: Yes. Birch Bayh had actually, I think, left the Congress by the. So it was - doesn't matter who it was at that point.

Anyway, I agree with Don. I would vote no on 7-A and 7-B, if we call them that. I would recommend contribution and claim reduction as well and would not want equal shares on contribution, but would go with market shares.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: Yes. I have an article that is cited in the materials on this, and I actually adhere to the views that I set. And briefly, those are that, principally, I fully agree that we need a claim reduction regime, so item 4 here, I think, is well put. I do think that it is necessary to implement a claim reduction scheme to have some causes of action for contribution.

I think that the concern that we heard from Judge Easterbrook of massive post-cases to determine third-party claims is eliminated as a practical matter if a settling

defendant is exempted from such litigation, and I believe the Bayh statute so provided. So, my inclinations continue to be in those veins, and I think the text of the Bayh statute was fine.

In terms of how to divide the liability, I think, by market share is fine for horizontal cases. There are some vertical cases, in which you can't divide the liability based on market share. So, in that instance I propose a presumption of *pro rata* by level of the market, and then division by market share within the level of the market affected.

MR. HEIMERT: Commissioner Delrahim.

COMMISSIONER DELRAHIM: I will recommend both 3 and 4, allowing for claims for contribution, as well as claim reduction. And for the next part, Item no. 3, it would be based on relative fault or culpability. Presumably, market share will be a factor that the court will consider because, as Commissioner Carlton was talking about earlier, that's probably one of the factors of whether or not a cartel is successful or who would be most culpable.

MR. HEIMERT: Commissioner Carlton.

COMMISSIONER CARLTON: I'm not completely decided,

but my inclination is, for the first option, no statutory change is appropriate.

MR. HEIMERT: Commissioner Burchfield.

COMMISSIONER BURCHFIELD: I'm somewhat on the fence on this, because I don't think any of the proposals is without significant problems, and I do see a significant deterrence benefit from the current joint and several liability situation. But I could be persuaded by a well-crafted claim reduction scheme that would potentially allow for some level of contribution from other, I would say, non-settling conspirators.

I would not be inclined to allow the settlement of one company or one entity to be reopened by a subsequent contribution claim. I think you get that result from claim reduction, but just to be clear, any contribution would be only against non-settling conspirators.

MR. HEIMERT: Vice Chair Yarowsky.

VICE CHAIR YAROWSKY: I like the formulation that Commissioner Burchfield just put forward. I'd like to explore that more. I was going to say 4 and 2.

Makan, you raise a good point, in a general way, about number 3. The only concern I have going into this

discussion is just that that could lead to a lack of uniformity in terms of how people would assess that. Number 2 is much more definitive. So, that's the only reason I'm kind of leaning toward number 2, but I do like the way you kind of amended the first part of that, Bobby.

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: I also think I agree with Commissioner Burchfield's formulation. Let's start with claim reduction before trebling. I am definitely in favor of that. After there's been claim reduction as to a particular defendant, and I don't think there's any room left for a contribution claim against that defendant, but I would allow claims for contribution against other defendants or non-defendant coconspirators. I favor the use of market share presumptively and take account of the situations where it's not a horizontal price-fixing case and so on, I think the gain standard is fine. So, I prefer two in the second list.

MR. HEIMERT: Commissioner Valentine.

COMMISSIONER VALENTINE: I also would go for number 4. I like Commissioner Burchfield's formulation with respect to 3, so that we would consider allowing contribution claims

against non-settling defendants. If contribution claim reduction is recommended, I likewise, with John Warden and some others, would, as a starting point, try to base allocation of liability on market share whenever possible, and, if not possible, think I would fall back on *pro rata* and tend to find the concept of relative fault quite subjective.

MR. HEIMERT: Chair Garza.

CHAIRPERSON GARZA: Although I had some uncertainty, I think I'd go with allowing claim reduction, but on contribution I like the effect of joint and several liability in deterrence and destabilizing cartels, *et cetera*. And I also think that there is some benefit to retaining contribution in terms of the DOJ leniency program.

So, at this point, although I could change my mind, I think I would be in favor of claim reduction but not contribution, at least for hardcore, horizontal restraints.

MR. HEIMERT: Commissioner Shenefield.

COMMISSIONER SHENEFIELD: What about the rest of the question?

MR. HEIMERT: Yes. On the allocation mechanism, Chair Garza, did you have an initial thought?

CHAIRPERSON GARZA: Does that make sense when

you're just talking about claim reduction and not contribution?

COMMISSIONER SHENEFIELD: Yes.

CHAIRPERSON GARZA: Then I guess market share would be the -

MR. HEIMERT: Commissioner Shenefield.

COMMISSIONER SHENEFIELD: Ditto. 4 and 2.

MR. HEIMERT: The consensus seems to be for claim reduction, some interest and contribution, as well. There was limited support for the first and second options. I may have misunderstood, Vice Chair Yarowsky; were you in support of option number 2, which would eliminate joint and several liability?

VICE CHAIR YAROWSKY: Yes. In listening to Makan's suggestion about number 3, I understand his suggestion. I just think that number 2 will be translated in a more uniform way throughout the courts. So, that - I'm 4 and 2.

MR. HEIMERT: So there appears to be no one in support of recommending statutory change to eliminate joint and several liability.

COMMISSIONER VALENTINE: Right.

MR. HEIMERT: Correct? Okay.

One Commissioner - Commissioner Carlton, you believe no statutory change was appropriate. Would you care to elaborate on those views?

COMMISSIONER CARLTON: Yes. My thinking, although it's subject to - I can be persuaded differently, but currently my thinking is that joint and several liability with no contribution achieves the greatest deterrent effect and encourages settlements. And for those reasons, even though it looks like *ex post*, it sometimes it can lead to what people would characterize as unfair allocations of burdens *ex ante*. So, that's my thinking right now.

MR. HEIMERT: Commissioner Burchfield.

COMMISSIONER BURCHFIELD: I am interested in hearing the views of the group, if people would care to express them, about the possible effect on deterrence of going to a regime of claim reduction or contribution. I am, as I indicated, concerned that tinkering with the rule of joint and several liability might have the effect of reducing the level of deterrence for cartel activity. I think this is the concern that Commissioner Carlton just expressed. And, while I am persuaded as a matter of fairness and equity that claim reduction and contribution do have a role, I would be

reluctant to advocate those changes if there were substantial evidence that it would reduce the deterrent effect of the current antitrust regime. So, I'm asking a longwinded question as to whether anyone can give me comfort on that issue.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: I'm not going to give you comfort, but I think I can articulate the analysis. There's a detailed economic analysis by Easterbrook, Landes, and Posner, in which they make a number of points, but I think two are most relevant for this discussion. One is that a rule of no contribution deters, to an extent, greater than a rule that would permit contribution and claim reduction.

