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June 17, 2005

Andrew J. Heimert, Executive Director & General Counsel
Antitrust Modernization Commission
1120 G Street, N.W., Suite 810
Washington, D.C. 20005

Re: Testimony

Dear Mr. Heimert:

Please find attached, in pdf, the written testimony of Hawaii Attorney General Mark J. Bennett and me addressing the topics for the June 27, 2005, Commission hearing panels, "State Indirect Purchaser Actions in the U.S. Antitrust Enforcement System" and "State Indirect Purchaser Actions: Proposals for Reform." In addition to our testimony, we are submitting under separate cover a Resolution entitled "Principles of State Antitrust Enforcement," which was adopted in March 2005 by the National Association of Attorneys General.

Attorney General Bennett and I look forward to participating in the panel discussions on these important topics.

Very truly yours,

A handwritten signature in cursive script that reads "Ellen S. Cooper".

Ellen S. Cooper
Chief, Antitrust Division

**Testimony of Mark J. Bennett and Ellen S. Cooper
Concerning Indirect Purchaser Actions
Before the Antitrust Modernization Commission¹**

Submitted June 17, 2005

We thank the Commission for providing us with the opportunity to submit this testimony. As will be apparent from our comments, few areas of antitrust law have as direct and substantial an impact as *Illinois Brick* on the ability of the state Attorneys General to carry out their core mission of protecting consumers and government institutions.

Summary

In the years since *Illinois Brick* was decided, the state Attorneys General have supported federal legislation to overrule that decision. Although those efforts on the federal level proved unsuccessful, many states, through legislation and judicial interpretation, have permitted downstream purchasers to recover damages. In a series of federal court cases with supplemental state claims, the states have demonstrated harm to downstream purchasing consumers and have governmental entities and successfully negotiated settlements with defendants.

The states, in a National Association of Attorneys General resolution, advocate that Congress repeal *Illinois Brick* and provide a federal remedy for downstream purchasers. *Hanover Shoe* should be modified to permit a fair allocation of damages among direct and indirect purchasers when there are multiple levels of claimants. The Attorneys General also oppose preemption of state antitrust laws, including state laws providing downstream purchaser remedies. Preemption of state law would interfere with traditional state functions and would

¹ Mark J. Bennett is Attorney General of Hawaii and Chair of the Antitrust Committee of the National Association of Attorneys General. Ellen S. Cooper is Chief of Maryland's Antitrust Division and Chair of the states' Illinois Brick Committee. J. Thomas Prud'homme, a Texas assistant attorney general, provided invaluable assistance in drafting and finalizing these comments. Drafts of these comments have been widely circulated among the Attorneys General and antitrust attorneys within those offices for review and comment, and the authors thank many enforcers for their suggestions and insights.

impair the federalism that is central to our system of government.

I. Historical Perspective

In *Illinois Brick Co. v. Illinois*,² the Supreme Court held that downstream purchasers are not entitled to recover damages for injuries suffered as a result of a violation of federal antitrust law. In doing so, the Court upended every prior federal Court of Appeals decision³ on the subject and denied a federal antitrust remedy to millions of consumers.⁴

The *Illinois Brick* decision caused particular concern to the state Attorneys General. By nullifying most consumer antitrust damages claims, the decision significantly weakened the *parens patriae* authority of the Attorneys General, which had just been recognized at the federal level in section 4C of the Hart-Scott-Rodino Antitrust Improvements Act of 1976.⁵ Indeed, the

² 431 U.S. 720 (1977).

³ See *Illinois v. Ampress Brick Co.*, 536 F.2d 1163 (7th Cir. 1976), *rev'd sub nom.*, *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); *In re W. Liquid Asphalt Cases*, 487 F.2d 191, 197-98 (9th Cir. 1973); *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1088 (2d Cir. 1971); *Armco Steel Corp. v. North Dakota*, 376 F.2d 206, 210-11 & n.3 (8th Cir. 1967); *South Carolina Council of Milk Producers, Inc. v. Newton*, 360 F.2d 414 (4th Cir. 1966); *Midway Enter., Inc. v. Petroleum Mktg. Corp.*, 375 F. Supp. 1339, 1344-45 (D. Md. 1974). See also, *Southern Gen. Builders, Inc. v. Maule Indus. Inc.*, 1973-1 Trade Cas. (CCH) ¶ 74,484 at 94,152 (S.D. Fla. 1972); *In re Ampicillin Antitrust Litigation*, 55 F.R.D. 269, 276 (D.D.C. 1972); *In re "East of the Rockies" Concrete Pipe Antitrust Cases*, 302 F. Supp. 244 (J.P.M.L. 1969); *Iowa v. Union Asphalt & Roadoils, Inc.*, 281 F. Supp. 391 (S.D. Iowa 1968), *aff'd*, 409 F.2d 1239 (8th Cir. 1969). In *Mangano v. American Radiator and Standard Sanitary Corp.* 438 F.2d 1187 (3d Cir. 1971) (*per curiam*), the Third Circuit upheld dismissal of an antitrust action based on plaintiffs' failure to answer interrogatories and, alternatively, plaintiffs' failure to "show that these overcharges became components of the prices they paid." *Id.* at 1188 & n.1. The Third Circuit's decision upholding dismissal for downstream plaintiffs' failure to prove pass-on implicitly recognizes plaintiffs' right to recover if they could prove pass-on. This is borne out by subsequent district court decisions in the Third Circuit that did not cite *Mangano* to limit antitrust recovery to "direct" purchasers. See *Midway Enter. Inc.*, 375 F. Supp. at 1344-45 (allowing damages for downstream purchasers); *In re Sugar Antitrust Litig.*, 73 F.R.D. 322, 350-55 (E.D. Pa. 1976) (same).

⁴ Prior to *Illinois Brick*, "indirect" purchasers were plaintiffs in almost two-thirds of all private federal antitrust actions and the only plaintiffs in 25 percent of these cases. S. Rep. No. 95-934, 95th Cong., 2d Sess. 19-20 (1978).

