



DEPARTMENT OF JUSTICE

CURRENT DEVELOPMENTS AT THE ANTITRUST DIVISION

Remarks by

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I. Introduction

Good afternoon. It is a pleasure to see so many familiar faces here today. It has been just over a year since I joined the Antitrust Division and this is my second chance to update the Council on recent events at the Division. I look forward to these events because I like to talk about recent developments at the Division, but I also enjoy the questions and discussions that follow. I especially like knowing that, if I get something wrong with this crowd, you'll let me know right away.

Today I will give you a brief update on the variety of enforcement activities at the Division and make a few comments about several decisions by the Supreme Court. Then I would like to discuss the recent amendments to the Sherman Act. Specifically, I want to talk in a little more detail about the detrebling provision and its application to state-court private damage actions.

At the outset, I would like to applaud President Bush's recent appointment of Debbie Majoras to be Chairman of the Federal Trade Commission. I had the good fortune to work with Debbie when she was at the Antitrust Division. I know I speak for myself and others at the Division when I say that Debbie was a terrific colleague and it will be a great privilege to work with her once again to enforce our antitrust laws. Debbie's integrity, professionalism, and commitment to public service make her an excellent choice to lead the Federal Trade Commission.

II. Update on the Antitrust Division

This has been a very busy year at the Antitrust Division, and I will mention some of the highlights.

A. Merger Enforcement

Of course, the biggest news story has been the Oracle trial. Earlier this month, the Division's Networks and Technology section wrapped up its case against Oracle's proposed acquisition of PeopleSoft in San Francisco. After a lengthy investigation, the Division concluded that the transaction would reduce the number of competitors in the markets for high-function financial management and human resource management enterprise software from 3 to only 2. This reduction in competition would lead to higher prices, less innovation, and fewer choices for the businesses, government agencies, and other organizations that rely on such products to automate and manage their essential HR and financial management functions. Closing statements were heard on July 20. We do not expect a decision from the district court until late-August, at the earliest.

In other merger news, the Division recently closed its investigation into UnitedHealth Group Inc.'s proposed acquisition of Oxford Health Plans Inc. The Division concluded that the merger should not substantially lessen competition in any relevant market. First of all, the Division concluded harm from coordinated interaction is unlikely. The wide variety of health insurance products offered, the differentiation among product lines, the diversity of health insurance customers, and the different methodologies for pricing to customers, would make it difficult for health insurers to coordinate on price or other dimensions of competition. We concluded that harm from unilateral effects is also unlikely because Oxford/United will have a number of viable competitors post-merger. In addition, United and Oxford are not close substitutes for one another for many customers.

The Division also examined whether the Oxford/United merger would give the combined company buying-side market power over health care providers. We found that, for all MSAs and

for the large majority of hospitals and hospital systems, the merged company will not account for a substantial percentage of provider revenues. In addition, while market shares are one factor in negotiating rates, a number of other factors (including the ability to steer patients and negotiating style) are also significant. As a result, a large commercial payer may actually pay hospital rates in excess of those negotiated by smaller competitors. If you are interested in reading more about this investigation, there is a detailed closing statement on the Division's website.

B. Civil Non-merger Enforcement

With respect to Civil non-merger matters, the big story is still Microsoft. The Division was greatly encouraged by the D.C. Circuit's recent decision, which affirmed the finding by the district court that the Department's consent decree settlement is in the public interest.¹

Of course, the Division's NetTech section has been diligently working for quite some time with the Plaintiff states and with Microsoft to enforce our Microsoft consent decree. The Division's Microsoft staff and the company appear regularly before U.S. District Court Judge Kollar-Kotelly to brief the court on enforcement activities (the most recent status conference was on July 19), and our staff meets often with the company in Redmond to ensure full compliance with the decree's requirements. Our Microsoft staff also consults periodically with European Commission staff regarding implementation of the EC's own Microsoft decision, which the company is currently appealing. Those consultations take place pursuant to Article VII of the U.S.-E.U. Agreement of September 23, 1991 regarding the application of the two jurisdictions' competition laws.

¹*Massachusetts v. Microsoft Corp.*, 373 F.3d 1199 (D.C. Cir. 2004).

The other civil non-merger matter I will mention briefly is our recently-closed investigation into Movielink, a joint venture formed by five major movie studios to provide video-on-demand services. This was a substantial investigation that focused on whether formation of the joint venture facilitated collusion among the studios or decreased their incentives to license movie content to competing video-on-demand (VOD) providers. The Division considered several theories of competitive harm but ultimately determined that the evidence does not support a conclusion that the structure of the joint venture increased prices or otherwise reduced competition in the retail markets in which Movielink competes.

