

Prepared Statement of Dan E. Gustafson
Gustafson Gluek PLLC
For the Antitrust Modernization Commission
June 27, 2005

Madame Chair, members of the Antitrust Modernization Commission, good afternoon. Thank you for inviting me to appear before the Commission and testify about important indirect purchaser antitrust issues. In my years of practice, I have had the good fortune of litigating numerous direct and indirect purchaser antitrust cases, occasionally with members of the Commission. Based on my years of antitrust litigation experience, I am prepared to offer my views on this important topic and the Commission's important work.

My views with respect to indirect purchaser antitrust actions derive primarily from my years of antitrust litigation including a wide range of antitrust matters. As you can see from my attached summary of professional experience, my practice primarily involves representation of plaintiffs in class action antitrust and consumer protection cases. These include both direct and indirect purchaser actions and both Section One and Section Two cases, including several intellectual property related antitrust claims. A complete summary of my education and professional experience is attached.

Summary of Statement

In the late 1970's, the United States Supreme Court's decision in *Hanover Shoe* and *Illinois Brick*, necessarily opened a significant gap in the federal antitrust

law's protection of competition, the deterrent effect of comprehensive civil antitrust enforcement and left indirect purchasers (primarily small businesses, family farms, and consumers) without a federal antitrust damages remedy.

Consistent with longstanding federalism policy, some states took this opportunity to broaden their respective antitrust enforcement regimes by enacting legislation – widely known as “*Illinois Brick* repealers” – to extend remedies to indirect purchasers under state antitrust laws. Other states adopted different mechanisms to protect their citizens from anticompetitive action. Some state courts declined to adopt the reasoning of *Illinois Brick* and interpreted their state's statutes to allow indirect purchaser antitrust claims. Some followed *Illinois Brick* with respect to interpreting their antitrust statutes but allowed indirect purchasers redress under their unfair or deceptive trade practices acts. Several other states conferred on their Attorneys General the power to protect indirect purchasers.

With respect to procedure and remedies, states also have adopted different approaches. Some followed federal law adopting treble damages and attorney fees provisions and several simply adopted the remedies of the statutes (i.e. consumer protection). Others added provisions to prevent duplicative recovery, limit indirect purchaser claims to consumers only or provide for other limitations.

This varied approach to indirect purchaser actions among the states is consistent with the varied approaches the states historically have taken in

implementing and articulating their own antitrust laws and policies. Thus, many questions impacting the various forms of state indirect purchaser actions, as well as other antitrust actions, remain subject to continued development. For example, although many states look to federal law for guidance, questions regarding the application and scope of various federal immunities and exemptions such as the “filed rate doctrine,” “McCarran Ferguson” immunity and the “state action doctrine” remain unsettled.¹ Also other questions such as the applicability of indemnification and contribution, joint and several liability, treble damages, and attorneys’ fees remain undecided or not fully developed. Furthermore, many states have yet to decide the scope of their respective Attorney General’s *parens patriae* standing to pursue indirect purchaser actions even in the absence of a specific grant of authority to prosecute indirect purchaser suits. Thus, although state indirect purchaser antitrust policy continues to mature, the experiment of the various states continues to evolve.

There exists no fundamental inconsistency between the current federal and state antitrust enforcement mechanisms, generally or with respect to indirect purchaser policies and actions. The basic premise behind antitrust law is the protection of competition, not competitors and nothing in the current system alters

¹ Although perhaps an unanswered question under some state antitrust law, because *Noerr-Pennington* finds its roots in federal constitutional law, it seems certain that the *Noerr-Pennington* doctrine will continue to shield antitrust defendants from liability for conduct premised on legitimate petitioning activities.

this concept. Nor are state indirect purchaser actions inconsistent with any expressed intention by Congress to preempt state law. To the contrary, as with many areas of law (e.g. criminal, environmental, discrimination), the Supreme Court recognized concurrent jurisdiction in antitrust law in *ARC America*.