⁵ See S. Rep. No. 95-9345, 95th Cong. 2d Sess. 16-17 (1978) (*Illinois Brick* decision a "virtual nullification of *parens patriae*").

Illinois Brick decision was flatly inconsistent with the intent of the Hart-Scott-Rodino Act, at least according to one of the Act’s sponsors.⁶

Thus, the *Illinois Brick* decision has hampered the ability of the Attorneys General to invoke federal antitrust law when carrying out their core mission of protecting consumers and government agencies. Moreover, in the name of administrative efficiency, the *Illinois Brick* decision has worked a significant injustice, denying recovery to downstream, or “indirect,” purchasers despite the recognition that, in most circumstances, overcharges are ultimately passed on to consumers.⁷

To correct this injustice, the Attorneys General have supported federal legislation introduced since *Illinois Brick* which would have effectively overruled that decision.⁸ To date, none of these efforts has succeeded.

Using the reasoning of *Illinois Brick*, the Attorneys General have also sought to judicially limit its applicability. For example, states sought to expand the recognized exception to the *Illinois Brick* bar for “cost plus” contracts, when allocation of damages would be relatively

⁶ “[I]f the intervening presence of . . . a middleman is to prevent recovery, the [*parens patriae* amendments] will be utterly meaningless.” CONG. REC. 30868, 30878-79 (1976) (statement of Rep. Peter W. Rodino). See also, Hearings on S. 300 Before the Senate Comm. on the Judiciary, 96th Cong., 1st Sess. 60-77 (1979) (statement of Chauncey H. Browning); Restoring Effective Enforcement of the Anti-Trust Laws: Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 96th Cong., 1st Sess. 58 (1979) (statement of William J. Scott).

⁷ See *Antitrust Enforcement Act of 1979: Hearings on S. 300 Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 69-77 (1979); Harris & Sullivan, *Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis*, 128 U. Pa. L. Rev. 269 (1979); Hovenkamp, *The Indirect Purchaser Rule and Cost-Plus Sales*, 103 Harv. L. Rev. 1717, 1726-27 & n.46 (1990).

⁸ See, e.g., H.R. 1942, 95th Cong., 2d Sess. (1978); S. 1874, 95th Cong., 2d Sess. (1978); H.R. 9132, 95th Cong., 1st Sess. (1977); H.R. 8516, 95th Cong., 1st Sess. (1977); H.R. 8359, 95th Cong., 1st Sess. (1977); H.R. 2004, 96th Cong., 1st Sess. (1979); H.R. 2060, 96th Cong., 1st Sess. (1979); S. 300, 96th Cong., 1st Sess. (1979). See also, Calkins, *Illinois Brick and its Legislative Aftermath*, 47 Antitrust L. J. 967 (1978).

simple. This effort has been largely unsuccessful.⁹

Immediately after *Illinois Brick*, many states also began to amend state contracts by inserting clauses assigning direct purchasers' antitrust claims to state government purchasers. These contractual provisions have proven of limited utility, however, in that they are procedurally difficult to enforce and, more importantly, do not provide relief to non-government consumers.

As the states attempted to limit the inequity wrought by *Illinois Brick* through legislation and litigation at the federal level and through amendment of state contracts, many also tried to obtain relief through state law, including state legislation. This effort began with state legislation, adopted in response to *Illinois Brick*, that expressly permits damage recovery by downstream purchasers harmed by a violation of state antitrust law.¹⁰ Other states had preexisting antitrust statutes which have been judicially interpreted to permit recovery of antitrust damages by downstream purchasers.¹¹ Still others have consumer protection or other laws that have been judicially interpreted to permit downstream purchasers to recover damages, including damages for violations that are functionally equivalent to antitrust violations.¹² Finally, some state consumer protection and antitrust statutes permit equitable relief, which has

⁹ See *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199 (1990).

¹⁰ One of the first states to adopt such legislation was California. The California legislation provides in relevant part that an action under the California antitrust statute "may be brought by any person who is injured in his or her business or property by reason of anything forbidden or declared unlawful by this chapter, regardless of whether such injured person dealt directly or indirectly with the defendant." Cal. Bus. & Prof. Code § 16750(a). Examples of other states with state antitrust statutes expressly rejecting *Illinois Brick* include Illinois (740 I.L.C.S. 10/7(2)) and New York (N.Y. Gen. Bus. Law § 340(6)).

¹¹ Examples include Arizona (*Bunker's Glass Co. v. Pilkington PLC*, 47 P.3d 1119 (Ariz. Ct. App. 2002)) and North Carolina (*Hyde v. Abbott Laboratories*, 123 N.C. App. 572, 473 S.E.2d 680, 684 (1996)).

¹² Examples include Florida (Fla. Stat. Ann. § 501.201 et seq., as interpreted by *Mack v. Bristol-Myers Squibb*, 673 So.2d 100 (Fla. Dist. Ct. App. 1996)) and Massachusetts (Mass. Gen. Laws Ann. ch. 93A §1-11, as interpreted by *Ciardi v. F. Hoffmann-La Roche, Ltd.*, 762 N.E.2d 303, 308 (Mass. 2002)).

been interpreted to permit the recovery of disgorgement and/or restitution on behalf of downstream purchasers for antitrust violations.¹³ These state laws have been labeled, imprecisely, “*Illinois Brick* repealers.”

As the Attorneys General labored in the wake of *Illinois Brick* to use state law to obtain recoveries for injured consumers and state purchasers, supporters of the *Illinois Brick* bar sought to invalidate these state laws, arguing that *Illinois Brick* preempts inconsistent state law. The Supreme Court unanimously rejected this argument in *California v. ARC America Corp.*,¹⁴ upholding California and Minnesota “*Illinois Brick* repealers,” an Alabama statute that had permitted recovery by “indirect” purchasers since 1908, and an Arizona statute that had not yet been interpreted by the state courts. Thus, for the past few decades, downstream purchasers have secured monetary recoveries for antitrust violations under state law. With that history, we urge the Commission to question whether the justifications expressed in *Illinois Brick* for barring recoveries by such purchasers under federal law withstand scrutiny.

