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Before the Antitrust Modernization Commission

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Good afternoon, Madam Chair and Members of the Commission. Thank you for the opportunity to appear before the Antitrust Modernization Commission at its first hearing which addresses an important topic: "State Indirect Purchaser Actions in the U.S. Antitrust Enforcement System." I have had the professional and personal privilege of working with a number of the distinguished Members of the Commission during my career. Over those years, I have learned so much from some of you and I am very grateful for that. I stand ready to assist the Commission as best I can.

My views are based on my experiences dealing with antitrust policy and litigation -- three years as a staff attorney at the Federal Trade Commission, nearly five years as a staff counsel at the Subcommittee on Monopolies and Commercial Law of the House Committee on the Judiciary, and nineteen years in private practice thereafter. I have lobbied the U.S. Congress on many antitrust issues for numerous clients and in one case a state legislature on Illinois Brick issues. I have prosecuted antitrust cases in state and federal court. And, occasionally -- admittedly, very occasionally -- I have been called upon to offer advice to firms and associations on antitrust issues.

I have dealt with Illinois Brick¹ my whole legal career. In the far off day of my last semester in law school, Illinois Brick was before the Supreme Court. We knew about it, studied it a bit, and its pros and cons provided fodder for discussion in our classroom. The Supreme Court resolved the issue a week or so after graduation. At the FTC, I worked a bit with some state attorneys general who were concerned about its impact on the parens patriae provisions of the Hart-Scott-Rodino Act.

Illinois Brick was a profound injustice in the eyes of my Chairman, the late Peter W. Rodino, Jr. I worked on some of his later attempts to pass federal legislation to overturn the Supreme Court. Congress recognized the complexities. As you know, Congress balked. In private practice, I have handled a number of cases on behalf of direct purchasers, but have generally been more active in a number of indirect purchasers actions. Most of the cases that I have brought on behalf of indirect purchasers were state court actions. I have helped resolve a number of those cases. Others remain pending.

My advice to any federal policymakers is plain, short and blunt – Don't just do something, stand there! Please permit me to explain.

¹ Illinois Brick v. Illinois, 431 U.S. 720 (1977).

The most important word in the title today's hearing is "system." There are a host of mechanisms that comprise the entire system – federal, state, private and public. Changes in one part of the system necessarily affect other parts. Overall, the system works reasonably well. Federal legislation could arrest the development of the state system. Illinois Brick repeal is and has been a creature of state law. For the moment, it should stay that way.

The goals of antitrust law and enforcement should be to have identifiable, concrete, positive and understandable benefits to consumers – to be pro-consumer as that term is commonly understood. The ultimate "consumers" can be individuals or businesses. Providing a remedy to aggrieved consumers and businesses involves them, educates them, benefits them and empowers them – it gives them a charter, a stake, a role, not to mention money! What could be better in theory than putting tools to enforce those laws in the hands of the beneficiaries of that case? If antitrust enforcement is a public function, then this is privatization. If it works properly, it cuts down on the need for public resources, deters violators, puts compensation in the pockets of consumers and is efficient.

As you are aware, about thirty states have acted to counteract Illinois Brick under their own state laws. The states' movement advanced seriously only after the Supreme Court upheld their ability to do so in Arc America.² That was only sixteen years ago. And,

² California v. Arc America Corp., 490 U.S. 93 (1989).

it is fair to say that indirect purchaser litigation under state law is a new phenomenon, amassing momentum only within the last decade or less. What an experiment in federalism it has been! It is federalism at its best!

Why? Providing benefits creates complexity. Overturning Illinois Brick is no exception. Providing a remedy to ultimate consumers poses questions of duplication of litigation, as well as the potential for multiple liability and the possible need for allocation of damages. These complex issues are being – and will continue to be – addressed in state houses, courts and in settlements. Not all state laws are the same. Some provide single damages. Some provide for a cap of a single treble damage recovery. Some provide for action by the attorney general, but not private parties.

The state experience is a laboratory from which we continue to learn. Congress should not intervene to impede this development. As President Reagan so forcefully reminded the country, federal action can be a problem as well as a solution. The experience that the nation has undergone in the past few years with incremental repeal can be a basis for federal action once the experiment plays out. For the moment, Congress should stay its hand and allow this experiment to continue. It remains to be seen what laws work at all, which laws work best and whether any law is worthy of a Congressional enactment.

It is a shame that the antitrust laws are so little understood because they are so important. Fair competition and private property are fundamental American principles from the earliest days of the country and are even part of the reason we broke away from England. Within our own lifetimes, one only needs to look at the energy crisis caused by the oil producing countries to understand the importance of competition. Those of us who are old enough to remember the 1970's well remember that the actions of the oil producing cartel OPEC led to devastating energy price increases and troublesome national shortages – with macro-economics effects. The cartel had an immediate impact on the lives of every American who drove a car, lived in a heated house or purchased goods at a grocery store. In fact, that cartel activity helped destabilize and damage the economic programs of administrations of three American Presidents (Nixon, Ford and Carter). Yet, most people did not understand that cartel's relationship to what antitrust violators do.

A central premise the majority relied upon in Illinois Brick was that direct purchasers were uniquely suited to pursue antitrust violators. Sometimes this is true, but not always, especially when the damages are "passed on." Empowering the true victims of antitrust violations to enforce the law has not only philosophical appeal, but practical benefits. Limiting recoveries to direct sellers has the dangers that arise whenever the seller is in effect conferring a valuable, exclusive, franchise on the purchaser. Could you imagine soft drink distributors suing Coke or Pepsi for price-fixing? Beer distributors suing Miller or Budweiser, if in fact those corporate giants engaged in anti-competitive conduct? The

answer is, of course, no. In those cases, the manufacturer of soft drink syrup or the brewery is conferring a huge benefit on the bottlers or distributors. The distributor franchises are worth tens if not hundreds of millions of dollars.

