

Before the Antitrust Modernization Commission
Panel II: “State Indirect Purchaser Actions: Proposals for Reform”
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Prepared Remarks of
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INTRODUCTION

I would like to thank the Commission and its staff for this opportunity to share my thoughts on proposals for reform related to the rights of direct and indirect purchasers to sue for treble damages under state and federal antitrust laws. Management of the litigation that has been spawned by the split treatment of direct and indirect purchasers in federal and state courts is a topic that I have written about in the past² and one that I continue to study.³ It is surely one that is worthy of the Commission’s consideration and possible action.

In keeping with the spirit of the Commission’s invitation that I direct my comments to proposals for reform, and in recognition of the fact that the literature and commentary on indirect

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² See, e.g., Andrew I. Gavil, *Federal Judicial Power and the Challenges of Multijurisdictional Direct and Indirect Purchaser Antitrust Litigation*, 69 GEO. WASH. L. REV. 860 (2001) (“*Federal Judicial Power*”).

³ See, e.g., Andrew I. Gavil, *Antitrust Remedy Wars Episode I: Illinois Brick from Inside the Supreme Court*, 79 ST. JOHN'S L. REV. 3 (forthcoming 2005) (“*Bernstein Lecture*”). The article will present my research on the papers of Justices Lewis F. Powell, Jr., Harry A. Blackmun, William J. Brennan, Jr., and Thurgood Marshall concerning *Illinois Brick*.

purchaser standing is extensive, I have endeavored to limit these remarks to a discussion of some options for substantive and procedural reform. I have not undertaken to present a detailed account of the evolution of the *Illinois Brick* line of cases and the substantive arguments for and against maintaining the rule of *Illinois Brick* in federal court, except as it directly relates to specific reform proposals.

SUMMARY OF RECOMMENDATIONS

The current split of direct and indirect purchaser rights has led to significant litigation management issues, and may well be creating a more significant risk of the kinds of damage apportionment issues that the Court most feared in *Illinois Brick*. That, in turn, probably increases the risk of duplicative recoveries, at least in theory, and arguably amplifies rather than alleviates federalist tensions.

There are two basic approaches that the Commission could recommend to improve the current situation – procedural and substantive – although in the latter category there are hybrid substance-procedure options that could be considered. Rather than attempt to canvass all of the possibilities – there are many – I have focused on two proposals.

A Procedural Solution.⁴ As Congress recently attempted through the Class Action Fairness Act of 2005, the Commission could recommend an integrated package of reforms, jurisdictional and procedural, that would more readily facilitate the removal from state court of indirect purchaser actions related to pending federal actions, and then promote their transfer and consolidation.⁵ By

⁴ This proposal is a further evolution of the one discussed in Gavil, *Federal Judicial Power*, *supra* note 2.

⁵ For a variety of reasons, I oppose the inclusion of federal and state government cases in this process. See Gavil, *Federal Judicial Power*, *supra* note 2, at 896-97.

expanding federal jurisdiction over state indirect purchaser suits to the constitutional maximum (*e.g.* minimal diversity and no minimum amount in controversy), plaintiffs would have the option of suing originally in federal court, and defendants would have greater authority to remove cases filed in state court. Once in federal court, such cases would be subject to transfer and consolidation under existing Federal Rules and MDL procedures. The package also could include new, antitrust-specific procedures, and reconsideration of *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998), which would in essence make the transfer permanent, permitting joint trial.

A Hybrid Substantive-Procedural Solution. A more comprehensive solution would have to come to grips with the underlying difference of opinion between federal and state authorities about indirect purchaser rights. The substantive choice has often been framed as one between preemption of state *Illinois Brick* repealers and overruling *Illinois Brick*.

For reasons I more fully explain below, I vehemently oppose making *Illinois Brick* the law of the land, i.e. federal preemption of state indirect purchaser suits. Some of the most basic assumptions of the Court in *Illinois Brick* were simply wrong and have not been borne out by time and experience. Moreover, legislation extending *Illinois Brick* would enshrine those errors and represent a major rejection of state autonomy. It would arguably be among the most potentially anti-consumer, pro-antitrust offender, antitrust legislative Acts ever conceived.

But I also oppose simply over-ruling *Illinois Brick*. First, it is too late in the day to solve the jurisdictional split between federal and state courts by simply permitting indirect purchasers to now sue in federal court. Owing to potential differences in federal and state standards of all kinds, such an Act would not necessarily put an end to forum shopping and the consequent challenges of multi-forum, multi-jurisdictional direct and indirect purchaser litigation. Also, although greatly overstated,

some of the concerns about indirect purchaser suits expressed by the Court in *Illinois Brick* are legitimate and warrant attention. To secure the maximum benefit of overruling *Illinois Brick*, therefore, it would have to be done in tandem with preemption of state indirect purchaser rights and other procedural safeguards.

SOME PRELIMINARY OBSERVATIONS

(1) Putting the Discussion of Indirect Purchaser Rights in a Broader Context (i.e. “Don’t Panic”⁶)

I am frankly concerned that the perceptions of some members of the antitrust bar of the extent of the *Illinois Brick* “problem” are exaggerated and outmoded. Although there are certainly areas of antitrust – including indirect purchaser litigation – that are in need of improvement at the margins, there is no crisis generally in antitrust today, and none in the area of indirect purchaser litigation.

Even a casual observer could quickly grasp that the last 30 years has produced a major shift in antitrust standards and priorities that has enormously reduced the chances for either truly meritless antitrust litigation or successful litigation that unambiguously should not have been, i.e. false positives.⁷ Indeed, it is probably more difficult today to prevail in an antitrust case than at any time in the 100+ years of modern American antitrust enforcement. The burdens of proving antitrust

⁶ For any sci-fi fans on the Commission who are fond of the work of Douglas Adams, it is worth remembering that the cover page of *THE HITCHHIKER’S GUIDE TO THE ANTITRUST GALAXY* prominently displays the cautionary note: “Don’t Panic.”