Second - and they make a number of other points in the article, and this is hardly a major one, but - the same math that proves the first point also proves that the effect of the rule in many cases is to cause the defendant to settle for significantly more than the claim is worth. And that, to me, highlights the conflict that you do get from time to time between a pure, deterrence-based regime and a regime that encompasses fairness as well as deterrence.

And if a no contribution rule tells the defendant

that you have to settle for more than the claim is worth based on an economic analysis of the claim, I think that's a negative for that kind of rule and provides additional support for getting rid of it.

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: I'm not an economist, and I didn't study this, but from experience, I would say that the presence or absence of contribution or claim reduction has no real effect on deterrence of violations, that the exposure to huge damages, even if you're talking only about your own market share, plus the possibility of criminal prosecution, fines, and imprisonment are the deterrents. What the presence of joint and several liability, coupled with the absence of claim reduction and contribution, does do is deter litigation by defendants after the question of violation, injury, and damages has been put into issue, because of the holding-the-bag problem that Don Kempf referred to.

And not all cases are clear. It's not clear that there has been a violation. It's not clear either as to the law or the facts in a particular situation. And I don't think you should - not only is this unfair, but I don't think it should be maintained, because it creates a legal regime

that isn't appropriate.

MR. HEIMERT: Commissioner Burchfield, did you have a response?

COMMISSIONER BURCHFIELD: I had just wanted to follow up on something that Commissioner Jacobson said. It's my recollection of the testimony of Judge Easterbrook and Professor Landes that they believe that the single damages estimates currently used actually understate the loss from the violations, and they might take issue with the notion that a defendant who pays more than his attributable share of the actual damages would be paying too much. And I think that's very subjective.

I tend to agree with Commissioner Warden that the point at which we want deterrence to be palpable for potential cartel members is at the time they are lighting that first cigar and starting to talk about fixing prices; it is not six years later when they are hauled into civil court, and the mathematical analysis that Landes and Easterbrook did struck me as being an interesting analysis of regret, but not necessarily an interesting analysis of deterrence.

COMMISSIONER JACOBSON: May I respond?

Quickly, there are two separate articles. The

earlier one is on contribution, and the second one is on optimal penalties. It is the first article that makes both of the observations that I indicated in my earlier comment. The second article is really a different analysis, and that's whether single damages are an appropriate remedy for a cartel. And the analysis there is no; for a cartel, single damages is not enough. In fact, it may be multiples of three in that article. I'm sure Dennis is more familiar with the work than me, but I think that's a fair summary.

So the point I was making earlier, that the original article does say - and there's nothing in the second article that contradicts it - that the effect is to cause the defendant to want to settle for more than the claim is worth. That's a separate analysis, and it's based simply on a mathematical analysis of the probability of success prevailing on the case versus the threat of treble damage award subject to the no contribution rule. So both of those propositions coexist accurately.

COMMISSIONER BURCHFIELD: And I agree with that, but the calculation, the decision-making calculus that they're focusing on at that point - and Commissioner Carlton, if you have views on this, I would like to hear them - is

optimal settlement or sub-optimal settlement once you've been caught. It didn't strike me as being as useful in addressing the question I have of whether joint and several liability without contribution or claim reduction is a necessary deterrent to the cartel members at the time they are forming and executing the cartel before they're caught.

COMMISSIONER JACOBSON: It is an additional deterrent. Removal of it removes that additional deterrent. That's pretty black and white. But as Commissioner Warden was saying, when you're advising clients not to violate the antitrust laws, you talk about jail, you talk about corporate fines, you talk about treble damages, and you may talk about indirect purchaser litigation. I've done many of these, and I'm sure other people here, Don, John, John, and Sandy have done even more.

Contribution does not make the list. So, when you're telling people what to do and what not to do, you're not telling them, my goodness don't do this because there's a rule against contribution in antitrust cases. As a practical matter, the only time you confront it is, as Dennis would put it, on an *ex post* basis rather than an *ex ante* basis. *Ex ante* is just one of fifty reasons not to do it.

MR. HEIMERT: Commissioner Delrahim.

COMMISSIONER DELRAHIM: I just wanted to throw out another possible hypothesis for the contribution idea, and I have no idea if - hopefully, one of the academics would pursue to study it - would be one of the things, when I went to the Justice Department and to a number of our field offices that do the criminal investigations - I was just shocked by the number of corporations who repeatedly engage in the darn thing, in the pharmaceutical and the chemical industries.

And the first question was, did they learn their lesson the first time? Were the fines not enough? And one of the field office chiefs said, you know, it's still profitable. I wonder, and it's the same group of folks. Like, two of the investigations were with the same cartel participants.

I wonder if claims against the defendants for contribution will not disrupt a happy friendship and cooperation amongst them, and maybe create some kind of an adversarial relationship that will discourage future cooperation and cartels. Again, pure hypothesis; I have no idea if there's any evidentiary support for it, but from a

policy standpoint, it might seem to make some sense. And I think the counterbalance to that - I agree with Commissioners Warden and Jacobson.

I don't think that contribution would diminish the deterrent effect, because I really do think it's probably more the prison terms and the criminal penalties that have more of a deterrent effect, rather than even treble damages or any other type of civil damage, which, more often, is probably a cost of doing business for those who engage in this overtly.

MR. HEIMERT: Commissioner Litvack.

COMMISSIONER LITVACK: Yes. I think if you looked at it from within the company when these things happen, there's no one I ever knew of, or saw, or heard, who tried to do a business calculation up front to see whether he would come out ahead or behind if he went ahead and fixed the prices. It's the individual criminal ramifications, to the extent they deter, other than just wanting to do the right thing, that works. And it is true when you say you get maybe not the same people, but the same companies, over and over - you know, one of my partners once said, the Ten Commandments have been around for a long time, too, but people violate

them.

[Laughter.]

COMMISSIONER LITVACK: You know, we're not going to pass a law that someone's not going to violate. So, I think, when it comes to contribution, we ought to be focusing on - claims reduction more particularly - what's fair. I think the points that have been made on this side are correct.

I think Commissioner Warden is correct, and Commissioner Burchfield - everyone's making the same point, I think, which is, it's not fair to have the current system, at least in my judgment, and I think, to the extent that there is, and I don't think there is, any deterrent benefit of the system, it's sufficiently minor compared to the benefit of just doing the right thing.

MR. HEIMERT: Chair Garza.

COMMISSIONER GARZA: I have a hard time with a notion of fairness for defendants; it's fairness among thieves. And I wonder about the message that we would be sending. At the same time, we're talking about the significance of stopping and preventing cartels and the sort of uniform consideration around the world that this is stuff that has really no beneficial effect. I don't personally see

us sending any particular message at this point that says, don't worry; we're going to change the rules so that you can all kind of mitigate it and split it up.