The Court in *Illinois Brick* provided essentially three reasons for barring downstream recovery of antitrust damages: (1) The bar was necessary to avoid the risk that defendants might have to pay multiple damages; (2) Direct purchasers will be the most efficient enforcers of the antitrust laws; and (3) Pass-on damages are difficult to calculate.¹⁵

As to the possibility of duplicative damages, the Supreme Court effectively abandoned this justification in its *ARC America* decision. As one commentator has noted, “[t]he antitrust enforcement experience in the nearly three decades since the *Illinois Brick* ruling suggests that

¹³ Examples include South Carolina (*FTC v. Mylan Labs, Inc.* 99 F. Supp. 2d 1 (D.D.C. 1999)) and Kentucky (*Id.*; see *Commonwealth v. Dare to be Great*, 511 S.W.2d 224 (Ky. 1972)).

¹⁴ 490 U.S. 93 (1989).

¹⁵ *Illinois Brick*, 431 U.S. at 730-33.

the concerns about multiple liability cited by the *Illinois Brick* majority might be overblown.”¹⁶

Likewise, the efficiency-of-enforcement rationale has not withstood the test of time.¹⁷ Even assuming this rationale’s validity when applied to private litigants, this justification is and always has been inapplicable to state Attorneys General acting in their *parens patriae* capacity on behalf of consumers. Under their respective state antitrust laws, most Attorneys General have pre-litigation investigative authority, usually including compulsory process for the production of documents and testimony. With this authority, the Attorneys General are at least as capable as “direct” purchasers of ferreting out antitrust violations and enforcing the antitrust laws.¹⁸

As to the difficulty of allocating damages among direct and downstream purchasers, while problems undoubtedly still remain, they are more manageable today. Advances since 1977 in data capture, storage and manipulation, as well as in econometric modeling has made such allocation less problematic. Moreover, when the Supreme Court decided *Illinois Brick* in 1977, trial courts were limited in their ability to evaluate and exclude possibly dubious expert testimony. Since then, the Supreme Court has recognized that the federal district courts are qualified to evaluate expert testimony and act as gatekeepers for the admission of such testimony.¹⁹ Even assuming that insurmountable analytical difficulties for allocating damages

¹⁶ Cavanaugh, *Illinois Brick: A Look Back and a Look Ahead*, 17 Loy. Consumer L. Rev. 1, 43-44 (2004) (noting that federal courts regularly exact large criminal fines on top of civil treble damage awards).

¹⁷ *See Id.* at 49 (“Indirect purchaser suits have led to a modest up-tick in deterrence”).

¹⁸ *See Id.* (“consumers, at least in actions brought by state governments, are getting some compensation from antitrust violators”); Hovenkamp, *The Indirect Purchaser Rule and Cost-Plus Sales*, 103 Harv. L. Rev. 1717, 1729 (1990) (noting that “private plaintiff lawsuits that follow separately initiated government price-fixing prosecutions . . . account for well over one-third of private price-fixing filings . . . [and] independent antitrust practitioners are probably in the best position to ‘detect’ worthwhile private cartel cases simply by keeping up with the literature on government investigations”). Moreover, direct purchasers often have little incentive to sue their suppliers for antitrust violations. Litigation usually disrupts business operations and creates ill-will while overcharges may be passed on to downstream purchasers.

¹⁹ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

remained in particular cases, the federal courts are now equipped to deal with them by simply excluding unreliable expert testimony.

Some recent cases highlight the success of the Attorneys General, and others, in obtaining recoveries under state law on behalf of injured downstream purchasers. These cases provide ample testimony to the effectiveness of the state-law remedy and call into question the continued viability of *Illinois Brick*.

For instance, in *FTC v. Mylan Labs, Inc.*²⁰ the Attorneys General of thirty-three states conducted a joint litigation with the Federal Trade Commission. The states represented government agencies and consumers, the majority of whom were “indirect” purchasers of the anti-anxiety drugs lorazepam and clorazepate. The FTC and states jointly settled with defendants for \$100 million, to be distributed to downstream purchasing consumers and to government agencies. Under this settlement, affected consumers who submitted valid claims received compensation equal to 100% of the total value of their purchases of the relevant drugs over the relevant time period. In total, 203,471 consumer refund checks were mailed worth \$42,937,014.80, for an average check value of approximately \$211, although many individual consumer checks exceeded \$1,000.²¹

Separate classes of non-consumer, non-government “indirect” purchasers (“third party payors”)²² and direct purchasers filed actions in the District of Columbia District Court. The direct purchaser action was settled for \$35 million, while the third party payor downstream

²⁰ 99 F. Supp. 2d 1 (D.D.C. 1999).

²¹ In addition, state agencies received \$28,217,983.00 and over \$2,880,000 was distributed *cy pres* under the express condition that the funds were to be used “in a manner reasonably targeted to specifically benefit, the health care needs of a substantial number of persons injured by the increased prices of lorazepam and clorazepate.”

²² The Attorneys General typically either lack legal authority or, as a matter of prosecutorial discretion, tend not to represent non-consumers, such as third party payor insurance companies, *parens patriae*.

purchaser case settled for \$25 million. Some businesses opted out of the third party payor downstream purchaser settlement and recently, a jury awarded pre-trebled damages in excess of \$12 million to four end-payor insurance companies.²³ The cumulative amount of these settlements and verdict (assuming it is trebled) is less than treble the states' estimate of overcharge damages.²⁴

Likewise, in *In re Buspirone Antitrust Litigation*,²⁵ the Attorneys General of thirty-seven states represented consumers and state agencies, most of whom were downstream purchasers of the drug BuSpar. Pursuant to their settlement with Defendant Bristol-Myers Squibb, the Attorneys General recovered \$100 million for their consumers and government agencies. Under this settlement, affected consumers who submitted valid claims received compensation equal to more than 100% of the total value of their purchases of the relevant drugs over the relevant time period. In total, \$30 million in refund checks was distributed to consumers.²⁶ The minimum consumer check was \$75.00, the average consumer check was \$646.97, and many checks reached into the thousands of dollars.

