

**ABA SECTION OF ANTITRUST LAW  
RESPONSE TO ANTITRUST MODERNIZATION COMMISSION JUNE 12, 2006  
REQUEST FOR PUBLIC COMMENT ON CIVIL REMEDIES PROPOSALS 2 & 3**

The Section of Antitrust Law (the “Section”) of the American Bar Association (“ABA”) is pleased to submit these comments to the Antitrust Modernization Commission (the “Commission”) in response to its Request for Public Comment, dated June 12, 2006, regarding civil remedies, specifically proposals 2 and 3. The views expressed herein are presented on behalf of the Antitrust Section. They have not been approved by the House of Delegates or the Board of Governors of the ABA and, accordingly, should not be construed as representing the policy of the ABA.

**Executive Summary**

The Section does not believe that the Commission should recommend these changes in the treble damage remedy available under the federal antitrust law. That remedy has long been a fundamental part of the antitrust laws, the antitrust laws have adjusted to that remedy, and the case for these alterations of that remedy has not been made. .

**Commission Proposals**

The Commission has requested public comment on two proposals that would change the mandatory trebling of damages for almost all antitrust claims. Proposal 2 asks whether courts might be permitted to eliminate the multiplier based on consideration of the certain listed factors. Proposal 3 asks whether courts might be permitted to increase the multiplier above three, as when the conduct has effects outside the United States for which damages will not be paid.

**Section Comments**

The treble damage remedy has been part of antitrust jurisprudence since the inception of the Sherman Act and deserves respect. Although Congress from time to time has seen fit to “detringle” antitrust damages in narrow circumstances and to address explicit countervailing policies, the basic treble damage remedy remains in place. We are aware of no reliable or systematic evidence that would support the proposals.

The substantive and procedural law of antitrust has evolved in ways that specifically equilibrate for the existence of the treble damage remedy. Requirements for antitrust injury, the standards for pleading and for granting summary judgment, and the substantive proof standards for various offenses, all adjust for the impact of the treble damage remedy. The proposals to alter the treble damage remedy do not take into consideration the many ways in which antitrust offenses, defenses, and procedures account for its existence and would significantly alter the equilibrium that has developed in light of that remedy.

If the Commission wishes to express to Congress an interest considering changes to the treble damage remedy, the Commission should urge study of the impact of the treble damage remedy on businesses and consumers, and identify what information would be pertinent to such an assessment. The Section would be pleased to assist in this effort. The Commission need not

prescribe any particular research design to make this contribution. Proposals 2 and 3 do not have the benefit of, and should only be considered after, such a systematic study or fact-finding.