Now, if someone had said to me, look, I think that it might actually enhance deterrence, because what happens now is that the very guilty might get away, and they may make a calculus that there's a chance they won't get caught, and they're not going to have to contribute, and some deeper pocket is going to have to pay all the money. And though they could be a destabilizing factor and not join the conspiracy, they're probably not going to have to worry about it, because Mr. Deep Pocket is going to have to pay most of it.

So, I guess for me, the compelling thing that would cause us to change the rules of contribution - I guess you mentioned fairness, and the other thing I think people have mentioned - would be whether or not that's contributing to the settlement of non-meritorious claims. And that would be something I would be interested in hearing about, whether there's any real reason that we have to think that non-meritorious claims are being settled for lots of money because of the rule against contribution.

MR. HEIMERT: Commissioner Carlton.

COMMISSIONER CARLTON: I just want to say, this can sometimes be a complicated literature. And I think there have been articles since the 1980 article, and it might be worth the staff just going back and trying to see what those articles say. In particular, what Commissioner Jacobson was saying, that you can settle sometimes for more than the total value - I believe that can occur in some models, but not in others. So, I don't think that's a real result, but it's worth going back and looking and seeing if that's survived, because I know there's been a lot of gain theoretical analysis of precisely that point.

But, more precisely, I don't think I can cite evidence just because it's not something that I've seen studies of, but I haven't searched them out - to address Sandy's point, which I think is irrelevant. What's the empirical evidence on contribution and deterrence? That, obviously, is the key question.

But in the absence of seeing such studies, and I don't believe at the testimony there were any such studies presented. If you're asking me my intuition, if I think penalties matter, since that's what we've been talking about

most of today, I'd like to think they do. And if I'm thinking through what the effect of contribution is, what I am worried about is what I expressed earlier this morning, which is that figuring out the value someone adds to a conspiracy can sometimes be quite difficult, and it can be not directly related to their market share. And by allowing contribution, in a sense, you're making sharing the rule. We'll share our liabilities; we'll share the gains. But when you don't have a rule of contribution, then that smaller firm, which may be essential for the cartel to exist, is faced with a liability if it goes forward. And that seems to me to be a deterrent that's useful to have in place.

So, I think the literature has been in the direction, maybe subject to the staff checking, that this formulation, although it doesn't achieve *ex post* fairness, because it's not based on market shares, as a rule of no contribution - *Ex ante*, it looks fair, and *ex ante*, it looks like it achieves the desirable deterrent effect.

MR. HEIMERT: Commissioner Kempf.

COMMISSIONER KEMPF: Three things. While Landes is an economist, Easterbrook and Posner are not. They both were in an institution where they had a great deal of economic

thinking, and they both have outstanding minds to conduct economic analysis, but they are not, like Commissioner Carlton or Bill Landes, actually schooled economists.

And in their article they recognize, specifically and expressly, that their proposal may not be fair, and they say, too bad; we place a higher premium on deterrence than we do on fairness. And on that, I think there's room for a quarrel to a point that Commissioner Jacobson made earlier, that laws that are fair get, perhaps, greater respect and, at the end of the day, work better as deterrents as a determined regimen because people respect them because they are fair.

Second, the driving thing on much of the initial legislation was not an issue of fairness among thieves; it was an issue that people who were wholly innocent concluded that they could not run the risk of proving their innocence. The cost and the candle were out of sync.

And someone with a one-percent or three-percent share of the market looking at 80-percent liability, was really very much a dramatic, bet-the-company case. And even though the likelihood of being found guilty was infinitesimally small, the results that would flow from that were so draconian that they said, I just can't do it. I know

I'm innocent, but I cannot run the risk that some jurors, in the face of a persuasive plaintiff's lawyer, might be convinced otherwise.

So, that's what drove it, not a question of fairness among thieves. And as to the interplay between contribution carve-out and claim reduction, it is my recollection that the framers of what I'll refer to as the Bayh-Thurmond legislation spent a lot of time thoughtfully examining that stuff and addressed all of those in a very thoughtful way. Now, three of us were involved in that, and I, for one, don't remember how they addressed it, because that was nearly 30 years ago, but I would think that we would be well served by digging that out, because I think I and Commissioners Yarowsky and Cannon were all looking at it a great deal at that time, and I know that all of these issues that we've been talking about today were precisely the ones we talked about 30 years ago. And I think we reached a bunch of sensible compromises that took into account those considerations, and we would do well to take advantage of that prior learning.

COMMISSIONER VALENTINE: Is that document number 4 in what was circulated to us?

MR. HEIMERT: I don't remember the precise number, but I believe that, prior to the meeting, we circulated several previously introduced bills, one of which I think was the one you're referring to, Commissioner Kempf.

COMMISSIONER CARLTON: But not the whole report, I don't think.

MR. HEIMERT: Not the whole report. We can obtain that if we haven't already, for Commissioners who are interested.

Commissioner Cannon, I think you're up next, if you'd like to speak.

COMMISSIONER CANNON: Sure. Back to what Don said about honor among thieves, *et cetera*. He's absolutely right about that. I don't think you mean to equate every antitrust defendant to a thief.

COMMISSIONER GARZA: Only if they're guilty.

COMMISSIONER CANNON: Only if they're guilty, but that would be a determination later. But, in the *Corrieta* case - and stop me if I'm wrong, but I don't think so - you had a lot of guilty pleas, and the Department finally ended up taking one or two defendants to trial, and they were acquitted. And then you had civil liability, and at that

point, the remaining non-settling defendant, which I think was the Mead Corporation - and it had two or three percent of the market and was facing then, I believe, about 80 percent of the liability for the industry. And, in fact, the reference to the debate that broke out about application of pending cases - Mead would come into the Congress and say, well, if it's fair in the future, it should be fair now.

The folks who were against applying it to pending cases were the defendants who had settled out and had gotten pretty sweet deals, in the scheme of the world.

So, when all that came into play, that was kind of my first foray into antitrust politics and Congress. I remember all of that and how it all played out, and thinking that this was an imminently fair way to go about it.

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: I associate myself with the remarks of Commissioners Kempf and Cannon and separately state that, yes, non-meritorious cases are being settled to avoid jury risk, and people practicing in this area face this situation time and again. Where they have to tell the client, you cannot rationally go to trial in this case, even though you believe and I believe that there's not a solid

case against you, because it will go to the jury, and if you lose, you're going to lose really big.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: A follow-up to underscore the points just made. Consider a treble damage case brought against a large number of companies. It's litigated for a couple of years. They're close to settlement, but they decide that the distance between the parties is sufficiently large and narrow that they just need a sweetener to complete the deal. Consider the possibility of getting the sweetener by deciding to file suit that day against a stranger to the prior litigation - but on the theory that the stranger was a coconspirator in the conspiracy being alleged - and approaching that stranger on the basis that you know the evidence against him is extraordinarily weak, but you're going to settle with these other guys, and the stranger is going to be on the hook for a massive amount of money. Pay me now; pay me big. And that is not a hypothetical case, let me just say; that is not a hypothetical case.