Illinois Brick issues arise primarily (although not exclusively) in the context of price-fixing and although perhaps more complex with respect to injury and damages, indirect purchaser actions less frequently implicate the difficult and perhaps even more complex issues of market definition and market power posed by many Section Two cases. State experiments to date suggest that the concerns about the complexity of proving impact and damages in indirect cases have not materialized. With the advent and refinement of sophisticated economic and statistical techniques and the increasing acceptance of these concepts by courts, expert testimony continues to make such proof manageable and reliable in most cases. In instances where calculating damages proves difficult or individual damages are very small, some state courts have approved *cy pres* awards that still provide a deterrent effect and although not directly, still provide a form of compensation to the category of persons injured by anticompetitive conduct.

The difficulty of coordinating multiple state court indirect purchaser actions in my view is significantly exaggerated. Prior to CAFA, all concerned -- the courts, the plaintiffs and the defendants -- strongly benefited from coordination and

cooperation to prevent inefficient, duplicative discovery regiments and, in my experience, coordination rarely, if ever, posed a difficulty. In fact, the issue of coordination almost never required court intervention other than to approve the stipulated agreement of the parties.

CAFA now offers what appears to be a solution in any event as most state cases will now be removable and subject to consolidation by the JPMDL. On the procedural standards applied to indirect purchasers, however, CAFA should be highly beneficial by creating consistency in the class action decisions that have unfairly varied significantly from state to state. Applying a uniform federal standard to Rule 23 decisions should eliminate the unfairness while allowing the state substantive law to continue progressing.

The ongoing state regimes add to the federal enforcement and deterrent aspects of our overall national antitrust policy to protect vigorous competition. State diversity retains and reinforces the historic role of the states as engines of creativity and multiple incubators of new ideas, procedures and limitations, all which serve the public good. Importantly, this state framework of indirect purchaser protection provides compensation to persons in fact injured, however remotely, by anticompetitive conduct. Furthermore, the increasing reliance of courts on well-accepted economic analysis and statistical techniques lessens the *Illinois Brick* concerns.

The federalism experiment is progressing and fulfilling an important role in our national antitrust system of protection and compensation of injured parties. The states are providing interesting ideas and should be allowed to continue without federal preemption to permit the continuation of this creative dynamic.

The Commission's questions related to indirect purchaser actions raise important issues that deserve broad-ranging, deliberate and careful consideration in evaluating the current dual system of federal and state antitrust enforcement. Because of the diversity of the system currently being utilized, any comprehensive change now would be premature and may deprive the public of discovering the best possible solutions yet to be fully developed by the various states.

Detailed Statement

After *Illinois Brick*, various states stepped up to fill the void created for private indirect purchaser antitrust claims. Over thirty states currently permit indirect purchaser actions in some form or another. A number of states and the District of Columbia passed "repealer" statutes that permit private indirect purchaser actions. *See e.g.*, Ala. Code § 6-5-60 (2005); D.C. Code Ann. § 28-4509 (2005). Several other states passed statutes granting their respective Attorneys General authority to pursue indirect purchaser claims on behalf of their citizens. *See e.g.*, Colo. Rev. Stat. § 6-4-111(2) (2005); Nev. Rev. Stat. 598A.160 (2005). Arizona, Iowa, and North Carolina, for example, recognized indirect purchaser

antitrust claims by judicial decision. *See, e.g., Bunker's Glass Co. v. Pilkington PLC*, 75 P.3d 99 (Ariz. 2003); *Comes v. Microsoft Corp.*, 646 N.W.2d 440 (Iowa 2002); *Hyde v. Abbot Labs., Inc.*, 473 S.E.2d 680 (N.C. Ct. App. 1996). Some states, such as Florida, Massachusetts, Nebraska, and Vermont allow indirect purchasers to pursue damages claims for antitrust violations under their consumer protection statutes. *See, e.g., Mack v. Bristol-Myers Squibb Co.*, 673 So.2d 100 (Fla. Dist. Ct. App. 1996); *Ciardi v. F. Hoffman-La Roche, Ltd.*, 762 N.E.2d 303 (Mass. 2002); *Arthur v. Microsoft Corp.*, 676 N.W.2d 29 (Neb. 2004); *Elkins v. Microsoft Corp.*, 817 A.2d 9 (Vt. 2002).