⁷ In the rare case in which a defendant loses it is often because it failed to provide sufficient evidence of justifications for its conduct. *See, e.g.,* Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking A Better Balance*, 72 *ANTITRUST L.J.* 3, 27-29 (2004). These are not true “false positives.” Monday morning quarter-backing of antitrust cases has become something of a sport in which better defenses can be imagined following losses in court. But courts decide antitrust cases like all cases based on the evidence provided by parties and their counsel. If we are to respect the rule of law, therefore, losses owing to failure to satisfy a burden of production should not be categorized as “false positives” – even by those who disagree with the outcomes.

violations have been largely re-written, *per se* rules of liability have been greatly circumscribed, and screens for isolating and disposing of weak antitrust claims are more abundant than ever. Those screens include antitrust injury requirements, limits on the admissibility of expert testimony, a more robust summary judgment device, difficult to satisfy class certification standards, more rigorous standards for proving damages, and aggressive appellate review, especially of those very few cases that make it to trial and result in plaintiff's verdicts. These developments have had an enormous impact on the incentives of plaintiffs to sue and of defendants to settle.

To the extent, therefore, that the Court in *Illinois Brick* was influenced in its decision to restrict access to the private right of action by concern that the substantive rules of antitrust were far too restrictive in 1977, the contours of the antitrust landscape today are far different. A "correction" might well be in order.

For the Commission's reference I have assembled four tables that I thought would be of interest generally, and particularly with respect to indirect purchaser and related issues. (*See* Appendix A, hereto.)

Several facts are illuminating. First, over the last decade, the typical number of federal antitrust cases is roughly half of what it was only 20 years ago. Table 1, drawn from data collected by the Administrative Office of the United States Courts, shows that over the last eight years the total number of civil antitrust cases filed annually in the federal courts has ranged from a low of 580 (1998) to a high of 858 (2000). The average per year was 718.⁸ In decided contrast, Table 2 shows

⁸ The average total number of civil cases filed in the federal courts over the last five years has been roughly 264,000. *See* Administrative Office of the United States Courts, Judicial Business of the United States Courts, Annual Report of the Director, 2004, Table S-7, available at <http://www.uscourts.gov/judbus2004/tables/s7.pdf>. As is shown in Table 1, during that same five year period (2000-2004), the average number of civil antitrust cases filed was 784 – less than

the number of antitrust cases – civil and criminal – filed in the federal courts for a comparable period two decades ago. During that period, the total number of antitrust cases filed in federal court ranged from a low of 1148 (1982) to a high of 1689 (1977). The average was 1389.⁹ So from the vantage point of even recent history, the level of antitrust activity in the federal courts today is very modest, at best.

The tables also suggest some patterns that are especially relevant to any discussions of direct and indirect purchaser litigation. First, the level of government activity appears to influence the corresponding level of federal civil private antitrust activity – and that includes the number of civil class actions filed.¹⁰ Second, the level of both government and private activity seems to have reached a contemporary peak in 2000, and has been steadily in decline since – and that is especially true of civil class actions. Perceptions of the volume of antitrust activity formed in response to the events of just a few years ago – especially about the level of private treble damage class actions – are already out-of-date.

Table 3 shows that the number of antitrust cases filed by the Antitrust Division crested between 1998 and 2000 relative to the period before and after.¹¹ Although a more specific study

.3% of the federal docket.

⁹ Table 1 does not include criminal cases filed. According to the Antitrust Division's workload statistics, collected in Table 3, there were 48 criminal cases filed per year on average over the same period. Including criminal cases would raise the average total number of federal antitrust cases filed during the 1997-2004 period from 718 to 766.

¹⁰ Of course, Section 5 of the Clayton Act was designed to promote that very end.

¹¹ The average total number of antitrust cases (criminal and civil) filed by the Antitrust Division between 1995 and 1997 was 71. The average between 1998 and 2000 was 86. From 2001 to 2004 the average dropped to 50. Roughly two thirds of the cases filed between 1998 and 2000 were criminal.

could be done to determine whether the specific cases filed directly correlate with the increased number of civil cases filed in federal court, it seems quite likely. Note that the total number of *private* civil antitrust cases filed in federal court increased from 608 in 1999 to 811 in 2000, a 33% increase. Perhaps more striking is the increase in civil class actions from 100 in 1999 to 213 in 2000, an increase of 113%. Those 213 class actions constituted 26% of all private civil antitrust actions filed in 2000. If there is a correlation between the increased government activity and the increased private activity – which seems likely – it is no wonder some antitrust watchers noted these increases with concern.

But those numbers were historically unremarkable and quickly trailed off. In 2001, the total number of private civil actions dropped from the 811 in 2000 to 707. More striking is the decrease in class actions from the recent high of 213 in 2000 to 122 just a year later. Also striking is the decrease in civil enforcement actions brought by the Antitrust Division over the last several years.¹²

My point is simply this: any perception that the volume of antitrust litigation is substantial or on the rise is uninformed. Admittedly, the figures I have presented only reflect activity in the federal courts, and indirect purchaser actions today are most likely to be filed in state courts. But given the likelihood that many indirect purchaser actions are complementary follow-ons to government cases, it seems likely that state antitrust cases are on the relative decline as are federal cases.¹³

¹² The average number of civil antitrust cases filed by the Antitrust Division between 1995 and 2000 was 25. From 2001-2004 it dropped to ten.

¹³ I am unaware of any source of data for state court antitrust filings that is comparable to the information collected by the Administrative Office of the U.S. Courts and would confirm these intuitions.

I urge the Commission, therefore, to move cautiously in this area as in others, casting a wary eye on anecdotal evidence. My research into the papers of the justices in *Illinois Brick* demonstrates that the policy issues presented by indirect purchaser litigation were challenging in 1977 and they remain so today.¹⁴ Hence, reasonable minds could differ then and now on how best to strike the balance among compensation, deterrence, and complexity.

On the other hand, the intervening years have produced a body of cases and experiences that warrant study and may permit the Commission to move beyond a debate limited to anecdotal evidence and opinion towards a truly informed and balanced consensus position. Although this Commission has formally concluded that it will not undertake a major empirical review of the antitrust laws, it could consider undertaking some focused empirical research to answer some of its own thoughtful questions concerning *Illinois Brick*. Do direct purchasers sue frequently, as *Illinois Brick* assumed? Are there any real examples of “multiple” liability judgments, or does it remain largely a theoretical concern? If the mere threat of multiple recovery enhances the settlement value of cases, do the settlements actually paid out approach even single damages? If the threat of difficult apportionment and duplicative recovery are real, are they inherent in indirect purchaser standing, or more a function of the current division of cases between state and federal courts? Is there a correlation between government enforcement activity and the incidence of indirect purchaser litigation? These are questions that may well be answerable with some modest efforts at data collection and would lend greater legitimacy to the Commission’s recommendations, if any.