C. Criminal Enforcement

Of course, the Division continues to be very active in criminal enforcement, and there have been a number of recent high-profile guilty pleas over the last six months.

Perhaps one of the most interesting of these was the De Beers plea, which resolved a case that began in 1994, when a federal grand jury in Columbus, Ohio indicted De Beers for conspiring to raise list prices of various industrial diamond products worldwide in 1991 and 1992. Industrial diamonds are used by certain tool manufacturers that make cutting and polishing tools for a variety of manufacturing and construction applications, including road construction, stone cutting and polishing, automobile manufacturing, mining, and oil drilling. De Beers' alleged co-conspirator, General Electric, was tried and acquitted by the district court on this charge. De Beers, however, which is headquartered in Lucerne, Switzerland, was not tried on the charge because the court lacked jurisdiction over the company.

In entering the plea agreement last month, De Beers admitted that it reached agreements with its co-conspirator to raise list prices for certain industrial diamond products as charged in the indictment. In furtherance of the conspiracy, officers, employees and agents acting on behalf

of De Beers had communications and discussions with, attended meetings with, and transmitted detailed future pricing information and plans to its co-conspirator. According to the plea agreement, De Beers and its co-conspirator sometimes used the cover of an officer of a customer, who was actually acting on behalf of De Beers, to transmit detailed future pricing information and plans to each other. De Beers sentenced to pay a \$10 million criminal fine. As Hew Pate said, “[t]his guilty plea reflects the Department’s persistence in the fight against illegal price fixing.”

The Division cracked another international conspiracy this year—this time involving the rubber chemicals market. Rubber chemicals used to improve the elasticity, strength, and durability of everyday household rubber products, such as tires, outdoor furniture, hoses, belts, and footwear. Approximately \$1 billion of these rubber chemicals are sold annually in the United States.

The first plea came in March, when Crompton Corporation, a U.S. manufacturer of rubber chemicals based in Connecticut, agreed to plead guilty and pay a \$50 million fine for participating a conspiracy to eliminate competition for certain rubber chemicals sold in the U.S. and abroad from 1995 to 2001. Crompton also agreed to assist the government in its continuing investigation. Then, just last month, Bayer AG, a German rubber chemicals manufacturer, agreed to plead guilty and pay a \$66 million fine for participating in the conspiracy. In total, the fines from the rubber chemical conspiracy have already exceeded \$100 million, and the investigation is still ongoing.

The last criminal case I will mention is the appeal in *United States v. Therm-All*, which is one of the more unusual outcomes I have seen at the Division. The primary issue on appeal was whether the price fixing conspiracy that had been charged in the indictment—and proven at

trial—had continued into the period of the statute of limitations. A panel of the Fifth Circuit (with one judge dissenting) held that, while the Sherman Act does not require proof of an overt act as an element of the offense, the government is nonetheless required to prove an overt act within the statutory period when the statute of limitations is raised as a defense. It further concluded that the government did not prove an overt act in the statutory period and reversed the judgments of conviction.

Here's the surprising part: After the government filed a petition for rehearing *en banc*, the court withdrew its earlier panel opinion and issued a new unanimous panel opinion, this time affirming the convictions.² The petition for rehearing was never granted and the court did not hear oral argument *en banc*. The court was not entirely clear about whether it was adhering to its prior holding concerning the need to prove an overt act within the limitations period.³ But the court's new unanimous opinion found that one of the co-conspirator's testimony that the conspiracy continued until the day the subpoenas were served, which was three weeks into the limitations period, was sufficient "direct evidence that the participants were involved in conspiratorial acts . . . during the limitations period."⁴ That was a complete reversal on the facts, and it even surprised some of the veteran appellate lawyers at the Division, and they have seen a lot.

²See *United States v. Therm-All, Inc.*, 373 F.3d 625 (5th Cir. 2004).

³The stated "holding" on the issue is "that in a price-fixing conspiracy, the government must produce evidence of the conspiracy's continued existence during the limitations period." *Id.* at 631; *accord id.* at 633.

⁴*Id.* at 636.