So, the risk of innocent defendants being hauled in and punished because the no contribution rule is a real one and, in my experience, has had serious repercussions in the

real world.

MR. HEIMERT: Commissioner Valentine.

COMMISSIONER VALENTINE: I'm also trying to respond to Chair Garza, because I think she asked a fair question in terms of what the real-world effects will be, here. I do fully agree here with virtually all the Commissioners on that side of the table, in terms of deterrence as a first issue. If you look at every antitrust training and compliance manual, if you watch the training that goes on inside corporations, it is individual liability, criminal imprisonment, stripes on your back, and treble damages that are the deterrents. No one talks about either claim reduction or contribution, and that would neither inspire consent nor enlighten anyone, I think.

And certainly no one with a cigar in his or her mouth walks to the table saying, well, I'd do this cartel but for the fact that there's going to be contribution and claim reduction. And I also think, unfortunately, that in response to Makan's question as to why we keep seeing these cartels, it's largely because other countries have failed to provide for individual liability. And it is largely individuals in foreign countries who lose no skin off of their backs by

getting together. And it's a very simple comfortable scheme; you just get together and raise prices. And maybe your company someday pays the price, but that's not an issue before us.

In terms of what kind of settlement behavior and fairness contribution or claim reduction incentivize, I'm afraid that we have a very mixed bag in front of us. But I have seen nothing, really, to suggest that contribution or claim reduction would lead to less fair settlements or to deter settlements, or to lead them to come in more slowly. And what little bits of anecdotal evidence from other areas - CERCLA Laws, securities laws - are, quite frankly, not terribly dispositive or helpful or enlightening.

And you could argue it either way. If everyone were going to end up taking their relatively fair share of the hit, you might argue that this would, in fact, both increase deterrence and encourage settlements. I would prefer a scheme where the big guy cannot run into justice and get home free, and everybody else picks up the bag. Or the big guy runs first to the plaintiffs with a settlement, because he has the most to lose. Now, the plaintiffs would probably be silly to settle with him, but that's a different

issue.

So, I just don't think that we have any way of someone saying, but we're being unfair and failing to sufficiently deter cartels based on everything in the record.

MR. HEIMERT: All right. Commissioner Carlton.

COMMISSIONER CARLTON: I was just looking at my notes from the contribution hearings, which I think were on 7-28. They're rough notes, but I was trying to keep track of what the panelists were saying. My notes indicate that most people were in favor of keeping everything. Maybe I was inaccurate, but I only have one person down as saying, get rid of it, but I'm just wondering if that squares with other people's notes or recollections. I know it would be in the transcript, but it does seem to me, the sense of our discussion today seems a bit different than at least what my notes indicated people testified to at the hearings.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: I think it's a fair point that, other than Don Hibner, there was support for retaining the existing regime. Mr. Hibner did testify along the lines that you're hearing from a number of the Commissioners, but I think it's fair to say that panel came out more towards the

position that you're espousing than the position that many of the others here are espousing.

COMMISSIONER VALENTINE: And I would say that perhaps that panel was not, you know, sort of your generally representative view of people. I'm not quite sure how we ended up with that panel, but when I referred to the evidence before us, I am also including all of the comments that have been submitted by the ABA and other people.

COMMISSIONER JACOBSON: It was an effort, like all of our panels, to get balance, but, you know, it's an amazing thing: in America people don't always say what you think they're going to say in advance, and this was one of those. And I don't fault those who put together the panel. I think I had a large piece of the credit or blame, as the case may be. But it came out the way it did, and we still have to vote our conscience.

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: That's my point, as well. We're not here to find facts on the basis of sworn record. We're here to take into account what was said but also our own knowledge and judgment.

MR. HEIMERT: Do other Commissioners have comments,

or should we proceed to some voting to see where we are on these issues.

Commissioner Burchfield, you had articulated a slight modification, or at least a possibility of that on, I think options 3 and 4. So, maybe we should clarify precisely what we're voting on, if you will, on those particular proposals.

COMMISSIONER BURCHFIELD: My only proposed change was on the third bullet, and I would change "other defendants" to "other non-settling conspirators" to eliminate any suggestion that the contribution would only lie against named parties in the lawsuit.

MR. HEIMERT: Do other Commissioners have views - are there any Commissioners who do not like that change or want to think about it and discuss it a little further?

COMMISSIONER BURCHFIELD: And it may also make sense to make a parallel change in bullet-point four, changing "non-settling defendants" there to "non-settling conspirators."

MR. HEIMERT: Again, on Commissioner Burchfield's proposal to modify 3 and 4, does anybody wish to comment against that idea?

Commissioner Kempf.

COMMISSIONER KEMPF: Yes. I can remember this coming up nearly 30 years ago, when we had this thing and did it in such depth. And I don't frankly remember the outcome of it, but I can remember people saying, well, gee, that has an unintended consequence of x or y. And a thoughtful resolution was achieved then - and because it's not fresh in my mind, I don't remember what it was, but I would be content to go back to that. I think it addressed that, and at that time, I know I felt was thoughtful and wise. And I frankly don't remember what it was.

MR. HEIMERT: Commissioner Jacobson, I have the feeling, is about to refresh your recollection.

COMMISSIONER JACOBSON: Let me read it - I'm trying to see what the bill was. So, why don't we continue the discussion?

MR. HEIMERT: Are there others who would like to respond to Commissioner Burchfield's proposed modification?

Commissioner Warden.

COMMISSIONER WARDEN: Thank you. I think it's a correct modification.

COMMISSIONER BURCHFIELD: But I would defer to

anything that is more thoughtful and more wise.

[Laughter.]

COMMISSIONER LITVACK: Hard to imagine.

COMMISSIONER JACOBSON: Commissioner Burchfield's articulation is consistent with S995 from the 97th Congress. There are some other bills.

VICE CHAIR YAROWSKY: Is that the one you worked on?

COMMISSIONER CANNON: S995.

MR. HEIMERT: Commissioner Cannon, when you stepped out for a moment, Commissioner Burchfield proposed to make contribution and claim reduction applicable to other non-settling conspirators. And the question is whether there is -

COMMISSIONER BURCHFIELD: The modification is at the end of the third bullet, to change "other defendants" to "other non-settling conspirators", and in the fourth bullet to change "non-settling defendants" to "non-settling conspirators" to take into account the possibility that entities not named in the lawsuit might be brought in later or sued separately for the same conspiratorial conduct.

