ANTITRUST MODERNIZATION COMMISSION

PUBLIC HEARING

Monday, June 27, 2005

Federal Trade Commission Headquarters
Room 432
600 Pennsylvania Avenue, N.W.
Washington, D.C.

The hearing convened, pursuant to notice, at 1:00 p.m.

PRESENT:

DEBORAH A. GARZA, Chairperson
JONATHAN R. YAROWSKY, Vice Chair
BOBBY R. BURCHFIELD, Commissioner
W. STEPHEN CANNON, Commissioner
DENNIS W. CARLTON, Commissioner
MAKAN DELRAHIM, Commissioner
JONATHAN M. JACOBSON, Commissioner
DONALD G. KEMPF, JR., Commissioner
SANFORD M. LITVACK, Commissioner
JOHN H. SHENEFIELD, Commissioner
DEBRA A. VALENTINE, Commissioner
JOHN L. WARDEN, Commissioner

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ALSO PRESENT:

ANDREW J. HEIMERT, Executive Director and General Counsel
WILLIAM F. ADKINSON, JR., Counsel
TODD ANDERSON, Counsel
MICHAEL W. KLASS, Economist
ALAN J. MEESE, Senior Advisor
HIRAM ANDREWS, Law Clerk
KRISTEN M. GORZELANY, Paralegal

C O N T E N T S

Indirect Purchaser Actions

These proceedings were professionally transcribed by a court reporter. The transcript has been edited by AMC staff for punctuation, spelling, and clarity, and each witness has been given an opportunity to clarify or correct his/her testimony.

P R O C E E D I N G S

CHAIRPERSON GARZA: Welcome, everybody, to this day of hearings — this afternoon of hearings of the Antitrust Modernization Commission. It also happens to be our very first set of hearings. The topic for today will be the U.S. System of Antitrust Enforcement that relates to the rights of direct and indirect purchasers to sue for antitrust damages.

I won't take very much time because I want to give maximum time to our speakers and to the Commissioners to ask questions but just to give a little bit of context.

The rules of direct and indirect purchaser litigation were essentially established by three key Supreme Court decisions. Of course, *Hanover Shoe*, *Illinois Brick*, *ARC America*, and by the laws of several states, both statutory and judicial, and that's the context in which we're going to be having our discussion.

Hanover Shoe, of course, is a case in which the Supreme Court limited the right of defendants to limit their antitrust damage exposure by claiming pass-on by companies if plaintiffs purchase directly from them.

Illinois Brick, then in that case the Court decided that only purchasers, direct purchasers, would be

able to recover damages from antitrust defendants.

ARC America — in *ARC America* the court ruled that the plethora of state law that developed in light of *Hanover* and *Illinois Brick* was not granted by current federal antitrust law.

So, with that very brief background, I want to start the hearing. The panel is before us.

I first want to thank you very much for the time that you've given to prepare your very thoughtful testimony, which will be included in whole in the Antitrust Modernization Commission record. Of course, we want to thank you for your presence here.

The way we want to proceed is that I'd ask each of the panelists to take about five minutes for an opening statement. If you'd like, you can introduce yourself. I won't be going through and introducing each of the panelists so if you could say a little bit about who you are and how you come here, and then summarize your testimony.

Once all the opening statements have been provided then there will be — there will be then questioning by the Commissioners. We have designated one person for each panel from the relevant Commission study group to take the lead in questions for the first 20 minutes and then we will give

opportunity for each of the Commissioners to add additional questions, about five minutes each.

We plan to conclude around 3:00 p.m.

If there are no questions then why don't we start and, I guess, we can start with Mr. Tulchin.

Panel I: State Indirect Purchaser Actions in the U.S. Antitrust Enforcement System

MR. TULCHIN: Thank you, Madame Chair, and Commissioners. It's a pleasure to be here.

My name is David Tulchin. I'm a member of the firm of Sullivan & Cromwell, LLP, in New York.

For the last five-and-a-half years or so I have been representing Microsoft in connection with private antitrust litigation around the country, both the litigation that was consolidated in an MDL proceeding before Judge Motz in the District of Maryland and the cases in 37 or 38 states that were filed and prosecuted against Microsoft. All of those cases stem from or arise out of the government's action against Microsoft here in Washington, which began in 1998. Of course, I'm not here to speak for Microsoft. I'm here speaking entirely for myself.

I will be brief. I think there were three principle points that I tried to make in the statement that

I submitted.

The first is that the two-tiered system, that is the system where direct purchaser actions are prosecuted in federal court and there are many, many indirect purchaser actions prosecuted in state courts, to my mind is inefficient. Indeed, I would say that the system is illogical and, in many ways, a waste of judicial resources, and beyond that, I think, societal resources.

We do have very much a national economy and, while there are some matters and there will be some cases that are purely local in their character and should be handled in the state court where those matters pertain, for the most part, antitrust litigation, particularly any major antitrust litigation, is really national in scope.

It has always seemed to me a little anomalous that, while the interstate commerce power has been invoked to give the federal government the power, for example – just as one of many, many examples – to set speed limits on local roads in every one of our states, when it comes to national economic matters, we seem to have a system that permits the balkanization that we have.

So, for example, in the cases that I've been involved with, there have been actions filed in 37 or 38

state courts requiring the time and attention of that many state judges. While there was some coordination of discovery, each one of the judges in each one of those states dealt with very similar matters, very often class certification motions that were similar, or virtually identical from state to state and various other discovery motions. In the cases where there were settlements, which is in about 15 states, of course, the process of seeking approval of settlements, obtaining approvals, sending out notices, *et cetera*, *et cetera*, gets repeated 15 times.

Because there were matters in so many states, the process of adjudicating what really is a national claim on behalf of indirect purchasers becomes extremely complex, extremely expensive. There are lawyers, in some cases dozens of lawyers — in each state on each side working on what really is the same matter — something which is expensive, of course, and seems to me a luxury that isn't necessary. While lawyers on both sides benefit from that, I'm afraid one would say it seems to be much more efficient and logical to have a single national system — there's no reason there shouldn't be — with one federal judge handling all such claims.

The second point that I've made is that the system

of having litigation in dozens of different state courts is, in one sense, quite unfair to the defendant and, in a sense, quite coercive. It's one thing to go to trial in a case where if you win, as a defendant, you gain something significant, and it's another thing where if you win you have just one victory but if you lose you have the domino effect of collateral estoppel. This means that it takes a tremendous amount of courage, one would say, for a defendant with pending cases in numerous states to take the risk that a loss will have that collateral estoppel effect with the potential of treble damages in dozens of other pending cases.

The upside should be commensurate with the downside, which is what we would have if we had one trial.

Of course, whether or not *Illinois Brick* remains the law, it seems to me that the principles that I've articulated apply either way.

The third point is that — and I think this is related to the other two — that in indirect purchaser cases, particularly where the article that was allegedly the subject of the overcharge is a component of the product that the consumer has purchased, claimants are very difficult to identify. That is, alleged victims of the overcharge are

difficult to identify.

In the case of Microsoft, for example, the software was usually installed on personal computers that consumers bought. Windows, for example, is typically two or three percent of the overall cost of the PC that the consumer is buying. No one has records of who has purchased from whom or where. There are precious few records that identify in any particular state or around the country who the indirect purchasers are.

The consequence of all that is that notice must be given to a settlement class or, indeed, after judgment if there's a trial, notice must be given to the potential claimants; a form has to be reviewed; a claim has to be made; and, as is true in many indirect purchaser cases, a very small percentage of the alleged victims actually make a claim.

I know my time is up. The point here, of course, is that very often the lawyers gain much more than the members of the class.

Thanks very much.

CHAIRPERSON GARZA: Thank you, Mr. Tulchin.

Ms. Zwisler?

MS. ZWISLER: Madame Chairman and members of the

Commission, I am Peggy Zwisler.

I'd like to begin by noting that I have been associated with two law firms during the time that I've been submitting information for this panel, Howrey and Latham, and the views that I submitted in my written testimony and in my remarks today are probably not those of either institution but are instead, of course, my own.

I am an antitrust defense lawyer with substantial indirect purchaser class action experience, which is, I suppose, why I'm to the right over here with David in terms of the political spectrum and I support the view that *Illinois Brick* should govern indirect purchaser actions at least in circumstances where the underlying antitrust claim is not a criminal price-fixing conspiracy.

In reviewing the statements of the eminent panelists on this panel as well as on the one that follows us, it appears to me that there are two considerations that underlie the opposite point of view, which is that Congress should nullify legislatively *Illinois Brick*. And those considerations — one is substantive and one is procedural. I think addressing them will clarify why I have what I would characterize as a rightist view, I guess, that *Illinois Brick* should be the law of the land.

The substantive justification for permitting indirect purchasers to recover for their remote sellers is that the antitrust laws should provide a remedy for the people who are the ultimate victims of the antitrust violation and they should be able to recover from even sellers upstream in the distribution system.

I hear frequently from indirect purchaser adversaries, a couple of whom are at this table with me, that Economics 101 will tell you that indirect purchasers always get the damage because of pass-on — the overcharges always pass through the distribution system. So that's the substantive justification.

The procedural justification for such suits is that courts and juries are supposedly better able to analyze complex damage models and apportion the damages today than they were in *Illinois Brick*'s time, and that's an underlying justification that people give for this phenomenon.

I don't think either justification works in the real world.

The experience in indirect purchaser cases in the main is that even when offered compensation for these alleged wrongs by way of settlements in class actions in which they have not invested and they have not had to

prevail and have accepted no risk, even in the optimum circumstance in which you would think indirect purchasers would participate, they don't participate in these settlements. They don't sign up to vindicate the allegedly violated rights.

So on the other side of the equation, defendants and courts are faced with the costs and the burdens and the complexities of this litigation which I detailed, as did others in their papers. And what we're doing is providing a result that doesn't seem to be valuable to the constituency that it is supposed to serve, because if it were valuable what you would see is legions of indirect purchasers lining up to get what is essentially free money or free coupons, and we don't see that. We really don't see that.

The procedural issue is also a red herring in my view. All of the examples that people have given you about settlements or apportionments of damages in multi-tiered antitrust clusters of cases, all of them are settlements. I don't know of any indirect purchaser litigation which was actually subjected to the crucible of a jury trial and went to a verdict in which damages were apportioned. That's not to say there haven't been such trials.

I tried the disposable contact lens antitrust case

some years ago but we settled before the verdict came in. But we really don't have a market experiment to test the precept or the concept that juries and courts and courts of appeals can grapple with these complex damage models and with the necessity to apportion the damages and to avoid duplicative recovery. We don't have a market experiment that does that. And why is it?

I think it's wrong to assume that in all of these cases the defendants have settled these indirect purchaser cases because they have recognized their wrongs and they want to compensate their victims. That may be the case with criminal price-fixing defendants but I will venture here a sweeping generalization to say that these cases are settled because of the risk analysis that defendants have to engage in when they get involved in these cases.

The colossal damage exposure that exists as a result of indirect purchaser litigation does not permit defendants to litigate these cases on the merits unless they are courageous, as David said, or unless they are quite big. So that procedural consideration to me doesn't support the plethora of indirect purchaser litigation that we have today.

And I do see that my time is up. Thank you.

CHAIRPERSON GARZA: Thank you.

Mr. Montague? Did I say that right?

MR. MONTAGUE: Montague.

CHAIRPERSON GARZA: Montague.

MR. MONTAGUE: Thank you, Madame Chairman and Commissioners.

Again, as everyone else, I'm testifying as to my own views and not my firm's and I am testifying here really based on my own personal experiences.

I was fortunate to join David Berger just as he and the late Harold Kohn were expanding the class action application to antitrust law so I'm happy to say – or not happy – that I've been involved in this under the old spurious class action pre-*Illinois Brick* and post-*Illinois Brick*.

Under pre-*Illinois Brick* I have been involved in cases involving both direct and indirect purchasers and have tried a case – a *Master Key* case, which was settled before verdict, for indirect purchasers. And I have tried cases post-*Illinois Brick* on behalf of direct purchasers. So that's my background and that is what I base my testimony on today.

To summarize, I am very much in favor of retaining

the direct purchaser primary line of enforcement with *Hanover Shoe* in place.

I am opposed to having the *Illinois Brick* issue being made to take away the states' rights to represent indirect purchasers and, I believe, Congress should leave things as they are.

Indirect purchasers – the indirect purchaser cases do not now impede direct cases and there are reasons for that.

Number one: With *Hanover Shoe* applying, the proof of damage is not affected and there is no diminution of the recovery.

Number two: Federal courts can manage direct cases even when there are indirect cases pending in federal courts. They have developed many ways to do this. The most obvious and most used method is that they make the direct purchaser case coordinate discovery with the state cases so that there is not duplication or at least a minimum of duplication and they order cooperation and usually the defendants join in on that wish. With the Class Action Fairness Act now being in effect, I think that will be even more manageable.

Thirdly, the direct cases usually do all of the

meaningful discovery and usually if there is a trial it will be the first to go to trial, or if they get defeated through procedural matters they will be the first to be defeated. That allows other parties to evaluate their cases and, I think, that adds to the disposal of other cases one way or the other.

My second point is that direct purchasers should continue to be the first line of enforcement.

Number one, which is a little repetitive, they can get the full recovery.

Number two, and often overlooked, is that direct purchasers particularly in class actions add significantly to the body of evidence, which is available to proving the case for class plaintiffs. I have recently had this experience in the High Fructose Corn Syrup litigation in which major class members came forward and gave us evidence that was key. I really believe it was. It got us over the hump in being able to overcome summary judgment, which we had to do in the court of appeals.

But a problem is that direct purchasers, as was pointed out in *Illinois Brick*, are reticent to sue because they have concern of retaliation, lost orders, bad service, misdirected shipments. They would not want to ruin their

relationship with the major supplier. And, secondly, they are very concerned about corporate relationships and, you all probably know this from your own experience, the importance of their relationship within the corporate community. So they have a reticence to sue to begin with, which is sort of innate.

Then, of course, they have to overcome the risks. The risks of losing antitrust litigation are very, very substantial as one knows. The plaintiff has to overcome each one of those risks from the first motion to dismiss all the way down through the last appeal and at any time – the plaintiff has to win each one of those, the defendant only has to win one – the case is over.

So with all of that risk and all of that reticence, and add to that the sophistication of defendants today causing most of the litigation today to be circumstantial. The main premise is that *Hanover Shoe* must remain intact, otherwise the incentives will be diluted and we will not have private antitrust cases by direct purchasers.

Thank you.

CHAIRPERSON GARZA: Thank you. Mr. Cuneo?

MR. CUNEO: Thank you. Good afternoon. My name

is Jonathan Cuneo and, for the reasons I'm about to describe, it's a real privilege to appear before you today.

For a number of years after I graduated from law school, I worked here in this building at the Federal Trade Commission and then for four-and-a-half to five years I was counsel to the Subcommittee on Monopolies and Commercial Law of the House Judiciary Committee where I had the privilege of interacting with a number of you.

For the past 19 years I have been in private practice with my own firm. It has usually had my name in it but it has gone through various iterations and I have worked on a number of indirect purchaser cases as well as direct purchaser cases and on very infrequent occasion my advice has actually been asked by major U.S. corporations.

Having said that, the reason it's a privilege is — you see from my background I'm very unaccustomed to my personal opinion meaning anything and so it's a privilege that a group as distinguished as this would see fit to hear my testimony.

Now, I believe *Illinois Brick* or I know *Illinois Brick* was decided in 1977 and according to my calculations that is almost 25 percent of the entire history of the U.S. antitrust laws. It comes out, I think, to 24.3 or 24.4

percent. And since that time — the Congress, of course, rejected attempts to overrule *Illinois Brick* even though the chairman that I worked for worked very closely with the Antitrust Division to try to have it overruled.

Since that time the states have gone out and enacted legislation that provides a remedy. So, therefore, the situation is dynamic and is continuing to evolve. And not only is the situation dynamic and continuing to evolve but it is starting to produce real benefits. There are indirect purchasers, third-party payers, purchasers of prescription drugs who have received millions of dollars in individual benefits.

In addition, there are — it's politically incorrect to say it — but from time-to-time there are coupon settlements that produce real value. I was delighted to understand a co-panelist, Ms. Zwisler, referred to a settlement I did with her firm last year in a positive light as providing real benefit to class members.

So it's a dynamic situation that is starting to produce results. Now there has already in the last couple of years been — or in the last year been a sea change and that is the passage of a federal class action bill, which will have the procedural effect of putting almost all of

these cases before the MDL and transferred to one judge. So a lot of the concerns that some of my defense colleagues have expressed in terms of duplicative and overlapping teams of lawyers in various courts around the country will be eliminated.

Now as I am sure most of the members of this panel well understand, there are still — this is a work in progress. There are still outstanding issues that — in which there is enormous variation in terms of class certification, for example. Minnesota has one set of standards, California has another, just to give you an example. No one knows where the federal courts will go.

In addition, there are questions about the efficacy of remedies. Therefore, I think that (1) decentralization of power to bring cases under state law as well as federal law is a necessary safeguard and (2) the state experiment has been moved into federal court and it is continuing, and that continuation should not be short-circuited. I think that this Commission and the Congress would do well to wait until we know more before it recommended federal legislation in this area.

Thank you very much.

CHAIRPERSON GARZA: Thank you.

Attorney General Bennett?

MR. BENNETT: Good afternoon, Chair Garza and members of the Commission. It's my privilege to testify today.

I'm the Attorney General of Hawaii and the Chair of the National Association of Attorneys General Antitrust Committee.

I spent the first ten years of my career as an Assistant United States Attorney here in the District of Columbia and in Honolulu and then spent 13 years as a partner in a large Honolulu law firm practicing what at least passes for complex litigation in Hawaii.

[Laughter.]

MR. BENNETT: The major message that I'm here on behalf of my colleagues to deliver to you today is that the states play an important vigorous and necessary role in antitrust enforcement. We recognize that we have our critics, some of whom are very vocal, but those who claim that the states are either free-riders or, to use a recently used term, “barnacles,” are, at best, uninformed.

I don't need to recount for you the history of the Sherman Act and that it was intended not to supplant but to augment already existing state antitrust laws and I will not

burden you quoting from Senator Sherman on that.

One only has to look at the history of the development of antitrust law in this country through cases in the relatively recent past – like Arizona – the *Maricopa County Medical Society*; *California v. American Stores*, *Hartford Fire Insurance v. California* – to demonstrate the role that the states have played in antitrust enforcement. We believe that that role should clearly continue.

The major topic for today is *Illinois Brick* and we believe that *Illinois Brick* should be legislatively overruled. *Illinois Brick* has the unfortunate combination of windfalls, injustice and an anti-deterrent effect. The three major rationales from the *Illinois Brick* court just do not stand up in the light of either common sense or experience.

The first rationale: Defendants might pay too much were there not a rule of *Illinois Brick*. The testimony from both panels, I think, is stark in that no one could actually point to any case, despite the large number of *Illinois Brick*-repealers, in which any defendant had actually paid too much. It's hard to come up with cases in which defendants pay as much as single damages. But beyond that, our sympathies should simply not be with the

wrongdoers. Our sympathies should be with the people and the entities that are injured by anticompetitive behavior.

I am not going to and I am not qualified to repeat the work of Professor Lande or echo Judge Easterbrook but if one looks at the fact that most cartels go undetected; the fact that even treble damages do not take into account the umbrella effect or allocative inefficiency — I would sincerely ask you not to ask me to explain the difference between allocative and technical inefficiency — ; the time value of money.

The damages that are awarded — even with *Illinois Brick* repealers — do not come close to compensating either the injured parties or society for the damages inflicted by cartels.

The second reason: Direct purchasers are supposedly more efficient enforcers. Well, that may be true in some cases. We only need to look at the Microsoft litigation to know that that clearly is not the case all the time. Where are the OEM lawsuits? They don't exist. In the drug cases where are the lawsuits by the manufacturers against the large drug companies? They don't exist. The reason they don't is for the simple and logical reason that many of these companies value their relationships with those

above them in the supply chain far more than they would value the possible prospect of recovery.

Cases that we've cited in our testimony demonstrate that indirect purchaser lawsuits can obtain real recoveries. I don't have time to go through them. Many of them are listed on the web site of the ABA but cases like *Mylan* in which the Attorneys General recovered $100 million and other indirects, $51 million; *BuSpar*, $100 and $140 million; *Taxol*, $50 and $15 million. We could go on and on. Vitamins, infant formula.

