

PHILLIP C. ZANE
Direct Dial: (202) 508-3490
Direct Fax: (202) 220-2290
E-Mail Address: pzane@bakerdonelson.com

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Antitrust Modernization Commission
1120 G Street, NW
Suite 810
Washington, D.C. 20005

**VIA FACSIMILE AND
ELECTRONIC MAIL**

Re: Public Comment Regarding Criminal Remedies,
71 Fed. Reg. 30,863-64 (May 31, 2006)

Dear Commissioners:

I write in response to your request for further comment on criminal remedies in light of the questionable constitutionality of the alternative statutory maximum fine of twice the gain to the defendant or twice the loss suffered by the victims as provided in 18 U.S.C. § 3571(d). I write as a private citizen and not on behalf of any client. The opinions expressed here are my own.

1. Amending the Sherman Act

The appeal of Section 3571(d) is that, if constitutional, it allows a court to impose a fine as high as may be appropriate under the circumstances without worry that inflation might erode the real value of the maximum fine specified in the Sherman Act (as amended) or that antitrust offenders might have conspired to fix prices on an even grander scale than the current specified maximum of \$100 million contemplates. Considering that we have already seen fines well in excess of \$100 million,¹ it may well be that some mechanism is needed to ensure that antitrust fines imposed on large organizations are appropriate to the scale of the antitrust crime that the organization has committed.

The problem with Section 3571(d) is not that it is flexible or theoretically limitless, but that the means of calculating the variable maximum in an antitrust case is unlikely to satisfy the standard of

¹ One defendant agreed to pay a fine of \$500 million in 1999 when the maximum fine specified in the Sherman Act was only \$10 million. *United States v. F. Hoffmann-La Roche Ltd.*, Cr. No. 99-CR-184-R (N.D. Tex. May 20, 1999).

proof required in a criminal case or even satisfy the requirements of that section. To impose a fine above the level specified in the Sherman Act, the government would have to prove gain to the defendant or loss to victims beyond a reasonable doubt because gain or loss is a fact necessary to determine the statutory maximum. We antitrust litigators determine gain or loss in civil antitrust cases by deploying economic experts whose models and analysis allow conclusions to be drawn about what the loss probably was. Section 3571(d) itself provides that it is inapplicable if determining gain or loss “would unduly complicate or prolong the sentencing process.” But to prove gain or loss beyond a reasonable doubt, the testimony and cross-examination of opposing economic experts would either have to be made part of a criminal trial or part of a post conviction sentencing phase before a jury. Either way, the economic testimony and the preparation for such testimony would likely unduly complicate and prolong sentencing. Moreover, as discussed below, economic analysis seems unlikely to allow a conclusion of gain or loss beyond a reasonable doubt.

In my article arguing that the Supreme Court’s recent Sixth Amendment jurisprudence culminating in *United States v. Booker*² requires the conclusion that Section 3571(d) is unconstitutional,³ I offered a solution that would provide a flexible alternative statutory maximum to ensure appropriate punishment of the worst offenders but whose application depended on facts easier to prove than gain or loss. My proposal⁴ was to replace Section 3571(d), but language can instead be added to Sections 1 through 3 of Title 15, although this would, of course, solve the problem only for antitrust crimes and not other financial crimes. Thus, the Sherman Act could be amended as follows:

§ 1. Trusts, etc. in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding ~~\$100,000,000~~ ten percent of its worldwide gross sales, including sales of its subsidiaries, for the fiscal year immediately preceding sentencing if a corporation, or, if any other person, \$1,000,000, ten percent of his or her gross income (as that term is defined in 26 U.S.C. § 61) for the fiscal year immediately preceding sentencing, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

§ 2. Monopolization; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and,

² 543 U.S. 220 (2005).

³ Phillip C. Zane, *Booker Unbound: How the new Sixth Amendment Jurisprudence Affects Deterring and Punishing Major Financial Crimes and What to Do about It*, 17 FED. SENTENCING REP. 263 (2005).