MR. HEIMERT: And thus far, there's been a fair

degree of consensus that that's an appropriate change. We want to get your views -

MR. HEIMERT: Commissioner Jacobson, do you have something additional?

COMMISSIONER JACOBSON: It's very appropriate, because the prospect of a side deal with someone who doesn't get sued can skew the whole regime, unless you have a provision to this effect. So, it is necessary.

COMMISSIONER GARZA: Just - Andrew?

MR. HEIMERT: Yes, Chair Garza.

COMMISSIONER GARZA: Some of the Commissioners know the staff had distributed something called "additional remedies materials," and tab six is S995, which does appear to resemble what Commissioner Burchfield had proposed, in that it allows for contribution and, in cases where you have a settlement, those people are subject to contributions.

MR. HEIMERT: We also had a question that was connected, which is, if we had contribution or claim reduction in the specified circumstances, what method of allocating the share of liability should we use? Do any Commissioners want further discussion? We can poll that, as well, in the process, unless people would like further

discussion.

Chair Garza.

COMMISSIONER GARZA: Just so people know, what happened in S995 - the method that was used was the damages attributable to each person's sales or purchases of goods or services.

COMMISSIONER CANNON: You're making me feel 29 again, Debbie.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: That statute was limited to price-fixing cases -

COMMISSIONER GARZA: It was.

COMMISSIONER JACOBSON: I don't think anyone has suggested so limiting, because the problem is just as acute in vertical cases. So, the limitation in that context needs to be taken with that fact in consideration.

MR. HEIMERT: Commissioner Shenefield.

COMMISSIONER SHENEFIELD: What's the essence of the difference between S1468 and S995?

COMMISSIONER JACOBSON: I'd like to know that. I don't recall off the top of my head. But I thought 1468 was broader than just price-fixing cases.

COMMISSIONER SHENEFIELD: And that's the Bayh Bill?  
1468.

COMMISSIONER CANNON: It was. That was the first one, Jon. And I cannot remember the difference. I didn't think there was a lot of difference to it.

COMMISSIONER SHENEFIELD: It would help me to know what I'm talking about when I talk about the two bills.

COMMISSIONER VALENTINE: I agree.

COMMISSIONER GARZA: They look identical; I have it here, too.

COMMISSIONER VALENTINE: And there're prices here, too.

[Simultaneous conversation.]

COMMISSIONER KEMPF: My recollection is that they are substantially the same.

COMMISSIONER JACOBSON: Yes. Also price-fixing only.

[Simultaneous conversation.]

MR. HEIMERT: Commissioner Shenefield, did you want to just ask for a point of clarification, or -

COMMISSIONER GARZA: They look identical to me, John.

COMMISSIONER JACOBSON: Could we go back to the calling of the question?

MR. HEIMERT: Yes. Why don't we put it to a vote as to what we're going to do on here. There were four main options and then there were three sub-questions, if contribution and/or claim reduction were adopted.

So, we'll go through them in order, and then we'll talk about the allocation.

COMMISSIONER GARZA: Can I just ask a question?

MR. HEIMERT: Chair Garza.

COMMISSIONER GARZA: For those who were around at the time these bills were being considered, you say the things that kept them from going forward was the limitation to cartels?

COMMISSIONER CANNON: Application of pending cases.

COMMISSIONER KEMPF: It was application of pending cases.

COMMISSIONER GARZA: So what would happen now if we did this? Do you think that would be an issue again?

COMMISSIONER CANNON: Application of pending cases?

COMMISSIONER GARZA: Yes.

COMMISSIONER CANNON: It depends. If there were

pending cases someone wanted to apply it to.

MR. HEIMERT: Vice Chair Yarowsky.

VICE CHAIR YAROWSKY: Well, yes. I mean, if the statute is silent, it's generally construed to apply to current statute only. I mean, you can make it specifically retroactive. If you say nothing then they may do what Steve has suggested, the manifest justice standard. That's the usual way retroactivity is processed, manifest justice. And the further along a case is, that's a major factor on whether it's unjust to apply it.

COMMISSIONER JACOBSON: The least controversial way is to put it through prospectively only. And, you know, given the experience the last time, I think it would be foolhardy to propose retroactivity. Plus I think each of the Commissioners would probably have to disclose about 15 conflicts of interest on it.

MR. HEIMERT: All right. Let's put that in. We'll put it to a poll. On joint and several liability, should Congress and courts change the current antitrust rules regarding joint and several liability, contribution, and claim reduction?

On the first option, if you approve that, please

raise your hand and keep it up until I recognize you.

No statutory change is appropriate.

COMMISSIONER CARLTON: Although I'm willing to keep thinking about it.

MR. HEIMERT: The final report will reflect the final views, of course.

Commissioner Carlton. I see no other hands.

On the second option, recommend statutory change to eliminate joint and several liability.

I see no hands.

On the third option, recommend retention of joint and several liability but recommend statutory change that would allow claims for contribution against other non-settling conspirators.

Commissioner Valentine, Commissioner Kempf, Commissioner Cannon, Chair Garza, Commissioner Yarowsky, Commissioner Warden, Commissioner Burchfield, and Commissioner Litvack.

And on four, recommend retention of joint and several liability, such that the remaining liability of non-settling conspirators would be reduced before trebling by the amount of the settlement.

Commissioner Shenefield, Commissioner Valentine, Commissioner Kempf, Commissioner Cannon, Chair Garza, Vice Chair Yarowsky, Commissioner Jacobson, Commissioner Warden, Commissioner Burchfield, and Commissioner Litvack.

And Commissioner Delrahim was not present for these votes. We'll obtain his views subsequently.

Now, on the sub-questions, because the consensus is to provide for claim reduction and contribution, how they would be allocated?

The first option, recommend that each defendant's allocated share of liability is equal *pro rata* or *per capita*. Any supporters of that?

I see no hands.

The second option, recommend that each defendant's allocated share of liability is equal to its market share or gain from the violation.

Commissioner Litvack, Commissioner Burchfield, Commissioner Warden, Commissioner Jacobson, Vice Chair Yarowsky, Chair Garza, Commissioner Cannon, Commissioner Kempf, Commissioner Carlton, Commissioner Valentine, and Commissioner Shenefield.

And the third option, recommend that each

defendant's allocated share of liability be based on relative fault or culpability.

I see no hands.

Again, I'll note, Commissioner Delrahim was not here to cast a vote.

Commissioner Valentine, would you care to comment, please?

COMMISSIONER VALENTINE: I am wondering if there may be cases where the market share will be virtually impossible to calculate, and would we want a fall-back in those situations of simply *pro rata* share?