Damage is difficult to calculate – the third rationale. With *Daubert* and *Kumho Tire*, I think that rationale disappears but it's ironic that I think that the principles given as the reasons for *Illinois Brick*, were they proffered today in federal court by an expert as opinions, would be inadmissible – as not satisfying the *Daubert* and *Kumho Tire* rule.

The last major point which I wish to make is that this Commission, I would respectfully suggest, should not suggest to the Congress that they preempt state law. It is, and this is reflected in a unanimous resolution adopted by the State Attorneys General, inimical to basic principles of federalism that inhere in our constitution to preempt state

law.

Some of the words that have been used in the testimony and, in fact, today are that having a separate state system is inefficient and illogical. One could make the same argument about federalism itself and, in fact, there are those who argue that the Sherman Act is both inefficient and illogical. Simplicity and convenience, if they exist, are simply not good enough reasons to preempt state law. Antitrust federalism, competition among enforcers is good, not bad for competition. And having the states as laboratories of democracy, in the words of Justice Brandeis' dissent in *New State Ice*, is a good thing, not a bad thing.

I would also point out one of the testifiers on a different topic talked about the rule of unintended consequences. An attempt to preempt state law would certainly bring that rule into play. There would be state laws dealing not just with indirect purchasers but with unfair trade practices, disgorgement. There would be endless litigation about which state laws were preempted and which weren't.

It is a traditional state function for attorneys general to seek restitution for their citizens who have been

damaged by anticompetitive behavior and that should continue.

And as we point out in our testimony, if *Illinois Brick* were repealed, a system of natural selection would itself make these cases migrate almost exclusively to federal court under one judge, especially if *Lexecon* were legislatively overruled but none of these are any reason to preempt the laws of 51 different jurisdictions.

My last words to the Commission, with respect, are I think that the guiding principle for this Commission and the Congress should be, "First, do no harm." I believe that it makes sense to repeal *Illinois Brick* but going beyond that would, I would respectfully suggest, violate that rule and I would respectfully ask the Commission not to do so.

Thank you.

CHAIRPERSON GARZA: Thank you.

We will now have questioning by the Commissioners. And, Commissioner Shenefield, you'll take the lead initially.

COMMISSIONER SHENEFIELD: Thank you very much.

First, Madame Chairman, let me add my voice to yours in congratulating the panelists on their statements, both written and oral. They are immensely helpful and I

would add to that the statements of the panel that comes afterwards as well.

Let me make a disclosure at the outset. *Illinois Brick* came down — I think it was June 6th, more or less, 1977. Somewhere along those lines.

Twenty-eight years is about right, I think, Jon. I testify more often on *Illinois Brick* than on any other single subject except airline deregulation and each and every time it was in favor of reversing *Illinois Brick* and that's the position I hold today and that's the position I'd like to test out with all of you.

First of all, Attorney General Bennett, let me ask you the question. It is a prime assumption of those who oppose reversal of *Illinois Brick* that direct purchasers are good enough. They sue most of the time, if not all the time. You've added — you've outlined a couple of points where they did not sue.

Do you know of any empirical work that quantifies how often they sue and how often they don't sue and would that be a useful piece of work to do?

MR. BENNETT: I think it would. I think the Commission decided it wasn't going to do empirical studies. I think that that would be a useful piece of information but

I did note that in my preparation for today's hearing looking at the testimony and the works of scholars that I didn't see that there and when you add to that the fact that most cartels in any case go undetected. The fact that direct purchasers are the ones with the most likely direct knowledge of illicit behavior would seem to indicate that they're not suing whenever they could.

COMMISSIONER SHENEFIELD: Ms. Zwisler, you, I thought in your prepared testimony, did come out at least provisionally for reversal of *Illinois Brick* but you seem to have recanted slightly in your oral statement. Am I being fair to you?

MS. ZWISLER: I think it's the opposite. I'm in favor of having *Illinois Brick* govern indirect purchaser litigation in the states as well as in the federal court.

COMMISSIONER SHENEFIELD: But didn't you in your statement say something about reversal of *Illinois Brick*?

MS. ZWISLER: With respect – if there is room for indirect purchaser litigation I think it should be limited to the case in which the underlying antitrust violation is a *per se* criminal offense because the policy considerations that suggest to me, in any event, that indirect purchaser litigation does not have much value today in U.S. antitrust

enforcement, those considerations, apply with less force when the underlying violation is a *per se* violation. There's less sympathy for the defendant, less need to be cognizant of the risk analysis of that defendant who has been convicted of price fixing and the damage calculation is easier when the price-fixing violation is the result of an overt conspiracy to fix price.

My experience today in class action litigation is almost exclusively not in the criminal area. All the current clusters that I'm handling are conduct based cases in which there has not been an adjudication of liability for the defendant in a criminal context so the question of whether these indirect purchasers – whether and to what extent they are damaged is a completely open question.

The point of my testimony really is that defendants can't test that issue in front of a jury trial in almost all circumstances because the exposure is so great. So then I'm a trial lawyer and so the normal analysis that I go through with a corporate defendant about whether to submit its problem to a jury when the plaintiff is another company does not apply in the circumstances in which an indirect purchaser class is the plaintiff.

COMMISSIONER SHENEFIELD: But does anybody on the

panel have any sense of how many direct – how many cases there are in which direct purchasers have not come forward? What percentage of all indirect purchaser cases have some direct purchaser involved in them? Is there anybody who has a sense impressionistically of that?

MR. MONTAGUE: I'm aware of very, very few cases where the indirect purchasers sued and no direct purchasers sued. One I referred to my paper and Peggy is on the other side of it, and that's the *Canadian Car* case. I think, by and large, almost most cases are direct purchaser cases with indirect purchaser cases in state court.

COMMISSIONER SHENEFIELD: Somebody – I think it was the Attorney General – mentioned *Microsoft* in which the OEM or, maybe it was you, Jon, the OEM haven't sued. Is that accurate and, if so, why didn't they sue?

MR. TULCHIN: No, not entirely. I don't know why they haven't. Those who haven't sued, I don't know why they haven't or why they have but some have sued. Others have, let's say, expressed an intent. But beyond that, of course, the *Microsoft* case, the government case against Microsoft was for unlawful maintenance of a monopoly. Not for price fixing.

The issue of whether there was any overcharge at

all imposed by Microsoft on direct purchasers or an overcharge pass-through down the line was never adjudicated in the government case. That may be an instance. Indeed, I mean, one might say that the import of the government case was, with respect to Microsoft, behavior that in a sense was overly competitive and there was no showing or finding of any overcharge at all.

COMMISSIONER SHENEFIELD: That's really sort of avoiding my point. I guess, my point is assuming that there was liability, which I think was found, were there direct purchasers who were injured and, if they were, why didn't they sue is my question.

MR. TULCHIN: Well, I think there are a number of possible answers. I don't know why those who didn't sue did not sue. One possible answer is that they did not believe they were overcharged at all and that's what I'm suggesting. There may be other reasons as well. There were suits by direct purchasers. There was an effort in federal court to have a class of direct purchasers, OEMs, certified. The judge in the case in the District of Maryland rejected that effort.

COMMISSIONER SHENEFIELD: Okay. Let me ask you all now to engage in a thought experiment. Let's just

assume that Congress reverses *Illinois Brick* and reverses *Hanover Shoe*. What will happen to the indirect purchaser suits? Where will they be brought? Anybody?

MS. ZWISLER: And assuming the Class Action Fairness Act is still in effect?

COMMISSIONER SHENEFIELD: Right.

MS. ZWISLER: So the indirect purchaser cases may be beginning – may be brought in a state court but the defendants are likely to avail themselves of the rights given to them by the Class Action Fairness Act and remove them to federal court.

COMMISSIONER SHENEFIELD: And do we all expect, you on the panel, that that's what would happen, that the vast majority of indirect purchaser suits would be brought eventually into federal court?

MR. CUNEO: Mr. Shenefield, I think that will happen today with the exception of an unusual circumstance in which a plaintiff class is suing an in-state defendant. I think almost all those cases will be brought in federal court today. In fact, even before the Class Action Fairness Act some indirect purchasers were asserting an injunctive claim in federal court under Section 16(d) and then invoking the supplemental jurisdiction of the court for state claims.

I think now that — now today, with no Congressional enactment, those cases are going to be brought in federal court.

COMMISSIONER SHENEFIELD: That suggests that preserving the state option is less important; does it not?

MR. CUNEO: No. I don't think so.

COMMISSIONER SHENEFIELD: Because there might be some sort of trivial experimental case brought?

MR. CUNEO: No. Again I don't agree with that and I — respectfully, and that —

COMMISSIONER SHENEFIELD: It's all respectful.

MR. CUNEO: Okay. Look, the fact is that having state laws is an independent basis of — and state enforcement of those laws is an independent basis of authority upon which either a consumer or a public official can act.

COMMISSIONER SHENEFIELD: But let me take you back to the original question. Assuming that *Illinois Brick* is reversed and *Hanover Shoe* is reversed, whatever number of suits now brought in federal court, it would go — presumably the number would go up? Do you think?

MR. CUNEO: No, I think it would probably stay —

COMMISSIONER SHENEFIELD: It would be about the

same?

MR. CUNEO: Yes.

COMMISSIONER SHENEFIELD: Attorney General Bennett, do you have a view?

MR. BENNETT: I think that the cases would tend to migrate to federal court. There would clearly be more removal but I think that it would be simply wrong to say that the only thing that preemption would do would cause a loss of some trivial or idiosyncratic cases. I think that you have different state laws. I think that the experimentation in the states in this issue is extremely important.

I don't want to beat a dead horse here but I think federalism is an extraordinarily important concept for the Commission to take into account. And I also think that if you do make an attempt to preempt state law defendants are going to continually claim that state law is well beyond the scope of what was intended to be preempted are actually preempted.

COMMISSIONER SHENEFIELD: I didn't mention preemption. I just – my assumption was just *Illinois Brick* is reversed so a federal right is created, federal jurisdiction is created, and *Hanover Shoe* is reversed but

that's all. Did you – what would you expect to have happen there?

MR. BENNETT: I would expect that the vast majority of cases would be litigated in federal court.

MR. TULCHIN: Commissioner, if I may –

COMMISSIONER SHENEFIELD: Mr. Montague and then we'll come to you, sir.

MR. TULCHIN: Thank you.

MR. MONTAGUE: Would I be out of line to address your presumption?

COMMISSIONER SHENEFIELD: No. I hope you do.

MR. MONTAGUE: I think you have – one – all of us have to realize what has happened since *Illinois Brick*. There has been an incredible difference in direct purchaser cases.

Number one, for the first time you have major, major corporations opting out of class actions and pursuing their own individual cases. Never happened before. That's a very important private enforcement line – it's a very important deterrent effect and it's very important to these companies that they can control – can recover when they've been damaged.

Secondly, as I alluded to before, you have major

class members cooperating and helping to provide evidence and I think General Bennett alluded to something, the fact that maybe that shows that they're complicit in some way, and I didn't mean to infer that at all. The reason is that they have dealt with these defendants and they have their own perceptions of the marketplace and their own review of the conduct of the defendants, which is helpful as evidence.

But if the direct – if *Hanover Shoe* is repealed, none of that is going to happen and you're going to find that direct cases will not play a major role in enforcement.

Let's face it, direct cases do have a track record of being successful. They do have a track record of being a good method of private enforcement. They've been tried. They've been won. Damages have been proved. Indirect purchasers – and I'm not knocking indirect purchasers because the state attorney generals have done a wonderful job under their state laws and I believe they should remain but they have not had the track record of success of private enforcement that direct purchasers have.

COMMISSIONER SHENEFIELD: Mr. Tulchin, you had something you wanted to add?

MR. TULCHIN: Yes. Just one point if I may. I do agree, Commissioner, that if *Illinois Brick* and *Hanover Shoe*

were reversed there would be cases that wind up in federal court for pretrial purposes but, of course, under *Lexecon* – unless *Lexecon* were reversed – those cases would all have to be remanded to the courts from which they came for separate –

COMMISSIONER SHENEFIELD: Do you think – if that happens, do you think it should be reversed? *Lexecon*?

MR. TULCHIN: Yes, I certainly do.

COMMISSIONER SHENEFIELD: Is there any disagreement here that if *Illinois Brick* is reversed and *Hanover Shoe* is reversed, *Lexecon* should also be reversed? Anybody disagree with that?

[No response.]

COMMISSIONER SHENEFIELD: Okay. Go ahead. Sorry, Mr. Tulchin.

MR. TULCHIN: That was the only point that we'd wind up with perhaps dozens of separate trials and the same – at least what I consider – defect with the collateral estoppel risk.

COMMISSIONER SHENEFIELD: Let me switch topics just briefly. Are there known to any of you notable cases where – I'll put it this way – an unfair multiple recovery has taken place or unduly duplicative? I know to some

extent it depends on how you define the terms, and I'm taking out of the equation entirely – because I don't think it should be there – criminal fines, even though the sentence may be based in some sense on the business done. But setting that aside, do any of you know of such – any such cases and is there a way to find out how – whether any such cases exist? Is that a piece of empirical research that would be helpful?

MR. TULCHIN: I think it would be very helpful and I think it would be very difficult to do because the judgment that would be required to be made about what a fair recovery is in a given situation is very, very complicated. One has to know what actual damages are and that in itself is extremely difficult to calculate without making lots of assumptions.

We had, for example, in some of the state court litigation against Microsoft, the plaintiff submitted an expert report that was 200 pages single spaced from an economist with very, very dense analysis and, if I remember, more than 1,000 footnotes appended and obviously making a judgment about what damages really are is quite difficult.

COMMISSIONER SHENEFIELD: Who was the economist?

MR. TULCHIN: Professor MacKie-Mason from the

University of Michigan.

COMMISSIONER SHENEFIELD: Would any of you object to having indirect purchaser cases remitted to the sole responsibility of state attorneys general?

[Laughter.]

MR. BENNETT: I would say that state attorneys general simply do not have the nationwide resources to handle all indirect purchaser cases. I think that the states have different views on litigating indirect purchaser cases and you wouldn't expect that 51 attorneys general would approach them in the same way and I think that a plaintiff's bar provides vigorous enforcement in addition to the state attorneys general. I am quite certain that my colleagues would be unanimous in not wishing to have the nationwide exclusive right to bring indirect purchaser cases be given to the attorneys general.

COMMISSIONER SHENEFIELD: You don't disagree with that, do you, Mr. Cuneo?

MR. CUNEO: Mr. Shenefield, I —

COMMISSIONER SHENEFIELD: Respectfully.

MR. CUNEO: My objection to that is so profound that I would even quibble with the word “remit” as if they originated there anyway. They, of course, originated in the

state legislatures, which in most cases, but not all, have afforded a private right of action in their wisdom to do so.

COMMISSIONER SHENEFIELD: Ms. Zwisler, you mentioned that there has been a 340 percent increase, I think, in class actions in some number of years recently. I wasn't sure whether you were citing that as a bad fact or a good fact or a neutral fact?

MS. ZWISLER: From a personal standpoint or professional and policy standpoint there may be different answers to that but I do think that it is helpful to look at class action litigation over the course of the last 25 years. It has only been in about the last ten years, I think, that we see these clusters of cases filed in the non-criminal price-fixing cases.

Initially, we saw class actions following guilty pleas. Then we saw them after the indictment. Then we started seeing them in civil cases and now we see them at the whisper of an investigation, both indirect and direct class actions. So I think the increase in class actions generally is congruent with the increase in antitrust class actions and those class actions place tremendous burden on the system.

But I would say in response to one of your earlier

questions, Mr. Shenefield, that the fact that we can't identify duplicative recoveries very easily, even if you do an empirical study, that's related, I think, to the fact that we don't adjudicate these cases to the end because the defendant's risk analysis precludes litigation on the merits in almost all circumstances.

So what happens is when the defendants are confronted with these multiple layers of cases is you get the best deal you can, frankly, from whichever plaintiff's group is going at you and you try to arrange the various settlements so that the total amount is something that the company can live with. But I don't think those settlements tell you much about whether — if there were a real case — there is duplicative liability and that kind of is the — that is the problem, I think, with the multiple layers of class actions that we see today.

COMMISSIONER SHENEFIELD: Madame Chairman, this is my last set of questions just so others are getting ready.

I'll start off with Mr. Cuneo but I'd ask anybody who has a thought on it to respond.

One of the arguments for retaining the status quo is — and Mr. Cuneo made it quite eloquently — we're sort of in a great laboratory experiment and lots of things

creatively are happening out there and who knows what we might learn soon and what sorts of things might be developed that we're not aware of and, therefore, let's not actually do anything. Let's just sort of watch this experiment unfold.

What is it that we would learn? When would we learn it and through what means would we learn it? Or to put it the other way, why shouldn't Congress act now after 28 years?

MR. CUNEO: Well, in essence, what — as you well know, having testified about this, Congress was unable to act 28 years ago and, as sometimes happens in the federal system, the states — according to whether they wanted to or not — rose to the occasion. Now all of a sudden in the last ten years this area of litigation has come alive. People, individuals are starting to achieve real recoveries, get checks, get things of value. Third party payers have received millions of dollars.

COMMISSIONER SHENEFIELD: Why is that an argument against not reversing *Illinois Brick*?

MR. CUNEO: Because there are outstanding — really outstanding questions that have yet to be resolved.

COMMISSIONER SHENEFIELD: Such as?

MR. CUNEO: As when these cases go into federal court what will be the standards for class certification? And basically there are a number of views of that in the supreme courts of the various states and no one knows how the federal courts will react but that is something, Mr. Shenefield, that ultimately when we get a little bit more experience, if we want to go in the direction you want to go to, that might be a very useful provision.

COMMISSIONER SHENEFIELD: But what might we learn about that subject say in the next five years that would change the debate one way or the other?

MR. CUNEO: Well, whether — to what extent, for example, do you have to show impact on every consumer, ultimate consumer in order to have a class certified? Another area — and if, for example, you cannot get a class certified in federal court then Congress will have acted and the remedy will be meaningless. Of course, you most of all don't want that. So that is something that's very significant.

Another area, just so you know this, in the area of remedies some states, for example, California, in their class action jurisprudence have a very well developed *cy pres* doctrine. I don't know whether that — maybe members of

the panel have a difference of opinion on whether that's a good thing or a bad thing but the fact of the matter is that after a few years the federal courts will develop a more advanced position on that issue.

So those are two areas. This is something in which there has now been a sea change. My own personal view is that it is unlikely that if Congress were to act it would act twice and so right now if it were to act it would have to act in an anticipatory manner and so my thought — although my sympathies of course are the same as yours — I think that there's a danger of moving prematurely.

COMMISSIONER SHENEFIELD: What do you mean your sympathies are the same as mine?

MR. CUNEO: Well, I —

COMMISSIONER SHENEFIELD: Are you for reversing *Illinois Brick*?

MR. CUNEO: I mean, in concept I applaud the states that have overruled or have acted to provide an indirect purchaser remedy. I think it's very important and, in fact, I'm going to try to submit a list of examples of situations just for your benefit in which the state indirect purchaser or direct purchasers have been reluctant to be plaintiffs but at the same time there are complicated

procedural questions. You can't just declare that there is a new remedy without taking into account who will get the money, whether that remedy will be useful, who can really prosecute these cases.

COMMISSIONER SHENEFIELD: So you are sympathetic to indirect purchasers. You just don't want to reverse *Illinois Brick*. Is that fair?

MR. CUNEO: Well, I think that at this time it is —

COMMISSIONER SHENEFIELD: Strom Thurmond used to say, that's a question that can be answered yes or no.

MR. CUNEO: Right. Well, I certainly couldn't improve on what —

COMMISSIONER SHENEFIELD: So which is it?

MR. CUNEO: — he would say. I would say at this time I do not favor Congress intervening.

COMMISSIONER SHENEFIELD: Thank you.

Madame Chairman, let me yield to the others. There will be lots of other questions.

CHAIRPERSON GARZA: Commissioner Burchfield, do you have any questions?

COMMISSIONER BURCHFIELD: I do. I want to focus my questions to begin with, and if I have time I may ask

others, on the supposition that is being made that the Class Action Fairness Act either coupled with a repeal of *Illinois Brick* or not but assuming that there is no federal preemption of the state indirect purchaser claims, I want to focus on the supposition that this will lead to a migration of these cases into federal court and ultimately more administratively efficient administration of these claims.