⁴ Zane, *Booker Unbound*, 17 FED. SENTENCING REP. at 267.

on conviction thereof, shall be punished by fine not exceeding ~~\$100,000,000~~ ten percent of its worldwide gross sales, including sales of its subsidiaries, for the fiscal year immediately preceding sentencing if a corporation, or, if any other person, ~~\$1,000,000,~~ ten percent of his or her gross income (as that term is defined in 26 U.S.C. § 61) for the fiscal year immediately preceding sentencing, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

§ 3. Trusts in Territories or District of Columbia illegal; combination a felony

(a) Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding ~~\$100,000,000~~ ten percent of its worldwide gross sales, including sales of its subsidiaries, for the fiscal year immediately preceding sentencing if a corporation, or, if any other person, ~~\$1,000,000,~~ ten percent of his or her gross income (as that term is defined in 26 U.S.C. § 61) for the fiscal year immediately preceding sentencing, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

(b) Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce in any Territory of the United States or of the District of Columbia, or between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia, and any State or States or foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding ~~\$100,000,000~~ ten percent of its worldwide gross sales, including sales of its subsidiaries, for the fiscal year immediately preceding sentencing if a corporation, or, if any other person, ~~\$1,000,000,~~ ten percent of his or her gross income (as that term is defined in 26 U.S.C. § 61) for the fiscal year immediately preceding sentencing, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

This approach is attractive, I believe, for several reasons. First, it automatically adjusts for inflation, so that advocates of antitrust enforcement need not periodically petition Congress to increase a specified limit. Second, it allows very large fines to be imposed on the largest offenders. Third, it automatically brings down the maximum fine for small corporations and individuals without substantial means to pay a fine, thereby ensuring not just that the punishment fit the crime, but that the punishment also fit the criminal.

2. Other Considerations

A. Practical Difficulty of Proving Gain or Loss

In the antitrust context, even defining loss can be difficult. For raw materials or intermediate goods whose prices are fixed, loss could be the difference between the price paid and the but-for price, what the price would have been but for the price fixing. But because these buyers were also resellers, they may have been able to pass along to subsequent buyers part or all of the increased price. Their loss might therefore best be measured by lost profits. But should this be lost net profits or lost gross profits? Should the loss instead be the difference between the supracompetitive price and the but-for price when the relevant goods are sold to the ultimate consumer? What if the price-fixed component of the ultimate product had only a small contribution to the price of the finished product, say, it was the price of an automobile's motor oil that was fixed instead of the price of its steel? Loss is elusive even in the simplest cases involving consumer goods whose prices are fixed by colluding retailers: What should the price have been? How did demand for the good change over time? What was the relevant inflation rate, the rate for the market as a whole, the industry, or the particular class of products?

Measuring gain is equally vexing. Should we use net profits or gross profits? How should we allocate profits? What if the price-fixer actually lost money on the goods sold even though the price was fixed? Furthermore, calculating gain cannot escape the same difficulties faced in calculating loss: How do we calculate what the price or profit should have been? In civil cases, of course, we argue about the proper measure of loss, which may vary from case to case, and we rely on economists to help estimate that loss. The criminal standard of proof requires too much certainty for these tools to be very useful.

B. Does the Need for Expert Testimony in Determining Gain or Loss Mean Gain or Loss Can Never Be Proven Beyond a Reasonable Doubt?

An economist reaches a conclusion about prices and pricing trends by gathering facts about a market (including observed prices and quantities, inflation rates, and cost of capital), and formulating a model that will attempt to show what prices would have been had they not been fixed. Economic analysis requires that assumptions be made and a model conceived. Then at trial, opposing economists present testimony and endure cross-examination about their conclusions. Although one can imagine cases in which the magnitude of gain or loss might readily be proven, antitrust litigators know from their experience in civil cases for recovery of damages from alleged price fixing, that opposing economists often come up with plausible but vastly different conclusions about what the but-for price was. The testimony of expert economists in price-fixing cases is quite different from the testimony of the prosecution's expert in a case involving DNA identification. The presentation of the DNA evidence has a certainty that economic evidence never will have. It is hard to believe that economic expert testimony based on assumptions and models and reaching conclusions in terms of confidence intervals can prove loss or gain beyond a reasonable doubt except in unusual cases.