This litigation also involved a private class of non-consumer downstream purchasers, as well as a direct purchaser class. All of these actions were consolidated with the Attorney General action for pretrial purposes and the settlements in all of these actions were contemporaneously negotiated. The non-consumer downstream purchasers settled for \$90 million while the direct purchasers settled for approximately \$220 million. Certain of the non-consumer downstream purchasers opted out of that settlement and have since settled separately for approximately \$50 million. Finally, there were several competitors who sued Bristol-Myers

²³ See *Health Care Service Corp v. Mylan Laboratories, Inc.*, Civ. No. 01-2464 (TFH), *Blue Cross Blue Shield of Minnesota*, Civ. No. 02-1299 (TFH) (Verdict Form, June 1, 2005).

²⁴ Overcharge damages are to be distinguished from other types of damages arising from an antitrust violation, such as direct purchasers' lost profits or competitors' lost sales/profits.

²⁵ 185 F. Supp. 2d 363 (S.D.N.Y. 2002).

²⁶ State agencies received over \$65 million.

Squibb directly, and received approximately \$60 million.

Comparing the BuSpar settlement amounts to estimated damages is difficult. The lawsuits involved two separate claimed violations, one with relatively low potential damages but high likelihood of success, and another with very high potential for damages but a lower likelihood of success. Although the settlements do not allocate damages among the different claims, we roughly estimate that the aggregate value of all settlements (excluding the competitor claims) is less than single overcharge damages for the claim with the high damage potential, and approximately double the potential overcharge damages for the claim with the low damage potential.

Another example of the success of the Attorneys General in obtaining consumer recoveries is *State of Ohio v. Bristol-Myers Squibb Co.*, No. 02-civ-01080 (D.D.C. 2002), in which the Attorneys General of all fifty-six states, territories, and possessions represented consumers and state agencies, most of whom were not direct purchasers of the drug Taxol. Pursuant to their settlement with Bristol-Myers Squibb, the Attorneys General recovered \$55 million in settlement of their consumers' and government agencies' claims. Under this settlement, affected consumers who submitted valid claims received compensation equal to 100% of their estimated overcharges. A total of 12,723 checks were mailed out, totaling \$7,242,114, for an average amount per check of \$569.21.²⁷ In addition, Bristol-Myers Squibb is currently supplying 13,000 vials of Taxol without charge for distribution to indigent patients.

Like the BuSpar case, the Taxol litigation also involved a private class of third party payor downstream purchasers and a direct purchaser class. The third party payor downstream purchasers settled for \$15,185,000; the direct purchasers settled for \$65,815,000.

Despite these successes, some commentators have persistently criticized reliance on state

²⁷ State agencies received \$37.5 million. The balance of the consumer portion of the settlement will be distributed *cy pres* to benefit cancer patients and their families.

law to compensate injured consumers on the ground that it creates unnecessary substantive and procedural complexity in cases where purchasers in more than one state are affected by an antitrust violation. While this is certainly a legitimate concern—one which would be addressed by legislative repeal of the federal *Illinois Brick* bar—the Attorneys General have not found either substantive or procedural complexity to be insurmountable in practice. The vast majority of actions brought by Attorneys General on behalf of downstream purchasers are brought in a coordinated fashion, on behalf of consumers in more than one state. Most of these cases are brought in federal court via a single complaint, with multiple state-law supplemental claims.²⁸ Many of these cases have been consolidated with class actions and in each such case, the Attorneys General have successfully coordinated their case prosecution with class counsel to avoid duplication and inconsistent representation.

The Attorneys General have brought a limited number of actions on behalf of downstream purchasers in state courts.²⁹ Even in these cases, however, the Attorneys General have coordinated their activities among themselves and, where feasible and appropriate, with class counsel. For instance, in the recent Vitamins antitrust litigation,³⁰ the Attorneys General negotiated a master settlement of multiple state-court actions involving both direct and downstream government purchasers, although the California Attorney General negotiated a separate California-specific settlement.

²⁸ Examples include *FTC v. Mylan Labs, Inc.*, 99 F. Supp. 2d 1 (D. D.C. 1999); *In re Cardizem CD Antitrust Litig.*, 332 F.3d 896 (6th Cir. 2003); *In re Buspirone Antitrust Litigation*, 185 F. Supp. 2d 363 (S.D.N.Y. 2002); *State of Ohio v. Brisol-Myers Squibb Co.* No. 02-civ-01080 (D. D.C. 2002); *In re Clozapine Antitrust Litigation*, MDL No. 874 (N.D. Ill. 1991); *State of Maryland v. Perrigo Co.*, 1:04CVO1398 (D. D.C. 2004); *In re Remeron End-Payor Antitrust Litigation*, Master File No. 02-CV-2007 (D. N.J. 2005); *In re Relafen Antitrust Litig.*, Master File No. 01-CV-12239-WGY.

²⁹ These cases are unusual in that, unlike other areas of state law enforcement, state antitrust enforcers have typically enforced their antitrust laws in federal court because of (1) the ability to secure a single forum for issues affecting multiple states, (2) the antitrust enforcers' experience in federal court, and (3) the relatively greater experience of the federal judiciary in handling complex antitrust litigation.

³⁰ See *In re Vitamins Antitrust Litigation*, 320 F. Supp. 2d 1 (D. D.C. 2004).

While some still argue that *Illinois Brick* was correctly decided, most commentators now acknowledge the need to revisit this decision in light of the success of the state statutes permitting downstream purchasers to be compensated for their antitrust injuries.³¹ The states strongly support the principle of full recovery for downstream purchasers.

