

## HORIZONTAL MARKET POWER: THE EVOLVING LAW AND ECONOMICS OF MERGERS AND CARTELS

*George Mason Law Review's Fourteenth Annual Symposium on Antitrust  
Law Sponsored by Navigant Economics and O'Melveny & Myers LLP*

The Willard InterContinental  
Washington, D.C.  
February 9, 2011

*Ashley Fry, Matthew R. McGuire, and Catherine Schmierer*

### INTRODUCTION

On February 9, 2011, the *George Mason Law Review* hosted its Fourteenth Annual Symposium on Antitrust Law. The Symposium, sponsored by Navigant Economics and O'Melveny & Myers LLP, took place at the Willard InterContinental in Washington, D.C., and brought together a distinguished group of practitioners and scholars to discuss the 2010 Horizontal Merger Guidelines ("Merger Guidelines" or "Guidelines")<sup>1</sup> and current trends in criminal cartel enforcement.

Daniel Polsby, Dean and Professor of Law at George Mason University School of Law, welcomed the participants, and Jeffrey A. Eisenach, Managing Director and Principal at Navigant Economics and Adjunct Professor at George Mason University School of Law, offered the opening remarks. Then, J. Thomas Rosch, Commissioner of the Federal Trade Commission ("FTC"), gave a keynote address, followed by the morning's two panels.

### KEYNOTE ADDRESS: FTC COMMISSIONER J. THOMAS ROSCH

Ian Simmons, a partner at O'Melveny & Myers LLP, introduced Commissioner Rosch, as the keynote speaker. Mr. Simmons stated that the Commissioner's term with the FTC, beginning in 2006, solidified his position as a "thought leader" within the antitrust community. Mr. Simmons stated that Commissioner Rosch has continually demonstrated that he is

---

<sup>1</sup> U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010) [hereinafter MERGER GUIDELINES], available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf>.

motivated by intellectual curiosity and is willing to think outside traditional paradigms.

The Commissioner began by sharing his observations of criminal cartels and merger enforcement, from both a theoretical and practical perspective. From a theoretical perspective, he discussed how behavioral economics underlies the existing system of punishment for criminal cartels. He stated that criminal antitrust enforcement in the United States focuses almost exclusively on deterrence, based on the Chicago School presumption that all individuals behave rationally (i.e., the belief that people will refrain from engaging in price fixing if they know that their actions could result in criminal fines or imprisonment). He argued, however, that many individuals in the market behave irrationally. As a result, he suggested that free-market economics should not be tied to the assumption of rationality.

For example, the Commissioner pointed out that it is unclear whether the current system of mixed civil and criminal cartel enforcement actually deters price fixing. For example, it is not currently understood how people weigh short-term gains—like increases in compensation—with long-term consequences—like civil and criminal penalties. Because there is little research in this area, the Commissioner turned to behavioral economics for further insight. As Professor Maurice Stucke points out, individuals are often motivated to act incrementally, rather than based on a broad view of the consequences that will result from a given set of actions.<sup>2</sup> The Commissioner stated that this view of behavioral economics is consistent with two unfortunate realities: (1) price fixing increases in difficult economic times; and (2) the duration of cartels has not decreased despite amnesty programs established to protect whistleblowers. Therefore, the Commissioner argued that successful punishment of criminal cartels requires the authorities to create a system that deters price fixing by attacking it incrementally.

Additionally, Commissioner Rosch stated that revision of the criminal cartel enforcement mechanism is necessary because the current system is not working as well as it should. As an example, he contended that the existing amnesty program does not provide proper incentives to whistleblowers because the program provides protection on a “first-come, first-served” basis. Commissioner Rosch explained that criminal behavior is often more common in cultures that reward it, and cartel members do not fear incarceration as much as they fear their business partners labeling them as a “turn-coat.” Based on these concerns, the Commissioner articulated his belief that after twenty years, it is time to critically review the amnesty program. To find the proper solution, he thought it will be necessary to conduct more research on price fixing and, more specifically, analyze which factors actually promote and deter price-fixing arrangements.

---

<sup>2</sup> Maurice E. Stucke, *Am I a Price-Fixer? A Behavioural Economics Analysis of Cartels*, in *CRIMINALISING CARTELS: CRITICAL STUDIES OF AN INTERNATIONAL REGULATORY MOVEMENT* 263, 277 (Caron Beaton-Wells & Ariel Ezrachi eds., 2011).