D. Other News

Finally, just a few weeks ago, the Department of Justice and the Federal Trade Commission issued their joint report on health care. The result of a two-year project, the report reviews the role of competition and provides recommendations to improve the balance between competition and regulation in health care. The report provides significant recommendations and observations on a variety of topics, including the availability of information regarding the price and quality of health care services, physician collective bargaining, hospital merger analysis, and many other important issues. As Hew Pate said, “[h]ealth care is an industry that can benefit from continued vigorous enforcement of the antitrust laws.”⁵ This report is the first truly comprehensive review of how antitrust enforcement can be enhanced to promote competition in this industry and produce the health care that consumers want.

III. Developments in the Supreme Court

I know I am not the first to observe that this has been an extraordinary year for antitrust in the Supreme Court. In addition to *Trinko*⁶, there have been a number of cases that may have a significant impact on the work of the Antitrust Division. In some cases, the impact is obvious, but in others it is not so obvious.

⁵Department of Justice and Federal Trade Commission Issue Report on Competition and Health Care (July 23, 2004) available at http://www.usdoj.gov/atr/public/press_releases/2004/204711.htm.

⁶*Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872 (2004).

A. *F. Hoffman-La Roche Ltd. v. Empagran S.A.*

The first of these is, of course, *Empagran*.⁷ As I am sure many of you already know, the *Empagran* case is a follow-on to the United States' successful prosecution of the international vitamin cartel: a private treble damage action against cartel members by foreign corporations that purchased vitamins outside U.S. commerce. The issue is whether the Foreign Trade Antitrust Improvements Act of 1982⁸ excludes such cases. The United States filed an amicus brief arguing for exclusion, and AAG Hew Pate argued the case for the United States.

In an 8-0 decision, the Supreme Court held that the FTAIA does bar antitrust actions where the anticompetitive conduct at issue causes independent foreign harm and that foreign harm gives rise to the plaintiff's claim. The Court ruled that the principle of comity among nations strongly points toward a reading of the statute that excludes suits of this sort and thus excludes significant risk of friction with foreign nations. Furthermore, the court held, the FTAIA's text and legislative history show no intent to expand the reach of U.S. antitrust laws to cover cases of this sort. In this part of its opinion, the Court observed that the antitrust laws provide for more sweeping relief (including relief to foreigners) in suits by the United States than in private antitrust cases.

The Court remanded the case to the D.C. Circuit to consider (if adequately preserved) plaintiffs' alternative argument that the foreign injury was not independent because, without an adverse effect in the U.S., the cartel could not have functioned and so could not have harmed plaintiffs. The D.C. Circuit in turn has directed the parties to file briefs on whether the plaintiffs preserved this alternative argument and, if so, whether the court of appeals should remand the

⁷*F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359 (2004).

⁸15 U.S.C. § 6a.

case to the district court to decide first the factual and legal sufficiency of the argument.

B. *Intel Corp. v. Advanced Micro Devices, Inc.*

*Intel*⁹ involved the construction of 28 U.S.C. 1782(a), which provides that a federal district court may order discovery “for use in a proceeding in a foreign tribunal” “upon the application of any interested person.” The United States filed an amicus brief in the Supreme Court taking the position that the statute authorized, but did not require, the district court to grant discovery to AMD, which had filed a complaint against Intel in a proceeding before the Directorate-General for Competition of the Commission of the European Communities. The Court agreed with the position of the United States as amicus and held (1) that discovery was not limited to “litigants” in the foreign “tribunal”; (2) that the proceeding in a foreign or international tribunal for which discovery was sought need not be “pending,” or “imminent,” as long as it was “within reasonable contemplation”; and (3) that discovery was not conditioned on reciprocal rights of discovery being available in the foreign jurisdiction. The Court emphasized that, although discovery was authorized, it was not required. It suggested several factors that would be relevant to the district court’s determination, including the ability of the foreign tribunal itself to order production, the nature of the foreign tribunal, the character of the proceedings, the receptivity of the foreign tribunal to the U.S. federal court assistance, the likelihood that the request was an attempt to circumvent foreign proof-gathering limits or other policies of the foreign government, and the likelihood that the request would be unduly burdensome or intrusive.

⁹*Intel Corp. v. Advanced Micro Devices, Inc.*, 124 S. Ct. 2466 (2004).