I'd like your comment on this question: Obviously under the Class Action Fairness Act there are outs that mandate a federal court in certain circumstances to remand cases to state court if more than two-thirds of the class action plaintiffs in that state-filed case are residents of that state. And that's a body count which has, as I understand it, nothing to do with the dollar value of the claims and if one of the defendants or a significant relief is sought from one or more defendants who are residents of that state.

My observation and experience has been that in various other types of cases plaintiffs have shown a preference for state court even when the federal court option is available to them and even, frankly, when the defendants are trying to get them into federal court. Maybe especially when defendants are trying to get them into

federal court. Lawsuits are brought under the state blue sky laws rather than the Federal Securities Act. Even when diversity exists in connection with product liability cases you can see explosions of tort actions brought in state court. Witness the breast implant litigation.

How strong do you think the presumption is that the Class Action Fairness Act is going to bring these cases into federal court whether or not *Illinois Brick* is reversed so as long as there's a state — my question is so long as there is a state cause of action available, don't you think it's likely we're going to have multi-track litigation in this area?

General Bennett, do you want to take a first crack at that?

MR. BENNETT: Sure. Well, I would first state that if one presumes that there is an *Illinois Brick* overrule then Section 4(c) of the Clayton Act would come back into play, I presume, giving attorneys general *parens patriae* authority and I think that most of my colleagues, if they were going to be filing a *parens patriae* suit with the provisions of Section 4(c) applicable would choose a federal court venue. I certainly couldn't speak for all of them but I know that given the provisions of Section 4(c) I would.

Now I can't pretend to be — I don't know that anybody at this point can pretend to be an expert in what the impact of the Class Action Fairness Act is going to be but it certainly would appear at first reading that people are going to be involuntarily or voluntarily pulled by this into federal court and it just would seem like there are going to be very few cases that are going to be able to stay in state court and if *Lexecon* were overruled they are all going to be tried by the same judge. I mean, it's predictive so, I guess, to some extent it has got to be speculation but it would just seem to me that it's going to be the outlier that's going to remain in state court.

COMMISSIONER BURCHFIELD: Mr. Montague?

MR. MONTAGUE: Yes. There's a — I call it a new phenomenon. I don't know whether that's the correct word but there's a new procedure that seems to be going on in federal court with indirect purchasers and that is, as you all know, even under *Illinois Brick* the indirect purchasers have a right to sue for injunctive relief in federal court. And that is now being used as a hook for ancillary jurisdiction to bring damage claims under state law. That's exactly what has happened in the *Canadian Car* litigation and there are cases pending both in state court and in federal

court.

If you read the latest opinions by Judge Hornby you'll see that he has taken full control of all of the state court – the indirect claims and is basically – I don't know whether he has done it in direct communications but through his opinions he certainly indicated to the state judges that they should lay off. So that's another method that is being used today and the *Canadian Car* case is not the first case in which this happened where indirect purchaser cases have been brought into federal court.

I guess what's going to happen is we're going to find the same situation and dynamics that occurred before *Illinois Brick* and that is that these cases will be, if they are to be settled, will be settled and there will be an allocation of the settlement but there will be one major settlement and then it will be allocated amongst the various levels.

COMMISSIONER BURCHFIELD: That suggests to me that if the plaintiffs want to be in federal court they can find a way to be there and my question is somewhat coming from the other direction which is if the plaintiff's counsel wants to be in state court even with an *Illinois Brick*-repealer and even with the Class Action Fairness Act, isn't the

plaintiff's lawyer going to find a way to stay there?

MR. MONTAGUE: Well, the answer is that a plaintiff's lawyer may find a way to stay there but another plaintiff's lawyer will find a way to bring it into federal court.

COMMISSIONER BURCHFIELD: I take your point.

MS. ZWISLER: I would answer the question of whether these cases are likely to stay in state court by asking what is the defendant's analysis of this issue and what are the possible reasons that a defendant would not want to remove if that defendant has the right under the Class Action Fairness Act.

I, frankly, can't identify any of the considerations for you that would suggest that the case would stay in state court and that is not to impugn the capability of the state judges that we appear before all the time. But they — I have cases — these indirect purchaser cases in jurisdictions where the judge does not have a law clerk at all, where he doesn't or she doesn't wear a robe, where they don't have access to electronic research capability. They don't have Lexis. They don't — some of the funding in these states is different so while they're capable they're not sometimes equipped to deal with the

tangled legal issues that we have.

But the real and more substantive question is why would a defendant leave it in state court if there were multiple other cases already filed? Given the opportunity to make one problem out of 80, which is what happened in the *Canadian Car* case, we would move — most defendants, in my experience in those that certainly work with me, would be taking those cases out of state court and trying to resolve the problem in one place and that's the benefit of the Class Action Fairness Act.

So the plaintiffs may try strategies to stay in the state court but I don't think they're going to have much success given the nature of these national problems and the benefits that that Class Action Fairness bill provides to us.

COMMISSIONER BURCHFIELD: So you think despite the plaintiff's counsel's best efforts that these cases are going to converge in federal court?

MS. ZWISLER: Yes, I do. Whether it is under the — whether — if the *Illinois Brick* is repealed then plaintiffs will have a cause of action under Section 4 of the Clayton Act. They may still choose to bring ancillary state claims. We have seen this frequently where you'll

have an alternate state claim because the remedies may be better or different in the plaintiff's point of view but those cases — the cases are going to be in state court — in federal court, I think.

COMMISSIONER BURCHFIELD: How do you respond to Mr. Tulchin's point that by having a multiplicity of litigation it gives the plaintiff's counsel negotiating leverage?

MS. ZWISLER: Well, I don't think of it in terms of the individual plaintiff's counsel in the first instance. I think of it in terms of the judge and whether we can get one judge to pay attention to this problem, as Judge Hornby is in our *Canadian Car* case, and try to resolve the conflicting claims sometimes among the various sets of plaintiffs and sets of plaintiffs' counsel, frankly, and require coordination. Because the biggest challenge of this type of litigation is the complexity of the coordination to bring it to any kind of result at all. That's the biggest challenge.

If you don't have a guilty plea defendant who is only litigating the amount of money that ultimately would be paid to someone at some point, if you've got a more complex problem, as we've been talking about, then making that one

decision maker — having one decision maker in a federal court is almost the driver of the strategy for the first phase of the litigation in any event.

COMMISSIONER BURCHFIELD: My time is up and, Mr. Tulchin, I know you had a comment. Perhaps the chair will allow you to make it.

CHAIRPERSON GARZA: Mr. Jacobson, we want to hear Mr. Tulchin's — can you do a 30-second response?

MR. TULCHIN: Yes, very quickly. I think Commissioner Burchfield's point is a good one. Private plaintiffs' lawyers do have good reasons in their own interest to keep cases in state court and I know they'll be inventive in trying to do that. I think some of that will continue to occur unless there is preemption.

CHAIRPERSON GARZA: Thank you.

Commissioner Jacobson?

COMMISSIONER JACOBSON: Thank you. I want to thank again all the panelists for their very helpful and informative views. Particularly for me, I will tell you, I came into this with some views that have been challenged by various presentations and I appreciate that.

I do want to make one comment. I think General Bennett indicated that the Commission had decided it would

conduct no empirical studies. That is not correct. One empirical study that was particularly ambitious was presented to us, and we decided not to undertake that study. It is emphatically not true that we have declined to undertake others and I think this is, indeed, one area where we may.

Actually to start that process my question is a toss up for the panelists. Is there a case or are there cases that have been litigated by indirect purchasers to final judgment? We heard about *Master Key* and the infant formula cases that were litigated but not to final judgment. I don't know of any and I would like to hear.

Mr. Montague?

MR. MONTAGUE: I'd have to check this but a possibility is pre-*Illinois Brick* the *In Re Plywood* antitrust litigation in Louisiana. It was tried. There were individual verdicts and judgments made rather than — they were test cases but I just don't recall whether they were direct dealers or whether they were indirect purchasers but that's something — that's one to look at.

COMMISSIONER JACOBSON: Ms. Zwisler?

MS. ZWISLER: I believe there was an infant formula indirect purchaser case in Kansas that went to

verdict and the verdict was for the defense. I believe the trial lawyer was Gordon Ball of Tennessee and I can check on that and provide you with the information after this hearing if you'd be interested in it.

COMMISSIONER JACOBSON: I would appreciate that.

Can anyone think of a case that resulted in a plaintiff's verdict where the apportionment issues had to be faced? I gather from the difficulty in identifying one case that was a defense verdict the answer is no.

Let me move on to a different subject which will be my last for this session.

That's based on the ten presentations that we have received and one of the questions that we had posed for comment was what are the cases in which significant indirect purchaser recoveries have been obtained.

It appears that the ones that have been identified are the various drug cases, the vitamins case certainly, and some of the infant formula litigation. All of those appear to be cases where indirect purchasers were represented at least in part by state attorneys general and my question is: Is that a coincidence? And, if so, why? And, if not, why not?

General Bennett, do you want to start with that?

MR. BENNETT: Well, I don't think that it's a coincidence but I think that in almost all of those cases there were indirect purchasers like third-party payers who had independent counsel but I think that traditionally attorneys general seek restitution, as I said, on behalf of their citizens and I think that attorneys general saw these cases as opportunities to do that. But in virtually all of them — and perhaps Ms. Cooper in the next panel might be able to give you more detail since she has certainly been involved in them — there were plaintiffs' counsel representing indirect purchasers as well.

COMMISSIONER JACOBSON: Do we know of any cases involving significant indirect recoveries where the states were not involved playing a major role? I didn't see any mention in the papers.

MS. ZWISLER: Well, in the smokeless tobacco litigation that Mr. Cuneo referred to, he was counsel for the indirect class in 18 states and I represented United States Tobacco — United States Smokeless Tobacco Company. That case — those cases are the class actions that followed U.S. Smokeless's loss of a billion dollars to a competitor in the monopoly case. I hasten to say for the record that I did not try the monopoly case. I inherited the class

actions.

There is no attorney general involvement in those cases and we resolved them in light of some of the collateral estoppel issues that Mr. Tulchin alluded to in the *Microsoft* litigation. The *United States Tobacco* case has got a similar issue, of course, and we resolved the case without any involvement with the attorneys general.

For what I consider to be value to the class, as evidenced by a statistic, in terms of participation, in that case over 150,000 consumers signed up for our coupon benefit package. Now the coupons, as I said in my paper, were only a $1 can. This product is Skoal and Copenhagen, which is — it's called "dip" actually. Moist smokeless tobacco and so it's a commodity type product.

But when we negotiated the settlement to address concerns about the advisability of approval in the coupon situation we committed — we, the defendant, committed to distribute 40 percent of the face value of the settlement to members of the class. And that resulted in us promoting the product to our consumers and getting this tremendous sign up, and that is 26 percent of the consumers that we estimate to be consumers of the product in the 18 states in which we settled the case.

COMMISSIONER JACOBSON: It was basically a coupon settlement?

MS. ZWISLER: It was a coupon settlement but in terms of the metric that I used to argue to the panel here that indirect purchaser cases have little value it is because generally you see sign ups for coupons in the single digits and here we had something quite remarkable in that regard. I think it is because of the peculiarities of that case but I would say that while the individual amounts may not be material in your estimation, the fact that the consumer said otherwise may suggest more value than you might attach to a coupon settlement in the normal course.

CHAIRPERSON GARZA: Thank you.

Commissioner Litvack?

COMMISSIONER LITVACK: Thank you. I won't reiterate the thanks that all of us have expressed to you. It really has been very illuminating.

Ms. Zwisler has said — and I just want to make sure that no one has any different facts or point of view. I think you've said that one of the issues that strikes you is the fact that — I'm overstating a little bit — very few people ever come forward in these indirect purchaser actions. I guess I address my question to Mr. Montague, Mr.

Cuneo and Attorney General Bennett. Is that your experience? Do you accept that as a premise?

MR. MONTAGUE: What, that very few indirect —

COMMISSIONER LITVACK: Indirect purchasers really come forward to participate in or take advantage of settlements that may have been agreed upon in these cases.

MR. MONTAGUE: I'm not sure I — this is — you added something about settlements that wasn't —

COMMISSIONER LITVACK: Okay. Let me try it one more time.

MR. MONTAGUE: Okay.

COMMISSIONER LITVACK: I thought Ms. Zwisler said — since we're talking in indirect purchaser cases about settlements because that's really what has transpired — that very few alleged victims come forward to participate in the settlement, which she says suggests that there really is no hew and cry or need for the indirect purchasers. So my question to you is do you agree with that?

Attorney General Bennett?

MR. BENNETT: Well, I think that it's just — if that is what she said then I think that that's just clearly wrong.

In the *Mylan* case involving lorezepam and

clorazapate, for example, which attorneys general, private counsel and the FTC did together, for consumers there was, for example, $42.9 million distributed to 203,000 people. In addition to another $28 million in *cy pres*, $28 million to government indirect purchasers, $25 million to indirect third-party payers and $36 million to opt outs.

In *BuSpar* there was $30 million to consumers with an average consumer check of about $700 and they got back 100 percent of their purchases with another $65 million to government purchasers.

In the *Taxol* case there were more than 13,000 checks sent out to consumers averaging about $600 each in addition to a significant amount of free product for indigent consumers and another $37 million for government indirect purchasers.

So I think that, at least from the perspective of the cases that the attorneys general have participated in, there has been a great many people at a consumer level and at a government indirect purchaser level who have significantly benefited and those are just three examples.

COMMISSIONER LITVACK: Ms. Zwisler, did I either misquote you or he just demolished the point?

MS. ZWISLER: Well, those are just three of the

hundreds and hundreds and hundreds of settlements that have been involved and to me I would pause here and say free product and *cy pres* distribution are not the same thing as providing benefit to alleged victims of antitrust wrongdoing. That is money that the defendants pay out. That's true. And one of the reasons that we do those pieces of a settlement is because consumers can't often prove that they actually purchased the product and so the price of settlement is to get a number that's high enough, frankly, to get counsel fees for some firms. And so the way we do it — because you can't just give money away to consumers because of the potential for fraud — is you do a *cy pres* distribution or a free product distribution. I don't think those demonstrate anything at all about the value of indirect purchaser settlements.

In addition to the fact that, as I said, there's hundreds of these and the fact that in three cases in which the government already had a verdict basically that the defendants chose to settle like this doesn't tell you much about the practice today, which I'm engaged in, which there isn't a previous government lawsuit that underlies the class actions.

COMMISSIONER LITVACK: Mr. Tulchin?

MR. TULCHIN: Yes. I agree with everything that Ms. Zwisler just said. And just to offer you my experience here, in 15 settlements that we've had over the last several years claims rates among the class members have been typically below five percent, very often at one to two percent of the members of the class.

COMMISSIONER LITVACK: I would just like to throw this open for one second, which is taking that as a fact, just accepting for a moment what has just been said by Ms. Zwisler and Mr. Tulchin; if, in fact, it is true and indisputable, I think, that coordination of these kinds of cases, indirect and direct, is a challenge. I'm not saying they can't be done but it's a challenge. If it is a fact, and I think it's indisputable, that apportionment of damages is a challenge — I'm not saying it can't be done, it's a challenge — and if, in fact, there is the potential for coercive settlements because of the multiplicity, and if, in fact, they are right that very few people come forward relatively speaking and Mr. Montague is right that virtually every case involves the direct purchaser anyway, why would we have to continue with the indirect purchaser since it would seem that the benefit is minimal and the challenges are great?

MR. BENNETT: Well, I would say that if I were opposing counsel and that question were asked I would object on the grounds that it assumed facts not in evidence.

[Laughter.]

COMMISSIONER LITVACK: It's all subject to connection.

MR. BENNETT: I just simply don't think it's true and I was giving three examples but if you go, for example, to the ABA web site on the antitrust section and state settlements there are more than 111 settlement agreements involving state action on the ABA web site. Admittedly some of them involve mergers but many of them involve purchasers.

In the *Augmentin* case $62 million went to direct purchasers and $29 to indirect. In *Paxil* $150 million to direct and $65 million to indirect. In *Relafen* $175 million to direct, $75 to indirect. In *Cardezam* where, I think now that the Supreme Court has denied *cert.*, the settlement is going to go forward, consumers are going to get $25 million.

So I just can't accept the premise that consumers don't benefit but there is no question that if the Commission goes toward overruling *Hanover Shoe* in some way the method of doing that – the devil is clearly going to be in the details – that clearly is a difficult question but I

just don't think there are facts to demonstrate that consumers don't benefit from indirect purchaser litigation.

And to the extent that there is a claim that the only ones who benefit are plaintiffs' counsel, which I think is not true, and to the extent that that depends on coupon litigation or coupon settlements, the Class Action Fairness Act is going to take care of that.

COMMISSIONER LITVACK: Thank you. Thank you.

CHAIRPERSON GARZA: Commissioner Warden?

COMMISSIONER WARDEN: General Bennett, you agree, I take it from your opening statement, that there is no constitutional barrier to preemption in terms of federalism here.

MR. BENNETT: Well, I haven't really significantly considered that but I would imagine that Congress' power under the Commerce Clause would probably give it the right to preempt the field but I certainly wouldn't want that to be taken as the viewpoint of my colleagues since I haven't discussed that with them.

COMMISSIONER WARDEN: Well, if medical marijuana can be preempted, I would think this could. As to a legislative judgment about preemption, what experimentation is going on in the laboratory of federalism besides the

permitting of indirect purchaser actions?

MR. BENNETT: Well, I think that the states that have adopted indirect purchaser statutes have adopted widely varying types of statutes. Some allow single damages. Some allow treble damages. Some only allow attorneys general to sue. Some have developed it through the common law rather than legislatively. And we can furnish the Commission a paper outlining the summary of the indirect statutes in the 30 or so states that allow that kind of action but I think that the states take a different view as to whether indirect purchaser suits should be allowed.

And if *Illinois Brick* is overruled I simply think that the damage to federalism from preempting those types of lawsuits is simply too great, especially given the fact that I think it's indisputable that the vast majority of the cases are going to migrate to federal court anyway, that they are going to be able to be managed.

But there is a real loss in our federalism system for the federal government to simply say we're going to stop the experimentation and we're going to take away from you, the states, the right to legislate in this, especially given that the states were the first to legislate in the area of statutes trying to protect competition.

COMMISSIONER WARDEN: Well, one might suggest the states as the inheritors of the police power in 1789 were about the first to legislate on every subject but let's leave that aside.

Every example you gave me, I believe, with experimentation had to do with the means of adopting — the means of defining the contours of indirect purchaser actions. Are there other relevant experiments going on in the laboratory of federalism about private damage actions under the antitrust laws?

MR. BENNETT: Well, I think, respectfully, I would refer that to question to Ms. Cooper. She may have more information but I think that the laws of the 51 jurisdictions are different. Some states have no antitrust laws at all and I think that this is an area in which the states should have the right to develop their own policies.

And while it may be inconvenient to have the laws of different sovereigns in many areas in terms of issues of consistency, preempting state action carries with it a great cost in terms of our system, in our federalism system. And I think to just simply say, well, what have the states been doing isn't a good enough reason to do away with it.

COMMISSIONER WARDEN: Well, is the case against

preemption here, assuming that federal law were modified to permit indirect purchaser actions, is the case against preemption here weaker than it was with ERISA?

MR. BENNETT: I don't think I'm really qualified to answer that question.

COMMISSIONER WARDEN: You are aware of the total preemption of state law by ERISA?

MR. BENNETT: Almost total.

COMMISSIONER WARDEN: Okay. Is it more important to federalism to keep state antitrust law alive even if the particular topic we're talking about, indirect purchaser actions, is provided by federal law than it was to keep 51 different rules of fiduciary behavior alive?

MR. BENNETT: I really don't know how I would answer that question in terms of a comparative sense. All I can say is that I think that allowing the states to legislate on areas and law affecting competition is important and that each of my colleagues agrees with that.

COMMISSIONER WARDEN: Mr. Cuneo, I heard you talk about dynamic developments in litigation in your opening remarks, I believe. I'm not sure exactly what the relevance of that was to the topic that we were considering. You want to keep state indirect purchaser actions but preclude

federal indirect purchaser actions as I understand you; is that correct?

MR. CUNEO: No, that isn't exactly correct. What I was suggesting right now – and this circles back to a question you asked General Bennett – is when I said there was a dynamic, what I meant is that – a number of things.