¹⁴ The initial vote in the case was 6-3 to affirm, i.e. to permit indirect purchasers to sue in federal courts. After an intense week of exchanges among the Justices a second conference was held and the vote changed from 6-3 to affirm to 6-3 to reverse. See Gavil, *Bernstein Lecture*, *supra* note 3.

(2) Appreciating the Substantive and Procedural Dimensions of *Illinois Brick*

The rights of direct and indirect purchasers to sue under Section 4 of the Clayton Act present two sets of issues that can conveniently be viewed as “substantive” and “procedural.” The substantive question is the issue first posed in the Supreme Court’s 1977 decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) – whether indirect purchasers should be permitted to sue under Section 4 of the Clayton Act to redress injuries they have suffered as a consequence of overcharges or other antitrust injuries “passed-on” to them from direct purchasers from the antitrust offender.¹⁵ Most often, that offender is a member of a cartel accused or found to have engaged in price fixing – the most severe of antitrust offenses. Indeed, many of these offenders have been indicted for criminal violations of Section 1 of the Sherman Act. In a far smaller group of cases, the offender is a firm accused or adjudicated to be a monopolist who has been accused or found guilty of monopolizing or attempting to monopolize in violation of Section 2 of the Sherman Act.

I emphasize the nature of the defendant-offender because I fear that the significance of the defendant’s status under law as an “offender” is often lost or downplayed in discussions of the challenges of managing direct and indirect purchaser cases in the state and federal courts. Proven antitrust offenders are not owed our sympathy. Instead, they are owed a level of remedial exposure

¹⁵ The Court viewed this issue as intertwined with the question it had faced nearly a decade earlier in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). That case presented the question whether a defendant who had already been found guilty of an antitrust violation (monopolization in that case) should be permitted to defend a subsequent private treble damage action by arguing that the direct purchaser suffered no injury because it “passed on” its damages to firms further down the chain of distribution. A majority of the Court in *Illinois Brick* was persuaded that offensive pass-on should be treated like defensive pass-on. In my forthcoming article on the justices papers in *Illinois Brick*, I argue that this assumption – that symmetry was required – was one of the fundamental errors in the reasoning of the Court. See Gavil, *Bernstein Lecture*, *supra* note 3; See also pp. 13-14, *infra*.

that will deter them and others who would consider similar conduct. They also must be prepared to forfeit the fruits of their wrongdoing to compensate those harmed by reason of their conduct.

In my study of the papers of the Supreme Court Justices in the *Illinois Brick* case, I found the following exchange between Justice Lewis F. Powell, Jr. and one of his clerks. The clerk, lamenting the seeming intractability of the policy issues posed by indirect purchaser rights remarked to Justice Powell in a Bench Memo prepared prior to oral argument that he would permit indirect purchasers to sue and “leave the rest of the problem to be solved by Congress.” He continued: “If it really is costly for these firms, you can be sure they will let Congress know about it.” Powell’s hand written response followed: “Getting relief from Congress by corps. guilty of anti-trust violations is unlikely!”

Justice Powell ultimately voted in *Illinois Brick* to preclude indirect purchasers from suing in federal court.¹⁶ The significance of his insight, however, should not be lost on this Commission: the serious antitrust offender is hardly a sympathetic figure. Arguments by those offenders, or their regular counsel, that emphasize the burden of facing multiple law suits from direct and indirect purchasers, yet ignore or downplay the potentially extraordinary benefits they have enjoyed from

¹⁶ Powell and other members of the Court also expressed particular reservations about the risks of embracing any per se rule against indirect purchasers. Like all per se rules, it posed the risk of over-inclusion and, in this instance, under-compensation and under-deterrence. Justice Byron White, who authored the majority opinions in *Hanover Shoe*, *Illinois Brick*, and *ARC America*, expressed that very concern when he dissented in *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199 (1990). Joined by the three dissenters in *Illinois Brick* – Justices Blackmun, Brennan, and Marshall, White noted Section 4’s “expansive remedial purpose” and pointed out that its language “does not distinguish between classes of customers.” 497 U.S. at 219-20 (White, J., dissenting). He went on to describe *Illinois Brick* as an “exception” that should not be “extended” in cases where it could undermine the “twin antitrust goals of ensuring recompense for injured parties and encouraging the diligent prosecution of antitrust claims.” *Id.* at 226. I urge the Commission to review Justice White’s dissenting opinion with interest.

their illegal conduct at the expense of economic progress and consumer welfare should be accorded little weight. Indeed, that was a critical message of *Hanover Shoe*.

Second, *Illinois Brick* cannot be considered in isolation. Before it was decided, as well as after, many states elected to endorse the rights of indirect purchasers to sue, and in *California v. ARC America Corp.*, 490 U.S. 93 (1989), a unanimous Supreme Court upheld their right to do so, rejecting any notion of federal preemption. Ironically, taken together, *Illinois Brick* and *ARC America* may well have amplified the risk of the very evils that *Illinois Brick* sought to forestall. By effectively commanding indirect purchasers to state court, and direct purchasers and others to federal court, the Court precluded any possibility of litigation efficiencies owing to consolidation and joint case management. It also amplified – at least in theory – the risk of complex apportionment issues, which can lead – in theory – to duplicative recoveries. Judicial capacity to neutralize these risks is arguably diminished absent some form of consolidation and coordination that unites all related direct and indirect purchaser cases before a single court.

The *Illinois Brick* “quartet” – *Hanover Shoe*, *Illinois Brick*, *ARC America*, and *Kansas v. Utilicorp* – thus pose two distinguishable issues, which in turn suggest two paths to reform. The substantive question asks whether and to what extent the rule of *Illinois Brick* should continue. The procedural question accepts to some degree the present circumstance: related antitrust litigation today is being pursued in parallel in state and federal courts. But it asks whether, in lieu of changes to *Illinois Brick* and related cases, procedural options exist for better managing the division of cases.