Finally, Commissioner Rosch reiterated that, although the FTC does not directly engage in criminal cartel enforcement because the Department of Justice (“DOJ”) retains exclusive jurisdiction over criminal antitrust matters, the FTC can (and does) aid criminal cartel enforcement in two ways: (1) by uncovering evidence of criminal activity and forwarding the information to the DOJ; and (2) by bringing enforcement actions under Section 5 of the FTC Act when the offending behavior falls short of being criminal. More specifically, he noted that the FTC provides the greatest assistance with cases involving (1) invitations to collude; and (2) price fixing among physicians.<sup>3</sup>

Discussing the difficulties for the DOJ in prosecuting invitations to collude, the Commissioner noted that the DOJ cannot attack these actions under Section 1 of the Sherman Act because there is no agreement. Additionally, *United States v. American Airlines, Inc.*<sup>4</sup> held that invitations to collude may only be challenged under Section 2 of the Sherman Act when one party has monopoly or near monopoly power.<sup>5</sup> As a result, the DOJ often seeks to prosecute these cases under mail and wire fraud statutes.<sup>6</sup>

In the healthcare arena, Commissioner Rosch detailed how price fixing has become increasingly common. For example, in *Arizona v. Maricopa County Medical Society*,<sup>7</sup> the FTC brought an enforcement action against a group of physicians under Section 5 of the FTC Act for colluding to set the prices that they would charge healthcare insurers for certain medical services.<sup>8</sup> In that case, the agency distinguished *Broadcast Music, Inc. v. CBS*<sup>9</sup> on grounds that the physicians were not fully integrated entities.<sup>10</sup> Additionally, Commissioner Rosch indicated that the agency has brought similar enforcement actions against healthcare providers that agreed to boycott certain insurers.<sup>11</sup>

Then, Commissioner Rosch turned his focus to the Annual Hart-Scott-Rodino Report for Fiscal Year 2010 (“HSR Report”),<sup>12</sup> which the FTC and

---

<sup>3</sup> See, e.g., *Arizona v. Maricopa Cnty. Med. Soc’y*, 457 U.S. 332, 356-57 (1982).

<sup>4</sup> 743 F.2d 1114 (5th Cir. 1984).

<sup>5</sup> *Id.* at 1117-18.

<sup>6</sup> 18 U.S.C. §§ 1341-43 (2006); see *United States v. Ames Sintering Co.*, 927 F.2d 232, 236 (6th Cir. 1990) (per curiam) (finding wire fraud based on defendant’s bid-rigging plan).

<sup>7</sup> 457 U.S. 332 (1982).

<sup>8</sup> *Id.* at 335-36.

<sup>9</sup> 441 U.S. 1 (1979).

<sup>10</sup> *Maricopa*, 457 U.S. at 355-57.

<sup>11</sup> See, e.g., Complaint at 8, *In re Minn. Rural Health Coop.*, No. 0510199 (F.T.C. June 18, 2010), available at <http://www.ftc.gov/os/caselist/0510199/100618ruralhealthcmpt.pdf>; Complaint at 2, *Advocate Health Partners*, No. 0310021 (F.T.C. Dec. 29, 2006), available at <http://www.ftc.gov/os/caselist/0310021/061229cmp0310021.pdf>.

<sup>12</sup> FED. TRADE COMM’N & U.S. DEP’T OF JUSTICE, HART-SCOTT-RODINO ANNUAL REPORT: FISCAL YEAR 2010 (2011), available at <http://www.ftc.gov/os/2011/02/1101hsrreport.pdf>.

DOJ released to Congress shortly after the Symposium. He noted the following statistics:

(1) The FTC challenged twenty-two mergers, while the DOJ challenged nineteen mergers.<sup>13</sup>

(2) Additionally, the FTC sent out twenty second requests, whereas the DOJ sent out twenty-six in total.<sup>14</sup>

(3) Finally, the enforcement rates for merger clearance were substantially different between the two agencies: the FTC brought enforcement actions to prevent mergers in only 15 percent of the mergers they reviewed, while the DOJ sought to prevent 26 percent of mergers they examined.