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: As articulated in the bullet there, it says "market share or gain." I think that would be interpreted to say market share wherever possible, gain where not. I think gain is as adequate a substitute as you can get.

COMMISSIONER VALENTINE: Okay.

COMMISSIONER WARDEN: I concur.

MR. HEIMERT: Commissioner Burchfield.

COMMISSIONER BURCHFIELD: That was going to be my question. And if it is intended that market share be the

principle determinate, I would advocate revising this to so state, and use gain as the default.

COMMISSIONER KEMPF: Let me just add a slight articulation. It's not the principle so much as the sole determinate, unless it can't be done that way, in which case it goes to gain.

COMMISSIONER VALENTINE: Point taken.

MR. HEIMERT: Commissioner Cannon.

COMMISSIONER CANNON: Yes. One thing for clarification on contribution, on number 3. If you go back - in S995 we did this. You didn't actually have to be a defendant. In fact, you could be not in that action, because it talks about there being cross claims, counter claims, third party claims -

COMMISSIONER VALENTINE: We went through this.

COMMISSIONER GARZA: I thought that's why we -  
[Simultaneous conversation.]

COMMISSIONER GARZA: We changed 3 to "conspirators" instead of "defendants."

COMMISSIONER CANNON: Oh. Never mind. That's very different.

MR. HEIMERT: We did make that change, but I think

you may have stepped out of the room. Burchfield proposed that.

COMMISSIONER JACOBSON: All Commissioners are entitled to 12, count them, 12, Emily Litella moments.

[Laughter.]

MR. HEIMERT: Do you care to change any of your -

[Simultaneous conversation.]

COMMISSIONER CANNON: No. No.

MR. HEIMERT: It's now non-settling conspirators, not defendants, and on number 3 it is other non-settling conspirators. We modified that on the fly.

COMMISSIONER CANNON: I got it. Okay. Thanks.

MR. HEIMERT: Did someone else have a pending comment?

The proposal was to make market share the presumptive basis on which to allocate, unless that is not possible, in which case gain would be a secondary option. And we will, in putting together the recommendations with the study group, so reflect that, unless there's a Commissioner who wishes to dispute that result.

COMMISSIONER JACOBSON: Let's just say "not feasible."

MR. HEIMERT: Not feasible. Fair enough.

COMMISSIONER JACOBSON: Anything is possible.

COMMISSIONER GARZA: Okay. Well, I think, although we're a little bit earlier than we thought, does anyone object to ending our day, at this point?

COMMISSIONER KEMPF: Let me make a procedural - as a trial balloon -

COMMISSIONER GARZA: Okay.

COMMISSIONER KEMPF: - Not as something I'm insisting on. I think we'll get bogged down on the first of the other three, but we may be able to get a quick, at least sense, of where we all are on the other two. Those are pretty simple - we may not be able to reach an agreement on them, but I think it might be helpful to, in teeing up our next session, for prejudgment interest and attorneys' fees, just to do a quick go-around like we've done on the other things, to get everybody's initial positions.

COMMISSIONER CANNON: I would concur.

COMMISSIONER KEMPF: I don't think that's sensible for the first one, because there are too many complexities.

COMMISSIONER GARZA: The question, I guess, is whether 45 minutes is that sufficient time for -

COMMISSIONER KEMPF: Oh, I don't think it will take more than five to ten minutes for each of them.

COMMISSIONER JACOBSON: I sense just calling for a stroke vote on these two.

COMMISSIONER SHENEFIELD: If we're very disciplined, we can do it easily.

MR. HEIMERT: Commissioner Cannon.

COMMISSIONER CANNON: I'm sorry. I just wonder if people's positions on all the treble damage issues could be affected -

MR. HEIMERT: I think that's why we've taken them up together, because regardless of where we come out on treble damages, that may affect one's views as to whether attorneys' fees or prejudgment interest would be appropriate, because they are integrated -

COMMISSIONER KEMPF: And I don't think so. And these are all subject to revision, anyway. None of this is binding on anybody.

COMMISSIONER GARZA: That's true.

COMMISSIONER WARDEN: I tend to agree with Commissioner Kempf. On the other hand, I think this is the kind of matter in which we should defer to the Chair. It's

her job to organize our -

COMMISSIONER KEMPF: That's why I put it up as a trial balloon and not something I was insisting on.

COMMISSIONER GARZA: Right. The thought had been that it would be best to talk about treble damages, prejudgment interest, and attorneys' fees together, although I don't think there's any particular hard and fast rule to do it. The one thing I don't want to do is end in the midst of deliberations.

So, unless there's an objection, I have no objection to taking up prejudgment interest now, and then we'll see where we are and how much time we have left.

COMMISSIONER KEMPF: I see us spending less than ten minutes on each of these.

COMMISSIONER GARZA: Well, why don't we see where we can get, and then we can make a judgment? We'll take it one step at a time, alright? The 12 steps of antitrust.

Andrew, do you want to go ahead?

MR. HEIMERT: Alright. We will then proceed to prejudgment interest.

COMMISSIONER CARLTON: Can I ask a clarifying question first? If we're going to vote on pr-judgment

interest, could someone explain to me the third recommendation in particular, the distinction between prejudgment interest and pre-complaint interest? I think I understand what that is, but then the rest of the sentence, "and damages for costs of capital and opportunity costs." I was a bit unclear as to what those words meant, and I'm uncomfortable voting unless I know what I'm voting for.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: It's largely redundant, as I understand it. There is prejudgment interest in the statute, which I don't think anyone has ever collected. I think what is intended to be referred to here is, fundamentally, cost of capital-, opportunity cost-type losses associated with the beginning of the damage period to the end and meant to compensate the plaintiff for the time spent in collecting the money pre-litigation and during the litigation.

So, I view it, personally, as entirely redundant.

COMMISSIONER SHENEFIELD: Point of clarification: the prejudgment interest in the statute now is only on the grounds of dilatory or frivolous litigation process.

COMMISSIONER CARLTON: And pre-complaint interest

means prior to the complaint.

COMMISSIONER SHENEFIELD: In the statute now, it just goes back to the point of complaint, and it's simple interest. Pre-complaint just means back to the time of -

COMMISSIONER KEMPF: It's a little bit like a fraudulent concealment recovery, analytically.

COMMISSIONER CARLTON: So, for my purposes, the difference between 2 and 3 is, one is prejudgment interest, which starts at the time the complaint is filed, and pre-complaint interest starts whenever the violation took place?

COMMISSIONER VALENTINE: Except that 1 is only when there has been the dilatory delay.

CHAIRPERSON GARZA: Right.

COMMISSIONER JACOBSON: That's existing law.