First, states are breaking out with indirect purchaser interpretations and statutes all the time. For example, the Arizona Supreme Court recognized one last year.

Second, there are differences in state antitrust laws from the federal antitrust laws that could make a difference. For example, the Cartwright Act in California. Some of California's other remedies – the Cartwright Act in California, which has, as I understand it, no monopolization provision but it does have an interpretation that goes in some respects beyond the Sherman Act. There are California Supreme Court opinions that say that.

The last time I checked, which is a long time ago, Connecticut had an explicit provision on exclusive territories. So the state laws do have nuanced differences and the states are coming up with a variety of different ways of addressing the *Illinois Brick* problem and it seems to make – to me that that is a dynamic situation and it may

make sense for the federal legislature to see which approach works best before it makes one national.

COMMISSIONER WARDEN: Well, the territorial exclusivity point doesn't even have anything to do with the subject we're discussing today, does it?

MR. CUNEO: Well, it has a difference in underlying antitrust law. Yes, I do — and I think the same thing is true with the remedies that are available in California, which some defendants considered to be more powerful than in other parts of the country.

CHAIRPERSON GARZA: Can I cut it off here just so we can give every Commissioner an opportunity to ask questions?

COMMISSIONER WARDEN: Yes.

CHAIRPERSON GARZA: Great.

Commissioner Yarowsky?

VICE CHAIR YAROWSKY: Yes. You know, it's very hard for all of us to resist fighting the last war but I think we're kind of in an interesting stage right now where we're talking about the last war but there's kind of new developments. We've all become pseudo-historians on testimony and that's fine. We're doing the best we can trying to interpret this line of cases.

From my standpoint, having been familiar a little bit with making the antitrust laws in the statutory sense, working with that, looking at *Hanover Shoe*, *Illinois Brick*, that was a new war. That wasn't an old war. That was a new war. In some ways one might even call that kind of an activist moment in time. It was kind of a rule of convenience, a very important one, very important. It was observed empirically and kind of elevated to a rule of law but there was no textual — and I tend to agree with you, General — there was really no textual support. There have been recent statutory enactments — plenty of chance to debate that but the court had the right to do what it did.

I think — again this is just my interpretation, I think by *ARC America* there was some real recalibration going on about that and they stepped aside from that activist moment. Then they relinquished it but now we're dealing with all of that. It's complicated.

I also agree because I'm kind of at the end of this study group panel that I think both Mr. Tulchin and you, Ms. Zwisler, made great points about the settlement dynamic. It's very hard to quantify that in coercive settlements. It's kind of a psychology surrounding litigation but it's real. Okay.

I also believe that Mr. Montague and others on the panel talked about sometimes direct purchasers don't choose to sue for other reasons. They are not just mythical speculative reasons. I mean they make a business determination not to sue because they have a continuing relationship perhaps, but it's rational. No different than, I think, the dynamic, you rightly point out, that happens a lot.

Well, if we all wait for empirical studies, and I do think we should try to do what we can empirically, will they be factored in? Will a 95 percent confidence level be reached in the null hypothesis that you cannot say that direct purchasers eschew filing suits because of business reasons? I don't know if we'll get to that point.

But I think we are at a new place now and that's what I'm most interested in. I think the Class Action Fairness Act was an interesting act. It took seven-and-a-half years, which might tell you how long it will take to do something with *Illinois Brick* or repeal the state laws. I think Bobby helped try to probe a bit, will most of these cases go up, will that have an administrative case, I think it will as well but there are some flaws in that act. Just in my view I don't think it affects our subject today. I

mean look at the choice of law, look at — I hope you're right, General, about the prior amendment and the legislative colloquy on the floor but remember that amendment was defeated so we have to see what happens.

But here is kind of where I'm coming from — kind of a subset of where Mr. Shenefield came from — Commissioner Shenefield. Someone invoked earlier about be careful before you do anything, at least do no harm unless you know what you're doing.

Here are kind of my set of two or three questions to probe that a bit: Does anyone on this panel with all the divergent views that we've heard think that Congress or this Commission or anybody, court, should take major steps at this historical moment without seeing how the Class Action Fairness Act impacts on the situation in some reasonable way?

Second — well, do you want to answer that now or do you want to hear the —

MR. TULCHIN: I'm happy to wait.

VICE CHAIR YAROWSKY: Okay. Second, does anyone on this panel think that — I think Commissioner Warden was probing this about the constitutional aspect of federalism — that from a policy standpoint, does anyone believe that the

states or the state AGs or citizens in the state should have absolutely no role in terms of the indirect purchaser area?

And does anyone believe that judges are going to be incapable with this Class Action Act of crafting the necessary procedures to deal with these tricky issues of allocation, of peripheral damages, *et cetera*?

If not, should we do anything in these areas?

MR. TULCHIN: I don't know if I'm going to answer all your questions satisfactorily but I'd like to at least try this one.

I do think Congress should do something now despite the Class Action Fairness Act. At least as I think about it, unless you're motivated by enhancing legal fees for the bar, the idea that indirect purchaser cases should be governed by 52 different sets of rules and 52 different sets of procedures – and that would be the case despite the Class Action Fairness Act. Lawsuits will be brought under the laws of many, many different states. They may get removed. They may get consolidated but eventually they are going back and they will be tried separately under each of those different sets of rules. For me at least it makes no sense when you have the same defendant or defendants and the same exact conduct and the gravamen of every complaint is

antitrust misconduct — I think that should all be governed by one set of rules and one set of procedures in one court.

CHAIRPERSON GARZA: We have a little bit of time before we move on. Was there anyone else on the panel that wanted to give a short response?

MR. MONTAGUE: If I may. I take the opposite position. Not surprisingly. I think we should wait. I think that the Fairness Act is a very new step forward. It is going to give the federal judges an opportunity to deal with this issue now like they did 20-30 years ago and I definitely believe from my experience that the federal judges are capable of dealing with these issues. They have in the past. Don't shortchange or undercut our judges today. They are very, very capable of managing these complex cases.

MR. BENNETT: I would just say briefly I think that *Illinois Brick* ought to be overruled but waiting and seeing is a close second to that.

And just in response to one of the most recent comments, in other areas relating to antitrust laws and areas relating to tort laws and areas relating to business conduct and unfair competition, businesses are subject to 51 different rules. And the fact that they may be in the

indirect purchaser area as well – it just doesn't seem to me to provide a reason for approving some sort of uniformity over letting the states pass their own laws in these areas and letting natural selection take its course, which will result in the migration of these cases to federal court.

CHAIRPERSON GARZA: Commissioner Cannon?

COMMISSIONER CANNON: Thanks.

General Bennett, welcome in particular although I must say that I was kind of hoping that – you said you agreed to come to Washington in June and you didn't suggest a field hearing in January.

MR. BENNETT: Well, there is a great deal of empirical research that does need to go on, on Maui.

COMMISSIONER CANNON: That was my thought. The pineapple really comes to mind as an important industry to think about – but anyway – but thank you for coming. We appreciate it.

Looking at the NAAG statement here, I guess it's not surprising that obviously it comes out where you have come out, certainly in preemption. And I think following up on what Commissioner Warden said, are there circumstances – is there a circumstance where we would ever see a position coming out of NAAG or out of any state attorney general

where preemption would be appropriate? I mean, I've not seen one in quite a few years and I'm just – I'm not trying to flippant. I'm just trying to see if there is a principle that you could state or articulate and say this is the circumstances in which it is appropriate for preemption to occur?

MR. BENNETT: No.

COMMISSIONER CANNON: Okay. Thank you. That's a Strom Thurmond answer. Thank you.

Ms. Zwisler, I had a question. Listening to your testimony, on the one hand I do hear you talk a lot about the fact that a lot of these cases are obviously settled pretty quickly because the specter of enormous liability is just too great when it comes into the settlement calculus, but on the other hand, I thought I just heard you talk about the question or the fact that settlements end up being coupon settlements, *et cetera*, that a certain amount of cash has to go in for counsel fees, *et cetera*, which to me is a little opposite. Either – you know, if these settlement possibilities or the liability possibilities are really gargantuan, it doesn't seem like it translates into actual settlements. Am I missing something there?

MS. ZWISLER: Well, it's a very complicated

dynamic but the answer is when you settle a case there are leverage points. I'm giving away some trade secrets here but the point is that you get into these litigations. If you've got a guilty plea defendant then you've got one set of leverage points and they're very short. So that kind of settlement, both for the fact that we've got a guilty plea defendant who is supposed to be making restitution, will call for one strategy in terms of achieving a settlement.

In other cases where we don't have a guilty plea defendant then there are leverage points in the case. There is the motion to dismiss where we run the argument that there is an intrastate limit on the state antitrust law. You might win that. If you win that then you're out of there.

Then you have the class certification. Okay. So you go through class certification and today, frankly, people — defendants are not terrorized by class certification because it happens a lot so maybe you win it and you get rid of some more cases.

Then you've got the merits based discovery.

So when you go through these cases you ultimately — the leverage shifts depending on what you win and what you don't and so you may get to a point where you are the

defendant. You may have had a class certified but you've got a really good argument on some legal issue or you defeat collateral estoppel. In *United States Tobacco*-type cases some states don't have privity so that you — they don't get collateral estoppel, so you've got the leverage on your side of the table and you work out a deal. It's just like any other settlement. It's not inconsistent to say that the *in terrorem* effect of the treble damage indirect purchase liability — purchaser liability ultimately requires a settlement but that those settlements can be achieved in a rational and reasonable way if you can pull the right levers in all of these courts depending on the judge and the issue.

So that's how that fits together.

What I actually say, though, is that the trial option for the defendant is limited, and I have tried a case against 32 state attorneys general and 10 plaintiffs class law firms, and the disposable contact lens case, and that was a very courageous thing for Johnson & Johnson to do, but those are very rare circumstances in which a corporation can say this means so much to me that I'm going to risk my problem on a jury, because that is a dynamic that is dangerous for all of us. But with that trebled damage liability in indirect purchaser cases, that threat or that

piece of leverage that you might actually try a case, pick a jury, test the facts here, that doesn't happen as frequently as it would in other cases.

COMMISSIONER CANNON: I guess in all the cases that you've been involved in, which I know are quite a few in a very long and distinguished career, did you try once or —

MS. ZWISLER: I've tried five antitrust cases.

COMMISSIONER CANNON: Five antitrust cases. Okay.

MS. ZWISLER: But only one so far —

COMMISSIONER CANNON: One indirect case.

MS. ZWISLER: — was a class action.

COMMISSIONER CANNON: I'm sorry.

MS. ZWISLER: Only one that's an indirect purchaser class action.

COMMISSIONER CANNON: Okay. Thank you.

Mr. Cuneo, one question for you, which is we talked a lot about the — oh, is my time up? Two seconds. Thanks.

We talked about —

CHAIRPERSON GARZA: That's the total of your question.

COMMISSIONER CANNON: Okay. John had — I'll talk

fast and five minutes is impossible. Commissioner Shenefield talked a lot about let's suppose that *Illinois Brick* will be repealed. By my count, and I could be wrong, probably the last tried and true and serious attempt at that where it really got some traction in Congress, I think that was in 1980 if I'm right about that.

And, of course, as you know, these get to a certain point where you think you're either going to do it or not and then you don't and it seems like it kind of drifts out of the pecking order in terms of things that may happen.

Especially given the Class Action Fairness Act, *et cetera*, when you see those as something that will spur the Congress to do this — you know, hopefully, this Commission's recommendations will do that and taken seriously.

What is it other than that that would lead you to think that, in fact, *Illinois Brick* and *Hanover Shoe* might be repealed?

MR. CUNEO: Well, Commissioner, I think you're right. I don't think that there has been any serious discussion even though there may have been an isolated bill introduced here and there since 1980 or 1981, something like that, and I really don't know what it would take to get

Congress interested. At that time, if you recall, elements of the business community were quite united in opposing the Antitrust Division in trying to achieve that. Maybe in light of the state actions the business community might view it differently and that kind of objection would not lie. Beyond that I haven't given much thought.

COMMISSIONER CANNON: I'm done. Thanks.

CHAIRPERSON GARZA: Commissioner Carlton?

COMMISSIONER CARLTON: Thank you.

Again I thank all the panelists. It's a hard topic as everyone realizes and your thoughts are helping us resolve what I think are difficult issues or at least see them more clearly. So following up on that I would like some help from the panelists on thinking through two or three short questions. I'm primarily going through in my questions of the panelists who are in favor of keeping the indirect purchase actions at the state level.

Just, so I understand, imagine the following experiment: Suppose there's a cartel and it's a cartel that sets the price of red bricks they use to make homes. As a result of the increase in the price of bricks, red bricks, builders choose to build homes with fewer red bricks and more white bricks. White bricks aren't part of the cartel

and are produced by independent firms but because of the increased demand for white bricks their price goes up.

As a consequence, therefore, of the cartel, the price of a home, which used to be $100,000, is now $150,000. I'm trying to figure out whether the panelists are saying that $50,000 would be the damage that an indirect purchaser would be entitled to? In particular, I want to direct this to Attorney General Bennett because you talked frequently about the role of the state attorneys general in sort of making sure consumers who are harmed get compensated. So I'm trying to figure out, is that what you would be proposing?

MR. BENNETT: Well —

COMMISSIONER CARLTON: Just keeping to the simple facts is what I'm looking for.

MR. BENNETT: — it sounds like one of the questions is should umbrella effect damages be recoverable. I mean if that's the question my answer to that in terms of perhaps Senator Thurmond's type of question is if it's as simple as the way you've described it then the answer would be yes. But in the real world, of course, calculating umbrella effect damages is never that simple.

COMMISSIONER CARLTON: So you would be in favor of

umbrella effect damages?

MR. BENNETT: Yes.

COMMISSIONER CARLTON: And the implication of that, for example, would be that if a consumer purchased a house with a lot of red bricks for $150 he would get the $50,000. If he purchased a house with one red brick he'd get the $50,000. And let's suppose there's some person who purchased with no red brick, would he also get $50,000 if he bought a house that was built solely out of white brick whose price rose as a result of the conspiracy?

MR. BENNETT: Well, it sounds like the — other than artistic issues, it sounds like in your hypothetical red brick and white brick are fungible and it would sound like that the vast market share is in red brick because if that weren't the case then your hypothetical wouldn't make sense.

So if you're hypothetical is something like 90 percent of the market is red brick, and I think you'd have to be near to that level for the — or somewhere near there, although I'm obviously not an economist, for the white brick manufacturers to take advantage of the umbrella effect, then yes. But if you're much lower than that it's just not going to have that simple effect and —

COMMISSIONER CARLTON: Okay. That's what —

MR. BENNETT: — in the real world those things aren't fungible.

COMMISSIONER CARLTON: Yes. My hypothetical had nothing to do with fungibility. It just had to do with the consequent effect of the cartel on ancillary prices and your answer was you would take those into account.

Let me ask a question about the laboratory experiment and I'm not quite sure I understand the states being a laboratory. I understand full well having 50 states doing 50 independent things trying to see which one works better, that sounds like a good idea.

What I don't understand is its applicability to the issue we're talking about here and the reason I don't understand the applicability is because what's going on in one state has a lot to do with what happens in settlements in other states precisely because of the concerns that Mr. Tulchin raised about collateral estoppel and the asymmetry between winning and losing.

For that reason it appears to me this is the antithesis of having 50 independent laboratories. It is instead an experiment in which if there is one state doing something it could affect settlements in all the other

states.

I'm just curious, Mr. Cuneo, if you could just say a word.

CHAIRPERSON GARZA: Finish up.

COMMISSIONER CARLTON: Okay.

MR. CUNEO: Well, I think that that consideration exists wherever you have various mechanisms that go state by state certainly in the products area or otherwise. And I think in that way I think what you're referring to is the — what a lawyer would call the offensive use of non-mutual collateral estoppel. Did I get that right? Is that what we're having now? Is that the ballpark?

[Laughter.]

COMMISSIONER CARLTON: I'll defer to you since I'm not a lawyer.

MR. CUNEO: I think that's what we're talking about. Of course, that is a phenomenon that exists in many, many areas but what we are talking about here is more — the issues that go into an *Illinois Brick* repeal as the business community properly played out 25 years ago are not simple. And it may be that one state comes up with — a better mouse trap is really what it comes down to. What you're essentially — the logical proposition that I think that

ultimately – would ultimately lead to repealing all state antitrust laws, which obviously would be a really, really, really significant huge step and in my view not a positive one.

CHAIRPERSON GARZA: Thank you. I hope that the panel will stay a little bit longer – just a little bit longer than 3:00 o'clock so we can get a few more questions in.

Commissioner Delrahim?

COMMISSIONER DELRAHIM: I have no questions, Madame Chair.

CHAIRPERSON GARZA: Okay. Commissioner Kempf?

COMMISSIONER KEMPF: I just want to express some concerns growing out of your written and oral submissions and some thoughts I've had in light of those and ask anyone who wants to comment but particularly Mr. Montague and Tulchin and Ms. Zwisler because you touched on these in particular.

When I hear questions about why people do or don't sue – the question was put, for example, to Microsoft. Why the OEMs didn't sue? And I'm saying, if I remember, one, they just didn't suffer any damages and didn't think they were harmed and they thought they were benefited. One of

the theories of the competitors of Microsoft who sued, it's my recall, that they were complaining that some of the stuff was actually given away to people. And I would be surprised if people who got stuff for free sued.

So — and then when I hear Mr. Montague say, well, you know, a lot of direct purchasers do sue. I say, well, yeah, if there are people who passed it on, it's found money. Why wouldn't you sue?

So I don't — I'm not sure I get much content out of whether people do or don't sue because I can see lots of reasons pro and con either way.

Then when I hear comments about apportioning stuff, I'm sort of saying, you know — I'm not sure what — how you'd apportion stuff other than the way I always think of it as — and this is where I'm driving is — I think of our system in general, apart from antitrust law but should perhaps include antitrust law, the people who really are injured, will they recover? And the people who really aren't injured, will they also recover? And the fact that people aren't injured will sue a lot if they can recover, I don't find it a compelling reason to enable them to sue.

I notice, for example, your footnote at the end. You say, well, if you're going to get rid of *Illinois Brick*

now you've got to get rid of *Hanover Shoe* as well and that has been touched on by some in both directions. Mr. Montague is exactly the opposite. And now coupled with your comment on the Class Action Fairness bill and yours that that would lead to gravitate to – why not repeal both and let people who are damaged recover if they want to sue and if they don't want to sue that's fine and vice versa? And say that, you know, if we had a class action bill maybe that will be a natural gravitation and if that causes problems of 50 jurisdictions over time we can address that in the future but maybe we ought to let – see how that goes if there's going to be a gravitation.

So my question just to sum it up is why not repeal both and see if the Class Action Fairness Bill leads to a gravitation to the federal courts to solve some of your problems in 52 jurisdictions?

MR. TULCHIN: Well, I might say if you repeal *Illinois Brick*, leaving aside *Hanover Shoe* for a minute, you are likely to get some cases brought by national plaintiffs' lawyers on behalf of a purported national class. If that class is certified then with the exception of those who choose to opt out, and they will be few and far between, you won't have all the duplicative class actions in various

state courts because residents in each particular state will be members of the national class.

COMMISSIONER KEMPF: But isn't that making my point that the gravitational thing will work?

MR. TULCHIN: If you hypothesize that *Illinois Brick* is repealed it will at least have addressed the complaint that I was making that I don't find it to be an efficient or rational system to have so many different state court actions pending at the same time. I agree with that. I like the *Illinois Brick* rule but I think we ought to have one uniform rule.

COMMISSIONER KEMPF: But in class action certification proceedings the defendants overwhelmingly oppose certification and that leads to the same result you're talking about. If certification is denied you get huge multiplicity of suits that don't materialize because usually the damages are too small but there's at least that potential.

MR. TULCHIN: Agreed.

MS. ZWISLER: I think that the problem with having one national class of indirect purchaser litigations can be related to my thought of limiting indirect purchaser cases to criminal price-fixing defendants and that's because the

colossal exposure of an indirect purchaser national class means that an antitrust defendant is not going to be able to litigate the case on the merits. So there's an argument that if there has been a previous adjudication on the merits in a guilty plea defendant context or a guilty verdict then that consideration doesn't obtain, so that if there is a guilty defendant and there is now an indirect purchaser class then there is an argument. I'm not saying I support it but that is an acceptable balance.