The price of the division of cases between state and federal courts cannot be measured simply by its impact on the strategic wars among plaintiffs and defendants. Duplication of effort likely takes its toll on public judicial and related resources. It also poses a risk of inconsistent results in related

cases – an outcome that mars public confidence in the rule of law. These two concerns – duplication of effort and the threat of inconsistent results – have long been recognized as justifications for joinder under the Federal Rules of Civil Procedure. It is imperative, therefore, that any analysis of direct and indirect purchaser litigation take into account the potential institutional price of the current regime.

Some Proposals for Reform

Proposals for reform can be usefully divided into “procedural” and “substantive” options, although as noted above, there are many variations of each that could be imagined, and hybrid substance-procedure options might also be considered.

The most obvious two substantive options have been debated for years through many ABA Antitrust Section Reports¹⁷ and extensive commentary: (1) Pre-empt State *Illinois Brick* repealers, or (2) overrule *Illinois Brick*. As noted above, I oppose both options.

I vehemently oppose any effort to force *Illinois Brick* on the states through preemption of state indirect purchaser rights. Doing so would surely diminish the number of follow-on class actions and alleviate any threat of duplicative and difficult to apportion damages – but that would be true of any legislative effort to diminish the scope of Section 4 and would come only at a high price for compensation and deterrence. Diminishing case load alone is surely not a basis for cutting back on access to remedial rights. The broader policies of deterrence, compensation, and federalism also must be weighed. Preemption of all indirect purchaser rights would produce a field day for antitrust offenders and little more.

¹⁷ For a more complete discussion of these Reports up through 2001, see Gavil, *Federal Judicial Power*, *supra* note 2, at 878-79.

Moreover, a reexamination of *Illinois Brick* – on its own terms and in light of the experience of the last 28 years – strongly suggests that the Supreme Court majority erred in *Illinois Brick* in a number of its most critical assumptions.

Symmetry. A major factor motivating the Court to preclude offensive pass-on in *Illinois Brick* was the idea that plaintiffs and defendants had to be treated alike. The argument is prevalent in the papers of the Justices as it is in the decision, itself. A majority of the Court concluded that for reasons of fairness, as well as doctrinal consistency, *Hanover Shoe* would have to apply “both ways.”

But *Hanover Shoe* and *Illinois Brick* are strange bedfellows indeed. *Hanover Shoe* was a product of the same Court that decided *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) and *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), whereas *Illinois Brick* was a product of the Court that decided *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) and *Continental TV, Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). These were two vastly different Courts¹⁸ and philosophically, the two cases are in truth irreconcilable. *Hanover Shoe* was a decidedly “pro-plaintiff” decision, animated by the twin aims of maximizing deterrence and minimizing the possibility that guilty antitrust defenders could escape liability and retain the fruits of their unlawful activity. *Illinois Brick* was a decidedly “pro-defense” decision, concerned about the undue threat of treble damage exposure to businesses and the administration of the treble damage remedy. They

¹⁸ In the decade that transpired from 1967 to 1977 the Supreme Court had been transformed. Gone were Chief Justice Earl Warren, as well as Justices Douglas, Black, Harlan, and Fortas. Taking their places on the Court were Chief Justice Warren Burger, and Justices Blackmun, Powell, Rehnquist, and Stevens. When *Illinois Brick* was decided, only Justices White, Stewart, Brennan, and Marshall remained from the Court that decided *Hanover Shoe*. White drafted the majority opinion in both, but Brennan and Marshall, who had joined him in *Hanover Shoe*, dissented in *Illinois Brick* and were joined by Justice Blackmun. Stewart, who had dissented in *Hanover Shoe*, joined White in *Illinois Brick*.

couldn't be any more asymmetrical, and the result in *Illinois Brick* was certainly not compelled by *Hanover Shoe*, as the Court maintained.

True symmetry between *Illinois Brick* and *Hanover Shoe* would have required greater deference to the rights of consumers and greater concern for deterrence, i.e. retaining indirect purchaser rights, even if indirect purchasers were subjected to strict standards of proof. In truth, the use of pass-on as a defense, and the use of pass-on by plaintiffs, serve vastly different purposes from the point of view of both compensation and deterrence. Permitting offensive pass-on, but precluding defensive pass-on, would have in fact been more consistent than treating both alike – and that remains true today.

Direct Purchaser Incentive to Sue. Two critical presumptions of *Illinois Brick* were that (1) direct purchasers would “most often” absorb any overcharges; and (2) they would therefore have sufficient incentive to sue the antitrust offenders with whom they dealt. Based on these two presumptions, the Court concluded that nothing would be lost to either compensation or deterrence if indirect purchasers were entirely deprived of any federal antitrust right of action. Hence, the Court placed all of the compensation and deterrence eggs in a single basket labeled “direct purchasers.”

It is important to fully digest the magnitude of these two critical presumptions because the Court invoked them to virtually bar all indirect purchasers from federal court. If either proves to be wrong, there is *no* compensation whatsoever¹⁹ and deterrence will be left to government enforcement and/or, in the case of monopolization, suits by injured rivals.

As noted above, although the Commission has decided not to undertake a major empirical

¹⁹ And of course the wrongdoer retains all of the fruits of its unlawful conduct and hence the full financial incentive to continue or repeat it.

study of the antitrust laws, some focused research and data collection could help to determine whether these critical assumptions of *Illinois Brick* have proven to be so correct that they justify continuation of a per se ban of indirect purchaser standing.

Although I have not undertaken such a study, I note that there is some evidence to date that at the very least casts doubt on *Illinois Brick's* assumption that direct purchasers will have an adequate incentive always to sue.²⁰ While it is true that some, perhaps many sue,²¹ it is not clear that they universally do so, and they have failed to do so in some very significant cases.

Perhaps more so today than in 1977, private treble damage lawsuits are major and uncertain undertakings, and direct purchasers may be less inclined than ever to risk rupturing their relationships with suppliers, even those who have fixed prices. That fear may be particularly acute in the rare case of challenges to dominant firm conduct under Section 2, precisely because the offender is a dominant firm and the purchaser may have few alternatives if the relationship sours.

²⁰ In recognition of that fact, the Ninth Circuit has sought to carve an exception to *Illinois Brick*, permitting “indirect purchasers ... [to] sue for damages if there is no realistic possibility that the direct purchaser will sue its supplier over the antitrust violation.” See *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1145-46 (9th Cir. 2003). Another variation of this is the “co-conspirator” exception – where direct purchasers are alleged to be co-conspirators with cartel members, indirect purchasers may be permitted to sue. See, e.g., *Paper Sys. Inc. v. Nippon Paper Indus.*, 281 F.3d 629, 631-32 (7th Cir.2002). There is some difference of opinion among the courts, however, as to the application of this “exception.” *Dickson v. Microsoft Corp.*, 309 F.3d 193, 214-15 (4th Cir. 2002).