C. *3M Co. v. LePage's Inc.*

Of course, you are all familiar with *LePage's*, so I will be brief. In response to an invitation to express the views of the United States, the Solicitor General filed an amicus brief criticizing the court of appeals' opinion, which had upheld antitrust liability for 3M's bundled rebate program.¹⁰ One could say that the Third Circuit's opinion did not make its reasoning terribly clear. The government's amicus brief urged the Court not grant certiorari, arguing that there was no conflict in the circuits regarding bundled rebates (no other circuit having squarely addressed the practice), that it would be preferable to allow the case law and economic analysis to develop further, and that the record was poorly adapted to development of an appropriate standard. The Court denied cert.¹¹

D. *Andrx Pharmaceuticals Inc. v. Kroger Co.*

The question in the *Andrx Pharmaceuticals* case is whether settlements in patent cases that involve payments from the patent owner to the alleged infringer and keep the alleged infringer from marketing its allegedly infringing product are per se unlawful. Responding to an invitation to express the views of the United States, the Solicitor General filed an amicus brief contending that it would be wrong to treat every such agreement as per se unlawful. However, the brief urged that the Court not grant certiorari, mainly because the opinions of the district court and the court of appeals¹² could be read as applying the per se rule only to an interim agreement (rather than an agreement settling the patent dispute) that barred the alleged infringer

¹⁰*LePage's Inc. v. 3M (Minnesota Mining and Manufacturing Company)*, 324 F.3d 141 (3d Cir. 2003) (en banc).

¹¹*3M Co. v. LePage's Inc.*, 124 S. Ct. 2932 (2004).

¹²*In re Cardizem CD Antitrust Litigation*, 332 F.3d 896 (6th Cir. 2003).

from marketing even competing products that neither infringed nor were alleged to do so. The Court has yet to rule on the petition for certiorari.

E. *Blakely v. Washington*

Finally, there is *Blakely v. Washington*, a case that is potentially very significant for the Antitrust Division, but that might not have caught the attention of many antitrust practitioners. On June 24, the Supreme Court ruled in a 5-4 decision that upward departures imposed on the basis of judge-found facts under the State of Washington’s sentencing guidelines regime violated the Sixth Amendment right to jury trial. The Court held that for purposes of applying the rule announced in *Apprendi v. New Jersey*¹³ the “statutory maximum” is “the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.”¹⁴

The defendant in *Blakely* pleaded guilty to second degree kidnaping. A state statute provided that the maximum sentence for that offense was 10 years’ imprisonment. Another statute established a grid of “standard” sentencing ranges, based on the seriousness of the offense and the defendant’s criminal history. The statute also authorized a sentencing court to depart upward from the standard range, and impose a sentence up to the statutory maximum, if it found substantial and compelling reasons warranting an exceptional sentence. Among such reasons was the fact that the defendant acted with “deliberate cruelty.” *Blakely*’s standard sentencing range was 49 to 53 months’ imprisonment, but the sentencing court found that he had acted with “deliberate cruelty” and departed upward, sentencing him to 90 months’ imprisonment. Because the “facts supporting that finding were neither admitted by petitioner nor found by the jury,” the

¹³530 U.S. 466, 490 (2000).

¹⁴*Blakely*, 2004 WL 1402697, at *4 (emphasis in original).

Court held that *Blakely*'s sentence violated the Sixth Amendment.¹⁵

The Court specifically observed that the United States, as *amicus curiae*, “note[d] differences between Washington’s sentencing regime and the Federal Sentencing Guidelines but questions whether those differences are constitutionally significant.” The Court then reserved the issue, stating that “The Federal Guidelines are not before us, and we express no opinion on them.”¹⁶ Needless to say, the *Blakely* decision has created chaos in the lower federal courts. Some courts have held that the sentencing guidelines are unconstitutional. Other courts have invalidated only those portions of the guidelines that appear to violate the holding of *Blakely*. And still other courts have upheld the constitutionality of the guidelines.

Last month, the United States filed petitions for writs of certiorari in two cases asking the Supreme Court to resolve this conflict and to do so on an expedited basis.¹⁷ On August 2, the Supreme Court issued an order granting the petitions in both cases, consolidating them, and setting an expedited briefing schedule. The brief of the United States as petitioner is to be filed by September 1, the briefs of respondents are to be filed by September 21, and a reply brief may be filed by September 27. Oral argument is set for Monday, October 4, 2004, and the Court has allotted a total of two hours for oral argument.

¹⁵Id. at *4.

¹⁶Id. at *6 n.9.

¹⁷Those cases are *United States v. Booker* and *United States v. Fanfan*.