My concern about national indirect cases is related to what I've seen over the last ten years which are these cases that follow conduct problems and the defendant in many circumstances is not liable. It is an adjudicated thing. There is a merits based defense and having an indirect purchaser as these attenuated victims of what may or may not be an offense you'll never know whether there was a merits based violation because the defendants can't accept the risk of adjudication even to the summary judgment level because if you lose summary judgment then the leverage is way on the other side of the table.

So to me the deterrence – there's a legitimate distinction between criminal price-fixing *per se* offenses and all the other kinds of cases that we're seeing today

that can be made and that would make some rational sense under the hypothetical that you outline but I believe that the deterrence and compensation for victims that are actually injured by an antitrust violation is most appropriately — the balance is most appropriately struck for all other types of claims at a minimum at the direct purchaser level.

MR. MONTAGUE: What you suggest, I suggest will create a whole new level of litigation. You start with the direct purchasers having to determine what the overcharge is because everything stems from that. So where are you now — if you eliminate or reverse *Hanover Shoe* and you reverse *Illinois Brick* then you've got a whole set of litigation. And you can take the brick industry: you've got the brick dealer, you've got the general contractor, you've got the subcontractor, you've got the homeowner. That's going to be some piece of litigation apart and on top of finding out whether or not the defendant violated the antitrust laws and what the overcharge was to the direct purchaser.

I think it would be totally unworkable. I think that you would find that effective private enforcement of the antitrust laws would be diminished tremendously and I think I would ask that when you consider all of this that

you not – most of the talk here has been on *Illinois Brick* but I think an awful lot of your consideration should go to the effects of what would happen if *Hanover Shoe* is reversed and what would happen to the effect of private enforcement.

Thank you.

CHAIRPERSON GARZA: I'm going to try to be brief. Actually, Mr. Montague, your answer to Commissioner Kempf's question reminded me that I was a little bit confused about what your position was. Is it your position – because your written testimony was that direct purchasers do sue and I think you said that you agreed that they are in most cases the most efficient litigators because of the accessibility of proof and the incentives to recover the overcharge, *et cetera*.

But now then the way you see it then is that the direct purchasers should be able to recover the full amount trebled of the overcharge and then the indirect purchasers, the whole litany, the list that you just went through, the subcontractors, *et cetera*, they would come along and do what? They would take a piece of the tripled – the overcharge or would they come and recover on top of what was awarded to the direct purchaser?

MR. MONTAGUE: No. They are – that would be a

separate – a totally separate piece of litigation on its own merits and they would have to show that what was passed-on to them if they can show it is a recovery that they get from the defendants separate and apart from what the direct purchasers recover.

Now the point is that – and I think this question was asked earlier – that, in fact, there really haven't been what have been called duplicative recoveries. I don't believe there has been a treble damage verdict and judgment for a direct purchaser and then there has been a recovery by indirect purchasers.

I think the other thing that is important to realize is all of the cases that have been pointed out by General Bennett as being effective indirect purchaser cases are all cases where the product did not change form. It just – the same product passed down the chain and I think if you get to the repeal of *Illinois Brick* this issue of remoteness and where – who gets what and who has got standing for what becomes an incredibly complex, difficult issue – this is going to consume a tremendous amount of court time, attorney time and it would not be efficient.

CHAIRPERSON GARZA: I have a follow up question actually for General Bennett. You were talking earlier

about the list of cases, *Mylan* and *BuSpar* and others that you mentioned in your written testimony and the amount of the recovery to the indirect purchasers. This is just a really quick simple question, I think.

In *Mylan*, for example, I think there was 100 — you said there was a $100 million settlement paid — available to be paid to the indirect consumers who submitted valid claims. And then I think that actually less than half of that amount, 49 million was awarded to consumers who submitted valid claims. What happened to the rest of the 100 million?

MR. BENNETT: Of the 100 million about 43 went to consumers, 29 was *cy pres* and 28 were government indirect purchasers that were directly represented by their attorneys general.

CHAIRPERSON GARZA: And what was the cy pres? What form did that take in *Mylan*? Do you know?

MR. BENNETT: I think the different states chose health related *cy pres* beneficiaries but it was different in each state. In addition to that, as I said, there was another $61 million for third-party payers and opt outs and $35 million to direct purchasers.

CHAIRPERSON GARZA: And in *BuSpar* and other cases,

in *BuSpar* about $30 million of the 100 million went to indirect consumers who submitted valid claims and then Bristol-Myers – I think it was seven out of 55. So again the remaining amount, was that *cy pres*?

MR. BENNETT: No. In *BuSpar* the remaining amount went to government purchasers so about $65 million to government purchasers. There was also injunctive relief. Other indirects, including third-party payers and opt outs, got about 140 million. Direct got 220 million and competitors got about 60 million.

CHAIRPERSON GARZA: Maybe I misunderstood the testimony. So the 100 million, for example, in *Mylan* wasn't just for the indirect purchasers?

MR. BENNETT: Well, it was. It was for –

CHAIRPERSON GARZA: Including the government?

MR. BENNETT: It was the consumers and the government, that category of indirects.

CHAIRPERSON GARZA: I have one more – another question really that goes to the issue of preemption of state law. As I understand the testimony, even if we – even if cases – indirect purchaser cases were all moved to the federal court, isn't it the case that unless you have some preemption of state law that you would still have an

incredible amount of complexity given the different standards that apply in the states that you mentioned? In fact, I gather that, from what you said, you'd prefer that in these cases you would still have the multiplicity of standards in terms of the amount of damages you could collect and whether there was a multiplier, the standards for class certification, other various things and substantive issues as to whether something is or isn't illegal.

But if you don't eliminate all of that difference between and among the states, don't you then still have a very complicated situation with your consolidated cases and don't you have a problem potentially of not being able to certify a national plaintiffs's class?

And just one more. If you imagine a world, let's say, in which you had a repeal of *Illinois Brick* so that basically you had a federal — an exclusive federal right — exclusive right to go into federal court for indirect purchasers and the state attorneys general still had the right to go in and represent the consumers in their state, what have we actually lost in terms of deterrence and compensation? Why do you — why would we still need to have the complexity involved in not being able to certify a

national class and having to basically resolve all these various issues under the state laws?

MR. BENNETT: Well, I guess, I would have to answer that multi-level question with multiple answers, hopefully short.

First, whatever you do or don't do, there is no possibility that the result is not going to be one with a great deal of complexity in large cases and difficult but not impossible to manage cases. So whatever solution you come up with or don't come up with you are going to still have large complex cases and I don't think the fact that you're going to have theoretically different state law causes of action is going to materially add to the complexity.

When you take into account what is apparently a fact on which everyone agrees that these cases are not going to go to trial, that these cases are, in fact, going to settle in some way or another or they're going to be dismissed because there's no liability then what you're really talking about is how these different state laws factor into the settlement dynamic and they already do that because now obviously indirect purchaser litigation is brought under a variety of state laws and yet that hasn't

impeded the ability to settle these cases.

So I don't think repealing *Illinois Brick* and coming up with a fair way to deal with *Hanover Shoe*, which I don't think is just a straight repeal because I think that will too much disincentivize direct purchasers, it is going to add to the complexity or make things more difficult and I think having independent state law causes of action adds to the deterrent effect.

Although I don't want to make speeches here I think that really there has been — the main focus here — as the main focus of the antitrust laws — here has to be deterring illegal conduct and the fact that wrongdoers may be subject to more liability or different kinds of liability I don't view as a bad thing. I think that's a good thing. If people don't want to get involved in these kinds of actions then they shouldn't engage in illegal conduct.

CHAIRPERSON GARZA: Just one quick follow up then. If we were to do some empirical research and discover that there was a lot of duplicative recovery or the equivalent of that in settlements, is it your view that, in essence, Congress shouldn't care? They should be agnostic as to whether or not the different states were allowing there to be duplicative recoveries on the basis that bad actors are

bad actors? Or do you think that's a legitimate thing to consider?

MR. BENNETT: Well, I mean, I think kind of *a priori* it's a legitimate thing to consider but if you look at the writing on the subject, regardless of what empirical research might disclose, I think that many commentators find that there isn't enough deterrent effect and the treble damages – there are articles with this title, treble damages aren't really treble damages anyway. They're more like single damages.

So that if you have duplicative recovery, and I don't think there are examples of that, and that brings what are now in actuality single damages up to double damages or treble damages, I don't think that's a bad thing.

CHAIRPERSON GARZA: Well, it's 3:15 so we will conclude the hearing and on behalf of all the Commissioners again I want to thank every one of our panelists for appearing, for your thoughtful testimony, and for your thoughtful answers to our questions.

We'll take a ten minute break before the next panel.

[Recess.]

Panel II: State Indirect Purchaser Actions: Proposals for Reform

CHAIRPERSON GARZA: I would like to welcome the second panel for the day and thank you very much for your thoughtful testimony and for agreeing to be here today to talk about the issues and answer questions from the Commissioners. I know a lot of you were in the audience for the first panel so you may have a sense of how we're going to proceed with this.

We have designated Commissioner Jacobson as the primary first questioner for this panel and so Commissioner Jacobson will begin with his questions and then as we did earlier we will then allow each of the Commissioners an opportunity to ask questions.

But before we begin let's start again with Assistant Attorney General Cooper and go the other way around the table and ask if you would just introduce yourself briefly and please in five minutes or so summarize your written testimony, which of course will be in the full record of the Commission's hearing.

Thank you.

MS. COOPER: Thank you. Good afternoon.

My name is Ellen Cooper. I'm an Assistant

Attorney General and Chief of Maryland's Antitrust Division. I'd like to thank the Commission for allowing me to express my views this afternoon. These views are entirely my own and should not be attributed to the National Association of Attorneys General or any attorney general.

However, I would like to start by saying something on behalf of the National Association of Attorneys General and that is to express — to summarize a resolution that was passed this past March by NAAG. After expressing some general principles of federalism, the resolution states that approximately 75 percent of all purchases by local governments and state agencies are through indirect distribution channels. So obviously this issue is very, very important to the attorneys general.

For over a century, state statutes have provided purchasers with remedies and the federal law has not preempted state statutes providing for indirect purchaser recoveries. Therefore, the National Association of Attorneys General opposes "federal preemption of any state antitrust statutes, including indirect purchaser statutes, or other limitations of state antitrust authority as such preemption or limitation would impair enforcement of the antitrust laws, harm consumers and harm free competition."

So today I'm here to advocate the principle that Congress should not preempt state laws allowing downstream purchasers to recover damages.

The attorneys general are chief law enforcement officers of their states and, as such, they are the primary enforcers of their state's antitrust laws. They represent consumers, usually as *parens patriae*, and they bring proprietary actions on behalf of state and local governments.

They get restitution and other equitable remedies for citizens injured by violations of state law.

Now, their authority for these actions may be codified in their state constitutions, based on common law, or may be legislative. If it's legislative, that authorization may be found in a variety of statutes, not just in antitrust statutes, but also consumer protection laws, so-called little FTC acts, general fraud statutes, to name a few.

Preemption of state law would interfere with these traditional state functions.

In past resolutions attorneys general have indicated a desire to repeal *Illinois Brick* and provide a federal remedy for downstream purchasers, and I'd like to

add a modification of *Hanover Shoe* to that, and that is to say that when anticompetitive activity injures purchasers on different levels of the chain of distribution, they may sue. Damages should be allocated to direct and indirect purchasers according to their actual damages. But if only a single level of purchasers files suit, the need for optimal enforcement, and also optimal deterrence as well, requires that the plaintiffs recover all damages regardless of pass-on.

I think this is consistent with the values that the attorneys general have expressed, that is, that they value fairness more than procedural efficiency. They value actual compensation to actual victims of antitrust violations over the theoretical risk of multiple liability for antitrust violators but they also value the deterrent effect of vigorous antitrust enforcement.

At the same time, I should say that the states have a history of bringing coordinated multi-state litigation. Usually the states file a single complaint in federal court and add supplemental state claims when it's appropriate. The provisions of Hart-Scott-Rodino make federal court a very attractive forum for the state AGs for these cases.

First, the attorneys general can represent actual persons as *parens patriae*. Second, they can prove damages in the aggregate. And, third, when it's appropriate, they can coordinate the enforcement side of their cases with the federal agencies and share investigative materials. And, also, provide injunctive relief that dovetails with the FTC's or Department of Justice's relief.

State attorneys general also have in the past coordinated actions with private class action counsel representing direct and downstream purchasers. And when all the claimants are in the same forum, then I think the plaintiffs also can be more efficient in conducting discovery, securing expert testimony, litigating trials, and negotiating settlements.

With that being said, I would oppose forced consolidation and coordination of suits by attorneys general in federal courts because that would be a blow to our federalist system. If a state attorney general filed suit in state court, especially on behalf of the state itself, it is completely inappropriate, I believe, for federal procedural law to force a state into federal court in some other state.

Maintaining the independent authority of the state

attorneys general is an important component of federalism and it's critical in keeping a healthy balance of state antitrust enforcement.

Thank you.

CHAIRPERSON GARZA: Mr. Denger?

MR. DENGER: Madam Chairperson, I want to thank all of you for giving me the opportunity to appear here today.

I have for about 30 years litigated direct and indirect purchaser class actions and opt out actions. I've also served on a number of task forces which have considered indirect purchaser issues.

The first panel obviously spent a fair amount of time discussing what at least some members believed to be the substantial increase in complexity and in internal and external costs, both private and public sector, as well as the risk of multiple liability that results from our post-*Illinois Brick* regime of direct purchaser suits in federal court and indirect purchaser suits in some of the state courts.

Today I would like to briefly discuss a possible legislative solution, as well as some procedural approaches, to address the problem, that alone or in combination at

various times, have been put forward by individuals with plaintiffs' perspectives, state attorneys' general perspectives and defendants' perspectives, respectively.

I think the first principle I'd like to talk about is consolidating all direct and indirect purchaser actions arising out of antitrust misconduct in a single forum. I think it's fair to say that at least a number of the participants on the prior panel felt that that was a constructive way to proceed.

The federal judges who have handled major MDL antitrust actions that I've talked with, as well as many plaintiffs and defense counsel have generally expressed the view that it is simply more efficient if a single judge has control of all aspects of a complex antitrust proceeding involving direct and indirect purchasers. Such a consolidated action would ideally include all federal and state actions arising out of the same violation.

To achieve this result I would recommend legislatively overruling *Illinois Brick* to permit indirect purchasers to sue for damages under Section 4 of the Clayton Act. If this were done, most indirect purchaser cases would be filed in federal court under federal law, as occurred prior to *Illinois Brick*.

Second, I would recommend legislatively overruling *Lexecon* to allow all federal cases to be consolidated in a single district for trial.

Third, I would go beyond CAFA and allow the broadest removal jurisdiction without regard to the amount in controversy and with minimal diversity.

I would also create a legislative presumption that all removed actions found to arise from the alleged antitrust misconduct should be transferred by the JPML to the same district as the related federal direct purchaser antitrust litigation.

Fifth, any opt outs from direct or indirect purchaser classes that were certified would be required to remain and participate in the same consolidated MDL proceeding.

I believe having all the plaintiffs before the same court would reduce litigation costs, conserve judicial resources and prevent inconsistent judgments and duplicative liability for the same overcharge.

To better handle this consolidated litigation I would recommend phased discovery and a trifurcated trial – liability, aggregate overcharge determination and allocation of damages.

To begin with, the federal courts, as they do today, could enter appropriate orders to require plaintiffs' and defendants' counsel to coordinate discovery with respect to common issues of liability and determination of the aggregate overcharge. This would be the first phase of discovery in the trifurcated trial proceeding.

The first part of the trifurcated trial would be a determination of liability applicable to all actions. That should resolve the collateral estoppel concerns that were highlighted by the first panel.

If liability were determined, the trial would proceed to a second phase against the defendants found to be liable in which the overall amount of the overcharge at the direct purchaser level would be determined. Defendants would not be permitted to defensively raise the pass-on issue in the second phase of the trial. Thus, as to defendants' use of pass-on, *Hanover Shoe* need not be legislatively overruled. Since defendants would be liable for the full amount of the overcharge, irrespective of whether it was passed through, deterrence would be fully served and would not be diminished or diluted.

Finally, in the last stage there would be an allocation of damages and apportionment among direct and

indirect purchasers. If experience pre-*Illinois Brick* is of guidance, in many cases we would be spared the last stage because there have been settlements, particularly pre-*Illinois Brick* and in some other cases since then, where there have been settlement allocations among direct purchasers and several levels of indirect purchasers to resolve the litigation.

Obviously in the last stage the court appropriately uses special masters and magistrates and others to assist in this process. I think there is some hope that a structure like this would eliminate some of the problems that we have experienced and at the same time resolve much of this litigation in a more efficient and less costly manner.

Thank you.

CHAIRPERSON GARZA: Thank you.

Mr. Gustafson?

MR. GUSTAFSON: Gustafson.

CHAIRPERSON GARZA: Gustafson, thank you.

MR. GUSTAFSON: Thank you, Madame Chair and members of the Commission.

I would like to thank you for inviting me and giving me this opportunity to address the Commission on

these issues. My view is derived from my litigation experience, which is primarily in the antitrust field representing both direct and indirect purchasers, mostly on the plaintiffs' side but occasionally a defendant makes a mistake and hires me without knowing better.

You are free to attribute my views to me or my firm since my firm is small enough that they all probably share my views in any event. What to do is the question presented here today and I strongly suggest that what we should do now is nothing. I think that the reason that we should stand on the sidelines and watch can be described for several reasons.

First, the perceived need for reform that you have heard from many of the members who testified earlier and others, I'm sure, is based primarily on anecdotal evidence and not on any empirical studies that really demonstrate the duplicative recovery, exceedingly high litigation costs or any of the rest of the things that drive the call for reform actually exist.

Second, although *Illinois Brick* has, in fact, now been 28 years or so ago, as I heard earlier, indirect purchaser actions really didn't get much traction until about ten years ago.

California was ahead of the rest of us but if you look at the case law, infant formula was one of the first multi-state indirect purchaser actions, which was in the mid '90s. I think it finally settled in '95 or '96 and so we're talking about a very short time of experimenting with indirect purchaser actions.

By the way, I meant private in that instance because the attorneys general had been active for longer than that.

Third, Congress has recently made two changes to the law that have not yet found their way into our knowledge base. In 2004 they changed the amnesty provision so that certain defendants meeting certain conditions could avoid treble damages and, as I understand it, joint and several liability if they cooperated with the government and helped in the investigation.

Second, about which there has been much discussion today, CAFA, which now at least in principle will remove most of the state cases to federal court and force consolidation into one forum.

These two changes are significant and have had almost no time for us to find out what effect they will have deterrence, duplicative recovery, coordination and the like.

Fourth, the courts have issued decisions affecting our national antitrust policy. The state courts that have added indirect purchaser claims rejecting these premises of *Illinois Brick* and we haven't talked about today the *Empagran*-type decisions add another layer of potential antitrust enforcement, which still has — we don't even know what those international cases are going to do. The cases haven't even settled out yet enough to know which plaintiffs, if any, are going to be able to satisfy the requirements that the Supreme Court set forth. So there's another uncertainty there that needs to be addressed before we make nationwide decisions about what our antitrust policy should be.

Fifth, the states, including the attorneys general, have adopted creative ideas. They have different remedies. They have different procedures. They have different limitations. They have different — they have different levels of protection. For example, nothing was mentioned earlier about the fact that Florida protects only consumers, only the end user. Whereas, other states protect everyone in the indirect purchaser chain. And to suggest, as was suggested earlier, that there is no interest in indirect purchasers in making claims discounts the fact that

when we settled, for example, the Lysine case in Minnesota where many large pork and cattle food producers made claims, the claims were in the tens and hundreds of thousands of dollars because those family farms are very different from consumers in the sense that it's a small business and not some person who is going to get a check for $5 or $10. So I think that there's a lot of different mechanisms in the state court that are being tested and being determined by the courts.

Finally — and I'll get to the suggestion my colleague made about trifurcation. It's an interesting one. But although I initially suggested only a wait and see policy, I now see the merit in testing some of these issues empirically. I think that some questions that were raised earlier make sense. Let's find out if there's duplicative recovery going on. Let's find out if chasing these class certifications all over the country is, in fact, causing defendants more costs than they would otherwise face in a consolidated proceeding.

