

ANTITRUST MODERNIZATION COMMISSION
Regarding State Indirect Purchaser Actions in the
U.S. Antitrust Enforcement System
(June 27, 2005)
Written Testimony of H. Laddie Montague, Jr.¹

INTRODUCTION

For more than forty years, I have been involved in litigating antitrust cases, mostly (but not always) representing plaintiffs and/or plaintiffs' classes and mostly for violations under Section 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2). Prior to the ruling in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), I represented both direct and indirect purchasers (though not in the same litigation). In many of those cases where direct and indirect cases were consolidated, for pretrial purposes either by the Multidistrict Litigation Panel or by its predecessor (known as the Coordinating Committee), the cases were pre-tried together and tended to settle together. More often than not, a single settlement was achieved and allocation among the various direct and indirect purchaser classes were successfully negotiated among the various class counsel – of course all subject to court approval under F.R.C.P. Rule 23(e). See,

¹I am a senior member of Berger & Montague, P.C. However, all comments and views expressed herein are solely my own.

e.g., In re Gypsum Cases, 386 F. Supp. 989, 965 (N.D. Cal. 1974); In re Chicken Antitrust Litigation, 669 F.2d 228 (5th Cir. 1982);² and In re Plywood Antitrust Litigation, 76 F.R.D. 570, 587 (E.D. La. 1976) (settled on behalf of various classes of direct and indirect purchasers after a jury trial).

Since Illinois Brick, my personal experience has largely been representing direct purchasers in the federal courts. These cases have typically been consolidated under 28 U.S.C. § 1407, while at the same time indirect purchases cases were pending in various state courts. In many of those cases, the presiding federal judge would contact the various state judges in an attempt to coordinate discovery, thus avoiding duplicative efforts; in most instances, those attempts were successful. Only recently have I been involved in a series of related cases in various state courts on behalf of indirect purchasers.³

²In re Chicken Antitrust was filed prior to the Supreme Court's decision in Illinois Brick, but was settled after Illinois Brick. The discussion by the Court as to why it approved an allocation of the settlement among direct and indirect purchasers is instructive and principally was because the defendants wanted total peace from all claims, including state law indirect purchaser claims. The District Court certified settlement classes of both direct and indirect purchasers and approved the settlement and the allocations negotiated by the various class counsel.

³These are the lawsuits alleging a conspiracy among automobile manufacturers to

It is the foregoing background from which I derive my views.

SUMMARY

1. Indirect purchaser actions in state courts have not impeded in any way the prosecution and resolution of related direct purchaser cases in the federal courts. With the advent of the recently enacted Class Action Fairness Act (“CAFA”) and state law indirect purchaser cases being funneled into federal court and subject to the M.D.L. standards, there is good reason to believe that the federal courts can manage the direct and indirect purchaser cases in the same manner in which they managed them pre-Illinois Brick.

2. It is vitally important that direct purchasers continue to be the first line of private enforcement of the antitrust laws. It is also important that indirect purchaser claims under various state laws remain viable, for there are instances where direct purchasers perceive it to be against their interests to sue their suppliers, and often indirect purchasers are substantially injured parties who should retain the right to recover where state law permits.

3. To date, multiple recoveries have not been a problem. I

prevent U.S. dealers and consumers from purchasing or leasing new automobiles in Canada, where prices are considerably lower.

am not aware of any instance in which an antitrust defendant has paid in settlements or in satisfaction of judgments as much or more than treble damages, or in most cases, more than single damages. While I have not performed a study of this issue, I understand that the systematic studies that have been conducted confirm my impressions. See, Robert H. Lande, [Why Antitrust Damage Levels Should Be Raised](#) (16 Loy. Consumer L. Rev. 329, 330 n. 24 (2004)).

4. I urge that Congress not legislate concerning the rights of indirect purchasers to sue under the antitrust laws. The federal courts have shown the flexibility to deal with a variety of situations involving indirect purchasers' actions under state law while simultaneously presiding over the federal claims of direct purchaser claims. And this flexibility is enhanced by the passage of the CAFA.

BODY

I wish to make the following points:

1. Burdens and Costs

In my experience, the pendency of claims by indirect

purchasers has not impeded the prosecution or resolution (by settlement or trial) of related claims of direct purchasers.

Prior to Illinois Brick, related direct and indirect claims proceeded together in federal court. In this pre-Illinois Brick era, direct and indirect claims would be settled together and the class counsel for the direct and indirect classes respectively would negotiate an allocation, subject to Court approval. The settling defendant had no stake in the allocation, only in the approval of the overall settlement and being dismissed with prejudice. With the passage of the CAFA, this may once again be the scenario. Of course, post-Illinois Brick, there is no similar “allocation” process among the plaintiff groups because the direct purchasers are entitled to the full extent of their overcharges, notwithstanding any possible pass-on of those damages. This serves the important goals of helping to deter anti-competitive conduct. But there is no reason to believe, post-CAFA, that the management of direct and indirect purchaser cases together would pose particular problems.