The Commissioner argued that these statistics do not imply that the DOJ is more aggressive than the FTC in seeking to block mergers. Instead, he believed the disparity in enforcement might exist because the DOJ has a more aggressive screening process and is more willing to conclude based on an HSR filing that the final merger is not, in fact, illegal.

Before concluding, Commissioner Rosch noted several trends in current merger enforcement. First, he has seen a significant increase in the number of companies utilizing the “failing firm” or “flailing firm” defense to provide support for a merger, but stated that companies put too much emphasis on this defense. Second, agencies have begun to scrutinize mergers more closely when the companies considered engaging in a joint venture before they agreed to a merger. Evidence that the companies previously considered a joint venture not only casts doubt on whether a full merger is necessary, but also bears on the viability of a failing firm defense. Third, based on the outcome in *Federal Trade Commission v. CCC Holdings Inc.*,<sup>15</sup> the FTC now gives more consideration to “coordinated effects.”<sup>16</sup> He also stated that economists’ views of coordinated effects are too narrow, arguing that economists fail to give appropriate weight to coordinated effects because they believe that if pricing is opaque, then there is no danger of coordinated effects. However, he argued that it is unclear whether market behavior is directly based on knowledge of others’ prices.

Commissioner Rosch ended his remarks by reiterating the FTC’s commitment to proving market definition pursuant to Section 7 of the Clayton Act. Although he stated that the FTC may seek to move quickly toward introducing evidence regarding the competitive effects of a merger during litigation, the agency’s actions do not eliminate the need to prove market definition. Nonetheless, he expressed his personal belief that once anticom-

---

<sup>13</sup> *Id.* at 1-2.

<sup>14</sup> *Id.* at app. A.

<sup>15</sup> 605 F. Supp. 2d 26 (D.D.C. 2009).

<sup>16</sup> *Id.* at 60-67.

petitive effects of a merger are proven, by definition, a market must exist in which those anticompetitive effects take place.

PANEL ONE: THE IMPACT OF THE 2010 HORIZONTAL MERGER GUIDELINES ON THE LITIGATION OF MERGER CASES

*Moderator:*

Alden F. Abbott, *Deputy Director for Special Projects, Office of International Affairs, Federal Trade Commission and Adjunct Professor, George Mason University School of Law*

*Speakers:*

Jeffrey W. Brennan, *Partner, Dechert LLP*

Kevin Murphy, *George J. Stigler Distinguished Service Professor of Economics, Booth School of Business and Department of Economics at the University of Chicago*

David T. Scheffman, *Director, Berkeley Research Group, LLC*

Howard Shelanski, *Deputy Director for Antitrust, Bureau of Economics, Federal Trade Commission*

Moderator Alden F. Abbott began the first panel by briefly talking about the issues presented by the Merger Guidelines and the impact that the new Guidelines will have on the litigation of merger cases. Then, he introduced the panel, and asked each panelist to discuss their views on how the Merger Guidelines will impact future litigation.

*Jeffrey W. Brennan*

Mr. Brennan offered his perspective on how courts will react to the new Guidelines. He noted that it is important to keep in mind the setting and understand that although the Guidelines matter, there are several other factors—facts, documents, witnesses, and client advocacy—that are equally important in litigating merger cases. Mr. Brennan suggested that the Guidelines should be viewed as a resource with a number of purposes. For example, the Guidelines are an advocacy tool that help to frame the case and provide a roadmap for the judge. In addition, he indicated that it would be helpful to offer testimony in the context of the Guidelines to educate judges in the event that they are not overly familiar with antitrust matters.

Mr. Brennan believed that judicial interpretation of the Guidelines will take time because the Guidelines contain significant flexibility and agency jargon. He also contended that it would be risky for the FTC and DOJ to abandon market definition because Section 7 of the Clayton Act and relevant case law explicitly requires agencies to define the relevant market. In fact, Mr. Brennan suggested that failing to define the market would be an abdication of the agencies' duty. In addition, he stated that market defini-

tion should be consistent with the competitive effects story that the agency argues to the court. However, he pointed out that Sections 6 and 9.1 of the Guidelines state that the agency normally will identify the relevant market.<sup>17</sup> Mr. Brennan believed that, through this language, agencies have left the door open to litigate cases without proving a market definition. Mr. Brennan concluded his remarks by stating that the FTC received substantial deference from the court in *Federal Trade Commission v. Whole Foods Market, Inc.*<sup>18</sup> and, as a result, may have an advantage over the DOJ in merger litigation if other courts give similar deference to the FTC in future cases.

