

Supplemental Civil Remedies-Damages Discussion Outline

Note: Possible recommendations have been narrowed to those that appeared to receive substantial support from four or more Commissioners during the deliberation meetings on May 8 and 23, 2006, or on which additional discussion was sought. Indications of support for particular recommendations are based on AMC Staff's recording of discussions during and the transcripts of the deliberation meetings on May 8 and May 23. No Commissioner is bound by the indications reflected in this document, and it is understood that Commissioners may change their positions from those tentatively indicated in initial deliberations.

I. *Treble Damages*

[1] No statutory change is appropriate; treble damages should be available in all antitrust cases (other than for existing exceptions).

[8 Commissioners tentatively favored: BB, SC, JJ, DK, SL, JS, DV, JY. Not present: MD]

[2] (Kempf proposal) Recommend statutory change that would retain treble damages but provide that a court, in its discretion, may limit the award to single damages based on a consideration of the following factors:

- [a] whether the violation was *per se* or rule of reason.
- [b] whether the violation involved single-firm or multi-firm conduct.
- [c] whether the violation was related to an otherwise pro-competitive joint venture.
- [d] the state of the development of the law with respect to the challenged conduct as an antitrust violation.
- [e] whether the challenged conduct was overt or covert.
- [f] whether the challenged conduct was criminal.
- [g] whether there has also been a related government action.
- [h] whether it is a competitor that is alleging the conduct was anticompetitive.
- [i] Whether the violation was proven by clear and convincing evidence.

[12 Commissioners sought comment and further discussion]

[3] (Warden proposal) Recommend statutory change that would provide that in all matters where the government institutes criminal proceedings and obtains a guilty verdict by plea or trial, all unlawful gains made by the defendants and precomplaint and prejudgment interest thereon shall be disgorged in that proceeding, together with such fines as may be provided by law and a civil penalty of 200% of the amount disgorged.

- i. The disgorged unlawful gains shall be apportioned among those from whom they were taken directly or indirectly by the criminal court in a summary proceeding to be concluded within 90 days of the entry of a final criminal judgment as to all defendants. Classes of direct and indirect claimants may participate through counsel in that proceeding. Claims of less than \$100 shall be disregarded and the amounts attributable to such claims paid to the Treasury.
- ii. Fines and civil penalties shall accrue solely to the Treasury, but the court may award compensation from those amounts to any private party found to have been a material factor in the instigation or successful conduct of the government's investigation and prosecution or to its counsel.

In the case of defendants acquitted of criminal charges, private claims may be asserted as otherwise provided by law, but only the actual amount of unlawful gain may be recovered.

[12 Commissioners sought comment and further discussion]

[4] Recommend statutory change that would retain treble damages in antitrust cases, and provide a higher multiplier for antitrust cases involving covert, hard-core, cartel conduct.

[2 Commissioners tentatively favored: DC, DG. 12 Commissioners sought comment and further discussion]

II. Prejudgment Interest

[5] No statutory change is appropriate; prejudgment interest should be available only in the circumstances currently specified in the statute.

[7 Commissioners tentatively favored: BB, SC, JJ, DK, SL, DV, JY. Not present: MD]

[6] Recommend that the statute be amended to provide prejudgment interest to all successful plaintiffs in antitrust cases. Such prejudgment interest would accrue from the time of injury.

[4 Commissioner tentatively favored: DC, DG, JS, JW. Not present: MD]

III. Attorneys' Fees

[9] No statutory change is appropriate; successful antitrust plaintiffs should continue to receive attorneys' fees.

[7 Commissioners tentatively favored: SC, DC, DG, JJ, JS, DV, JY. Not present: MD]

[10] Recommend that attorneys' fees should be reduced in civil litigation that follows on criminal prosecutions.

[7 Commissioners tentatively favored: BB, DC, DG, JJ, JS, DV, JW, JY. Not present: MD]

[11] Recommend statutory change to allow defendants to recover attorneys' fees for frivolous antitrust cases.

[4 Commissioners tentatively favored: BB, DC, DG, JW. Not present: MD]