IV. Antitrust Criminal Penalty Enhancement and Reform Act of 2004

That brings me to my final topic today, which I believe is one of the most significant changes to the antitrust laws in decades. That is the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, which President Bush signed into law in June.¹⁸ The new statute has three sets of provisions: The Tunney Act amendments, the criminal penalty enhancements, and the detrebling provision.

A. Tunney Act Amendments

The Tunney Act amendments make one substantive change in the Tunney Act. That change permits district courts to save taxpayer money by authorizing an alternative means for public dissemination of public comments to a proposed decree and the United States' response to those comments. The amendments also make certain clarifications in the description of the Tunney Act process that are consistent with established practice and codifies current standards for review of such decrees.

Finally—and this is an interesting bit of historical trivia—the amendments add ten words to the language of the Tunney Act that were apparently unintentionally omitted during the legislative process in 1973. The legislative history of the Tunney Act strongly suggests that Congress intended to enact language that included these ten words, but that a printing error dropped these ten words, which were never picked up again.¹⁹

¹⁸Pub. L. No. 108-237, 118 Stat. 661 (codified in scattered sections of 15 U.S.C. and accompanying notes).

¹⁹As reported in H. Rep. No. 93-1463 on October 11, 1974, the amended version of the proposed 15 U.S.C. 16(g) read as follows (emphasis added):

Not later than 10 days following the date of the filing of any proposal for a consent judgment under subsection (b), each defendant shall file with the district court a description of any and all written or oral communications by or on behalf of such

B. Criminal Penalty Enhancements

The recent legislation also increases the maximum Sherman Act corporate fine to \$100 million, the maximum individual fine to \$1 million, and the maximum Sherman Act jail term to 10 years. Of course, we believe this increase in penalties will increase the level of deterrence for antitrust crimes and enhance the Division's anti-cartel program by creating greater incentives for antitrust violators to seek amnesty under the Division's Corporate Leniency Policy. It will also bring antitrust penalties in line with those for other white collar crimes and will ensure the penalties more accurately reflect the enormous harm inflicted by cartels.

I should note that the new maximum fines require no amendments to the U.S. Sentencing Guidelines, so they apply to offenses committed after June 22, 2004. The new maximum jail term, however, does require a Sentencing Guideline amendment. The current guideline results in a maximum 33 month sentence, and higher jail sentences can only be imposed for offenses committed after the effective date of the amendment of the applicable guideline.

C. The Detrebling Provisions

That brings me to perhaps the biggest change brought about by the new legislation: The detrebling provision.

This provision was specifically designed to augment the Antitrust Division's Corporate

defendant, including any and all written or oral communications on behalf of such defendant *by any officer, director, employee, or agent of such defendant*, or other person, with any officer or employee of the United States concerning or relevant to such proposal, except that any such communications made by counsel of record alone with the Attorney General or the employees of the Department of Justice alone shall be excluded from the requirements of this subsection. Prior to the entry of any consent judgment pursuant to the antitrust laws, each defendant shall certify to the district court that the requirements of this subsection have been complied with and that such filing is a true and complete description of such communications known to the defendant or which the defendant reasonably should have known.

Leniency Policy, which has been so very effective in exposing harmful cartel activity in recent years. Under this program, a cartel participant that voluntarily blows the whistle on the cartel can avoid prosecution if it comes forward and cooperates with the investigation and prosecution. This legislation gives cartel members an even greater incentive to turn themselves in. It does that by limiting their potential damages in private lawsuits to single damages based on their own role in the cartel, provided that they also cooperate with plaintiffs in the private lawsuit. Other cartel participants remain fully liable for treble damages based on harm caused by the entire conspiracy. The result should be more cartels exposed and brought to justice, both in criminal prosecutions and in private legal actions.

It is important to emphasize that this provision reduces civil damages from corporate amnesty applicants to single damages in a private lawsuit only if an applicant cooperates with the plaintiffs in that lawsuit. It will be up to the court in which the civil action is brought to determine whether cooperation is satisfactory, but the statute makes it clear that cooperation shall include providing a full account of all facts known to the applicant or cooperating individual that are potentially relevant to the civil action and furnishing all documents potentially relevant to the civil action that are in the possession, custody, or control of the applicant or cooperating individual, wherever those documents are located. An antitrust leniency applicant must also use its best efforts to secure the cooperation of employee witnesses.