COMMISSIONER VALENTINE: Right. But he was asking for the difference between 1 and 3, and it's not simply the timing of when it starts; it's the instances in which it would exist.

COMMISSIONER JACOBSON: Right. But the proposal here is to change it so that, basically, the plaintiff is made whole for the delay.

COMMISSIONER GARZA: Delay not caused, necessarily,  
from the -

COMMISSIONER JACOBSON: From beginning of the  
damages period.

COMMISSIONER GARZA: Right.

COMMISSIONER JACOBSON: Not necessarily from the  
act, but from the beginning of the damages period.

MR. HEIMERT: That's option 3.

COMMISSIONER JACOBSON: Correct.

MR. HEIMERT: And option 2 would start the clock  
when the complaint was filed.

COMMISSIONER GARZA: So just to be clear, option 1  
recommends that the statute be amended to provide for  
prejudgment interest from the time of complaint?

MR. HEIMERT: "Time of complaint" distinguishes it  
from number 3.

COMMISSIONER GARZA: Is that the intent?

COMMISSIONER KEMPF: I read them just the opposite.  
[simultaneous conversation.]

COMMISSIONER CARLTON: I'm sorry that I asked the  
question.

COMMISSIONER BURCHFIELD: Let me add to the

confusion by telling you how I read them. The first bullet I read as being the discretionary prejudgment interest that is allowable under present law for dilatory tactics by the defendant.-

COMMISSIONER GARZA: Right.

COMMISSIONER KEMPF: Right.

COMMISSIONER BURCHFIELD: The second option I read as mandating prejudgment interest to any successful plaintiff, from the complaint forward.

[Simultaneous conversation.]

COMMISSIONER BURCHFIELD: The third option I read as allowing, but not mandating, prejudgment interest from the time of the complaint, plus allowing pre-complaint interest from the time of the initial injury, plus - and these seem to me to be duplicative, so I may be misstating it, because I don't think the way I'm stating it is very compelling, but - prejudgment interest, plus damages for costs of capital and opportunity costs, which I would interpret to mean some, perhaps, company-specific rate-of-return factor that would be applied to the damages to reflect how the losses could have been used by that particular plaintiff, had that particular plaintiff had the money rather than the defendant had the

money -

COMMISSIONER WARDEN: Let's take that as our operating thesis.

[Simultaneous conversation.]

COMMISSIONER GARZA: So recommendation 2 is mandated, and recommendation 3 is permissive.

COMMISSIONER JACOBSON: But 2 is from the date of complaint, while 3 includes the entire damages period.

COMMISSIONER VALENTINE: Okay.

COMMISSIONER GARZA: Well, so much for 10 minutes.

COMMISSIONER BURCHFIELD: I also take it that 3 -

[Simultaneous conversation.]

MR. HEIMERT: Commissioner Burchfield.

COMMISSIONER BURCHFIELD: I also interpret 3 as - maybe I'm wrong on this - not bound by the dilatory standard that is applicable to the first one. And presumably, it would be governed by the general standard of prejudgment interest, which is basically when the court, in its discretion, believes it's necessary to make the plaintiff whole.

COMMISSIONER VALENTINE: I agree.

MR. HEIMERT: Commissioner Carlton.

COMMISSIONER CARLTON: The reason I asked for clarification for the last part of 3 was that I was worried about raising it, actually, the way that I think Commissioner Burchfield just did.

It seems to me 2 and 3 are symmetric. In a sense, they're asking a simple question: do you want to start it from the day of the complaint, or do you want to start it from the day of the injury? It's wholly a question as to what interest rate you want to use and what cost of capital you want to use. That could apply to either one, and to keep it cleaner, I'd say 2 is, do you want to get pre-judgment interest, and 3 is, do you want to get prejudgment interest from the date of the complaint or from the date of the bad act.

It seems like a separate issue as to what interest rate you want to use. That gets into more sophisticated questions that, it seems to me, are separate.

MR. HEIMERT: Commissioner Kempf.

COMMISSIONER KEMPF: There's a separate difference between them, Dennis. 2 is mandatory; 3 is discretionary.

COMMISSIONER JACOBSON: Why don't we just have each Commissioner say what they think?

COMMISSIONER GARZA: Well, why don't we have each Commissioner just say what they think should be the appropriate approach, because the questions are just too confusing.

MR. HEIMERT: All right.

Commissioner Kempf.

COMMISSIONER KEMPF: I vote yes on option 1, no on option 2, no on option 3. To me, this is another hot-button issue. All defendants will favor 1, and all plaintiff's will favor 2 or 3. If you make a change, you're just inviting descents into squabbling.

MR. HEIMERT: Commissioner Litvack.

COMMISSIONER LITVACK: No change.

MR. HEIMERT: Commissioner Cannon.

COMMISSIONER CANNON: Well, I preface by saying we can't worry too much about squabbles. I mean, that's what people have paid us these big bucks to do. That being said, with all these other changes and things, I really want to think about the possibility of 3, but right now I would really go for 1 at this point, with no change.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: I agree that no change is

appropriate. If we do other tinkering with the statute, which I will oppose as strongly as I can, then I would revisit it. But, assuming no other changes on damages and fees, I would certainly vote strongly for no change.

MR. HEIMERT: We'll get Commissioner Delrahim's views later.

Commissioner Carlton.

COMMISSIONER CARLTON: My view is I would tend to go with 3. It seems clear that you want to award people for time value, and that's part of the damages, and that's my current thinking.

MR. HEIMERT: Commissioner Burchfield.

COMMISSIONER BURCHFIELD: I would advocate 1, and I'm not persuaded by 3, because I think as phrased, it provides the opportunity for duplicative recovery of both the statutory prejudgment interest rate - let's say the T-bill rate - plus internal costs of capital and opportunity costs, which I believe would be somewhat duplicative.

MR. HEIMERT: Vice Chair Yarowsky.

VICE CHAIR YAROWSKY: No change.

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: I favor awarding interest from

the beginning of the damages period as was properly phrased by Commissioner Jacobson, so long as there has not been an award of treble, or otherwise enhanced, damages that are greater than that interest amount. I don't understand how damages for cost of capital and opportunity costs ever found its way into this question. That's what interest is intended to compensate for. Maybe it shouldn't be as low as the T-bill rate, but it ought to be fixed at a rate and not get into some subsidiary litigation about the internal rate of return of the plaintiff.

MR. HEIMERT: Commissioner Valentine.

COMMISSIONER VALENTINE: I would go with 1, and that is a condition qualified upon, whether there are issues that we'll be discussing the next time, and I would ask to revisit this if things come out differently from how I would vote on those.

MR. HEIMERT: Chair Garza.