It was interesting for me to hear about this interim effect of these class certifications in the various indirect purchaser states while at the same time suggesting that a 50 state class after an *Illinois Brick* repeal would

be somehow better.

There's many things going on in the world of antitrust. There's a lot of evidence that suggests that the deterrent effect is not working and I think that it's time that we should watch and observe what happens with the changes that we have out there before we try to adopt a national and uniform policy.

Thank you.

CHAIRPERSON GARZA: Thank you.

Professor Gavil?

PROF. GAVIL: Good afternoon, everyone. Of course, I, too, thank all of you for the invitation to join you today.

One disclaimer. I am a professor at Howard University School of Law. I'm also a counsel at Sonnenschein, Nath & Rosenthal and I'm also a member of the ABA Antitrust Section Task Force that is a liaison to this committee and obviously today I am offering only my own thoughts.

One of those thoughts – putting on my Howard University hat for a moment – is if any of you hiring, please free to call me. My students are wonderful. Beyond that, I'm on my own.

As I said in my prepared statement, I think context is important in approaching the issues of *Illinois Brick* and I think it is useful to look at today's situation in the context of a longer picture. That longer picture shows that overall in the last 30 years antitrust is quite different today from the doctrine that faced the Supreme Court in 1977. It's quite different for plaintiffs and defendants that are litigating antitrust cases today. There are filters in place that weren't in place in 1977. It is far more difficult today than at any point probably in the history of federal antitrust law to litigate and succeed in an antitrust case. So that the perceived threat that might have been of concern to the court in 1977, keeping in mind that that was the same court that decided *Brunswick* and decided *Sylvania*, that's the context in which they were approaching the question of indirect purchasers.

I think today we are in a much different situation and there should be much less concern over all. That's reflected in the number of cases filed in the federal courts. In general, the number of federal antitrust cases in the federal courts today is half of what it was a generation ago. I would take issue with some of the representations that were made in the first panel about

increases in class actions and numbers. As you have seen in the statistics I have provided you from the administrative office, at least at the federal level that's true. The number of antitrust cases overall has fluctuated but generally has been dropping over the last few years and class actions, in particular, dropped quite precipitously after a high mark in 2000.

I think all of that is important to give context to the issue.

Having said that, as you know from my remarks, I believe that there is a problem, that we can do better and that we should address it but I think it's almost important to put that problem in the context of other issues that might be of importance to this Commission. The indirect purchaser issue is there. It could easily increase in importance if there was an uptick in enforcement activity but it is far from anything that approaches a serious and threatening problem at this time. As I said in my remarks, don't panic.

Second, just to briefly summarize my position. *Hanover Shoe* was right. *Illinois Brick* was wrong. And I think we could do a great service to antitrust by de-coupling those two cases. I think the court in *Illinois*

Brick was wrong in assuming that symmetry was the only way to approach those cases. It misdirected the court's analysis in *Illinois Brick* and, as I explain at greater length in my remarks, I think that those two can be de-coupled. It is perfectly consistent to me to have the rule of *Hanover Shoe*, that doesn't allow a motion to dismiss based on who the plaintiff is, coexist with a rule that allows offensive pass-on.

A generation, I think, is a long enough time for an experiment. There is always resistance, of course, to established patterns and we have some fairly established patterns both in the plaintiffs and the defense bar at this point and maybe some vested interest in the current system. I would hope that we could move beyond that. It is not a perfect system. It's a system that has some serious flaws. I think there are better substantive and procedural options that we could consider and I don't think that the Class Action Fairness Act is going to fix all of the problems. I think it will probably permit some cases to be removed, maybe a lot of cases, but as long as there is room within that Act for additional sort of strategic forum shopping it's not going to solve all the problems and we could well wind up with some significant cases left in state courts and

it doesn't take more than a few significant cases to disrupt the system.

A reminder, too, that any kind of removal would be based on diversity even though the diversity standards are minimized under the act. You will still have all of the problems that come with any kind of diversity case in federal court looking at differences in law in the various jurisdictions.

Preemption is always a difficult issue but here I think it represents a concession to the states who have kept indirect purchaser rights alive for a generation.

Finally, like Mike Denger, I think that we could do better if we did overrule *Illinois Brick* to craft a sensible unified trifurcated proceeding in the federal courts.

I thank you very much for your attention.

CHAIRPERSON GARZA: Thank you.

Mr. Steuer?

MR. STEUER: Thank you, Madame Chair and Commissioners. I am here this afternoon as Secretary of the ABA Section of Antitrust Law to report on the work that the Antitrust Section has done on remedies. The views I express are limited to those in the reports that have been

submitted. Any other views I express are entirely inadvertent.

Let me tell you how we got to where we are. There was a two-day remedies forum conducted in 2003 in connection with the Antitrust Section spring meeting and the attempt there was to present a wide range of views on a wide range of remedies topics. That resulted in a remedies task force in 2003 and '04, which I had the opportunity to chair, which presented a report that then became a report of the Council itself.

The work of the task force involved a series of interviews with interested parties of all stripes, including members of the bench and bar. Ultimately we determined that the very topic that you're addressing today was the most fruitful of all the remedies topics that the ABA, at least, could address. There were others that were more suitable for government bodies and so forth.

What we learned was that after three decades of debate there are very passionately held views, and you've heard a lot of them here already today, on all sides of this issue.

What we concluded is that we were not going to take sides but we thought that things could be more

efficient than the system we have today and we also found that there seemed to be an opportunity today, and this has come up, for a breakthrough because what has changed is that now more than half the states have some form of *Illinois Brick* repealer. So the playing field has changed for defendants. Politics have changed as well. There are reasons for all sides in this debate to see whether perhaps something could be done to move the ball.

The objective of the task force and the section was to see if we could come up with a practical solution to at least make things better than they are today. Maybe not perfect in anybody's view, but better. And what we endeavored to do was prepare an illustration of legislation that would create greater efficiency and stand some realistic chance of actually being passed.

The features of this — and the actual text that we came up with is included; again it's an illustration—were, first to provide indirect purchasers a federal cause of action, repealing *Illinois Brick*.

Second, not to provide for duplicative recovery and, thereby, eliminating *Hanover Shoe*.

Also, to provide one forum for both discovery and trial, so in other words to repeal *Lexecon* with relaxation

of diversity jurisdiction. Now, since this was drafted, part of this already has been accomplished with the Class Action Fairness Act, although this would go further and close what some people have described as a form of loophole.

Fourth, there would be a provision for prejudgment interest, which doesn't exist today. It would be of palpable benefit to plaintiffs and balance some of the other effects of this legislation.

Finally, there would be no preemption of state law. The no preemption was really a matter of political reality more than anything else. There were strong views, frankly, on both sides of the preemption issue but in the end the feeling was that including preemption would make any such proposal into a political non-starter.

So what are the gains and losses? Defendants have to gain out of this the elimination of the possibility that there could be full federal recovery by direct purchasers plus full state recovery by indirect purchasers, unless a state statute explicitly provided for duplicative recovery. Right now, in the states that address this, the statutes do the opposite. They say that courts should endeavor to avoid duplicative recovery. Now, we've heard that there haven't been any instances of anybody paying six times damages but,

of course, the feeling was that this does play into the settlement dynamics.

Second, defendants would gain efficiency from the consolidation of everything for discovery and trial in one forum.

What defendants would lose is that today in almost half the states indirect purchasers may not recover. So that would — since there would be a federal cause of action, indirect purchasers would now be able to recover everywhere, including those cases where they might be the only plaintiffs.

What plaintiffs would gain: Plaintiffs would gain primarily prejudgment interest, which is something that's rather straightforward and goes right into the pockets of aggrieved plaintiffs. What plaintiffs would lose from this would be the ability to have what we've heard described as offensive use of collateral estoppel without the prospect of defensive collateral estoppel because of the multiple forums.

They'd lose what has been expressed as somewhat greater control over selection of judges. They would lose the negotiating leverage of having multiple forums and the expense of having litigation in multiple jurisdictions.

And at least the possibility, which so far has just been theoretical, of duplicative recovery between directs and indirects.

What we learned, in summary, is that there were very few moderates on these issues. Almost nobody really would advocate this as their first choice but what we wanted to do is illustrate what a compromise might look like that could actually get enough support to be passed.

Your priorities may well be very different so it's important, I think, for you to understand where we were coming from in drafting this proposed illustration of a piece of legislation.

The section appreciates the opportunity to bring these views to your attention and I'd obviously be happy to answer any questions you have.

CHAIRPERSON GARZA: Thank you very much.

Commissioner Jacobson, would you like to begin?

COMMISSIONER JACOBSON: Thanks again for five very excellent presentations.

My first question is for Professor Gavil and it relates to a topic that was raised earlier, and that is the topic of an empirical study which is addressed in your paper.

If we were to try to embark upon an empirical study before taking any action in the way of a recommendation here, what would we look for and how would we get it?

PROF. GAVIL: Well, the statistics that I gathered were from the Administrative Office of the federal courts and they do have some statistics certainly on the gross numbers or number of antitrust cases that are filed in the federal courts and they break out antitrust class actions.

One way to go further beyond the surface of what they have is to actually look at the civil cover sheets. There's not that many. There's, you know, 700 to 800 per year as the number of cases being filed in the federal courts right now but the civil cover sheets would identify specific cases. What could you find out from that? It would give you some sense of what cases are filed and whether they're filed by direct and indirect purchasers. You could look for connections to government enforcement actions and see the degree to which the cases being filed in the federal courts are follow on cases to cases brought by the federal court.

The hardest thing to get at, which is relevant to these issues, is the indirect purchaser cases filed in the

state courts because states don't necessarily code those cases. I did not do an exhaustive search. I looked at the equivalent of the administrative office statistics for several states and antitrust just ain't as big as we think it is out there in the rest of the world. It's not generally broken out. The numbers for antitrust cases at the state level are probably pretty small so it's very difficult to get at that level of information.

However, we do have — from the civil cover sheets we should have — I'm not sure on this but we should have information on removed cases and a lot of those are state indirect purchaser cases.

So it would be the beginning of some kind of database to get a sense of what the relationship — you know, how much of the federal antitrust docket on the civil side is really the kind of problem we are talking about? Is it 50 cases or is it 500 of the 800 cases? I think that would be helpful to know and that kind of issue we should be able to get at.

COMMISSIONER JACOBSON: Other than what has already been assembled by the Commission in the course of these hearings and the ABA in the course of their remedies work, do you know of any way to get at the number of cases

that have been certified as classes as opposed to not, the number of cases that have been tried to verdict as opposed to settled, and some harder, more quantified view of the recoveries by settlement, I gather, in just about all the cases? Are there data sources for those, which candidly, I think, are probably more interesting to the Commission than the number of filed cases.

PROF. GAVIL: The Administrative Office, I understand, does keep information on cases terminated and that shows up in their statistics. The question would be — and I believe if you look at the equivalent of the exit sheet as opposed to the cover sheet it gives some indication of how that case terminated. By matching the case numbers and the names with the sort of here's what's went into the system, here's what came out of the system, you should be able to develop some kind of database of how cases are being disposed of and that also is better than looking at reported cases because reported cases is always just sort of the tip of the iceberg. That's the only things that get litigated to the point of a reported decision. It's not a perfect system, though.

I was talking with the Chair during the break about could you do a survey of members of the bar who are

specifically involved in the cases to get a better feel but I think you really want the particulars, you want the names of the cases so you can do some of this matching up to get a sense of how much of it is really related to follow on cases, what are direct purchaser cases, what are indirects.

The gross numbers are not that large so it doesn't seem to be — it wouldn't be trying to look at 50,000 cases. If you looked at five years it would be 3,000 to 4,000 cases. Also, the federal government, the workload statistics give you some sense of the level of government activity. And what I found was a pretty high correlation between level of government activity and level of private activity. Within a year usually it looked like follow on. It looked like it had an impact.

COMMISSIONER JACOBSON: Of course that has been true since 1914.

PROF. GAVIL: And Section 5 of the Clayton Act was designed to make it true.

COMMISSIONER JACOBSON: Mr. Gustafson, do you have any additional thoughts for us on where we might go in terms of getting empirical data to help our effort?

MR. GUSTAFSON: I think that to the extent that it would be more than anecdotal, the antitrust bar that

practices in this area is not that large. I think there would be some confidentiality concerns as many of these documents would be subject to protective orders but as all of you know settlements are public. They have to be approved at least as to class actions. The certified or not certified, both sides of the case know the answer to that question. And the damages analysis would be the most difficult thing, I think, to disclose because of the confidential information in that but I suspect that the Commission could do something to protect confidentiality of that information.

I think that the lawyers – to the extent that you all wanted to make some sort of analysis of these different anecdotal claims, I think the lawyers on both sides would be willing to help with that. I agree with the Professor that I don't think it's that many. I don't think it's that many cases that you need to collect data on.

COMMISSIONER JACOBSON: Ms. Cooper, do the states have anything that we're missing?

MS. COOPER: The states right now are trying to gather a list of cases that they've done over the past 20 years or so. I'm not sure that we had planned to break out which cases were indirect purchaser cases but I think that

could be done and I think at least by the time the Commission ends its hearings we should have something that we can present on state AG cases.

COMMISSIONER JACOBSON: I think that would be quite useful.

Let me ask each of the panelists to address a point that was really not well developed in the papers but that was underscored by Mr. Montague in his testimony a couple of hours ago and that is his concern that if we come up with an ABA-like solution of the sort that Mr. Denger and Professor Gavil and the ABA have suggested or any other tinkering with the rule of *Illinois Brick* we will perforce dilute the incentives of direct purchasers to sue and that will have a negative impact on enforcement.

I'd like to get each of your views on that point and whether it's valid or not.

Ms. Cooper, do you want to start on that?

MS. COOPER: I think that there may be situations where – in fact, there have been windfalls to direct purchasers where that might be true. But in the case where there have been actual damages I don't see that there would be any dilution in incentive to sue because direct purchasers were there and because there was some attempt to

allocate according to actual damages.

COMMISSIONER JACOBSON: Mr. Denger?

MR. DENGER: Frankly, I think in most cases, at least from the standpoint of direct purchaser class actions, there is no shortage of plaintiffs' lawyers willing to bring actions. Even if the recovery were diluted somewhat with a need to share it with indirect purchasers, I do not believe there would be any significant decline in direct purchaser actions.

As to the major corporations today, if they have a legitimate cause of action with all of their obligations to shareholders and so forth, they and their counsel have been very vigilant in protecting their rights. In the *Vitamins* case, for example, a lot of the major opt outs were large United States corporations who were just as effective, if not several times more so, than the class in obtaining recoveries. While there may be situations out there, I think they are few and far between where direct purchasers would not sue if *Illinois Brick* were repealed.

COMMISSIONER JACOBSON: Mr. Gustafson?

MR. GUSTAFSON: I think it's the *Hanover Shoe* repealing that is going to be the disincentive for direct purchasers, of course, because merely overruling *Illinois*

Brick doesn't affect their incentive much.

I disagree with Mr. Denger on major corporations. If you look at the direct purchaser cases that have been pursued in this country, absent cases like vitamins when many of the defendants were foreign and there were large sources of supply — that is many of the defendants made many of the products and the fear of retaliation was lessened because there was not just as single supplier or two suppliers — that, by and large, large corporations don't sue now.

If you look at the 10 or 15 or so drug — generic — what I call the generic delay drug cases that have been filed in the last six or seven years, you don't see the major drug wholesalers in any of those cases. In fact, what you do see is them assigning their direct purchaser claims to the smaller purchasers who are actually indirect purchasers who don't have the fear of retaliation from the major drug houses.

So I think there would be a large disincentive to sue if you overrule *Illinois Brick* and overrule *Hanover Shoe* and proceed with the ABA remedy. I can see lots of reasons why major corporations, in addition to the reasons they face today, why they wouldn't pursue those claims.

COMMISSIONER JACOBSON: Are those assignments a matter of public record? Are those included in the settlement documents in those cases?

MR. GUSTAFSON: I'm not sure about the settlement documents. They're generally included in the complaint. I mean, they are public to the extent that they allege their federal standing as a result of an assignment.

COMMISSIONER JACOBSON: Professor Gavil?

PROF. GAVIL: I think if you retained *Hanover Shoe* but you overruled *Illinois Brick* you'd be removing the sort of artificial impediment and there would be some re-equilibrating of incentives. I think the incentives for some direct purchasers would go down, probably the direct purchasers with most pass-on but the incentives for indirect purchasers would go up because they would have access to federal remedies in federal court.

So I think on balance you wouldn't get that much of a difference. You might get better deterrence because there wouldn't be this artificial impediment. There wouldn't be this difficulty in deciding who gets to sue and where and all of the additional litigation costs.

COMMISSIONER JACOBSON: Mr. Steuer, did the ABA look into that question in the course of its drafting this

example statute?

MR. STEUER: Well, I think implicit in this illustration is that collectively there would be the incentive to recover single damages that would then be trebled, but what would disappear would be any incentive of direct purchasers who could not show harm to bring a suit for what is sometimes termed duplicative damages. In other words, damages that they had passed-on but would be entitled to collect under the present system. But I think that what's happened with, for instance, opt outs and so forth, demonstrates that to a real extent even though the incentive may be then divided up among different layers of purchasers or different purchasers there remains ample incentive collectively to pursue the suit. So I think that is implicit in the illustration - that there wouldn't be the additional incentive to the extent it exists of indirects to bring a suit even if they had passed-on all of the over charges.

COMMISSIONER JACOBSON: Moving on to a different set of questions. The Class Action Fairness Act has been mentioned as a possible solution or mitigating factor to a number of the procedural problems and it's a new statute on February 18th that went into effect. My question is, isn't

it likely that we're going to see plaintiffs gravitating towards state cases naming as a principal defendant one of the element – one of the members of the alleged conspiracy to avoid removal of jurisdiction? Aren't we going to see cases that are created such that perhaps a third of the counties in one state are represented so that the aggregate is $4.7 million in damages rather than the $5 million CAFA threshold? And is CAFA going to be the panacea that some of the panelists have suggested?

Let me start with Mr. Denger on that one.

MR. DENGER: Well, I don't think CAFA will be a panacea, but obviously time will tell. Absent a *Lexecon* repealer, to begin with you still have the same problem of cases going back to the district to which they were removed for trial. Because of the differences in substantive state law, even if you remove indirect purchaser cases to federal court the probabilities of getting a nationwide indirect purchaser class – or even state classes – certified are not high based on the experience of trying to certify nationwide classes in other areas of law where there are substantial substantive differences among the states.

If a class isn't certified, and we know that under a number of states' laws today indirect purchaser classes

are often not certified, then the original action, as I understand CAFA, would go back to state court. If there are opt outs from classes, certified indirect purchaser, they would also go back to state court. We ought to keep in mind that in many cases indirect purchasers encompass substantial commercial entities, drug stores, food chains, various wholesalers and retailers on the multilevel supply chains, third party payers in the case of insurance. There are a lot of substantial commercial entities that, if they thought it was in their interest, could always opt out and they'd go back to state court. And on top of that, you have all of the devices that could be used by a creative plaintiff to, in effect, plead around CAFA and try to avoid removal in the first instance.

In addition, discovery about pass-on is not really relevant in direct purchaser litigation today. However, if indirect purchasers were in the same MDL proceeding, you can rest assured they would be seeking discovery from the direct purchasers as to the extent of any pass-on of the overcharge. So I suspect you would have some opposition to a single consolidated MDL proceeding from direct purchasers.

So when you throw all these factors in, I don't think it is a sure-fire bet that CAFA, which wasn't designed

to deal specifically with the indirect purchaser problem, will be effective in doing so.

COMMISSIONER JACOBSON: Mr. Gustafson, I can see that you don't agree with everything that Mr. Denger said. Would you like to respond?

MR. GUSTAFSON: I don't agree with everything but I do agree with a lot of what he said. I think that CAFA is not the panacea that people think it might be. I think that there are a lot of provisions of the statute that give creative lawyers wiggle room, as you mentioned a few, Commissioner Jacobson. I think that there is — one of the things that was, in my practice, very common before CAFA was negotiated coordination of these various cases. In my career I can't think of a single one that wasn't amicably negotiated, however hard fought, and involved no court involvement other than to sign the agreed upon coordination order. I now think CAFA will be a place where the lawyers fight for control of the case as they have in other cases that have been consolidated as opposed to the uncertainty of losing the negotiation prior to CAFA bringing people together. I think this will be more divisive.