With respect to procedure and remedies, states also took various approaches in adopting indirect purchaser protection. Some adopted treble damages and attorneys' fees provisions similar to the federal remedies, *see e.g., Cal. Bus. & Prof. Code* § 16750(a); Wis. Stat. § 133.18(1)(a), others simply adopted the remedies of the statutes (i.e. consumer protection) already in place, *see e.g., Mass. Gen. Laws ch. 93A* § 11; Fla. Stat. Ann. § 501.211(2), still others added provisions to prevent duplicative recovery, *see e.g., N.D. Cent. Code* § 51-08.1-08(4), and several limited indirect purchaser claims to consumers only, *see Mack*, 673 So.2d at 103, or prohibited the use of class actions to enforce indirect purchaser laws. *See e.g., Lennon v. Philip Morris Co., Inc.*, 734 N.Y.S.2d 374 (N.Y. Sup. Div.

2001). Thus, the federalism experiment began with states enacting varying protections for indirect purchasers left without a federal remedy.

The concept of state experimentation in various areas of the law, including antitrust law, has a long and well-accepted history. For example, one of the benefits of the federal system is that states can serve as social laboratories and experiment with solutions to social problems. Alex Long, *State Anti-Discrimination Law As A Model For Amending The Americans With Disabilities Act*, 65 U. Pitt. L. Rev. 597, 600 (2004) (citations omitted). In some cases, the federal legislative or judicial branch will “initiate [] a dialogue with the states about individual rights that results either in the creation of a nationwide standard or more experimentation among the states.” *Id.* at 601. In other cases, “states have served as the catalyst for federal reform.” *Id.* Indeed, in some instances, “state innovations have, in turn, led to suggestions that Congress might possibly use these more expansive state statutes as models for federal legislation.” *Id.* at 601.² Thus,

² Both Democratic and Republican administrations have repeatedly recognized the importance of permitting and encouraging the various states to experiment with government policies to provide invaluable information to shape federal policy. *E.g.*, Schuck, Peter H., *Introduction: Some Reflections on the Federalism Debate*, 14 Yale J. on Reg. 1, at *8 (March 1996) (observing that Clinton administration encouraged use of the waiver authority under section 1115 of the Social Security Act to allow states to experiment with changes in AFDC, Medicaid, and child welfare policies) Price, Deb, *Bush Weds Welfare, Marriage*, Detroit News Washington Bureau (March 21, 2004) (reporting on the \$1.5 billion marriage initiative supported by the Bush administration that would allow states to experiment with plans to offer relationships skills to welfare recipients, teach high

both a long history and bipartisan support exist for states experimenting with the development of the law before enacting comprehensive, national antitrust regulation.

Already, these state reactions to *Illinois Brick* suggest that private state indirect purchaser actions provide substantial benefits to the United States antitrust enforcement system. First, indirect purchaser actions supplement the deterrent effect of federal government proceedings, federal direct purchaser actions and state government proceedings. Government enforcement agencies possess limited resources. *E.g., Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1976) (stating that “private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations”). Indeed, some argue that the great majority of cartels proceed without detection. R. Lande, *Why Antitrust Damage Levels Should be Raised*, 16 *Loy. Consumer L. Rev.* 329, 330 at n. 24 (2004).

As a result, private indirect purchaser suits add an important element to antitrust deterrence and enforcement because those small businesses and consumers often possess a strong and unencumbered incentive to pursue antitrust claims. One level removed in the supply chain from the antitrust offender, these indirect purchasers often enjoy many avenues of supply thereby lessening the

school students about marriage and launch a public relations campaign lauding marriage).

concern for retaliation or the curtailment of supply. By contrast, direct purchasers may well be a conduit of or unwitting participant in or even a possible beneficiary of an antitrust violation of its supplier. Furthermore, direct purchasers often have significant financial or exclusive relationships with suppliers that are inconsistent with an incentive to pursue antitrust claims and hinder their actual ability given the potential supply concerns. Consider the fact that large drug wholesalers generally have not pursued any of the actions alleging antitrust violations in the generic drug cases; even though in certain of these cases, courts found anticompetitive conduct by drug manufacturers. Their customers – the wholesalers – have little economic incentive to redress such conduct and powerful incentive not to do so.