COMMISSIONER GARZA: I think that damages should include interest from the time of the injury, as opposed to from the time that the complaint is filed or the time the judgment is issued, although I tend to agree with Commissioner Warden that I might be in favor of that - I see

an interrelationship with the punitive treble damages award.

But in general, I favor any damages that include the interest.

MR. HEIMERT: Commissioner Shenefield.

COMMISSIONER SHENEFIELD: As of now, I'm minded to support number 3.

MR. HEIMERT: The tallies with the contingencies make it a little bit difficult to test the consensus, but there are at least seven people who indicated a preference for no change to current law, but at least two of those were contingent upon whether treble damages changes, and we're not going to have time to get to that today.

There were four Commissioners in favor of providing interest from the time of the injury, but again, with the caveat depending on how things come out with treble damages, and Makan Delrahim was not here to cast a view. So that could shift around.

There were no Commissioners for the second option, which was to provide prejudgment interest in all antitrust cases.

VICE CHAIR YAROWSKY: Just to clarify. I didn't give you a contingency, because I assumed that all of these

were going to be in this section. So, if you need me to say contingency, you can ask.

COMMISSIONER LITVACK: I think a number of us would.

MR. HEIMERT: I think that's right. There's a number of people with a contingency, and it may be revisited, depending on where we come out with treble damages.

So would Commissioners find further discussion at this point helpful, or should we postpone -

COMMISSIONER KEMPF: No.

COMMISSIONER GARZA: No. No. No. We know where we are for going into the other issues.

COMMISSIONER KEMPF: Now, the question I have is, can we do a similar exercise on attorneys' fees?

COMMISSIONER GARZA: Yes. Let's just get an initial polling, again with the understanding that we may need to revisit or refine, in connection with the treble damage discussion.

MR. HEIMERT: All right. So, should attorneys' fees be awarded to successful antitrust plaintiffs? The four options: no statutory change is appropriate, recommend statutory change to bar plaintiffs in addition to treble

damages, allow defendants to recover attorneys' fees in frivolous cases or in actions between major competitors

Commissioner Kempf.

COMMISSIONER KEMPF: I vote yes on number 1, no on number 2, and no on number 4. On number 3, I'm content with it that way, but I would prefer simply the English rule, which would read, "recommend statutory changes to allow successful defendants to recover attorneys' fees." So, it would be reciprocal to the current rule for plaintiffs. I would support a frivolous thing, but I certainly wouldn't take it away from plaintiffs.

MR. HEIMERT: Commissioner Litvack.

COMMISSIONER LITVACK: I think I'm in exactly the same position. No change is appropriate as to plaintiffs. Obviously, yes on 1; no on 2. In some way I want to have more discussion on 3; I'm just not sure how I feel about that. I feel a little more certain that I'm not for number 4, but that, too, I'd want to discuss.

MR. HEIMERT: Commissioner Cannon.

COMMISSIONER CANNON: Yes. For sure number 1. I agree with hearing more on number 3. Definitely noes on 2 and 4.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: Yes on 1, no on the other three.

MR. HEIMERT: Commissioner Delrahim.

COMMISSIONER DELRAHIM: Yes on 1, no on 2, yes on 3, no on 4.

MR. HEIMERT: Commissioner Carlton.

COMMISSIONER CARLTON: I'm the same. Yes on 1, no on 2, yes on 3, and no on 4.

MR. HEIMERT: Commissioner Burchfield.

COMMISSIONER BURCHFIELD: Yes on 1, no on 2, yes on 3, and tentatively yes on 4.

MR. HEIMERT: Vice Chair Yarowsky.

VICE CHAIR YAROWSKY: Yes on 1, no on the remainder.

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: Yes on number 2 if the enhanced portion of damages pursuant to trebling is greater than the amount of the fees and interest. If not, then fees should be awarded. I favor number 3, but - and I understood Commissioner Kempf to say that the successful defendant should recover fees in all case - I think that's not feasible

in certain kinds of antitrust litigation. I strongly favor number 4, because that is an area where it is clearly feasible and where I think the initiation of litigation is most subject to abuse by plaintiffs.

MR. HEIMERT: Commissioner Valentine.

COMMISSIONER VALENTINE: Yes on 1; no on 2. I would be open to discussing 3, but I think, at most, I would do it in an equivalent of Rule 11 cases, and no on 4.

MR. HEIMERT: Chair Garza.

COMMISSIONER GARZA: Yes on 1, no on 2. Yes on 3, although I thought that perhaps it might be amended to apply to cases that are brought by plaintiffs who are not purchasers or sellers.

MR. HEIMERT: Commissioner Shenefield.

COMMISSIONER SHENEFIELD: Yes, no, maybe yes on 3, and no.

MR. HEIMERT: Just to review, I think everybody, with the exception of John Warden, favored keeping the rule to allow successful antitrust plaintiffs to receive attorneys' fees.

There is one for barring attorneys' fees.

On number 3, there was some interest in further

discussion.

And 4, there was very limited interest, although some, so that I think, can come up in a discussion, perhaps, of number 3.

Why don't we start with some discussion of number 3?

[Simultaneous conversation.]

COMMISSIONER GARZA: We've got 20 minutes, and the question is whether we can adequately cover this in 20 minutes?

COMMISSIONER VALENTINE: No.

COMMISSIONER JACOBSON: My vote is no.

COMMISSIONER VALENTINE: No. No.

COMMISSIONER GARZA: Then let me just, before we conclude, make sure that we all understand what we're doing. The next meeting is May 23rd; is that right?

MR. HEIMERT: Correct.

COMMISSIONER GARZA: Andrew, what do we have before we get to finishing the attorneys' fees and doing the treble damages? What else did we have on our plate for the 23rd?

MR. HEIMERT: We have enforcement institutions, both state and federal; we have Robinson-Patman; and we have

new economy issues.

COMMISSIONER GARZA: That's sounds to me like an awful lot to cover. Is it an eight-hour day?

MR. HEIMERT: It's another eight-hour day.

COMMISSIONER JACOBSON: Do we want to punt new economy?

COMMISSIONER GARZA: Yes, that's what I'm thinking.

COMMISSIONER VALENTINE: Yes.

COMMISSIONER JACOBSON: Seconded.

COMMISSIONER VALENTINE: Third.

COMMISSIONER GARZA: So then, on the 23rd we will complete the business we have here, and we will also discuss the issues of enforcement institutions, federal and state, and the Robinson-Patman if we have time.

MR. HEIMERT: Commissioner Delrahim.

COMMISSIONER DELRAHIM: I just would like to be recorded, for prejudgment interest, for the third option, as modified.

MR. HEIMERT: Okay. Thank you.

All right. So, the meeting of the Antitrust Modernization Commission is adjourned.

[Whereupon, at 4:39 p.m., the meeting was

adjourned.]