Finally, Mr. Brennan responded to questions about coordinated effects under the Guidelines. He stated that the Guidelines provide the agencies with flexibility in showing coordinated effects. He contended, however, that agencies must still prove to the court how a merger will result in dangerously coordinated interaction.

### *Kevin Murphy*

Professor Murphy worked at the FTC during the *Whole Foods* litigation. Based on that experience, he argued that there are good and bad aspects to the new Guidelines. He indicated that in *Whole Foods* the structuralist approach<sup>19</sup> did not fit the case because the proposed market definitions were either exceedingly narrow or incredibly broad.<sup>20</sup> Thus, Professor Murphy praised the Guidelines' shift from the structuralist approach to upward pricing pressure ("UPP") theory. He stated that the new Guidelines reflect a closer approximation of what the agencies actually do in merger cases. More specifically, the Guidelines rely on evidence of what is happening in the market by looking at actual events and determining how those events affect prices.

However, Professor Murphy noted that there are several problems with the UPP model. First, he stated that the assumptions underlying the UPP model are problematic. The UPP model relies on unstated cost pass-through assumptions that are unrealistic because they assume that businesses can pass on 50-100 percent of their costs to consumers. Professor Murphy argued that the problems with UPP can be fixed by addressing these proble-

---

<sup>17</sup> MERGER GUIDELINES, *supra* note 1, at 20, 29.

<sup>18</sup> 548 F.3d 1028 (D.C. Cir. 2008).

<sup>19</sup> Professor Murphy refers to the FTC's previous approach to market definition as "structuralist." Prior to the new Guidelines, the FTC traditionally defined the relevant market at the outset of the case and proceeded to argue for a preliminary injunction only after it had settled on the definition. *See id.* at 1036-37.

<sup>20</sup> For example, one potential market definition in *Whole Foods* was all supermarkets generally, which would be an exceedingly broad definition. *See id.* at 1035. The other potential definition, which the FTC ultimately used, was "premium, natural, and organic supermarkets." *Id.* at 1032.

matic cost pass-through assumptions. Additionally, he argued that although UPP is not a perfect solution, the structuralist approach was, quite simply, wrong. Professor Murphy contended that the new Guidelines will help judges better understand merger analysis and provide the agencies with the flexibility necessary to understand the competitive effects of a merger.

Additionally, Professor Murphy indicated that the move away from the traditional approach to market definition has both positive and negative consequences. In his view, the Guidelines recognize that market definition functions on a continuum. By contrast, the structuralist approach incorrectly assumed that market definition was a static concept.

Finally, Professor Murphy argued that even under the new Guidelines, agencies must still define the market because a court will not accept an agency's findings unless it defines a relevant market in which the allegedly anticompetitive effects took place. He concluded that market definition is a core principal of antitrust law that cannot be eliminated.

*David T. Scheffman*

Mr. Scheffman began by discussing the Guidelines' application to cases involving unilateral effects. First, Mr. Scheffman indicated that although the Guidelines assume that customers are price insensitive when margins are high, customers are often price sensitive in these circumstances. In addition, in *Federal Trade Commission v. Staples, Inc.*,<sup>21</sup> the court failed to accept the FTC's argument that price insensitivity can be inferred from high margins.

Next, Mr. Scheffman stated that UPP theory is complicated and assumes that all mergers with differentiated products will raise prices. He argued that under *Staples*, agencies are required to show the actual effects a merger will have on a given market, so the agency cannot simply rely on economic theory. However, Mr. Scheffman stated his belief that the FTC would not bring a case based solely on econometrics and, even if it did, the agency could not meet its burdens in litigation without additional evidence. In addition, unlike econometrics, he contended that customer opinion and actual numbers (e.g., sales figures) are more persuasive categories of evidence and, in many cases, will be decisive.

