

Response of the American Antitrust Institute
Working Group on Criminal Remedies
to AMC Request for Public Comment
June 30, 2006

These are the comments of a Working Group on Criminal Remedies established by the American Antitrust Institute for purposes of responding to the AMC's request for public comments. These comments reflect a consensus of the Working Group, but it should not be assumed that all agree with every statement or position herein. The Working Group is chaired by Kenneth Adams (Dickstein, Shapiro), and the other members are John M. Connor (Purdue University), Albert A. Foer (AAI), and Robert H. Lande (University of Baltimore).

Question 1. Some observers have opined that application of 18 U.S.C. sec. 3571(d) consistent with the Constitution may be difficult in all but the most unusual circumstances after U.S. v. Booker, given Booker's requirement that the gain or loss be proven to a jury beyond a reasonable doubt. Should 18 U.S.C. sec. 3571(d) be amended so that it is not applicable in Sherman Act prosecutions? If Section 3571(d) were made inapplicable to Sherman Act prosecutions, should the maximum fine under the Sherman Act be increased? If so, what should be the revised fine amount?

1. We see no reason to amend the alternative fine provision of Title 18 to make it inapplicable to Sherman Act prosecutions. If a Sherman Act case arises in which the government believes it can meet its burden of proof, there is no apparent reason why section 3571(d) should not apply in that case just like in any other. In addition, in cases where the recommended fine is agreed between the defendant and the government as part of a plea agreement, section 3571(d) provides the sentencing judge

with statutory authority to impose an agreed-upon fine which exceeds the Sherman Act maximum.¹

Increasing the maximum Sherman Act fine is unlikely to provide an adequate substitute for the alternative sentencing provisions of section 3571(d), if Booker is held to require that the amount of gain or loss must be proved beyond a reasonable doubt. In the bulk vitamins price fixing case, for example, the statutory maximum would have had to exceed \$2.5 billion in order to support a fine equal to two times the gain or loss resulting from the defendants' unlawful conduct. Congress is unlikely to enact that big an increase, especially since the last increase was enacted less than two years ago.

As a practical matter, if the Booker decision means that for cartels as extensive as bulk vitamins the inadequacy of the statutory maximum cannot be resolved by resorting to section 3571, prosecutors will probably resolve the problem by charging the defendants with multiple offenses. (In the vitamins case, for example, defendants were convicted of fixing prices with respect to nine different vitamin products. Had it been necessary, each vitamin/market could have been the subject of a separate count in the indictment.

Question 2. In responding to the first question, please also comment on the following:
A. What is the practical difficulty of proving gain or loss from an antitrust violation beyond a reasonable doubt?

2. (A) Proof of gain or loss in most antitrust cases involves complex econometric analysis about how markets would have performed in the absence of the unlawful conduct. Since that is not something that can be observed, it can only be approached

¹ The DRAM cartel prosecution offers a good example. The joint sentencing memorandum submitted in connection with one defendant's guilty plea includes the statement that "the gain derived or the loss resulting from the conduct charged is sufficient to justify a fine of \$185 million pursuant to 18 USC §3571(d)". Joint Sentencing Memorandum by United States and Hynix Semiconductors, Inc., U.S. v. Hynix, CR05-249 (ND Cal 5/11/05)

through expert opinion. And in most cases the experts engaged by the plaintiffs and the defendants express conflicting opinions. Proof beyond a reasonable doubt is difficult to achieve without reducing the amount proven to a low number.² In some cases it may be less complex to analyze the defendant's illegal profits than the harm done to victims, but that will often result in an understatement of the harm done and even that analysis typically involves complex accounting issues (*e.g.*, allocation of costs across different product lines and corporate subsidiaries) which leave lots of room for disagreement.

B. If evaluation of the amount of gain or loss requires or warrants expert testimony, can it be said as a matter of law that gain or loss cannot, in such a case, be proven beyond a reasonable doubt?

(B) Once you are in the arena of conflicting expert opinions, which will almost always be true in Sherman Act cases when it comes to proving the gain or loss caused by defendants' violation, proof beyond a reasonable doubt ordinarily will be difficult to achieve except by low-balling the amount. (See footnote 2, *supra*)

C. Why do businesses agree, post-Booker, to pay fine amounts in excess of the \$10 million (now \$100 million) statutory maximum?

(C) Presumably they agree because (i) the government can charge multiple offenses as suggested in section 1 above, and (ii) the company is willing to pay whatever price it takes to keep individual executives out of jail.

² Expert opinions about gains and losses ordinarily are based on statistical and econometric analysis which is susceptible to being expressed in terms of "confidence bands". In other words their analysis will typically identify a range of possible overcharges. The expert can testify to the percentage likelihood that the actual overcharge lies within a certain band. If the band is low enough, the expert ordinarily will be able to testify that (s)he is 95 percent confident that the actual overcharge lies within that band. Thus the higher standard of proof which applies in criminal proceedings can be attained, but typically only at the expense of understating the likely damages caused by the defendants' unlawful conduct.

D. Is the threat of criminal prosecution of a greater number of individuals employed by a business, or of more serious sentences for the business's individuals, a factor that leads some businesses to agree to pay fine amounts in excess of the \$10 million or \$100 million maxima?

(D) Justice Department officials have been quoted as saying that each month of jail time is worth several million dollars of corporate fines.

Contact Person: Albert A. Foer, President
American Antitrust Institute
2919 Ellicott Street, NW
Washington, DC 20008-1022
202-276-6002