²¹ Some recent examples include: *In re Automotive Refinishing Paint Antitrust Litigation*, 358 F.3d 288 (3d Cir. 2004); *In re Linerboard Antitrust Litigation*, 305 F.3d 145 (3d Cir. 2002); *In re High Fructose Corn Syrup Antitrust Litigation*, 295 F.3d 651 (7th Cir. 2002); and *In re Baby Food Antitrust Litigation*, 166 F.3d 112 (3d Cir. 1999). There are also a number of examples of consolidations of federal direct and state indirect purchaser suits that were filed in and later removed from state court under currently available procedures. See, e.g., *In re Cardizem CD Antitrust Litigation*, 332 F.3d 896 (6th Cir. 2003). Thus the federal courts have had some significant experience managing combined direct and indirect purchaser actions, albeit under the most complex of conditions, having to apply a mix of federal and state standards.

As noted, in *Illinois Brick* the Court stated: “*Hanover Shoe* does further the goal of compensation to the extent that the direct purchaser absorbs at least some *and often most* of the overcharge.” 431 U.S. at 746 (emphasis added). First, even if that were true of the prohibition of defensive pass-on in *Hanover Shoe*, it was not necessarily true of offensive pass-on, which specifically enables compensation. By precluding a defense of pass-on, *Hanover Shoe* eliminated the possibility that an antitrust wrongdoer could in effect avoid liability on a “technicality.” “Who sued” was less important to the Court than what the offender had done.

More importantly, there was and remains no support for the Court’s presumption that “often most” of the overcharge will be borne by the direct purchaser. Pass-on may or may not occur in any given case. Under *Illinois Brick*, single products simply sold through minimal levels of distribution are lumped together and treated the same as component products sold through many. Such a “one size fits all” per se rule is ill-fitting to the broad range of possible circumstances.²²

Even if it were true that direct purchasers frequently “absorb” overcharges, other factors might well lead the direct purchaser to hesitate before suing the supplier that feeds it – a point argued to the Court but downplayed in *Illinois Brick*. There is at least some experience since 1977 to suggest that the point is worthy of greater consideration. There are significant examples of major

²² Use of a rigid indirect purchaser ban also places a premium on characterization: to be characterized as an “indirect purchaser” is to be banned from federal court. Hence, in unusual circumstances, characterization debates can themselves complicate litigation. *See, e.g., Blades v. Monsanto Co.*, 400 F.3d 562, 568 n.4 (8th Cir. 2005). Characterization debates also can lead to arguably perverse applications of *Illinois Brick*. One example may be *Campos v. Ticketmaster Corp.*, 140 F.3d 1166 (8th Cir. 1998), which concluded that purchasers of music concert tickets from Ticketmaster were *indirect*, not direct purchasers, and were hence barred from suit. Yet it was not at all clear from the court’s analysis who other than the concert ticket purchasers could be defined as a “direct” purchaser and hence who might ever have standing to sue to challenge the alleged antitrust violations of Ticketmaster.

antitrust violations being challenged only or substantially by rivals, government, and indirect purchasers – but not by significant direct purchasers.²³

First, if borne out by a more thorough study, that may well suggest that in fact the opposite of the Court’s assumption is true – that “often most” direct purchasers do pass-on all or part of the overcharge to their customers rather than “absorb” it. There are two important points to consider here. First, *Illinois Brick* may not have considered that whether the offender is a monopolist or a cartel, by definition it likely possesses market power. Hence, the direct purchaser may have few if any alternative sources of supply. Under such circumstances, direct purchasers may be especially reluctant to risk rupturing their relationships with their suppliers by initiating major antitrust litigation against them. Retaliation could be costly. Second, it may well be that if all competing direct purchasers face the same overcharge, they are more, not less likely, to pass it on, precisely because they know that all others have faced the same price increase. In a sense, a cartel problem has been solved, and they themselves may act as a cartel.

Even if direct purchasers elect to sue, their litigation goals, strategies, and incentives may not necessarily align with those of indirect purchasers. Repairing their relationship with their suppliers and securing more favorable future terms may be more important to them than vindicating the consumer welfare policies of the antitrust laws. Settlements controlled solely by the priorities of direct purchasers, therefore, could lead to sub-optimal compensation and deterrence.

²³ By definition, these cases are difficult to identify precisely because they have *not* been filed. One example may be *In re Warfarin Sodium Antitrust Litigation*, 391 F.3d 516 (3d Cir. 2004). Another example is the *Microsoft* follow on litigation. Although the district court certified a class of direct purchasing consumers, *see In re Microsoft Corp. Antitrust Litigation*, 214 F.R.D. 371 (D.Md. 2003), and a number of Microsoft rivals sued in their individual capacities, none of the major OEM direct purchasers of Microsoft Windows initiated treble damage actions against Microsoft.

So much of the logic of *Illinois Brick* depends on the accuracy of these assumptions that their potential weakness should not be ignored. If direct purchasers lack the incentive to sue – either because of pass-on or fears of rupturing valuable relationships with their suppliers – there will be little or no compensation and greatly diminished deterrence. In such circumstances, state *Illinois Brick* repealers may provide the sole means of recourse to injured consumers.

Apportionment as Per Se Complex. *Illinois Brick* further suffers from the same infirmity as do all *per se* rules. It assumes that “always or almost always” pass-on will be immeasurable. If that is not the case, the *per se* rule will seriously under-deter.

As Justice White argued in dissent in *Kansas v. Utilicorp.*, a sensible application of his opinion in *Illinois Brick* would treat it as an “exception,” applicable only in circumstances where the plaintiff can offer no readily provable damages:

In sum, I cannot agree with the rigid and expansive holding that in no case, even in the utility context, would it be possible to determine in a reliable way a pass-through to consumers of an illegal overcharge that would measure the extent of their damage. There may be cases, as the Court speculates, where there would be insuperable difficulties. But we are to judge this case on the basis that the pass-through is complete and provable. There have been no findings below that this is not the fact. Instead, the decision we review is that consumers may not sue even where it is clear and provable that an illegal overcharge has been passed on to them and that they, rather than the utility, have to that extent been injured.