He also argued that agencies cannot conduct reliable analyses of competitive effects if they—as the UPP requires—only examine the two parties to the merger because those analyses would ignore the competitive effects on the rest of the market. In addition, Mr. Scheffman argued that the Guidelines contain a theoretical presumption that UPP theory is correct; however, this proposition has never been proven empirically. He argued that, in fact,

---

<sup>21</sup> 970 F. Supp. 1066 (D.D.C. 1997).

there is evidence that UPP theory may be entirely incorrect in some instances.

Finally, Mr. Scheffman responded to questions on coordinated effects under the new Guidelines. He pointed out that *FTC v. CCC Holdings* explains how important market definition is in a coordinated effects case. He stated that if the market participants lose on the market definition element, then they need significant evidence to show that the merger will not lead to dangerously coordinated interaction.

*Howard Shelanski*

Mr. Shelanski began his discussion by addressing two common criticisms of the Guidelines: (1) the Guidelines abandon “market definition”; and (2) the Guidelines free antitrust enforcers from the fundamental burden of proving actual or prospective harm. First, Mr. Shelanski stated that the Guidelines merely “recast” market definition in an attempt to focus more on competitive effects. He saw this as an attempt move away from the structural use of market definition in the competitive effects analysis that the FTC began using in *United States v. General Dynamics Corp.*<sup>22</sup> He also indicated that the traditional approach to market definition centered on finding the smallest market in which the merger would result in a small, but significant non-transitory increase in price (“SSNIP”). Namely, in the past, the agencies sought to answer the following question: “What is the smallest number of products a monopolist must control to create a SSNIP?” Mr. Shelanski explained that under the new Guidelines, the SSNIP is used as benchmark for showing decreases in competition, rather than as a way to define the relevant market. He also contended that it was necessary to recast market definition because determining the SSNIP in a structuralist fashion was problematic, in part, due to cross-elasticity of demand.

Next, Mr. Shelanski stated that the Guidelines do not eliminate the burden of proving harm in merger litigation. Therefore, the agency should not get to court without defining the relevant market. He stated that the burden shifts only after the agency has proven both (1) the existence of particular market; and (2) negative effects on competition within that market. However, the Guidelines allow the agency to show competitive effects using the UPP model, which could make defining the market unnecessary if the diversion of customers from firm A to firm B provides enough UPP to demonstrate harmful competitive effects. Thus, arguments over whether additional firms should be considered when examining competitive effects are merely shifted later in the litigation.

In addition, Mr. Shelanski contended that the Guidelines provide guidance to companies contemplating mergers so that they know when to expect

---

<sup>22</sup> 415 U.S. 486 (1974).

a second request (e.g., if the merger will result in a Herfindahl-Herschmann Index prohibited by the Guidelines). He also argued that UPP is meant to be a rebuttable presumption that allows an agency to back into its market definition before arguing over other relevant evidence. Mr. Shelanski stated that the problems associated with UPP's cost pass-through and high margin assumptions identified by Mr. Scheffman could be used to rebut the presumption in favor of UPP during litigation.

In response to the other panelists' remarks, Mr. Shelanski stated that although empirical evidence will always trump econometrics, there is no such thing as second-class evidence. He also indicated that neither the DOJ, nor the FTC rely heavily on the presumption in *United States v. Philadelphia National Bank*<sup>23</sup> that mergers resulting in an undue increase in market concentration are presumed to be harmful.<sup>24</sup> The Guidelines' omission of this presumption, with the exception of Section 5.3,<sup>25</sup> was intended to signal the presumption's weakness.

Finally, Mr. Shelanski responded to panelists' remarks about UPP theory. He argued that it took the industry a long time to understand how the structuralist approach would work within the agencies and argued that all parties should give the Guidelines time to take effect. He also noted that UPP moves toward a net-efficiency approach to merger review. Mr. Shelanski ultimately concluded by stating that the new Guidelines are a better (albeit not perfect) approach than the former, structuralist framework.