This detrebling provision was intended to provide the most incentive possible for firms and individuals participating in illegal conspiracies to seek the protection of the Leniency Program and turn themselves in. That is why it explicitly applies to state actions as well. Indeed, the legislation itself clearly states that “in any civil action alleging a violation of section 1 or 3 of the Sherman Act, *or alleging a violation of any similar State law* the amount of

damages recovered . . . from an antitrust leniency applicant . . . shall not exceed that portion of the actual damages sustained by the claimant”²⁰

Of course, in a world where people will not hesitate to quibble about what the meaning of the word “is” is, some clever lawyer will undoubtedly come forward and try to make the argument that the detrebling provision does not apply in a particular state action, perhaps (for example) because the state law at issue allows actions on behalf of indirect purchasers.

That argument would be flatly mistaken. The scope of the detrebling provision was clearly intended to be broad in order to serve the express purpose of the legislation—to enhance the Division’s Leniency Program. The provision’s legislative history makes this abundantly clear. For example, Chairman Hatch explained that:

This [detrebling] provision addresses this disincentive to self-reporting [created by the threat of treble damages]. Specifically, it amends the antitrust laws to modify the damage recovery from a corporation and its executives to actual damages. In other words, *the total liability of a successful leniency applicant would be limited to single damages without joint and several liability*. Thus, the applicant would only be liable for the actual damages attributable to its own conduct, rather than being liable for three times the damages caused by the entire unlawful conspiracy. [¶] Importantly, this limitation on damages is only available to corporations and their executives if they provide adequate and timely cooperation to both the Government investigators *as well as any subsequent private plaintiffs bringing a civil suit based on the covered criminal conduct*.²¹

Similarly, Senator Leahy explained that this detrebling provision “would . . . give our prosecutors the authority to effectively limit a cooperating party’s potential civil liability as well, *and to limit that liability to single damages in any subsequent civil lawsuit brought by a private*

²⁰Pub. L. No. 108-237, 118 Stat. 661, Title II, Subtitle A, § 213(b) (codified in note accompanying 15 U.S.C. § 1).

²¹150 Cong. Rec.S3610, S3614 (remarks of Chairman Hatch) (emphasis added).

plaintiff.”²² This was echoed by Senator Kohl, who stated that the provision “will give the Justice Department the ability to offer those applying for leniency the additional reward of *only facing actual damages in antitrust civil suits, rather than treble damage liability.*”²³ Finally, Senator DeWine explained that this provision “decreases . . . liability by limiting the damages a private plaintiff may recover from a corporation that has cooperated with the Antitrust Division. *Specifically, the conspirator is not liable for the usual treble damages; instead, it is only liable for actual damages.*”²⁴ Significantly, none of the Senate sponsors of the legislation suggested that this detrebling accomplished anything other than a complete elimination of any potential treble damage liability.

The House sponsor of the legislation, Chairman Sensebrenner, was equally clear about the breadth of the detrebling provision:

Title II of the legislation also contains important modifications to the antitrust leniency program used by the Department of Justice to facilitate the detection and prosecution of antitrust violations. Under existing practice, parties that cooperate with Federal antitrust authorities to uncover violations may not be subject to government prosecution, but remain liable in civil actions brought by private parties. *The bill creates an additional incentive for corporations to disclose antitrust violations by limiting their liability in related civil claims to actual damages.* Furthermore, while a cooperating party would be liable only for damages attributable to that party’s conduct, noncooperating conspirators will remain jointly and severally liable for treble damages for the misconduct of all of the conspirators.²⁵

This statement makes it clear that the detrebling provision—in order to have the maximum intended effect of creating an incentive for corporations to disclose antitrust violations—limits

²²150 Cong. Rec. at S3615 (remarks of Sen. Leahy) (emphasis added).

²³150 Cong. Rec. at S3615 (remarks of Sen. Kohl).

²⁴150 Cong. Rec. at S3619 (remarks of Sen. DeWine) (emphasis added).

²⁵150 Cong. Rec. H3654, H3657 (remarks of Chairman Sensebrenner).

liability in all related civil claims to actual damages.

Needless to say, if the detrebling provision were read narrowly to permit some state law treble damage antitrust claims to proceed, the goal of the detrebling provision would be seriously compromised. In light of this and in light of Congress' clear intent to enhance the Leniency Program by limiting the "total liability" of a successful leniency applicant, any doubts should be resolved in favor of finding that such claims are precluded when the other requirements of the detrebling provision are satisfied.

V. Conclusion

Well, that's my report for now. It has been an extremely productive six months at the Antitrust Division since I saw a number of you last, and an extremely interesting period for the development and enhancement of antitrust law generally. I look forward to your comments and questions.