II. Solutions to the Conflict between *Illinois Brick* and State *Illinois Brick* Repealer Statutes

The states, through the National Association of Attorneys General (NAAG), advocate that Congress repeal *Illinois Brick* and provide a federal remedy for downstream purchasers. As previously discussed, the state Attorneys General view the current federal system as perpetuating an injustice to consumers. The Attorneys General favor fairness over procedural efficiency; and compensation to victims of antitrust violations over the theoretical risk of multiple liability. Further, the Attorneys General unanimously oppose preemption of state antitrust law, favoring instead coordination of multistate litigation. When the parties can consolidate all claimants in the same forum, plaintiffs can achieve efficiencies in discovery, securing expert testimony and in the conduct of trials or settlement negotiations; defendants can secure a global resolution of liability and damages. On the other hand, forced consolidation and coordination of actions in federal courts would minimize the opportunities for the state courts to develop vibrant state antitrust law. The solution is to remove the federal ban on indirect purchaser actions without preempting state statutes that recompense injured consumers and government purchasers.

The touchstone of a federal antitrust damage claim should be actual damages. Once the fact of injury is established with reasonable certainty, the plaintiff may establish the amount of harm under a less stringent standard. Although it has long been a rule in antitrust cases that damages may not be based on mere speculation, a jury may make a “just and reasonable

³¹ See, e.g., Cavanaugh, *Illinois Brick: A Look Back and a Look Ahead*, 17 Loy. Consumer L. Rev. 1, 43-44 (2004); Giali, *Federalism and the Indirect Purchaser Mess*, 11 Geo. Mason L. Rev. 157 (2002); Davis, *Indirect Purchaser Litigation: ARC America’s Chickens Come Home to Roost on the Illinois Brick Wall*, 65 Antitrust L. J. 375 (1997).

estimate.”³² The rationale for the more relaxed standard is that ascertainment of the precise damages is often difficult as a result of the defendant’s illegal conduct.³³ Thus, plaintiffs should continue to benefit from the leeway established in *Bigelow v. RKO Radio Pictures*³⁴ and other cases permitting reasonable inferences in establishing damages,³⁵ and damages should be awarded to the plaintiff actually “injured in his business or property” within the meaning of Section 4 of the Clayton Act.³⁶

The combined effect of *Hanover Shoe v. United Shoe Machinery Corp.*³⁷ and *Illinois Brick*, of course, subverts that touchstone. As has been recounted numerous times in the literature, *Illinois Brick* was premised in large part on the *stare decisis* effect of *Hanover Shoe*, which preceded it by only nine years. *Hanover Shoe* had been premised on a concern that recognizing a pass-on defense would eviscerate deterrence of antitrust violations. According to the Court, end purchasers, while collectively bearing the brunt of the damages, suffer only a small injury individually. Consequently, end purchasers have little incentive to sue. Second, even if end purchasers were inclined to sue, the task of proving damages in “the real economic world” would “normally prove insurmountable.”³⁸ Thus, the Supreme Court chose to eliminate the passing-on defense and award a potential windfall to the direct purchaser rather than to the antitrust violator.

³² *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946).

³³ *See Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 379 (1927).

³⁴ 327 U.S. 251 (1946).

³⁵ *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 123 (1969); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 563 (1931) (“just and reasonable inference”).

³⁶ *See generally* ABA Section of Antitrust Law, *Proving Antitrust Damages: Legal and Economic Issues* (1996).

³⁷ 392 U.S. 481 (1968).

³⁸ *Hanover Shoe*, 392 U.S. at 492-93.

Illinois Brick required the Court to do one of three things: (1) Overrule the recently decided *Hanover Shoe*; (2) Determine that multiple purchasers down the chain of distribution could recover damages; or (3) Rule that only direct purchasers could recover the full amount of damages. The Court, valuing the principle of *stare decisis*, held that “the overcharged direct purchaser and not others in the chain of manufacture and or distribution, is the party ‘injured in his business or property’” as required by Section 4 of the Clayton Act.³⁹ Thus, not only were defendants prevented from asserting a passing-on defense, but downstream purchasers were prevented from proving that overcharges had been passed on to them. Once again, this result was based on the Court’s concern that tracing downstream purchasers’ damages would complicate cases, impair the deterrent effect of the treble damages remedy and create a serious risk of duplicative recoveries. In reaching this conclusion, the Court elevated its theory of how to maximize deterrence and judicial economy above the Clayton Act’s textual requirement to compensate antitrust victims. This calculus is inconsistent with express Congressional intent in enacting the Hart-Scott-Rodino Antitrust Improvements Act of 1976;⁴⁰ indeed, the states have always rejected this calculus.

Illinois Brick and *Hanover Shoe*, combined, create, in essence, an irrebutable presumption that direct purchasers suffer the entire injury. Downstream purchasers, regardless of provable facts regarding economic loss, are completely foreclosed from any recovery. Thus, by operation of law, the current damage remedy system affords substantial windfall recoveries for direct purchasers, while foreclosing injured downstream purchasers from any recovery. This system is ill-conceived. When anticompetitive activity injures persons at multiple levels of the chain of distribution and those persons sue, the defendant’s treble damage exposure should be allocated among direct and downstream purchasers commensurate with actual damages sustained. Moreover, in circumstances when only a single level of purchasers, whether direct or downstream, files suit, then *Hanover Shoe*, and its rejection of the pass-on defense, is necessary to promote optimal enforcement as well as sufficient deterrence to antitrust violations.

³⁹ *Illinois Brick*, 431 U.S. at 729.

⁴⁰ 15 U.S.C. §15c.

While other doctrines of federal antitrust law prevent some injured plaintiffs from recovering damages, courts are permitted to weigh such factors as the nature of the plaintiff's injury and the relationship between the specific injury and the alleged antitrust violation.⁴¹ Thus, even in the absence of *Illinois Brick*, courts would still retain the necessary power to reject claims that are inherently speculative. Downstream purchasers with non-speculative claims, however, could recover.

