



## REQUEST FOR PUBLIC COMMENT

### Civil Remedies

(Comments Requested by July 10, 2006)

1. The Commission is evaluating a proposal to reform indirect purchaser litigation. The potential reform would consist of three principal components: (1) Legislative overruling of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), so that indirect purchaser claims could be brought under federal antitrust law, and *Hanover Shoe, Inc. v. United Shoe Machinery*, 392 U.S. 481 (1968), so as to allow assertion of the pass-on defense; (2) Statutory provisions either (a) to allow removal of all state indirect purchaser actions to federal court to the full extent permitted under Article III, or (b) to preempt state indirect purchaser laws; and (3) Statutory provisions to allow the consolidation of all related direct and indirect purchaser actions in a single federal district court for pre-trial and trial proceedings.

Should the Commission recommend such reform to Congress? Should the proposal be modified in any respects? In responding, please also comment on the following:

- a. Is a provision that would allow removal of state indirect purchaser actions necessary or desirable, in light of the generally applicable removal provisions contained in the Class Action Fairness Act?
- b. Is preemption of state indirect purchaser actions necessary or desirable if state indirect purchaser actions may be removed to federal court?
- c. Should the Commission also recommend to Congress that courts be required to use structured proceedings to resolve purchaser claims? Those proceedings would resolve liability in the one phase, determine total damages in another, and allocate damages among direct and indirect claimants in a separate phase. Would structured proceedings work better if courts could combine certain of the proceedings, especially liability and total damages, in appropriate cases in the exercise of their discretion?
- d. To what extent would the legislative overruling of *Hanover Shoe* create new challenges in the process of certifying appropriate classes of claimants? Can any such challenges be resolved fully through the structured approach suggested in (c) above?

2. The Commission is evaluating a proposal to alter the circumstances in which treble damages are awarded to successful antitrust plaintiffs. The proposal would provide as follows:

The court, in its discretion, may limit the award to single damages based on consideration of the following factors:

- a. whether the violation was *per se* or rule of reason;
- b. whether the violation involved single-firm or multi-firm conduct;
- c. whether the violation was related to an otherwise pro-competitive joint venture;
- d. the state of the development of the law with respect to the challenged conduct as an antitrust violation;
- e. whether the challenged conduct was overt or covert;
- f. whether the challenged conduct was criminal;
- g. whether there has also been a related government action;
- h. whether it is a competitor that is alleging the conduct was anticompetitive; and,
- i. Whether the violation was proven by clear and convincing evidence.

Should the Commission recommend such reform to Congress? Should any of the factors listed above be removed? Are there any other factors that should also be included?

3. Should the Commission recommend to Congress that courts in their discretion be permitted to increase the damages multiplier above three? For example, should courts be able to increase the multiplier above three where the conduct has significant effects outside the United States for which damages will not be paid?

4. The Commission is evaluating a proposal to change the current regime regarding private antitrust actions. The proposal would provide as follows:

- a. In all matters where the government institutes criminal proceedings and obtains a guilty verdict by plea or trial, all unlawful gains made by the defendants and precomplaint and prejudgment interest thereon shall be disgorged in that proceeding, together with such fines as may be provided by law and a civil penalty of 200% of the amount disgorged.
  - i. The disgorged unlawful gains shall be apportioned among those from whom they were taken directly or indirectly by the criminal court in a summary proceeding to be concluded within 90 days of the entry of a final criminal judgment as to all defendants. Classes of direct and indirect claimants may participate through counsel in that proceeding. Claims of less than \$100 shall be disregarded and the amounts attributable to such claims paid to the Treasury.
  - ii. Fines and civil penalties shall accrue solely to the Treasury, but the court may award compensation from those amounts to any private party found

to have been a material factor in the instigation or successful conduct of the government's investigation and prosecution or to its counsel.

- b. In the case of defendants acquitted of criminal charges, private claims may be asserted as otherwise provided by law, but only the actual amount of unlawful gain may be recovered.

Should the Commission recommend such reform to Congress? Should any of the particular components be modified?

Source: 71 Fed. Reg. 34,590 (June 12, 2006)