C. Why Do Businesses Agree to Pay Fines above the Sherman Act Minimum?

To this observer, *Apprendi*⁵ rendered Section 3571(d) unconstitutional when it made clear that the Supreme Court would require that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.”⁶ *Booker* simply made clear that the rule in *Apprendi* applied equally to sentences under the U.S. Sentencing Guidelines for federal crimes. But the application of *Apprendi* to Section 3571(d) was an academic conclusion. To a practitioner advising a client that faced a prisoner’s dilemma of accepting an attractive, if expensive, settlement offer or going to trial and risking enormous consequences, the sound advice was usually (but not always): take the government’s deal.⁷ Few defendants could afford the risk of massive damages from a criminal antitrust trial, and challenging the constitutionality of Section 3571(d) by entering a conditional plea and litigating the legal issue required the government’s willingness to agree to a legal battle it knew it might well lose.⁸

In some cases the government can get around the problem of proving gain or loss by charging more than one count. This probably would not work in a bid rigging case, where there might have been a single conspiratorial meeting and a single rigged bid. But even in a case involving hundreds or thousands of sales of price-fixed goods, instead of bringing a simple indictment with, say, one count of conspiracy to fix prices, the government would have to bring a more cluttered indictment and make a more cluttered case, enumerating multiple conspiracies or multiple sales. The proposal I made above is a simpler solution to the problem and one that would not change current practices very much.

D. Does the Threat of Prosecution of Individuals Encourage Corporations to Agree to Pay High Fines?

Businesses probably do incur significant costs in an effort to protect employees from prosecution, abandoning employees only when forced to do so.⁹ In this observer’s experience, the government prosecutes those individuals it thinks it can convict of antitrust offenses. Judge Kaplan’s recent criticism of the Justice Department policy of requiring cooperating businesses to terminate employees under investigation and to refuse to provide representation for them suggests that a policy of threatening individuals in the hope of extracting greater concessions from a corporation might be improper. Again, given the likely unconstitutionality of Section 3571(d), the proposal offered above seems to solve the constitutional problem while maintaining present prosecutorial practices.

⁵ *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

⁶ *Apprendi*, 530 U.S. at 490.

⁷ See Phillip C. Zane, *The Price Fixer’s Dilemma: Applying Game Theory to the Decision of Whether to Plead Guilty to Antitrust Crimes*, 48 ANTITRUST BULL. 1 (2003).

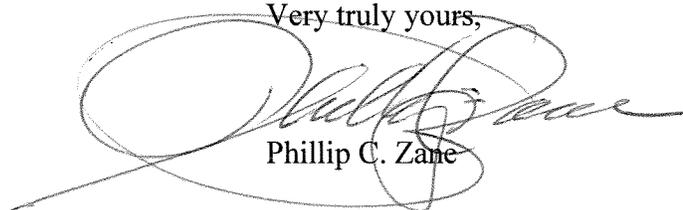
⁸ Scott Hammond, the Deputy Assistant Attorney General for Criminal Enforcement in the Antitrust Division has now publicly acknowledged that gain or loss must be proved beyond a reasonable doubt unless the defendant admits gain or loss. Statement of Scott D. Hammond on Behalf of the United States Department of Justice before the Antitrust Modernization Commission Hearings on Criminal Remedies at 14 (Nov. 3, 2005).

⁹ See *United States v. Stein*, No. 05-Cr-0888 (S.D.N.Y. June 26, 2006) (Kaplan, J.).

Antitrust Modernization Commission
June 30, 2006
Page 6

I thank you for the Commission's attention to the topic of criminal remedies and for the opportunity to present these comments.

Very truly yours,

A handwritten signature in black ink, appearing to read "Phillip C. Zane", is written over the typed name. The signature is fluid and cursive, with a large initial "P" and "Z".

Phillip C. Zane

PCZ:sam

Enclosure