Many downstream purchaser claims are, in fact, non-speculative. If *Illinois Brick* rested on the assumption that economic analysis is incapable of tracing the actual effects of overcharges through multiple distribution layers, even under the lenient standards of *Bigelow*, far more robust econometric tools exist today.⁴² For example, using available data, the states have submitted damages calculations in a wide variety of pharmaceutical cases.⁴³ States and private plaintiffs should continue to do so.

In addition, the states believe that enhancing coordination and lessening burdens on the courts and the parties are worthwhile goals. Indeed, the states have a clear history of pursuing these goals. As discussed above, through the Multistate Antitrust Task Force of NAAG, the states have successfully brought coordinated, multistate litigation, generally filing a single complaint in federal court and, when appropriate, appending supplemental state claims.⁴⁴ The states intend to continue this practice.

⁴¹ Compare *Blue Shield v. McCready*, 457 U.S. 465 (1982) with *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983).

⁴² See discussion *supra* at p. 5. See also Cotterill, Egan, Buckhold, *Beyond Illinois Brick: The Law and Economics of Cost Pass-through in the ADM Price Fixing Case*, 18 *Review of Industrial Organization* 45 (2001); Taylor, *Indirect Damages from Price Fixing: The Alabama Lysine Case*, 18 *Review of Industrial Organization* 33 (2001).

⁴³ See, e.g., *FTC v. Mylan Laboratories*, 99 F. Supp. 2d 1 (D.D.C. 1999).

⁴⁴ See note 22 and accompanying text.

While the states generally opt to file downstream purchaser suits in federal court, the Class Action Fairness Act of 2005⁴⁵ should result in a large number of private state court cases being removed to federal court. Because the Act permits aggregating the amount in controversy and relaxes diversity standards, more downstream purchaser cases are certain to qualify for removal. In cases with national or international corporate defendants, the federal courts will likely have at least discretionary jurisdiction: Even if a state suit is brought only or primarily on behalf of the citizens of that single state, the defendants may be citizens of other states or countries; the principal injuries may have been incurred elsewhere; or another class action may have been filed within the past three years.

The Act applies equally to “mass actions” as to class actions.⁴⁶ Mass actions are defined as suits of 100 or more plaintiffs that are tried jointly because they involve common questions of law or fact. However, each plaintiff in a mass action must satisfy the \$5,000,000 jurisdictional amount in controversy, which is unlikely in an downstream purchaser action.

Under the Class Action Fairness Act, if a direct purchaser class action, pending in federal court, asserts the same or similar factual allegations against any of the same defendants as a later-filed, state court, downstream purchaser action, that action is likely to be removed to federal court and then consolidated with the direct purchaser action, at least for pre-trial proceedings. However, for truly efficient case management, the Supreme Court’s ruling in *Lexecon*⁴⁷ should be legislatively reversed so that the cases could be tried together.⁴⁸

⁴⁵ Pub. L. 109-2, Feb. 18, 2005, 119 Stat. 4.

⁴⁶ *Id.* § 4.

⁴⁷ *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998).

⁴⁸ H.R. 1038, the Multidistrict Litigation Restoration Act of 2005, would effectively reverse *Lexecon*. Section 2 of the Act would allow a judge with a transferred case to retain it for trial or to transfer it to another district for the convenience of parties and witnesses. Further, a transferred case would be remanded by the Judicial Panel on Multidistrict Litigation to the court from which it was transferred for determination of compensatory damages “unless the court to which it was transferred for trial purposes also finds, for the convenience of the parties and witnesses and in the interests of justice,

The states believe that the Class Action Fairness Act does not apply to the *parens patriae* actions of the state Attorneys General. In debating Senator Pryor’s amendment to S. 5, an amendment that would have explicitly excluded actions brought by the state Attorneys General on behalf of their citizens, Senator Cornyn of Texas stated, “I think it is very plain that no power of the State attorney general is impeded by virtue of S. 5, or will be once it is signed into law. . . . [C]learly, when State law and the State Constitution specifically provide for the right of an attorney general, a State attorney general, to sue on behalf of his State’s citizens, then this bill, when made a law, will not in any way impede that endeavor.”⁴⁹ In addition, Senator Salazar of Colorado stated, “It is important for us to make sure as this legislation is being considered that we all understand that it is going to have no impact on the powers and duties of the attorneys general.”⁵⁰ Nevertheless, the beneficial *parens patriae* provisions of Hart-Scott-Rodino make federal court an attractive forum for multistate downstream purchaser cases.⁵¹

The state Attorneys General have unanimously resolved to oppose preemption of state antitrust laws, including *Illinois Brick* repealers.⁵² Almost every state has an antitrust law of general applicability; every state has some type of antitrust law.⁵³ In fact, many states enacted antitrust statutes before the Sherman Act was passed in 1890. While state statutes differ, many are interpreted in conformity with federal antitrust law. The majority give some deference to federal court interpretations of federal law. As chief law officers of their states, the Attorneys

that the action should be retained for the determination of compensatory damages.” H.R. 1038, introduced on March 2, 2005, by Rep. F. James Sensenbrenner, passed the House and has been referred to the Senate Judiciary Committee.

⁴⁹ Congressional Record, February 9, 2005 at S1162.

⁵⁰ *Id.*

⁵¹ These provisions include the option to prove damages in the aggregate. 15 U.S.C. §15d.

⁵² National Association of Attorneys General Resolution, Principles of State Antitrust Enforcement, March, 2005 (“NAAG Resolution”).

⁵³ On state antitrust enforcement authority, see generally ABA Section of Antitrust Law, State Antitrust Enforcement Handbook (2003) (“Handbook”); ABA Section of Antitrust Law, Monograph No. 15, Antitrust Federalism: The Role of State Law (1988).