#### PANEL TWO: CURRENT TRENDS IN CRIMINAL CARTEL ENFORCEMENT

*Moderator:*

Ian Simmons, *Partner, O'Melveny & Myers LLP*

*Speakers:*

Barry Boss, *Managing Partner, Cozen O'Connor*

Steve Bunnell, *Partner, O'Melveny & Myers LLP*

James Langenfeld, *Managing Director and Principal, Navigant Economics and Adjunct Professor, Loyola University Chicago School of Law*

Lisa M. Phelan, *Chief, National Criminal Enforcement Section, Department of Justice (Antitrust Division)*

Moderator Ian Simmons began the second panel by introducing the panelists. He initiated the discussion by describing two topics for debate: (1) the converging and diverging interests of company counsel and individual counsel in criminal cartel investigations; and (2) the status of the "volume of commerce" damage analysis in the U.S. Sentencing Guidelines

---

<sup>23</sup> 374 U.S. 321 (1963).

<sup>24</sup> *Id.* at 363.

<sup>25</sup> MERGER GUIDELINES, *supra* note 1, at 18.

after *United States v. Booker*.<sup>26</sup> Mr. Simmons questioned the relationship between company counsel and counsel for the company's individual employees when the company is under investigation by the DOJ in a criminal antitrust matter. For example, he asked panelists to opine on the ethical issues that arise and asked when companies should decide to secure independent counsel for individual employees. In addition, Mr. Simmons also asked whether the advisory "volume of commerce" analysis in the U.S. Sentencing Guidelines is still appropriate after *Booker*, or whether the analysis should more closely align with the analysis of damages in civil antitrust matters.

### *Barry Boss*

Mr. Boss focused on the relationship between company counsel and individuals' independent counsel in criminal cartel matters. He noted that independent counsel may not be necessary when an individual is unlikely to be prosecuted, but he argued that it is generally better for companies to err on the side of caution and obtain counsel for employees who have any risk of being individually prosecuted.

Further, Mr. Boss stated that individuals often may not understand that communication with the company is discoverable. He noted that this is particularly problematic when companies have obtained additional counsel for an internal investigation, because internal investigators' discussions with employees who have not obtained individual counsel constitute open communication. Without independent counsel, employees may not be obligated to speak with internal investigators, which can make it difficult for the company (along with company counsel) to put together the big picture. In addition, Mr. Boss argued that separate counsel for individuals is always necessary when there is potential for individual exposure or when there is a conflict between the company's interest and the individual's interest. When individuals have independent counsel, company counsel can communicate with the individual through their counsel without risking the appearance of impropriety.

Mr. Boss also commented on the DOJ's carve-out policy. Most corporate plea agreements with the DOJ include a non-prosecution agreement that protects all employees from prosecution if they cooperate with the DOJ's investigation. The DOJ, however, "carves-out" those individuals who are either particularly culpable, refuse to cooperate, or cannot be found. Mr. Boss explained that the carve-out policy was unique to the DOJ and can be traumatic for clients. Mr. Boss declared that the carve-out policy

---

<sup>26</sup> 543 U.S. 220 (2005). *Booker* held that the Sentencing Guidelines are "effectively advisory." *Id.* at 245-46. A sentencing court must "consider [the] Guidelines ranges," but may "tailor the sentence in light of other statutory concerns as well." *Id.*

functions to publicly stigmatize individuals not included in the company's plea agreement with the DOJ. In addition "carved-out" individuals never have an opportunity to clear their names in the event that they are not charged or are ultimately exonerated.

Similarly, Mr. Boss found it disconcerting that civil damages generally result in less liability for clients than criminal penalties. He explained that *Booker* allows lawyers to argue that a sentence or fine should be adjusted based on causation. Now, courts can consider additional factors, like the actual harm to consumers, when fashioning an appropriate sentence under the Sentencing Guidelines. Mr. Boss argued, however, that it would be difficult to use this tactic in practice because the government has preempted this approach by placing sentences in plea agreements. Under the Federal Rules of Criminal Procedure, if a sentence is included in a plea agreement accepted by the court, then the court must abide by the agreed-upon sentence.<sup>27</sup> Therefore, Mr. Boss concluded that although consideration of actual harm to consumers in the damage assessment in a criminal matter works in theory, the option would only be available in practice if there was a slow plea or a full trial.

*Steve Bunnell*

Mr. Bunnell argued that it was in the best interest of both the company and the individual employee for individual employees to have independent counsel because the company has a strong interest in knowing what its employees are doing. Therefore, it is usually not an option for an employee to decline to talk to company representatives.