None of the concerns that caused us to bar the indirect purchaser's suit in *Illinois Brick* exist in this case. For that reason, rather than extending the *Illinois Brick* exception to § 4's grant of a cause of action to persons injured through anticompetitive conduct, I would hold that the petitioners in this case have standing to sue. This result would promote the twin antitrust goals of ensuring recompense for injured parties and encouraging the diligent prosecution of antitrust claims.²⁴

I agree with the sentiment that not all indirect purchasers are created equal. There may be

²⁴ *Kansas v. Utilicorp. United, Inc.*, 497 U.S. at 225-26 (White, J., dissenting).

some – perhaps many – instances in which a class of indirect purchasers cannot assemble an economically sound model for apportioning damages. In those cases summary judgment may be appropriate for the defendant. But there was and remains no basis for presuming, without any opportunity to at least offer evidence, that that will “always or almost always” be the case.

Multiple Recovery as a Genuine Threat. My research has disclosed that some of the Justices in *Illinois Brick* were seriously perturbed by the lack of evidence that any defendant had in fact been ordered to pay out duplicative recovery. Nearly thirty years later, that has not changed. Duplicative recovery remains a theoretical problem.²⁵ Even if it has perhaps become a more viable theoretical problem as a consequence of the split of cases between federal and state courts, actual examples of multiple recoveries through verdicts seem to be difficult to identify.

It has nevertheless been argued that the mere theoretical threat of multiple recovery may enhance the settlement value of related cases. Even so, it seems largely implausible that any firm or group of firms has ever agreed to a settlement that can be equated with “multiple recoveries,” i.e. six-fold damages. If so, it could only have been the most serious antitrust offender. In any event, eliminating the split of cases between state and federal courts and facilitating joint management of related direct and indirect purchaser litigation would likely all but eliminate this “risk.”

In conclusion, legislative preemption of *Illinois Brick* repealers would be “beneficial” only in the same sense that repeal of Section 4 would be – of course, with no right of action, there would be less litigation and no evidentiary challenges. But such an Act would amount to the single most

²⁵ In a somewhat unique circumstance, defendants in the follow-on private litigation to the FTC’s case against Mylan argued that the FTC’s procurement of a settlement on behalf of indirect purchasers precluded certification of a later class of direct purchasers on the ground that duplicative recovery would result. *See In re Lorazepam & Clorazepate Antitrust Litigation*, 289 F.3d 98 (D.C. Cir. 2002).

profoundly anti-consumer antitrust enactment in history, cutting off as a matter of law any hope of consumer recovery even in the most “clear and provable” cases of pass-on.

As noted above, the second major substantive option often mentioned is overruling *Illinois Brick*. Despite my strong views on the continued importance of indirect purchaser rights, I do not support a simple overruling of *Illinois Brick*. We are far beyond the point where simply overruling *Illinois Brick* can solve the management problems created by parallel federal and state proceedings. Even if the federal courts were re-opened to indirect purchasers, forum shopping could well continue in the state courts owing to differences in pleading requirements, class certification standards, summary judgment standards, and proof standards. Hence, I reject the idea that the substantive choice is between preempting *Illinois Brick* repealers and overruling *Illinois Brick*. The real choice is between permitting indirect purchasers to continue to sue in state courts, or re-establishing their right to sue in federal courts, albeit with added procedural safeguards designed to address the legitimate, even if overstated, concerns expressed by the Court in *Illinois Brick*.

Procedural Reform Options

As noted above, if a substantive solution cannot be secured, procedural solutions are available that can ameliorate much, if not all, of the negative consequences of remedial diversity. The Class Action Fairness Act of 2005, Pub. L. No. 109-2, may be a useful model, although it does not go far enough and is simply not tailored to the problems of indirect purchaser litigation.

Section 4 of the Act, “Federal District Court Jurisdiction for Interstate Class Actions,” amends 28 U.S.C. § 1332 (the diversity statute) to expand federal jurisdiction and hence expand removal jurisdiction. It does so by altering several long-standing rules affecting diversity class

actions.²⁶

In *Snyder v. Harris*, 394 U.S. 332 (1969), the Court held that class representatives and class members cannot aggregate their damages in order to satisfy the minimum amount in controversy requirement of the diversity statute. In *Zahn v. Int'l Paper Co.*, 414 U.S. 291 (1973), the Court went further, holding that even where the class representative meets the minimum amount in controversy, supplemental jurisdiction cannot be used to include class members in a diversity class action – each and every member of the class must meet the minimum amount in controversy.²⁷

Two additional rules concerning the determination of citizenship also affect class actions. The long-standing general rule is that diversity must be “complete,” i.e. each and every plaintiff must be diverse from each and every defendant. *Strawbridge v. Curtiss*, 3 Cranch 267 (1806). In the case of class actions, the Court has long held that the citizenship of the class must be determined by looking solely at the class representative. *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921). Hence the class representative cannot be a citizen of the same state as any adverse party.

The Class Action Fairness Act expands federal court jurisdiction by loosening most of these requirements, although it imposes others. Under the Act, class members may aggregate their

²⁶ Other sections of the Act provide for increased scrutiny of coupon settlements, attorneys fees petitions in coupon settlement cases, and class member payments to counsel, all of which apply to all class actions filed in federal court.

²⁷ Until recently, there had been a split of authority in the federal courts as to whether the 1990 Supplemental Jurisdiction Statute, 28 U.S.C. § 1367, effectively overruled *Zahn*. See Gavil, *Federal Judicial Power*, *supra* note 2, at 870-76. That split was resolved on June 23, 2005 by *Exxon Mobil Corp. v. Allapattah Svs., Inc.*, 125 S.Ct. 2611 (2005). By a 5-4 margin the Court held that Section 1367 did in fact overrule *Zahn*. Hence, it will now be possible to initiate a diversity class action in federal court – or remove one filed in state court – provided that any single plaintiff meets the minimum amount in controversy. This will make it easier for some indirect purchaser actions to be originally filed in federal court, or removed from state court.

damages and only minimal diversity is required. Moreover, diversity of citizenship can be based on the class representative or any class member. On the other hand, the Act only applies to plaintiffs classes of more than 100, and the aggregate minimum amount in controversy must exceed the sum or value of \$5 million. Also, the federal courts must decline jurisdiction in some circumstances and have the discretion to decline in others.