General are the primary enforcers of their states' antitrust laws. The Attorneys General also represent the consumers within their states, either as *parens patriae* or as its functional equivalent under state law.⁵⁴ The Attorneys General also may bring proprietary actions on behalf of governmental entities to recover overcharges either in state or federal court.⁵⁵ Because approximately 75% of all purchases by local governments and state agencies are made through "indirect" distribution channels,⁵⁶ state *Illinois Brick* repealers can have a significant impact on state coffers. The Attorneys General believe that "the erosion of state sovereignty is inimical to the basic principles of federalism that inhere in our Constitution."⁵⁷ They, therefore, oppose "federal preemption of any state antitrust statutes, including indirect purchaser statutes, or other limitation of state antitrust authority, as such preemption or limitation would impair enforcement of the antitrust laws, harm consumers, and harm free competition."⁵⁸

History supports the position of the Attorneys General on preemption. As a result of our system of federalism, the state "laboratories of democracy" have in many instances ultimately influenced debate on federal policy.⁵⁹ The current debate over the status of "indirect" purchasers is but one example. Other current examples include the treatment of resale price maintenance and the balance between economic efficiencies and consumer price effects in analyzing mergers.⁶⁰ As one commentator concluded in an article on antitrust federalism:

⁵⁴ Handbook at 18.

⁵⁵ A state, as well as its political subdivisions, is a "person" entitled to secure relief under the federal antitrust laws. *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390, 396 (1906).

⁵⁶ NAAG Resolution.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.")

⁶⁰ See Burns, *Embracing Both Faces of Antitrust Federalism: Parker and ARC America Corp*, 68 Antitrust L. J. 29 (2000).

Federalism allows for the experimentation, the successes, and the failures needed to find the best approach for a given time and a given market. It reminds legislators, courts and scholars that, on many key issues, reasonable minds may differ and that, because society has conflicting and overlapping desires, there may not be one single answer.⁶¹

In the present situation, states have developed a full panoply of downstream purchaser remedies, all of which recognize the fundamental injustice of *Illinois Brick*. Some provide for single damages;⁶² others for treble damages.⁶³ Some incorporate *Hanover Shoe*;⁶⁴ others do not.⁶⁵ Some allow only the state Attorney General to bring an action;⁶⁶ others allow any downstream purchaser to do so.⁶⁷ Some liberally allow class actions⁶⁸ while others view class action certification skeptically or do not permit class actions at all.⁶⁹ Finally, some states have repealed *Illinois Brick* only as to governmental plaintiffs.⁷⁰ Each of these state legislative solutions to a federal law injustice succeeds in addressing the problems created by *Illinois Brick* without succumbing to the insurmountable complexities forecast by the Supreme Court. Further, these alternatives offer an array of models for Congress today.

Preemption would affect more than state antitrust laws. The paths around *Illinois Brick* are not limited to state antitrust law claims. As can be seen in Judge Hogan's opinion in *Mylan*,

⁶¹ *Id.* at 44.

⁶² *See, e.g.*, Ark. Code Ann. § 4-75-212, § 4-75-315.

⁶³ *See, e.g.*, Cal. Bus. & Prof. § 16750(a).

⁶⁴ *See, e.g.*, Md. Com. Law Code Ann. § 11-209(b)(2)(ii).

⁶⁵ *See, e.g.*, Wi. Stat. Ann. § 133.18 (1)(a).

⁶⁶ *See, e.g.*, Or. Rev. Stat. § 646.775(1)(a).

⁶⁷ *See, e.g.*, Kan. Stat. Ann. § 50-161(b).

⁶⁸ *See, e.g.*, D.C. Code Ann. § 28-4508(c).

⁶⁹ *See, e.g.*, *In re Relafen Antitrust Litigation*, 221 F.R.D. 260, 280-82 (D. Mass. 2004).

⁷⁰ *See, e.g.*, Colo. Rev. Stat. Ann. § 6-4-111(2).

explicit “repealers” of *Illinois Brick* are only a part of the mix of statutes and decisional law. Many state antitrust remedies for downstream purchasers rest upon judicial constructions of the state antitrust act.⁷¹ Often the state enacted its law much earlier than the Supreme Court’s decision in *Illinois Brick*.⁷² Other states rest their downstream purchaser claims on equitable remedies like restitution and disgorgement.⁷³ Finally, many claims do not even sound in antitrust. Many states recognize price-fixing and other antitrust violations as violations of their consumer protection laws or Unfair and Deceptive Trade Practices Acts (Little FTC Acts).⁷⁴ Preemption of these non-antitrust laws would be particularly inappropriate and almost certainly would have broad, unintended consequences in other areas of law.

Preemption of state law would interfere with traditional state functions. Attorneys General bring enforcement actions on behalf the state in state court. Restitution is part of traditional Attorney General enforcement authority. States’ ability to seek restitution on behalf of citizens injured by violations of state law should not be abridged. Similarly, Attorneys General bring actions in state court as *parens patriae* on behalf the the citizens of their states. Their right to do so, which may be codified in state constitutions, may accrue by reason of common law, or may be granted by the state legislation, should not be preempted.

If a meaningful federal remedy for downstream purchasers is enacted, disputes will migrate toward federal court. First, by aggregating claims in federal court, plaintiffs can achieve efficiencies necessary for effective prosecution of claims.⁷⁵ Second, by relying on a federal remedy, plaintiffs from all states can receive uniform recoveries, especially in negotiated

⁷¹ See, e.g., *Bunker’s Glass Co. v. Pilkington PLC*, 47 P. 3d 1119 (Ariz. Ct. App. 2002).

⁷² See, e.g., Ala. Code Ann. § 6-5-60.

⁷³ See, e.g., *Mack v. Bristol-Myers Squibb*, 673 So. 2d 100 (Fla. Dist. Ct. App. 1996).

⁷⁴ See, e.g., *Ciardi v. F. Hoffman-LaRoche, Ltd.*, 762 N.E. 2d 303 (2002).

⁷⁵ See, O’Connor, *Is the Illinois Brick Wall Crumbling?*, 15-SUM Antitrust 34 (2001).

settlements.⁷⁶ Third, because so many state claims are interpreted with some degree of deference to federal law, the existence of an effective federal remedy for downstream purchasers will ultimately moderate differences in state law. Conversely, if the federal remedy for downstream purchasers is inadequate to compensate consumers' damages, state remedies must remain available.