Second, and perhaps the greatest benefit of state antitrust actions by private indirect purchasers, is that small businesses and consumers receive compensation for defendants' antitrust violations. Private indirect purchaser actions allow those persons who in fact suffered the economic loss arising from price fixing and other anticompetitive conduct the opportunity to recover their damages.

In conjunction with private enforcement, courts have also long recognized that class actions play an important role in the enforcement of antitrust violations. Certifications of classes are particularly important in indirect purchaser actions because many of the injured persons are small business and consumers where pursuing individual actions makes no economic sense. With the increased

recognition by courts of the well-accepted economic analysis and statistical techniques, the concern about proving pass through that often stymied indirect purchaser class certification should lessen. Thus, a positive change that may result from CAFA should be the application of a uniform class certification standard. Combined with the increasing willingness of federal courts to rely on standard, accepted statistical and economic techniques to determine antitrust impact and to calculate antitrust damages, these changes should result in a fairer, more reliable class certification process for private indirect purchaser actions. Disputes about allocation,³ complexity or other difficulties should not impede recovery of class-wide damages.

The infant formula indirect purchaser cases provide a good example of significant recovery in multi-state coordinated private indirect purchaser antitrust litigation. Coordinately pursued in about 17 states (excluding California), these cases eventually settled for over 60 million dollars in cash and product. In many of the states, consumers received cash payments ranging up to several hundred dollars per child and other states received significant *cy pres* infant formula product allocation to be distributed to food shelves. These cases followed a State of Florida case and a federal direct purchaser class action that settled for hundreds of

³ Any problems with allocating a judgment among competing purchasers should be left to a post-judgment allocation proceeding supervised by the court after proper notice and an opportunity to be heard.

millions of dollars. Where a Minnesota court certified a multi-state settlement class of indirect Lysine purchasers, class members that filed claims collected significant *pro rata* cash payments in each state.

More recently, federal courts have demonstrated that application of a uniform class certification standard provides benefits. Large settlements have resulted from indirect purchaser actions in the generic drug antitrust claims pursued in federal court.⁴ In each of these indirect purchaser settlements, many businesses (e.g. third-party payors including private insurers, HMO's and union health benefit plans) received large cash payments while consumers received smaller but not insignificant cash payments often totaling more than their actual estimated damages). For example, in the Augmentin antitrust litigation, the court approved a \$62.5 million dollar direct purchaser settlement and \$29 million indirect purchaser settlement; in the Paxil antitrust litigation, the court approved a \$65 million settlement for indirect purchasers and \$150 million dollar direct purchaser settlement pending approval; in the Relafen antitrust litigation, the court approved a \$75 million settlement for indirect purchasers and a \$175 million settlement for direct purchasers; and in the Taxol antitrust litigation, the court

⁴ In this instance, the indirect purchaser class actions were filed in federal court on the basis of their claims for injunctive relief, a remedy most courts have held falls outside the indirect purchaser prohibition of *Illinois Brick* and the damages claims were properly before the court pursuant to state law and federal supplemental jurisdiction.

approved a \$65 million direct purchaser settlement, a \$15.2 million third-party payor settlement and a \$50 million indirect purchaser settlement for consumers and State Attorneys General.

Although many indirect purchaser actions follow federal criminal activity or direct purchaser actions, several current cases stand alone where no other actions have been filed. *See In re Canadian Import Antitrust Litig.* (D. Minn.); *Federal Guarantee Fee Antitrust Litig.* (D.D.C); and *In re New Motor Vehicle Canadian Export Antitrust Litig.* (D. Maine).