The Class Action Fairness Act thus may apply to some indirect purchaser class actions filed in state court – but its conditions, limitations, and exceptions, designed with certain kinds of torts in mind, may limit its utility for antitrust.

An “Antitrust Procedural Improvements Act of 2006” could borrow some of the methodology of the Class Action Fairness Act, but more specifically provide for better procedural options for removing and thereafter coordinating related state and federal indirect and direct purchaser suits. Some such removal and transfer is already being accomplished through existing jurisdiction and procedure rules, but significant numbers of cases probably remain beyond the scope of federal removal statute.

As I have previously outlined,²⁸ such a proposal would include the following basic features:

- removal authority over related indirect purchaser actions would be expanded to the constitutional limits;
- federal courts would be granted antitrust-specific expanded authority to use MDL procedures to transfer and consolidate related direct and indirect purchaser actions for pre-trial and trial.

There are many details to these proposals that are discussed at length in my 2001 article, and I refer the Commission to that article for a more complete exposition of this approach.

²⁸ See Gavil, *Federal Judicial Power*, *supra* note 2, at 887-901.

Compared to current practice, such an approach would concentrate more related cases in a common forum. Although bigger is not always better - combining many cases, even related ones, could increase the complexity of the management of the collected cases – it could have the advantage of diminishing duplicative discovery and litigation, and facilitating consistent pre-trial treatment of related direct and indirect purchaser suits. If concentration continued through trial, it would also facilitate damage apportionment and hence allow for specific controls over the possibility of multiple recoveries.

Procedural solutions, however, are a compromise. On the one hand, they could greatly improve the management of related direct and indirect purchaser cases and perhaps lessen the incentives to forum shop. A procedural solution might also permit states to retain a sphere of autonomy in the matter of indirect purchaser rights. That autonomy can express itself not only in the definition of the scope of indirect purchaser rights, but in many other ways, such as pleading, class action, summary judgment, and expert witness standards. On the other hand, retaining that autonomy may come at a significant price. Differences between federal and state standards on such issues add their own level of complexity to consolidated litigation, multiply proceedings, and reintroduce the possibilities of inconsistency. When direct and indirect purchaser cases are consolidated in federal courts, federal judges can be called upon to interpret and apply the laws of many states on a variety of pre-trial issues. And if transfer under MDL proceedings remains limited to pre-trial under *Lexicon*, the ultimate decisions on aggregate and apportioned damages may be beyond coordination.

Hybrid Substance-Procedure Options

Another legislative approach would be directed at resolving the substantive tension generated

by *Illinois Brick* and *ARC America*. It would consist of three components: (1) overrule *Illinois Brick*; (2) pre-empt all state antitrust laws conferring rights on indirect purchasers except in substantially intrastate matters and establish *exclusive* federal jurisdiction over related direct and indirect purchaser claims that affect interstate commerce in federal court; and (3) establish an antitrust specific interpleader statute that would allow for all direct and indirect purchasers to sort out allocation issues in a single proceeding once liability and aggregate damages have been established.

First, *Illinois Brick* would be expressly overruled, restoring indirect purchaser rights in federal courts. This alone might lead many indirect purchasers to elect to file in federal court. But others might not. As a result, the mere availability of indirect purchaser rights in federal court would not foreclose the kind of forum shopping, management, and consistency problems that exist today.

Second, to address that contingency, indirect purchasers would not merely be permitted to sue in federal court, they would be *required* to do so when their suits meet a threshold test of interstate commerce and are related to other direct or indirect purchaser suits pending in other state or federal courts.²⁹ In other words, state indirect purchaser rights would be pre-empted in favor of federal rights.

Third, because overruling *Illinois Brick* and preempting all state indirect purchaser rights³⁰ alone might still not resolve all of the issues now extant in the federal and state courts, new

²⁹ This would be analogous to current Federal Rule of Civil Procedure 13(a), which makes certain counterclaims compulsory - i.e., they must be brought or they are later precluded.

³⁰ There would have to be three important exceptions to preemption. First, in the rare case of overwhelmingly intrastate antitrust violations, it would be hard to make the case for an exclusive federal remedy as a matter of constitutional authority. Second, absent pending and related cases in federal court or in other state courts, there would be no justification of such an invasion of state prerogative. Finally, cases initiated by the state on its own behalf or on behalf of its citizens would be permitted to go forward in state court.

procedures would also be needed to guide courts in managing the consolidated cases in a way that specifically addresses and diminishes the concerns voiced in *Illinois Brick* about apportionment, multiple damages, and the burdens on defendants forced to litigate these complex issues.

A critical factor in the success of this approach would be trifurcation. Phase I proceedings would focus on liability, and might well be relatively abbreviated in follow-on suits due to Section 5 of the Clayton Act. In Phase II, the plaintiffs – as a group – would litigate with defendants the aggregate amount of damages, for example, the “overcharge.” In Phase III, absent unusual circumstances, the defendants would be excused. As is true in interpleader, they would have no specific interest in litigating how the shared fund should be allocated. Hence they would be relieved of the responsibility and costs of litigating allocation issues. Like the typical interpleader action, the parties vying for portions of the fund would alone litigate – or settle – the allocation issue. Direct and indirect purchasers would be put to the test of evidence in establishing their respective claims to the “common fund” created by the first two phases.³¹

For the competing claimants, failure to establish either liability or aggregate damages would end all litigation and render the phase three proceeding unnecessary. A combination of a dedicated statute of limitations and preclusion doctrine also would help to define the window during which direct and indirect purchasers could initiate actions of their own or intervene in the consolidated action. Failure to file or intervene within the specified time period would, as with compulsory counterclaims, preclude any subsequent action over related events.

³¹ One option might be to retain the traditional civil burden of proof – “preponderance of the evidence” for establishing the aggregate amount of damages, typically the overcharge, but to impose an elevated burden of proof, such as “clear and convincing evidence,” on indirect purchasers seeking apportionment.

This proposal, too, is a compromise, but one that strikes a more reasonable balance among compensation, deterrence, federalism, and concerns about litigation management and fairness to defendants.