It is no surprise that computer hardware manufacturers did not step forward to sue Microsoft even after the government's case resulted in findings of wrongdoing. The same is of course true of the auto industry. It should be no surprise that car dealers have not, to my knowledge, sued the automakers for alleged anti-competitive conduct with respect to the re-importation of cars from Canada, although indirect purchaser suits abound. Similarly, when there were suspicions of anti-competitive conduct among suppliers of IPO capital, would small companies, who were relying on Wall Street for money, sue those underwriters? Not likely.

Moreover, in situations in which there is a lack of full competition in the distribution system, direct purchasers may themselves be beneficiaries of an antitrust conspiracy. One Court has already found that a claim of direct purchaser plaintiffs was inappropriate because direct purchasers benefitted from the conspiracy.³ Certainly, American domestic oil companies profited immensely from the activities of OPEC in the 1970's, even though no investigation turned up any evidence that they were included in the agreement among the oil producing states. And, if the market share of antitrust violators is high enough,

³ Valley Drug Co. v. Louisiana Wholesale Drug Co., 350 F.3d 1181 (11th Cir. 2003).

direct purchasers will settle litigation on terms that are favorable to the manufacturer or face reprisal. In sum, providing indirect purchaser remedies is not only fair, consistent with purposes of the antitrust laws and empowering, it serves an important purpose – additional deterrence.

Sometimes it's hard to locate the ultimate consumer of products. One of the key ingredients of Illinois Brick's reasoning is essentially that it is just too complicated to locate ultimate consumers. Because of the internet, e-mail and the database technology, there has been an information revolution since 1977. Purchasers of prescription drugs, computers and other "middle bracket" consumer items can be tracked. And, in some cases, the ultimate purchasers are businesses with records of their purchases. The problem of consumer identification continues to exist most severely when consumers generally pay cash for a small ticket items, such as food or cigarettes. In these circumstances, lawyers must work creatively to compensate the ultimate consumers either directly or through a cy pres recovery.

Indirect purchasers have sometimes achieved direct monetary settlements that are significant. The cases of indirect purchaser suits filed on behalf of insurance companies against drug manufacturers for alleged overcharges in the reimbursement of allegedly price-fixed or monopolized drug products come to mind. Insurance companies, union health and welfare funds and other third-party payers have received hundreds of millions

of dollars in recoveries. And, of course, there are examples of indirect purchasers who have "discovered" the antitrust violations. The 1990's IPO case is such an example.

Two major criticisms have been leveled against the provision of indirect purchasers actions. The first is duplicative or multiple litigation in diverse forums. The Class Action Fairness Act of 2005, which President Bush signed into law on February 18, 2005, will, without doubt, have the effect of moving the vast majority of state indirect purchaser class actions from state to federal court. Indirect purchasers cases will, for the first time, primarily be brought in federal court, it is reasonable to assume, and be subject to the same MDL procedures in the federal court as direct purchaser cases. Rather than be faced with multiple lawsuits around the country, defendants will proceed in a single proceeding with common procedures. The efficiencies and cost savings to defendants should be significant. And, it should lead to increased coordination between direct and indirect purchaser classes. Moreover, the currently uneven state practices in certifying classes (compare California to Minnesota) should accede to relatively uniform federal standards on certification. In sum, this significant federal enactment should cut down on the procedural cost of litigation, increase coordination, promote global settlements and lead to uniform standards of certification. It would be unwise for Congress to take further action until the Courts have acquired more experience under CAFA.

A second criticism deals with the possibility of multiple liability – treble damages for each group of purchasers throughout the stream of distribution and alleviation of duplicative liability. This is more of a theoretical concern than a real problem. I am unaware of any case in which any major company has been harmed by duplicative recovery. There are a number of studies that suggest that treble damages in the antitrust context really amount to a single damage remedy.⁴

As to the question of allocation as between classes of purchasers there is no indication of anything more than a theoretical problem. Every lawyer involved in the litigation process understands that the question of whether multiple sets of damages are readily available is a difficult one, fraught with complexity. This vagueness affects settlement dynamics and has led to give and take bargaining and concessions. There has been no unfairness to defendants. There is no hue and cry from any corner that defendants in antitrust cases – particularly cartels which involve the most heinous kind of antitrust conduct – have been unfairly treated.

Moreover, there is no argument that price-fixing is over deterred, does not harm American consumers or has been eradicated. Despite international governmental

⁴ See e.g., Robert H. Lande, Are Antitrust “Treble” Damages Really Single Damages?, 54 Ohio St. L.J. 115 (1993).

cooperation, the past ten years has witnessed an explosion in cartel conduct and it revealed some of the most damaging antitrust cartel violations by private companies in history.

Congress should not act to preempt state law. The federalist approach allows states to experiment and for the laws develop incrementally. There is no case to preempt state antitrust enforcement and there is every reason not to.

At the same time there is no reason at this time for Congress to act precipitously to enact a federal regime that provides an indirect remedy under federal law. Right now the majority of consumers in the nation, including consumers in California, New York and Florida have the benefit of this remedy. States have a free choice whether to provide this remedy to their consumers. Many important states do and a number of important states do not – Texas and Pennsylvania come to mind. And, state laws differ. Some states provide a limited remedy to all consumers. Some explicitly avoid duplicative recovery. Some provide remedy to state attorney generals only. Some provide single damages only. In any event, the state experiment has not run its course yet. Any Congressional action will freeze development in the law.

Thank you.