Mr. Bunnell stated that one approach is for the company to pay for an individual's lawyer after the initial interview. He noted that having counsel for individual employees can be important because there is a risk that an individual employee may have misplaced loyalty and say something inaccurate even when they are not culpable. Bringing in independent counsel is a safe way to test the facts while providing reassurance to employees and boosting employee morale. Mr. Bunnell indicated that pooled counsel is another option that can prevent witnesses from saying things that they should not; however, companies cannot use pooled counsel when certain individuals have an incentive to race for a plea or have other conflicts.

Mr. Bunnell also discussed the issue of carve-outs. He explained that informal identification of certain individuals in the plea agreement creates an inference that the individual is on the high-end of culpability for a felony. He found it troubling that people are stigmatized without having any recourse to defend themselves or their reputations.

---

<sup>27</sup> See FED. R. CRIM. P. 11(c)(1)(C) (providing that if a sentence is included in a plea agreement, then the court, after accepting the plea agreement, must abide by the agreed upon sentence).

Finally, Mr. Bunnell criticized the post-*Booker* Sentencing Guidelines' reliance on a formula for computing damages, from both an economic and a litigation standpoint. Mr. Bunnell concluded by arguing that mechanical reliance on the 20 percent presumption is not sensible and suggested that an approach that considers actual harm to consumers might function as a better method to achieve justice when assessing criminal penalties.

*James Langenfeld*

Professor James Langenfeld started his presentation by focusing on the calculation of damages in civil antitrust matters, which is premised on Section 4 of the Clayton Act.<sup>28</sup> The causation or but-for analysis affects both liability and damages, and typically relies on an overcharge methodology. The key questions are (1) was there an anticompetitive act?; and (2) what happened after the agreement? To conduct the damage analysis, assume that there was an agreement that caused a price increase, find the impact on the market, and then calculate damages based on the market impact. To find the impact on the market, the key questions are (1) can the actual data on price and quantity be accurately measured?; (2) what are the relevant products and sales affected by the cartel?; and (3) how can prices but for the alleged anticompetitive acts be estimated reliably? The following expression shows a mathematical calculation of this process: Damages =  $(\text{Price}_{\text{actual}} - \text{Price}_{\text{but-for}}) \text{Quantity}_{\text{actual}}$ . The critical element is showing that the agreement resulted in an impact on the market.

Professor Langenfeld argued that the but-for pricing used to calculate civil damages is more accurate than criminal antitrust enforcement's 20 percent overcharge rule. The actual price during the cartel is separate from the volume of sales that are actually affected because prices impact each company differently. For example, large customers, or those with extended contracts, do not always pay the inflated prices facilitated by a cartel. Professor Langenfeld contended that the problem with the 20 percent rule in the Sentencing Guidelines is that it includes customers who are not necessarily affected by the cartel. Similarly, it does not take into account outside factors like price wars, which can indicate that the volume of sales may not have been affected for the entire duration of the cartel. Additionally, he stated that just because there is an agreement to raise prices, does not mean that the agreement caused prices to increase throughout the market or that the cartel had any negative impact. Professor Langenfeld discussed how the but-for analysis takes these factors into account.

As a caveat, Professor Langenfeld added that causation analysis can be time consuming because it requires econometrics and experts to determine whether there was an anticompetitive effect on the market. Nevertheless, he

---

<sup>28</sup> 15 U.S.C. § 15(a) (2006).

noted that the length and depth of the damage analysis can be limited and suggested that mini-trials may be worthwhile. Ultimately, however, Professor Langenfeld concluded that a shift from the Sentencing Guidelines' 20 percent overcharge rule toward causation analysis would be beneficial because it would ensure that the punishment in criminal antitrust matters is proportionate to the crime—a goal worth the cost of time taken in conducting the analysis.

*Lisa M. Phelan*

Ms. Phelan began by providing a brief background on the DOJ's focus on international cartels. She explained that the DOJ is continually discovering larger and larger multi-national cartels despite increasing penalties. In 2010, the DOJ brought approximately sixty cases, comprised of eighty-four defendants and resulting in over 26,000 jail days. Key cases included *In re Air Cargo Shipping Services Antitrust Litigation* (the "Air Cargo Cases"),<sup>29</sup> *In re TFT-LCD (Flat Panel) Antitrust Litigation* (the "LCD Cases"),<sup>30</sup> and *In re Municipal Derivatives Antitrust Litigation* (the "New York Municipal Bond Cases").<sup>31</sup>

In addition, the DOJ has actively encouraged other countries to adopt leniency programs similar to its own amnesty program. Ms. Phelan noted that when addressing international cartels, communication and coordination across jurisdictions is imperative to prevent one jurisdiction from "jumping the gun" and accidentally informing defendants of an investigation or indictment before enforcement agencies in other jurisdictions are prepared to move forward.