Contrary to the repeated claims of antitrust offenders, there is little evidence of excessive enforcement of antitrust laws, even with the combination of government enforcement (federal and state) and private enforcement (direct purchaser and indirect purchaser). *See Lande* at 330 (stating that there is no convincing evidence that the aggregate of direct purchaser damages, indirect purchaser damages, and the like produces damage levels so high that they have led to real duplication or over-deterrence). Many of these myths have been debunked about indirect purchaser suits. Contrary to earlier predictions, indirect purchaser suits have not bankrupted any Fortune 500 companies. In fact, it is clear that firms (e.g. ADM, Ajinomoto) which have violated the antitrust laws can survive, and perhaps even thrive, after compensating indirect purchasers. *See Cavanagh*,

Edward D., *Illinois Brick: A Look Back And A Look Ahead*, 17 Loy. Consumer L. Rev. 1, 49 (2004).

Congress has not overruled *Illinois Brick* or *Hanover Shoe*, nor has it read *Illinois Brick* as the uniform national rule preempting states attempts to fill the void left by *Illinois Brick*.⁵ Furthermore, the Supreme Court subsequently blessed state indirect purchaser actions and concluded that such cases did not undermine *Illinois Brick* and *Hanover Shoe*, did not complicate federal cases or dilute the incentive of direct purchasers to sue and did not conflict with any federal policy against states imposing liability separately. *See California v. ARC America*, 490 U.S. 93, 97-98, 103-05 (1989). At most, the interaction between *Illinois Brick* and state indirect purchaser antitrust statutes creates issues regarding allocation among injured parties (direct and indirect purchasers). But these allocations issues have been easily handled by the parties and the courts. *See e.g. Nichols v. Smith Kline Beecham Corp.*, Civil Action No. 00-6222 (E.D. Pa.) (in granting final approval of the settlement, the court noted that interests of the consumers and third party payors have been represented by counsel appointed to represent their interests in the allocation process). In no event, should these issues create a benefit for

⁵ Because congressional power to enact the Sherman Act and Clayton Act is found in the Commerce Clause, federal law can only reach activities in or affecting commerce. Thus, preemption of state antitrust regulation may leave intrastate anticompetitive conduct (such as many of the milk bid rigging cases of recent past) immune from antitrust scrutiny or solely in the hands of state regulators.

antitrust offenders and should not provide a basis for such wrongdoers to retain ill-gotten gains.

The *Illinois Brick* Court's concerns with indirect purchaser actions related to the purported complexity of litigation and the possibility of imposing multiple liability on antitrust wrongdoers failed to materialize. *See Comes v. Microsoft Corp.*, 646 N.W.2d 440, 449-50 (Iowa 2002) (observing that the concern of multiple liability was "unfounded," and that "district courts are fully capable of ensuring antitrust defendants are not forced to pay more in damages than amounts to which the injured parties are entitled."). Moreover, "[e]ven assuming such danger of multiple liability exists, there is no federal policy against states imposing liability in addition to that imposed under federal law." *Id.* at 450. "What some would call multiple liability, others would call maximization of deterrence and compensation." Cavanagh, Edward D., *Illinois Brick: A Look Back And A Look Ahead*, 17 Loy. Consumer L. Rev. 1, 44 (2004). As to the *Illinois Brick* Court's concerns of complexity, one court has stated:

In the years that have passed since the *Illinois Brick* decision, experience has shown that the courts can manage the complexity of indirect purchaser recovery in antitrust cases. Defendants raise the concerns regarding the difficulty of the proof of damages, but fail to provide examples of cases of unfavorable complexity. Our research has similarly revealed none. In contrast, recent developments in multistate litigation show that plaintiffs may be able to produce satisfactory proof of damages. *Cf. In re S.D. Microsoft Antitrust Litig.*, 657 N.W.2d 668, 679 (S.D. 2003) (noting that seven of nine courts reviewing the issue in that case upheld class certification of

indirect purchaser plaintiffs based on their proffered testimony regarding proof of pass-on damages). We think our courts can resolve the complex damages issues that may arise.