Subject to uniform standards of proof that would now develop in the federal courts, the rights of direct and indirect purchasers would be equalized and rationalized. Both compensation and deterrence would be served, as would institutional interests in avoiding overlapping and inconsistent litigation. Far fewer judicial and litigant resources would be consumed. Defendants would be relieved of the burdens of defending related actions in multiple forums, state and federal, but would not as readily be in a position to retain the spoils of their anticompetitive conduct in those cases where direct purchasers fail to sue.

Federalism also will be served in the end. The generation old federal-state battle over indirect purchaser rights would come to an end, and it would be a consequence of healthy federal-state dialogue. Those who have advocated preemption based on *Illinois Brick* would have to be satisfied with preemption of state indirect purchaser rights. And state officials concerned about the fate of their indirect purchasing consumers should find some solace in seeing those rights restored in federal court. Hopefully, all of those who have been affected, or will be, by direct and indirect purchaser litigation will find common ground in the new, unified procedures available in federal court to resolve all related direct and indirect purchaser litigation – by far a preferable method to resolving these disputes than the current split between state and federal courts.

CONCLUSION

Today we are the victims of circumstance. As Justice Blackmun argued in dissent in *Illinois Brick*, in this area of law, timing is everything. Had *Illinois Brick* come to the Court before *Hanover*

Shoe, he predicted, it would have been an easy case, and would have been decided the other way.³² Similarly, today we face the world created by *Illinois Brick* and *ARC America*. Ironically, it is a world in which the fears of the majority in *Illinois Brick* are more likely to be realized.

The solution is not to be found in the seductively simple invitation to pre-empt state laws granting indirect purchaser rights. Those laws correctly viewed *Illinois Brick's* per se rule with skepticism. Neither is a solution to be found in simply overruling *Illinois Brick*, while leaving its state progeny in place.

The better route, even though it may take some time to fully unfold, is to embrace the opportunity for productive federal-state dialogue and bring indirect purchasers back into the fold, but with safeguards that recognize the concerns expressed by the Court in *Illinois Brick*.

Sadly, the combination of *Illinois Brick* and *ARC America* robbed the federal courts of a generation of opportunities to develop clear and nationally uniform standards of proof for apportionment of damages among indirect and direct purchasers. By returning those cases to federal court, we can reinitiate an orderly process of development, hopefully striking a more reasonable balance between the interests of consumer welfare that are so fundamental to our antitrust laws and the real challenges of managing modern, multi-party, multi-forum antitrust litigation.

³² *Illinois Brick*, 431 U.S. at 765 (Blackmun, J., dissenting).

**Antitrust Case Statistics
Federal Filings**

Table 1 – Administrative Office of the United States Courts
Civil Antitrust Cases Filed 1997-2004¹

| | Total # Federal Civil Antitrust Cases Commenced | Commenced by U.S.² | Private | Class Actions | Class Actions as % of Private Cases Filed |
|-------------|--|--|----------------|----------------------|--|
| 1997 | 598 | 28 | 570 | 78 ³ | 14% |
| 1998 | 580 | 32 | 548 | 60 | 11% |
| 1999 | 645 | 37 | 608 | 100 | 16% |
| 2000 | 858 | 47 | 811 | 213 | 26% |
| 2001 | 723 | 16 | 707 | 122 | 17% |
| 2002 | 826 | 20 | 806 | 126 | 16% |
| 2003 | 762 | 33 | 729 | 97 | 13% |
| 2004 | 752 | 21 | 731 | 116 | 16% |

¹ These statistics are for civil cases only, reported on a September to September year.
Source: Administrative Office of the United States Courts, Judicial Business of the United States Courts, Annual Report of the Director, Tables C-2; C-2A & X-5, available at <http://www.uscourts.gov/judbususc/judbus.html>.

² The U.S. statistics are broken down further by the Administrative Office into “plaintiffs” and “defendants” cases, but it is unclear what the reference to the U.S. as a defendant in an antitrust case might mean.

³ The class actions statistics are further broken down into government and private, although all years are private except for 1997, where one of the 77 was listed as U.S..

Table 2: Federal Antitrust Cases Commenced
1977-1984⁴

| | U.S. Cases | Private | Totals |
|-------------|-------------------|----------------|---------------|
| 1977 | 78 | 1611 | 1689 |
| 1978 | 72 | 1435 | 1507 |
| 1979 | 78 | 1234 | 1312 |
| 1980 | 78 | 1457 | 1535 |
| 1981 | 142 | 1292 | 1434 |
| 1982 | 111 | 1037 | 1148 |
| 1983 | 95 | 1192 | 1287 |
| 1984 | 101 | 1100 | 1201 |

⁴ This data is excerpted from Steven C. Salop & Lawrence J. White, *Private Antitrust Litigation: An Introduction and Framework*, in LAWRENCE J. WHITE, ED., PRIVATE ANTITRUST LITIGATION: NEW EVIDENCE, NEW LEARNING 3, 4 (1988). Salop and White’s data covers 1941-1984 and was assembled from multiple sources. “U.S. Cases” includes criminal and civil cases.

Table 3 – United States Department of Justice, Antitrust Division
Workload Statistics: Cases Filed 1995-2004⁵

| | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 | 2003 | 2004 |
|-------------------------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|
| # Criminal Cases Filed | 60 | 42 | 38 | 62 | 57 | 63 | 44 | 33 | 41 | 42 |
| # Civil Cases Filed | 26 | 27 | 21 | 23 | 29 | 23 | 10 | 7 | 14 | 8 |
| Totals | 86 | 69 | 59 | 85 | 86 | 86 | 54 | 40 | 55 | 50 |

Table 4 - Federal Trade Commission
Antitrust Nonmerger Cases 1990-2002⁶

| 1990 | 1991 | 1992 | 1993 | 1994 | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | 2001 | 2002 |
|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|-------------|
| 6 | 6 | 10 | 12 | 12 | 12 | 6 | 4 | 13 | 7 | 10 | 3 | 10 |

⁵ United States Department Justice, Antitrust Division, Workload Statistics, FY 1995-2004, available at <http://www.usdoj.gov/atr/public/workstats.htm>. Note that the DOJ Statistics appear to differ from the Administrative Office’s. This could be due in part to the reporting period utilized or other factors.

⁶ This data is excerpted from William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Norms*, 71 ANTITRUST L.J. 377, 478 (2003) (“Appendix A”). Professor Kovacic’s data on FTC antitrust nonmerger cases covers January 1961-July 2003.