Finally, any state's legislature may opt to eliminate its *Illinois Brick* repealer. It should be left to the states to determine whether their consumers have been accorded a reasonably meaningful federal remedy for claims that consumers otherwise might pursue under state law. Federal preemption of state remedies may make the system of antitrust enforcement less complex, but the resulting tidiness comes at the price of impairing the system of federalism that is fundamental to our national structure.

⁷⁶ See, e.g., *In re Buspirone Antitrust Litigation*, 185 F. Supp. 2d 363 (S.D.N.Y. 2002); *Ohio v. Bristol-Myers Squibb*, No. 02-civ-01080 (D.D.C. 2002). But see *In re Relafen Antitrust Litigation*, No. 01-CV-12239 - WGY (D. Mass. 2001).

BACKGROUND

During the past several decades, state Attorneys General have developed a sophisticated, efficient and effective antitrust enforcement practice, based on principles of federalism and applying accepted economic theories. Consumers in states throughout the country have been able to recover damages on a wide variety of important products, including, most recently, pharmaceuticals, which were being sold at illegally inflated prices.

The National Association of Attorneys General has adopted a number of resolutions supporting state and federal antitrust enforcement during this period. There have been no antitrust-related resolutions for a number of years, and the earlier resolutions have typically addressed specific legislation. Thus, most of the current members of NAAG have had no opportunity to express their views on general principles of state antitrust enforcement.

Last year, Congress created the Antitrust Modernization Commission. The AMC's mission is to (1) to examine whether the need exists to modernize the antitrust laws and to identify and study related issues; (2) to solicit views of all parties concerned with the operation of the antitrust laws; (3) to evaluate the advisability of proposals and current arrangements with respect to any issues so identified; and (4) to prepare and submit to Congress and the President a report. The Commission has developed a list of issues for study. Among the issues to be studied are:

- Whether state indirect purchaser statutes should be preempted.
- Whether changes should be made to the enforcement role that the states play with respect to federal antitrust laws.
- Whether state attorneys general should continue to play any role in merger enforcement.

This resolution will provide a framework for responding to requests from the Commission for the views of state Attorneys General.

Sponsored by Attorney General Mark Bennett (HI)

**NATIONAL ASSOCIATION OF ATTORNEYS GENERAL
Proposed**

**Spring Meeting
March 14-16, 2005
Washington, D.C.**

**RESOLUTION
PRINCIPLES OF STATE ANTITRUST ENFORCEMENT**

WHEREAS, the antitrust laws are intended to promote a competitive marketplace, benefit all the citizens of the several states, and advance robust innovation; and

WHEREAS, our nation's Attorneys General, as chief law officers of their states, are the primary enforcers of the states' antitrust laws; and

WHEREAS, state Attorneys General represent their states and the citizens of their states in federal antitrust litigation; and

Principles of Federalism

WHEREAS, erosion of state sovereignty is inimical to the basic principles of federalism that inhere in our Constitution; and

WHEREAS, the federal antitrust laws were enacted by Congress with the intent that those laws complement rather than supplant state antitrust laws; and

WHEREAS, this Congressional intent, has been reaffirmed many times, including in the seminal case of *California v. ARC America Corp.*; and

Federal-State Cooperation

WHEREAS, state Attorneys General work closely with the two federal antitrust enforcement agencies, the United States Department of Justice Antitrust Division and the Federal Trade Commission; and

WHEREAS, the increasing level of cooperation between state Attorneys General and the federal antitrust agencies has been mandated by Congress and has been memorialized in several important Protocols concerning coordination of merger investigations, sharing information, and state prosecution of criminal antitrust offenses; and

Indirect Purchaser Statutes

WHEREAS, state statutes providing for recovery for antitrust injury by purchasers have been in existence since the nineteenth century; and

WHEREAS, approximately 75% of all purchases by local governments and state agencies are made through “indirect” distribution channels; and

WHEREAS, in 1977 the Supreme Court of the United States in *Illinois Brick Co. v. Illinois* limited recovery to “direct” purchasers only for antitrust injuries pursued under much of federal antitrust law; and

WHEREAS, in *California v. ARC America Corp.* the Supreme Court of the United States rejected the claim that state statutes providing for recovery by “indirect” purchasers in antitrust cases were preempted by federal law; and

WHEREAS, “indirect” purchaser recovery helps deter anticompetitive behavior; and

Merger Review and Enforcement

WHEREAS, the Attorneys General have jurisdiction to enforce antitrust provisions relevant to mergers and acquisitions, and have frequently done so; and

WHEREAS, in *California v. American Stores*, the Supreme Court held that States can obtain divestiture in merger cases; and

WHEREAS, in merger cases, the effects of consolidation in national mergers are more often felt locally than nationally and state Attorneys General are at least as knowledgeable about those effects as are the federal antitrust agencies; and

WHEREAS, State Attorneys General have often worked efficiently and productively with the federal agencies to investigate potentially anticompetitive mergers; and

Antitrust Exemptions

WHEREAS, the National Association of Attorneys General has consistently opposed legislation that weakens antitrust standards for specific industries because there is no evidence that any such exemptions would either promote competition or serve the public interest;

NOW, THEREFORE, BE IT RESOLVED THAT THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL:

1) Opposes federal preemption of any state antitrust statutes, including indirect purchaser statutes, or other limitation of state antitrust authority, as such preemption or limitation would

impair enforcement of the antitrust laws, harm consumers, and harm free competition;

2) Opposes establishing weakened antitrust standards for specific industries as such weakened standards would affirmatively harm consumers, and as there has been no demonstration that such weakened standards would in any way benefit competition; and

3) Supports continuing and increased cooperation between the state Attorneys General and the Antitrust Division of the Department of Justice and the Federal Trade Commission, as such cooperation is wholly consistent with bedrock principles of federalism, and because such cooperation affirmatively promotes free competition and the interests of the citizens of each of the several states.