Bunker's Glass Co. v. Pilkington, PLC, 75 P.3d 99, 109 (Ariz. 2003).⁶

Nor should Congress limit the ability to pursue indirect purchaser actions to the State Attorneys General. State governments are already overworked and underfunded. Although states often produce extraordinary results, their resources are limited and as administrations change, policy considerations may affect the extent of their antitrust activity. The states should not shoulder the entire responsibility for policing the antitrust conduct that affects their citizens. Private parties, such as small businesses and consumers, should be empowered to pursue their own claims and should be given the opportunity to do so. But because some states have selected their Attorney General as the proper party to pursue indirect purchaser claims, that portion of the experiment continues and should provide valuable

⁶ Some have suggested that “Illinois Brick, far from embracing modern economic thought, was a throwback to earlier cases where the courts were reluctant to ‘ramble through the wilds of economic theory.’” Cavanagh, Edward D., *Illinois Brick: A Look Back And A Look Ahead*, 17 Loy. Consumer L. Rev. 1, 21 (2004) (citations omitted) However, “[c]omplexity is not a foreign concept in the world of antitrust. These cases typically involve highly intricate litigation.” *Comes*, 646 N.W.2d at 451; *see also Gordon v. Microsoft Corp.*, 2003 WL 23105552 (Minn. Ct. App. 2003)(rejecting the complexity argument, the court ruled that plaintiff’s expert’s methodology for measuring pass through damages to indirect purchasers was adequate to certify a class of indirect purchasers).

information about whether these states can prosecute these cases as effectively and efficiently as private actions.

As stated above, private litigants who are bringing these indirect purchaser actions have and continue to experiment with the most efficient ways in which to litigate these multi-state and multi-jurisdictional cases. They have implemented informal coordination in the multi-state actions including appointing Supervisory Courts to oversee such aspects of the case as settlements (as was done in the *Vitamins* cases and currently being done in the *Laminates* cases) or agreeing to coordination before the federal court in which cases in which both the indirect action and direct actions are before the same court (such as in the drug cases). Congress should allow states to continue experimenting and developing protocols which will assist Congress in determining the best method for proceeding.

As with the current state experiments with indirect purchaser cases, Congressional interference with the *Lexecon* decision at this time appears premature. In practice, because many cases settle in any event, few cases are actually transferred back to their original jurisdiction for trial. There are certainly good arguments on both sides of the issue but it remains to be seen how prevalent the problems or how important the concerns.

For example, on the one hand, strong arguments can be made for ensuring that related cases are handled together, preserving judicial resources by permitting

consolidated trials and allowing cases to be tried before a judge familiar with the facts, the attorneys and the procedural history. On the other hand, parties and witnesses generally prefer trial in the original district. It may simply be impracticable for one court to try the conglomeration of claims presented by cases that are sufficiently related to qualify for MDL transfer but are based on different laws, and many cases require local discovery. *Lexecon* also implicitly recognizes the deference traditionally accorded to the plaintiff's choice of forum.

Although it may seem that the efficiencies that stem from permitting the transfer of cases for trial as well as pretrial purposes would outweigh the counter-arguments, this question deserves more real life tests and more thoughtful discussion before changes are made.

In the final analysis, the current system is working to provide remedies to indirect purchasers injured by anticompetitive conduct, parties and the courts are effectively coordinating these cases to avoid duplication and inefficiency and CAFA presents an opportunity to strengthen indirect purchaser actions by applying a nationwide class certification standard to eliminate unfairness and inequitable results. Although arguments can be made for adopting different approaches to national antitrust enforcement, given the short time that private indirect purchaser actions have been pursued under state law and given the many unanswered questions yet to be resolved, it is my strong view that now is the time to carefully

study the maturation process in the various states until sufficiently developed so that the best, most efficient, fairest and most effective ideas can be gleaned from the state experiments. In the end, perhaps the best system of antitrust enforcement will be a combination of federal and state government actions and private federal direct purchaser actions and private state indirect purchaser actions.