I think certainly there will be lawyers that will try to plead around CAFA. They have been trying to plead

around the removal statutes since the beginning of the removal statutes and they will continue to as long as they feel there are friendly jurisdictions and state courts.

I think a key test that remains to be seen with respect to CAFA is how the federal courts are going to treat class certification. Rule 23 is arguably a procedural rule and the federal rule would arguably apply but there's certainly a suggestion that CAFA has to apply to state standards and all of that has got to be worked out.

So I think it offers more trouble potentially in the beginning than solutions but we'll have to see.

COMMISSIONER JACOBSON: I want to ask one wind-up question but let me just follow up on that. Isn't it clear under *Hanna against Plumer* that class certification would be federal?

MR. GUSTAFSON: I think so.

COMMISSIONER JACOBSON: Federal law would apply.

MR. GUSTAFSON: I think so.

COMMISSIONER JACOBSON: My last question is really for Ms. Cooper and Mr. Gustafson, which is, what do you find, if anything, objectionable about the ABA's — I'll call it — proposal. Mr. Steuer called it example. And if we were to move in that direction, what problems would that

cause, if any, for your constituencies?

Ms. Cooper?

MS. COOPER: I think that if I remember the provisions correctly, and I'm not sure that I can be held to do that —

COMMISSIONER JACOBSON: As I understand it, repeal of *Illinois Brick*, repeal at least on a first level basis of *Hanover Shoe*, consolidate all the cases in federal court but no preemption of any state statute. Is that reasonably accurate?

MR. STEUER: Prejudgment interest.

MS. COOPER: Prejudgment interest, right.

COMMISSIONER JACOBSON: And prejudgment interest, yes.

MS. COOPER: On that basis it's a proposal but that's really not so far off from what we were advocating in our paper. We do want to be sure that in addition to allocation of damages to those who sustain actual damages there is somebody present in the case who can receive a recovery when you are balancing between the wrongdoer, the antitrust violator, and a plaintiff. I would like to see recovery under those circumstances. I'm not sure that the ABA proposal addresses that circumstance. But, in general,

so long as there is no preemption of state law I think the result here is not so different from what we're advocating.

COMMISSIONER JACOBSON: Mr. Gustafson, clearly you'd prefer the ABA to Ms. Zwisler's suggestion that we had earlier today?

MR. GUSTAFSON: Right.

COMMISSIONER JACOBSON: What issues, if any, do you have with their suggestion?

MR. GUSTAFSON: You are right about that. I do prefer their proposal. I think there is several questions that are left unclear by the ABA proposal and one is how the courts are going to handle class certification of indirect purchaser claims. I mean to the extent that you add an indirect purchaser claim and then don't certify the class, especially at the consumer level you are effectively giving them a remedy without a — I mean, giving them a claim without a remedy for the higher up in the chain of indirect purchasers as Mr. Denger points out.

There are some substantial businesses who do have the kinds of records that would be able to demonstrate the issues of pass-on that trouble the courts. But for consumers, without some sort of an almost presumption of pass-on to the consumer, those classes are going to continue

to struggle and that's going to be an issue that will all but take away the remedy granted by the overruling of *Illinois Brick*.

I think it's an interesting proposal and it ought to be looked at. The prejudgment interest is a powerful deterrent, I think. It's a major weakness, I think, in the current antitrust enforcement scheme because it's very difficult to get prejudgment interest, but because these cases go on for so long and then are — before they're uncovered and then they're litigated for so long, the costs or the time value is a very important component.

COMMISSIONER JACOBSON: My time has long expired so thank you all very much.

CHAIRPERSON GARZA: Commissioner Yarowsky?

VICE CHAIR YAROWSKY: I just wanted to see if we could take off in one place and Commissioner Jacobson certainly made a great start about what you all think the Class Action Fairness Act fixes need to be and also to kind of clarify it a little further because I know it's difficult. It's a statute long in the making but still seems very impressionistic on some things.

One is *Lexecon* is missing. Is that correct? You may not all agree.

Two, and I think we may have a difference of opinion here, it's not an ideological opinion, it's just maybe a gap, about whether on a multi-state class action situation that would be removed under this bill, what would happen on certification? Yes — is it a procedural rule? The way I read this statute is that a judge if he or she had 14 or 15 different state actions before him or her would basically have to apply choice of law based on that law in a state about certification. Now 38 states have fairly convergent certification standards like Rule 23 but there are a few states that don't.

The real hang up in the debate in Congress was, and this is why I assume that it's not just they're going to apply Rule 23 — what happens if a judge faced with 14 — let's say 12 different states with different standards other than Rule 23 — a judge might just throw up his or her hands and say, I can't manage that case. And then under CAFA where does it go? It can't go back to state court. That's the way it used to be. It is kind of stuck in limbo.

There was an amendment that I've talked about it with all the folks up here just because we may need to think about it as a suggestion. Senator Bingaman went to the floor and said, look, that can happen. In that case, I'm

not saying it's good or bad, I'm just curious what you think, we should give the judge the discretion to come up with a center of gravity rule about what the certification is and apply it in terms of other certification procedures.

So, two — I guess we have *Lexecon* missing. Two, what happens about certifications that are multi-state context? Three, pleading — I

Three, pleading — I suppose — you know, my sense is here this Act basically shifted the power of forum shopping — but again not a political statement but really because of the abuses — alleged abuses that were there — from the plaintiffs' side to the defendants' side for the most part. I mean, I think the defendants are pretty much in control of where these cases are going to be. There's a very narrow exception that Commissioner Burchfield pointed to where if two-thirds or more of the plaintiffs are in a single state and the defendant is a resident of that state, I guess, you could call that an intrastate action. But resident, interestingly, was defined as having been incorporated. It wasn't whether they had substantial business operations or major operations. It's whether — that's the definition. Whether it was — resident is defined as incorporated.

Well, if you want to empirically play that out, very few defendant corporations are going to be incorporated perhaps in that state.

So I don't think the plaintiff will have a lot of ability to control where the forum is. The question is if that's the case they walk across the street and are in federal court. Will the judge be able to see if there are plaintiffs playing around with pleading requirements? That is — I'll list that as three but, I mean, think about that.

Four — what is four? What is four and five? Because I'd love to get this on a short list so we can all think about it.

MR. DENGER: Well, I think you have an opt out problem.

VICE CHAIR YAROWSKY: Okay.

MR. DENGER: And if you get a case like *Vitamins*, for example, there were very substantial opt outs. If they opt out the way I read CAFA is that indirect purchasers can go back to state court to sue.

VICE CHAIR YAROWSKY: Unless there's —

MR. DENGER: Unless — and I haven't looked at it that closely—-but with the supplemental jurisdiction powers, the district court may have some ability to keep way them in

federal court, but I haven't studied that.

VICE CHAIR YAROWSKY: Okay. Anything — yes, professor?

PROF. GAVIL: I think the problem that's inherent and you see it in your questions is that this is going to be a major distraction. It doesn't get us really closer to solution of the problem. It gives a set of additional problems.

I think it was Commissioner Burchfield this morning — not this morning, at the earlier panel today — came to the solution to this conclusion and I think it's right here. The Class Action Fairness Act may well facilitate entry to federal court for those who want to be there but for those who don't want to be there, there are a lot of things in that very complex statute that can lend strategies and wind up being litigated, and there are going to be questions to be litigated.

One example that hasn't been mentioned here — one of the factors listed on both the mandatory remand and the discretionary remand is whether or not related cases have been filed within the last three years.

Well, we have antitrust with a four year statute of limitations that is tolled during the pendency of a

government case. That can stretch out the time line quite long and there's a concrete example of something that could creep in there and become part of somebody's strategy.

The point is that it's going to be a distraction. Even if we had an antitrust specific procedural improvements act that really tried to address the issues of indirect purchaser suits, it is not a substitute for bringing those cases initially into federal court for overruling *Illinois Brick* and sort of forcing the hand of indirect purchasers into federal court. It is a compromise. It's better than the current system but I would still think that with an antitrust specific statute we could get at our problems a little bit better and try to close some of the loopholes.

CHAIRPERSON GARZA: Thank you.

Commissioner Warden?

COMMISSIONER WARDEN: I have one question for Ms. Cooper. Your concern about being sure that someone always recovers completely. Do you see any difference between denying a pass-on defense when only direct purchasers sue and presuming 100 percent pass-on when only indirect purchasers sue?

MS. COOPER: No, I don't.

COMMISSIONER WARDEN: You don't think there might

be a due process problem in the second situation presuming injury without proof?

MS. COOPER: I think that's what we're doing now with direct purchasers.

COMMISSIONER WARDEN: No. You're saying — there can't be much question of injury in the case of direct purchasers. What you're doing is denying then the defendant an opportunity to prove that somehow the direct purchaser passed this on or avoided the full impact of what apparently occurred. You don't think — do you think that presents the same constitutional problem as presuming that somebody — that the defendant is in privity with suffered an injury that somebody else first suffered?

MS. COOPER: Well, I think that what we have now is essentially a presumption that the direct purchaser has suffered the injury and I think what we actually have in reality is almost always pass-on to the indirect purchasers. I think that if there is somebody who is not an indirect purchaser or in some way it is unrelated, or distinct from the damages, that's a different story.

COMMISSIONER WARDEN: But you don't think there's a due process problem in presuming pass-on if only indirect purchasers sue?

MS. COOPER: No, I don't.

COMMISSIONER WARDEN: Okay. Professor Gavil and Mr. Denger, if your trifurcation approach were adopted and state law preempted, would you or either of you sign on to the proposition that the allocation stage could be a summary adjudication by the judge only without a jury with limited discovery, limited proof and limited trial days?

MR. DENGER: First of all there is trial jury issued.

COMMISSIONER WARDEN: Well, that's statutory in a federally created cause of action so Congress can deal with that however it wishes.

MR. DENGER: That's true. I think —

[Simultaneous discussion.]

COMMISSIONER WARDEN: No, it's not an action of common law. That's all that's preserved but go ahead.

MR. DENGER: I think as a practical matter you would find the courts and the parties working out some sort of summary procedure. I think in most of these cases you would find just as you did pre-*Illinois Brick*, when there were multiple levels of indirect purchaser classes and a direct purchaser class in cases, they worked out settlement allocations. You can take a look at some of the drug cases

today where there were allocations worked out among direct purchasers, third party payers, and other indirect purchaser plaintiffs and so forth. So I think most of them as a practical matter are going to get resolved.

For the ones that don't resolve, if the parties and the courts are agreeable, I think some sort of summary trial procedure with a limited number of trial days is worth considering and in many cases may be agreed to.

PROF. GAVIL: I don't think I would support any blanket assumption that some kind of summary proceeding would work. I think that Mike is absolutely right that in most cases, just like today – I mean the truth is very few cases that go to trial on damages get that far. There's going to be summary judgment. There's going to be *Daubert* motions on the experts, especially in indirect purchaser cases. There's going to be challenges to whether or not the damage model being presented is relevant and reliable. I think there are a lot of screenings in place that they would have to get past before they would get to a jury but if they get past those screens then I think they're entitled to a jury trial.

If I could just add one – going back one question. I don't think that I would agree with the representation

there's a presumption of pass-on if we overrule *Illinois Brick*. There's a presumption of a possibility and the indirect purchaser has to prove subjective standards of proof even today.

COMMISSIONER WARDEN: I didn't mean to suggest that but what I believe Ms. Cooper maintained was that if only indirect purchasers sued they should be entitled to the full overcharge, period, and that the issue of how much was passed-on doesn't even come into the case.

That's what I thought she suggested.

PROF. GAVIL: I don't think so.

MS. COOPER: Well, what I was suggesting was in the case when there were no other plaintiffs available and the plaintiff was an indirect purchaser that the rule of *Hanover Shoe* should be modified so that there would be somebody available to receive the damages. That, of course, doesn't address the question.

COMMISSIONER WARDEN: No, but once overcharge by the defendant was established, even though the overcharge was to someone else, since that someone else hadn't sued, the full amount of the overcharge would be recovered by the indirect purchaser plaintiff. That's my understanding of her position.

PROF. GAVIL: I don't know whether I would agree or disagree. I'd have to think about it a little further but I think the point there, like *Hanover Shoe*, is that we shouldn't take away the deterrent. We should make sure that there is some plaintiff in a position to deter by suing.

COMMISSIONER WARDEN: My time is gone.

CHAIRPERSON GARZA: Commissioner Shenefield?

COMMISSIONER SHENEFIELD: Let's see if I can get you all together to write some legislation. Let's start with the ABA proposal and let me ask you, Professor Gavil, do you feel so strongly about not having put prejudgment interest in your proposal that you would balk at joining his proposal?

PROF. GAVIL: Not at all.

COMMISSIONER SHENEFIELD: What about the opposite on preemption? You've asked for preemption of state law. They haven't included it for political reasons. Would you suffer that to be amended and join in his or is preemption required?

PROF. GAVIL: I don't think preemption is required. As I said in my remarks, I think it makes a more effective and better solution but if it's politically not viable then I think that we're better off with overruling

Illinois Brick even if it's without preemption.

COMMISSIONER SHENEFIELD: I take it, Mr. Steuer, there's nothing in the ABA proposal that's inconsistent with the Gavil proposal for some sort of antitrust specific interpleader process that would get everybody before the court and divvy up the proceeds?

MR. STEUER: No. In fact, I think that's what's contemplated — that it's possible to remove and consolidate all cases that come out of the same nucleus of facts.

COMMISSIONER SHENEFIELD: And a trifurcated procedure might be that kind of a process?

MR. STEUER: It certainly could be.

COMMISSIONER SHENEFIELD: And, Mr. Denger, could you join on to all of that?

MR. DENGER: Well, I've already joined on to prejudgment interest as a member of the ABA Remedies Task Force — even though I think there is an issue when you're providing for the automatic trebling of damages, whether that, in part, duplicates the prejudgment interest. Personally, I think I'd have to be convinced on the prejudgment interest, but since I joined in it once before as a matter of compromise —

COMMISSIONER SHENEFIELD: You're estopped, right.

MR. DENGER: Yes.

COMMISSIONER SHENEFIELD: Ms. Cooper, how about you? How far could you go along with this proposal?

MS. COOPER: I'm not sure that I could – I mean, I really am speaking just for myself here.

COMMISSIONER SHENEFIELD: I understand.

MS. COOPER: I think that again ensuring that state AGs would still have all of the *parens* authority I think this proposal would go a long way to solving one –

COMMISSIONER SHENEFIELD: And they would, would they not?

MR. STEUER: Yes, there is nothing in there to the contrary.

COMMISSIONER SHENEFIELD: Right. We get to you, Mr. Gustafson.

MR. GUSTAFSON: I hope you saved it because I was going to be the most difficult.

COMMISSIONER SHENEFIELD: I'm working up. What part of this is absolutely impossible for you to accept?

MR. GUSTAFSON: There's no part of it that's absolutely impossible for me to accept. There's a part missing and that's what role does class certification play in this proposal because if class certification is going to

be treated by the federal judges – presumably that's where we're going to end up – by the federal judges – since *Illinois Brick* the indirect purchaser classes are going to be denied and they're effectively not going to have a remedy.

COMMISSIONER SHENEFIELD: But can't we legislatively write something about that?

MR. GUSTAFSON: Sure. If the legislation is that we're going to let all participants who can show damage or injury, in fact, to participate in this process without having to jump the hoops of whether there are predominate questions versus individual questions versus regional differences, things like that, if all you have to show is that you have, in fact, been injured as an indirect purchaser and here is my damage, I can get behind this proposal.

But if you're going to put up a stumbling block of Rule 23 and apply it as the federal courts have to indirect purchasers, that is with *Illinois Brick* in mind that you can't prove pass-on because it's too complicated, then it defeats the purpose of the proposal because you effectively –

COMMISSIONER SHENEFIELD: I think we can work our

way around that.

MR. GUSTAFSON: Sure, because otherwise you effectively write the direct purchasers out of that law you wrote them back into.

COMMISSIONER SHENEFIELD: I have one further question, Professor Gavil, for you. The empirical research that you were thinking of, can we do that in an time that would be useful to us? In other word, we go out of existence in May of 2007, thereabout, so we have to actually come to conclusions some time well before then.

PROF. GAVIL: The answer is I don't know but I think you could do some that would be beneficial and inform the Commission in that time.

COMMISSIONER SHENEFIELD: Thank you. I don't have any further questions.

MR. GUSTAFSON: Let me just add with respect to collecting lawyer data I think that would be very easily done. I think the lawyers in this practice of antitrust law would be very willing to cooperate with that information as to the extent they could with the Commission.

CHAIRPERSON GARZA: Commissioner Litvack?

COMMISSIONER LITVACK: I had really two different questions. One directed to Mr. Denger. I have found the

courts not anxious to bifurcate. You're going to have them trifurcate?

MR. DENGER: Well —

COMMISSIONER LITVACK: How many judges do you think are really going to buy on to that and, assuming for a moment that they don't, is that material?

MR. DENGER: Well, if they don't then you just have one complete proceeding with all of the issues combined. That would obviously make it much more difficult for the courts to manage. One of the reasons I think they would consider trifurcating is it is clearly easier to manage the case if you can first determine liability because you can limit the participation of lawyers on common issues of liability and on the aggregate overcharge.

And then when you get to the third part, the trifurcation stage, I would guesstimate that what would happen is that the court would, first of all, try to reach some sort of allocation. There are ways that the court could encourage the parties to get together to resolve allocation issues.

And while I agree with you that some courts are reluctant to bifurcate, in this circumstance logic suggests that it would be a lot easier for the judges if they were to

try the trifurcation approach. I have usually found judges, if they find an approach that is far easier for them, to be amenable to at least trying it and that's what I think would happen.

COMMISSIONER LITVACK: Assuming, but certainly not deciding, that Commissioner Warden is wrong and that jury trials are required, would you suggest that the jury – you do this in a jury trial context, too? I understand the parties might agree not to but assuming some of them are a stick in the mud.

MR. DENGER: You know, you could do it in the jury context as well. I think as a practical matter, the amount of times that you would face a significant complex jury trial, at least in most follow on cases from the government criminal cases – not some of the other indirect purchaser cases we've talked about – are small.

COMMISSIONER LITVACK: You're making the distinction Ms. Zwisler made.

MR. DENGER: Yes.

COMMISSIONER LITVACK: I have one more question. It's really addressed to Professor Gavil. I may be the only one on this panel who doesn't know exactly what this empirical study that we're doing – we-re talking about –

would do. I got the cover sheets and I understand — I can understand what they are and I understand that they are class actions that have presumably been approved settlements, been approved by the courts, I can know what they are, but what is that really going to tell me? Because if I listened carefully to what I have heard from those who are really most opposed to this whole thing, while it's anecdotal, the things that they're concerned about aren't things I'm going to learn, I don't think, from this empirical study. Or am I wrong? Can I learn it.

PROF. GAVIL: I think you're right but with a caveat. I think there are issues that came up in both panels today. Are direct purchasers suing and how often? I think we can answer that.

COMMISSIONER LITVACK: Yes.

PROF. GAVIL: Okay. What's the relationship between government enforcement and follow on cases and what is that relationship? How much of — how strong is the relationship? I think we can answer that.

We have anecdotal evidence about recoveries by indirect purchasers. I think we can answer that by isolating the indirect purchaser cases. We could get a little bit more information.

Very importantly this question of, well, does anybody really recover double or multiple recovery, I think by matching up the cases that involve direct and indirect purchasers that haven't otherwise been consolidated, which would probably turn up in a reported case, we might get a handle on that.

So I think that there are some of these important assumptions being made about how these cases are handled that we probably could get more insight into.

COMMISSIONER LITVACK: I'm sorry, Mr. Denger.

MR. DENGER: If I could just add the one thing I think that will be exceedingly difficult to get a real handle on is whether there has been the multiple liability for a variety of reasons. One, with all due respect to Professor Gavil, I've been in the cases and seen a lot of economist testimony as to the amount of actual damages. That will vary all over the lot. And when you look at all of the factors and try and assess that against what the world would have been like absent the conspiracy, it's very, very difficult.

Secondly, you would have to make assumptions about the merits of particular cases. And not all class actions are completely meritorious with plaintiffs suffering –

COMMISSIONER LITVACK: Really?

MR. DENGER: — significant antitrust damages. Yes, really.