Next, Ms. Phelan argued that individuals should have independent counsel when the company's interests diverge from an individual employee's interests. For example, an individual might be seeking immunity, be a carve-out, or be looking to move quickly relative to the company. She also stated that pooled counsel can be problematic when all of the individuals in the pool are not going to receive favorable agreements from the government. Ms. Phelan noted that it is generally high-level executives who

---

<sup>29</sup> No. MD 06-1775(JG)(VVP), 2008 WL 5958061 (E.D.N.Y. Sept. 26, 2008), *report and recommendation adopted in part by* No. 06-MD-1775(JG)(VVP), 2009 WL 3443405 (E.D.N.Y. Aug. 21, 2009). Charges of agreeing on air rates and fuel surcharges were brought against eighteen airlines and fourteen executives with more than \$1.6 billion in fines awarded. *Air Cargo Antitrust Settlement 2*, CLASS ACTION REFUND, <http://www.classactionrefund.com/?cases> (last visited July 4, 2011) (follow "Air Cargo Antitrust Settlement 2" hyperlink).

<sup>30</sup> 483 F. Supp. 2d 1353 (J.P.M.L. 2007). Over \$860 million in fines were issued against six companies and nine executives in the *LCD Cases*. *Taiwan LCD Producer Agrees to Plead Guilty and Pay \$220 Million Fine for Participating in LCD Price-Fixing Conspiracy*, U.S. DEP'T OF JUSTICE (Dec. 9, 2009), <http://www.justice.gov/opa/pr/2009/December/09-at-1321.html>.

<sup>31</sup> 560 F. Supp. 2d 1386 (J.P.M.L. 2008).

need separate counsel; however, she noted that the deciding factor should always be whether the company's interests align with the individual employee's best interests.

With regard to the DOJ's carve-out policy, Ms. Phelan defended the carve-out system by explaining that the DOJ is the only agency that can give immunity to hundreds of employees at one time—a power facilitated by the existence of the carve-out system. Furthermore, because there are multiple reasons for being “carved-out,” Ms. Phelan contended that carve-outs are not always indicative of culpability. Finally, she stated that the carve-out issue has also been litigated four times, with courts repeatedly finding in the government's favor.

Ms. Phelan also argued in favor of the 20 percent overcharge presumption as a proxy for harm in the U.S. Sentencing Guidelines. A criminal antitrust violation is a per se violation of Section 1 of the Sherman Act.<sup>32</sup> She contended that the DOJ is unlikely to pursue a criminal antitrust action without evidence that there is an effect on commerce—leaving open the question of what “volume of commerce” was affected. Because the actual effect on commerce cannot be known but for the conspiracy, the 20 percent rule creates a presumption that the conspiracy affected the entire market. All sales in the market are multiplied by 20 percent to calculate damages. She argued that the 20 percent proxy was favorable to the causation analysis used in civil antitrust matters, because causation analysis is a long process. The DOJ's goal is to take down and punish as many cartels as possible. As a result, the 20 percent rule functions as the most efficient way to calculate damages in criminal antitrust matters and has continually been supported by Congress.

Finally, Ms. Phelan responded to Professor Langenfeld's assertion that the 20 percent rule fails to account for companies that might not be affected by a conspiracy because of long-term contracts. She explained that the DOJ may be willing to hear arguments that certain customers or sales should be excluded from the agency's analysis of damages in criminal antitrust matters.

## CONCLUSION

Overall, the *George Mason Law Review's* Fourteenth Annual Symposium was enormously successful. Participants and panelists left with a better understanding of how the new Merger Guidelines will impact future litigation under Section 7 of the Clayton Act and an increased awareness of current trends in criminal cartel enforcement.

---

<sup>32</sup> 15 U.S.C. § 1.