

Civil Remedies-Damages and Liability Discussion Outline

Note: Italicized text is based on the questions on which the Commission requested comment from the public.

Treble Damages

1. *Are treble damage awards appropriate in civil antitrust cases?*
2. *Should other procedural changes be considered to address issues relating to treble damage awards, such as providing courts with discretion in awarding treble (or higher) damages, limiting the availability of treble damages to certain types of offenses (e.g., per se unlawful price fixing versus conduct subject to rule of reason analysis), or imposing a heightened burden of proof?*

- No statutory change is appropriate; treble damages should be available in all antitrust cases.
- Recommend statutory change that would provide that treble damages remain available in antitrust cases, except in specified circumstances, in which only single damages would be awarded.

If so, those circumstances are:

- When the conduct giving rise to the alleged violation is evaluated under the rule of reason, and is not *per se* unlawful.
- When the conduct giving rise to the alleged violation is single-firm conduct.
- When the conduct giving rise to the alleged violation was part of a joint venture with pro-competitive justifications.
- When the conduct giving rise to the alleged violation has not been clearly established as unlawful under the antitrust laws and the defendant therefore could not have known or reasonably be expected to have known that its conduct was unlawful.
- When the conduct giving rise to the alleged violation is overt.
- When the conduct giving rise to the alleged violation would not be appropriate for criminal sanctions.
- When the action is brought as a follow-on to a U.S. government criminal prosecution or investigation.
- Recommend statutory change that would keep treble damages potentially available in all antitrust cases; but, in a given antitrust case they would be available only if:
 - ... only if:
 - A court in its discretion, exercised with regard to statutorily specified considerations, awards treble, as opposed to single, damages.

- A plaintiff proves that the defendant's conduct violated the antitrust laws by clear and convincing evidence.
- Recommend statutory change that would "de-couple" actual and multiple damages, awarding single damages to the plaintiff and multiple damages to the government.
- Recommend statutory change that would make treble damages available only to purchasers from or sellers to a defendant found liable under the antitrust laws.
- 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.

Prejudgment Interest

3. *Should successful antitrust plaintiffs be awarded pre-complaint interest, cost of capital, or opportunity cost damages?*
4. *Are the factors used to determine when prejudgment interest is available set forth in 15 U.S.C. § 15(a)(1)-(3) appropriate? If not, how should they be changed?*

- No statutory change is appropriate; prejudgment interest should be available only in the circumstances currently specified in the statute.
- Recommend that the statute be amended to provide for prejudgment interest in all antitrust cases.
- Recommend that the statute be amended to allow prejudgment interest, as well as pre-complaint interest, and damages for costs of capital and opportunity costs, in all antitrust cases.

Attorneys' Fees

5. *Should courts award attorneys' fees to successful antitrust plaintiffs?*
6. *Are there circumstances in which a prevailing defendant should be awarded attorneys' fees?*

- No statutory change is appropriate; successful antitrust plaintiffs should continue to receive attorneys' fees.
- Recommend statutory change to bar plaintiffs from recovering attorneys' fees in addition to treble damages.
- Recommend statutory change to allow defendants to recover attorneys' fees for frivolous antitrust cases.
- Recommend statutory change to allow defendants to recover attorneys' fees in actions between major competitors.

Joint and Several Liability, Contribution, and Claim Reduction

7. *Should Congress and/or the courts change the current antitrust rules regarding joint and several liability, contribution, and claim reduction?*

- No statutory change is appropriate; leave rules on joint and several liability, contribution, and claim reduction as they are.
- Recommend statutory change to eliminate joint and several liability; an antitrust defendant would be liable only for damages attributable to it.
- Recommend retention of joint and several liability, but recommend statutory change that would allow claims for contribution against other defendants.
- Recommend retention of joint and several liability, but recommend statutory change that would provide for claim reduction, such that the remaining liability of the non-settling defendants would be reduced, before trebling, by the amount of the settlement.

If either or both contribution or claim reduction is recommended:

- Recommend that each defendant's allocated share of liability is equal, *pro rata* or *per capita*, for purposes of determining any contribution claims or reducing the plaintiff's remaining total claim.
- Recommend that each defendant's allocated share of liability is equal to its market share or gain from the violation for purposes of determining any contribution claims or reducing the plaintiff's remaining total claim.
- Recommend that each defendant's allocated share of liability be based on relative fault or culpability for purposes of determining any contribution claims or reducing the plaintiff's remaining total claim.