Third, increasingly, in the last four or five years there have been a lot of opt out settlements and these opt out settlements, unlike class settlements or state attorney general settlements, are not public and that data may not be ascertained.

So without all of that I am a little bit doubtful as to whether or not we can get meaningful data. I think you can get data. It just may not be meaningful data.

COMMISSIONER LITVACK: Thank you.

CHAIRPERSON GARZA: Commissioner Burchfield?

COMMISSIONER BURCHFIELD: I want to come back to a comment that I think Ms. Cooper made that she would — I understand that you oppose preemption. I also thought I heard you say that you would oppose exclusive federal jurisdiction if it had the effect of taking away the right of state attorneys general to bring actions at their discretion in their own state courts.

MS. COOPER: That's correct.

COMMISSIONER BURCHFIELD: Would you also oppose exclusive federal jurisdiction with regard to private

plaintiffs opting to bring claims under state law in state court?

MS. COOPER: Well, that's an issue that doesn't — obviously doesn't concern me as directly. My primary concern as I hoped I articulated in my written remarks is that there are a lot of related kinds of cases that the attorneys general bring and I think maybe this is true, although I haven't given it a lot of thought, for cases that would be brought by private actions as well. They may be antitrust related or partially antitrust but also have other significant components.

I'm not talking about cases in which somebody is trying to plead around the antitrust action but frequently in cases we look at we see conduct that really encompasses more than the traditional antitrust conduct.

And I am very concerned that those cases would also somehow end up outside of state courts where I think they belong.

COMMISSIONER BURCHFIELD: Mr. Denger, do I understand that you are or are not advocating preemption of the state laws?

MR. DENGER: I am —

COMMISSIONER BURCHFIELD: You are?

MR. DENGER: I am not —

COMMISSIONER BURCHFIELD: You are not.

MR. DENGER: — advocating preemption of state laws. I think a case could be made potentially but I think it is politically not do-able.

COMMISSIONER BURCHFIELD: Does anyone on this panel favor preemption? I know Professor Gavil mentioned it before but he seems to be retreating from that somewhat.

PROF. GAVIL: I wouldn't retreat from it. I understand that there may be a political issue with it but I think it would give us a better resolution of the problem. But I will add that it was really — it was an oversight on my part. I have a footnote in my remarks that talks about exceptions and I would exempt the states for the same reason I exempt the federal government from being involved — forced to be involved in any kind of coordination effort. I think state enforcers and federal enforcers have to be free to choose their forum and to prosecute based on their choices and discretion and shouldn't be forced into this national system. I should have made that more clear in my statement.

COMMISSIONER BURCHFIELD: And that would be true even if you create a situation where private plaintiffs want to follow in the wake of the state attorney generals in

state court?

PROF. GAVIL: If they follow in the wake they can follow in the wake in federal court. I think that the main issue here is if the cases are related to cases pending in federal court and in the hypothetical you just posed it may be that there is no relationship with any other pending cases in federal court. If it truly was an intra-state matter, and I assume if the state AG decided to prosecute just in state court that would probably be the case, then they wouldn't be eligible for this sort of national unified proceeding. The relatedness is very critical to understand. We wouldn't want to force people into federal court when there is no efficiency benefit and there is no issue to be gained.

I will say this about the preemption. I was just looking at the ABA proposal, and the last sentence of the first paragraph in the ABA proposal is, "There will be no duplication of recovery of damages under this section."

I don't think you can deliver on that promise if you don't preempt state indirect purchaser rights because if there are non-preempted state indirect purchaser rights that are private and they're pursuing their indirect purchaser damages in state courts, I don't think you can deliver on

this. You're going to have a continuing problem of can we remove it and what does it really represent. I think the only way to extinguish those issues is to have preemption of the private rights.

COMMISSIONER BURCHFIELD: My last question – if you would like to comment on it, I would – it would help me to hear your answer and that is we have isolated a number of issues here, duplicative litigation, difficult to manage litigation, possibly inconsistent results that certainly are possible in the indirect purchaser versus direct purchaser cases that are the topic today.

Given that there are other areas of law where those same issues arise and given that the federal government hasn't chosen in the area – they've specifically chosen not, in fact, to try to preempt state blue sky laws or undermine the ability of people to bring claims in state court under those state blue sky laws when there is duplicative federal litigation going on and there are other instances we could cite as well, what is the reason that we are singling out – that we would go to Congress and say that this is a special problem and it deserves a special solution? Yes, there's a problem but why is this problem deserving of a different –

PROF. GAVIL: In part, I would answer —

[Simultaneous discussion.]

PROF. GAVIL: I think I'd answer by saying, well, usually the resistance is because the perception is that there is a clear state interest in some particular set of rights that are distinct from the federal rights. And, in part, we would be saying that by preemption here. We'd be saying that after 28 years we are willing to relinquish *Illinois Brick* in favor of having a system that can be better coordinated. I don't think it is true in the same, for example, in the blue sky security area that you have multiple litigation, multiple forum litigation all arising out of the same issues in the same way that we face in antitrust.

It is not going to be a frequent occurrence. It is not going to be a repeating problem so it isn't a great invasion of state rights but to the degree those cases are already being removed, to the degree the Class Action Fairness Act means that more of them will be removed, we're not taking that much of an additional step to say it really would be better to avoid these sort of procedural eddies in the water and just make the exclusive remedy federal.

We already have exclusive federal jurisdiction for

antitrust cases.

MR. STEUER: It might help for me to expand on what our reasoning was. Looking at the state laws we found no state law that specifically called for duplicative damages and, in fact, many of them specifically instructed courts to avoid duplicative damages. So it's true as Professor Gavil points out that under this illustration it would leave open the possibility that a state law that specifically called for duplicative damages would be effective and would become part of the mix that a federal judge would have to address.

I don't find that to be a very realistic prospect because I don't think that that is something that has been the intent of any of the state laws. The intent of the state laws really addresses litigation that will take place within state courts. The only reason for the duplicative effect is the anomaly that you do have *Illinois Brick* in the federal system side by side with these state laws. So Professor Gavil is absolutely right that theoretically the problem is there. The solution, if that's the right word, of preemption, in our judgment was a non-starter, but our judgment also was that the problem itself was at this point only a theoretical one unless and until some state actually

enacted a repealer statute that called for duplicative damages.

CHAIRPERSON GARZA: Commissioner Kempf?

COMMISSIONER KEMPF: I continue to be bothered, by this question similar to what I posed to the first panel, by the notion that people who aren't damaged recover. And I hear people say, well, you know, deterring antitrust is a good thing, you know, why not let 501(c)(3) companies bring antitrust actions if that's the way we feel, or anybody who feels like it. Once you decide you're not going to let anybody who feels like it bring a case, you say, well, that was an irrational system. And it continues to strike me that a rational system, the most rational system is one that says people who are really injured can really recover and people who aren't really injured really can't recover. And in each case they can recover the amount of their damages times three. And in light of that, Professor, for example, why are you so comfortable giving more meat on the repealing of *Illinois Brick* but not messing with *Hanover Shoe*?

PROF. GAVIL: Because I think they serve completely different purposes. The reason you have the rule of *Hanover Shoe* and the reason I think it still makes sense is if the direct purchasers are the only ones that sue it

could happen. I don't really feel it's appropriate to give the defendant a motion to dismiss, and that's what it would be, based on the ground that, well, if they can prove any kind of pass-on and, well, how much would they have to prove — would they have to prove 100 percent pass-on? Do they just have to say there has been pass-on? But the litigation stops at the doorway and I think that creates a great disincentive for the direct purchaser who may have passed-on some or all damages to sue in the first place?

COMMISSIONER KEMPF: Why is that just an issue of proof? I mean in other words if someone comes in and says, oh, I passed — the defendant says they passed-on and the guy says, no, I didn't, why can't —

PROF. GAVIL: Because in —

COMMISSIONER KEMPF: — they show proof?

PROF. GAVIL: Because in truth the defendant has no particular interest in whether there was pass-on.

COMMISSIONER KEMPF: No, I understand that but the plaintiff does and he will say, oh, you found me out or he'll say, no, I didn't pass-on or I passed-on a little bit. And that just becomes a question of proof.

PROF. GAVIL: But if you overruled *Illinois Brick* then you are absolutely right. It just becomes a question

of proof. If you wind up with direct purchasers and indirect purchasers in federal court the only issue that should be of interest to the defendant is to defend against the accusation of overcharge. That's the only thing that really would be litigated as between the plaintiffs and the defendants.

The question of how much each layer was damaged is frankly just a strategy by the defendant to try and complicate the litigation and it's a strategy that I would just like to take away because in truth I think it harms deterrence and they have no particular interest in what this allocation would be. Here's a defendant yelling it's so unfair to the indirect purchasers that the direct purchaser can recover all of the damages. I think that we do damage to deterrence to allow the defendant to even get into that box and start arguing that issue.

If there are direct and indirect purchasers and if they both sue and we overrule *Illinois Brick* they will wind up in the same place and they will duke out over how much the damage was. It's irrelevant to the defendant and we should make it irrelevant to the court.

COMMISSIONER KEMPF: Okay. I am not going to use any more time although I obviously have difficulty with that

answer.

CHAIRPERSON GARZA: Okay. Commissioner Delrahim?

COMMISSIONER DELRAHIM: Thanks. Two quick points. First, just a clarification, Mr. Gustafson. You mentioned in your opening remarks that, as others have cautioned the Commission to wait and gain some more experiences with the Class Action Fairness Act, but you mentioned the recent de-trebling legislation. If we were to wait, what could we learn from that with respect to how it's going to impact indirect purchaser lawsuits? How is that relevant here?

MR. GUSTAFSON: Well, it's all part of a national system of antitrust enforcement and deterrence and we have enacted a statute on the federal level that takes away some of the deterrent in terms of punishment, adds some inducement to cooperate, and so we don't know what effect that's going to have on discovering cartels, exposing the evidence so that the other guilty parties are appropriately punished. And so to make changes in the indirect purchaser cases, which follow on in large part, although not exclusively, they follow on in large part from the direct purchaser actions that's going to affect that.

If a defendant is going to go into the amnesty program and sort of fess up that's going to strengthen the

indirect purchaser ability to prove their case and perhaps will increase the deterrent maybe more or maybe less than the deterrent is decreased by the single damages provisions of the law. So we just don't know how that law is going to affect the outcome of the direct purchaser actions which directly – in my view, directly affect the outcome of the indirect purchaser actions.

COMMISSIONER DELRAHIM: I commend Commissioner Shenefield for that masterful attempt. I wish he was a United States Senator having spent some time down there, we didn't attempt – perhaps it wouldn't have ended up taking seven-and-a-half years despite Commissioner Yarowsky's efforts to have passed the Class Action Fairness Act had Mr. Shenefield been in charge of that. But that was – I thought that was the best way to try to see where we have some agreement.

There was a recent *Business Week* article commenting on antitrust follow-on suits and identifying that, in addition to some of the asbestos cases, as perhaps the next cancer to the civil justice system. One of the things they suggested are those cases where the government has revealed or expended its efforts to bust a cartel, they suggest de-trebling of follow-on suits. It's a separate

issue than what we're talking about but perhaps related. For those cases, if there was going to be some kind of compromise, do you see any — I would love to know what the panel thinks — with those cases where the indirect purchaser's actions are follow-ons to a government action like the vitamins case and others, do you think there is — and where deterrence is less of an issue there — do you think it makes sense to de-treble in those limited situations and address part of the problem as a combination to some of the other solutions we've discussed?

MR. GUSTAFSON: Absolutely not. I think that we discover so few cartels that — and let's back up for a second. If we had a policy that deterred all anticompetitive conduct we wouldn't be talking about any of the rest of this because there wouldn't be any in a theoretical world where the deterrence was so powerful and the benefits to competition and innovation that we would recognize as a society would be spectacular. But because our deterrence is so understated here we are talking about duplicative recovery and preemption and all these other issues that are causing these procedural problems and judicial inefficiency. So absolutely no.

I think, if anything, we should talk about

increasing the deterrent effect and increasing treble to more than treble and increasing prejudgment interest because until we have some – the only empirical evidence I have seen, by the way, is something that suggests 10 percent or less of the cartels are caught but let's even assume it's 50 percent. Until we get to the point where people say I am not going to interfere with competition because the penalty is too great, we haven't reached a deterrent level yet.

COMMISSIONER DELRAHIM: But the issue – I mean, it's really the incentives. I mean, part of the argument against overturning *Hanover Shoe* is incentive for those folks who could have the most evidence and ability to bring lawsuits would go away.

I don't know when the last – I don't know – maybe some of the panelists would know when the last private action busted a cartel. I actually think it's really the government's efforts. So the incentive on the private side to come and bring a lawsuit rather than just recovering from that is less so.

Are there – Mr. Denger –

[Simultaneous discussion.]

MR. DENGER: The last one that I know of that you could make an arguable case that the private plaintiffs

discovered was the biggest one ever — *Vitamins*.

Secondly, if you look back over all of the literature, and I think a lot of it is summarized in an article Don Klawiter wrote a few years back, there is very, very little in the way of any sort of empirical evidence as to what it is that deters. Is it individuals' large criminal sanctions, is it sending to jail, is it treble damages, quadruple damages or what have you? I don't think anyone really knows what it is that deters.

And, finally, when you do have a criminal fine system based as it is today on an alternative maximum fine that is possibly double the alleged loss, which is determined by a percentage of the sales of the defendant's product throughout the entire conspiracy period, and when there is also a possibility of restitution as a condition of probation, and then direct and indirect purchaser damages, you have to look at all as one system.

If you are going to look at an effective system you can't separate it out. You have to look at it all together. And that's the one thing I would urge you to do.

MR. GUSTAFSON: Very quickly. Now that's how you do it in the rest of the areas of law. If I assault you in the street and I get fined $10,000 as part of my criminal

penalty that doesn't affect your right to sue me in civil court for assault and battery. So I think that if you look at the other areas of law there is not this discount for criminal activity.

COMMISSIONER DELRAHIM: It's just a matter of whether treble or single damages. I think that's the issue I was more concerned about is whether there – you know, it would make more sense to de-treble those.

PROF. GAVIL: I can tell you that at the remedies forum we had very specific commentary that treble damages is far too much and also far too little and 2007 may not be enough time to resolve this, which is why the ABA group decided not to address that.

CHAIRMAN GARZA: I want to give an opportunity to Commissioner Carlton to ask any questions.

COMMISSIONER CARLTON: Just one or two questions. The first one is to Professor Gavil. I understand the suggestion to do the empirical studies. I take it from the questions you've posed as to what would be studied would be primarily to determine, in fact, do indirect purchasers serve a deterrent – have a deterrent effect by looking at whether they've actually instigated action or whether they just follow on and whether they are actually recovering

something.

Now I assume if the answer to those questions were no, they don't get very much and they're not really responsible for initiating actions, just following on, would it then follow that your position is that we should leave *Illinois Brick* in place?

PROF. GAVIL: No. One, I don't think that's what it's going to show. Two, I view the value of the empirical evidence is to support to some extent perceptions that people have about what's going on and I think to provide support for any conclusion this Commission comes to. I think whatever the Commission recommends, if you haven't undertaken some effort to put some of that information together, you're going to be subject to criticism for not really having the information.

COMMISSIONER CARLTON: Yes, now I agree. I think that's a good point but I guess my real question is I can't think of — let's suppose there were no cases of indirect purchasers brought and let's suppose, in fact, they get no money. Are you saying that has no effect on the decision as to whether to overturn *Illinois Brick*?

PROF. GAVIL: You're asking me to assume the opposite of what the case is and, yes, if the opposite is

true then it undermines the whole issue of whether this is something important enough for us to deal with. If indirect purchasers are not out there suing and there weren't these class actions being filed in state court which are creating a problem — well, there's no problem and we don't have to deal with it.

COMMISSIONER CARLTON: It's creating a problem, they're just not getting any money.

PROF. GAVIL: Well — but let me — let me address that one. I notice that there was a question asked about that and it came up this morning. There were a number of questions about how much do indirect purchasers really recover. My reaction to that is completely irrelevant. By definition, the nature of a class action — the device was created, and so it's part of its nature — the assumption is we have lots of people with very small injuries that wouldn't on their own have the incentive to bring suit. That's the very purpose of a class action. It is to incentivize the group to look at their injury as a whole. So I'm not really impressed by the idea that, well, people get $5 here or $5 there.

Let's say you and I — you know, our overpayment on our coffee pot which was price-fixed is only five cents but

it turns out there's 100 million of us who bought that coffee pot. I think that there is deterrence value in permitting those small recoveries. In the aggregate they may not be so small and in the aggregate there may be significant consumer harm.

COMMISSIONER CARLTON: That I agree with but in the aggregate you don't find any payments to them. My question is, is that why we're doing a study? Is that what we're trying to find out?

PROF. GAVIL: It's not about the payment to them. It's about what it costs to defend it. And if the cost of defending something real — I think this was the FTC's reason for having a problem with coupon settlements is that it didn't actually cost the defendant very much. That's the issue from the point of view of both deterrence and compensation.

COMMISSIONER CARLTON: Yes, I agree with that. That leads to my next question, which actually came up — and I direct it to Mr. Gustafson. You were talking about deterrence and that's what Professor Gavil was just talking about. If we are focused on deterrence, we can get deterrence in a lot of ways. The question we're grappling with is not — although in part it's the aggregate amount of

deterrence. It's really whether you get extra deterrence from indirect purchasers and how much you get. And that was really the point of my question to Professor Gavil.

When you were talking, and others on the panel have also said that this — that it's not clear damages have ever exceeded multiple overcharges. Isn't the real point that that goes to as to whether the multiple is correct, not whether you have direct plus indirect purchasers being able to sue? In other words, can't you address the question of under-deterrence by keeping it only focused on direct purchasers but raising the multiple? That is, they seem to me separate issues.

MR. GUSTAFSON: Sure. I believe you could raise the deterrent and leave indirect purchasers out but, as you heard testimony this morning from Ms. Zwisler and Mr. Tulchin, they both consider the indirect purchaser actions to be a deterrent. They testified long and hard about the costs to their clients and so I think they do consider those to be a deterrent and so you could do it as you suggest. I agree but the current system does it in a slightly different way.

COMMISSIONER CARLTON: If I — I guess I don't. Okay.

CHAIRMAN GARZA: Is it a quick one?

COMMISSIONER CARLTON: It's very quick. Let me pose it quickly. I'll pass. That's okay.

CHAIRMAN GARZA: Sorry about that.

MS. COOPER: Could I just address something before we move on?

CHAIRMAN GARZA: Very quickly.

MS. COOPER: We have been talking about deterrence but I just want to remind everybody that compensation is also an issue here and it is just simply not correct that consumers don't receive anything meaningful out of these cases. I just — I want to use the same three cases that General Bennett used. In *Mylan* — and we're talking about here primarily elderly consumers who do not have insurance — in *Mylan* the average check was $211. In *BuSpar* the average check was $646.97. And in *Taxol* the average check was $569.21. I believe these recoveries were quite meaningful to the individuals who received them.

MR. GUSTAFSON: By the way, if the Commission is interested in that information, I did go to Russ Consulting who does a lot of the administration for at least the cases I'm involved in and they had a fairly extensive computer database that is non-name and social security specific. It

just says average payment, you know, number of people paid, number of people, claims, and I had some of that information for today but they have a pretty good database if you're interested in that kind of information.

COMMISSIONER JACOBSON: Which case?

MR. GUSTAFSON: It's both direct and indirect purchaser cases.

COMMISSIONER JACOBSON: There's no question we would like that.

MR. GUSTAFSON: I will ask Mr. Redford if he would produce that. I think it's sanitized sufficiently that there's no privacy concerns because it doesn't list any names or any identification.

CHAIRMAN GARZA: Did I miss Commissioner Cannon? Oh, I was just going to turn to him?

COMMISSIONER JACOBSON: He had to step out.

CHAIRMAN GARZA: Okay Well, then since it's 5:15, sometimes timing is everything, and I think we'll try to wrap it up. I, once again, thank you very much for your participation during this hearing.

I warn you that we may want to get back to some or all of you with additional questions as follow up. Obviously, there may be some questions that we didn't have

time to ask or some that were prompted by the discourse. And if you want to supplement your testimony with things like what we were just talking about in terms of Russ Consulting, please feel free to do so.

Thank you very much.

[Whereupon, at 5:15 p.m., the proceedings were adjourned.]