In the post-Illinois Brick era, even where indirect cases in state court co-exist with related direct purchaser actions in federal court,

there has been no ill effect on the direct purchaser cases. First, more often than not, the presiding federal judge communicates with the state judge(s) handling the indirect case(s) and works out a coordinated discovery order which eliminates most (if not all) duplication of effort on the defense side.⁴ Secondly, it has been the normal practice that the direct cases in federal court take precedence in preparing for trial and that it is not until after the federal case is tried or settled that the state cases move past the consolidated discovery stage. Thus, both federal and state courts (as well as counsel) have recognized the most efficient way for these cases to co-exist and have made them very manageable.

As an aside, this reminds me of the “saying” inside the front cover of the very first Manual for Complex Litigation, to wit:

There are no inherently protracted cases,
only cases which are unnecessarily
protracted by inefficient procedures and
management.

It appears both the federal and state courts and class counsel have

⁴Because the state antitrust laws that deal with purchaser rights are basically identical to Sections 1 and 2 of the Sherman Act, coordination of indirect discovery with direct purchaser claims is very doable. This similarity of laws seemed to be recognized in principle by the U.S. Supreme Court when it held that Congress did not pre-empt the state antitrust laws when it passed the Sherman Act. California v. ARC America Corp., 490 U.S. 93, 100-103 (1989).

heeded the Manual's simple proverb.

2. Both Direct and Indirect Purchaser's Claims Are Important for Effective Private Enforcement of the Antitrust Laws.

I believe that the Supreme Court “got it right” when it recognized that the claims of the direct purchasers were the most important to the private enforcement of the antitrust laws. While the Court stressed that direct purchasers had the largest economic stake per claimant and therefore had the greatest incentive to bring suit, there is another important though less apparent reason to incentivize them. The direct purchaser is likely to have evidence helpful in establishing the alleged violation. Those purchasers further down the line will not have that asset. Thus, all things being equal, the direct purchaser should be able and properly incentivized to successfully litigate an antitrust claim.

That is not to say that indirect purchasers proceeding upon state law claims should play no role in private enforcement. There are instances when direct purchasers perceive it to be against their interests to sue their supplier. When I appeared before a group of in-house corporate counsel discussing the issue of their role in

enforcing the antitrust laws, two themes of concern emerged: (1) we are afraid our supplier will retaliate in some way, i.e., cut us off, or not give us the service we now get, or “lose” orders and “misdirect” shipments; and (2) intercorporate relations are very important to us and bringing such a suit may hurt our standing in the corporate community. In recent years, major corporations have elected to opt-out of class actions and pursue their claims individually, or have remained in class actions as a member and actively assisted class counsel by providing evidence and other assistance. Thus, these concerns may now be fading.

The bottom line is that indirect purchaser actions under state law have an important role to play in the antitrust enforcement regime. The pending Canadian Automobile Litigation, referenced earlier, is a good example. In this case, American dealers (direct purchasers) appeared to have no interest in investigating or pursuing claims that their manufacturers might be conspiring to preclude them from buying cars in Canada where prices for the identical cars were considerably lower than in the United States. In contrast, consumers filed both in federal and state courts; thus, it was the

indirect purchasers (consumers who purchased from American dealers and alleged they paid too much) who investigated and are now litigating this alleged antitrust violation. Only time will tell whether these cases will result in a meaningful recovery. In any event, this is a perfect example where indirect purchasers are filling a private enforcement void left by absent direct purchasers.

3. Duplicative Recoveries Are Not a Problem.

There is nothing inherently wrong with multiple recoveries against the same defendant for an antitrust violation. What may be considered unjust is a duplicative recovery, i.e., when the total damages paid by a defendant exceed what it would have paid had it lost a direct purchaser class action. It is my perception that where direct and indirect purchasers have recovered from the same defendants for the same alleged violation, duplicative recoveries have rarely, if ever, occurred. Indeed, in some cases the aggregate settlements have not even reached the single damages of the direct purchaser caused by the violation. Thus, this issue should not be a major force in shaping policy, for duplicative recoveries rarely, if ever, happen. Even if they sometimes occur, that would

serve as a laudable goal of deterrence.

Finally, it is important to recognize that a defendant has control of its own fate. Again, in my experience and as a practical matter, it is rare, if ever, that a defendant desires to settle where settlements cannot be reached with direct and indirect purchaser classes that will not result in duplicative recoveries.

Lastly, the indirect purchasers' claims under state law act as a further prophylactic proscription discouraging disobedience of the antitrust laws. Whether utilized in every case or whether or not it results in meaningful individual recoveries to each individual indirect purchaser, the right of the indirect purchaser to sue serves an important purpose, whether it serves as compensation, or disgorgement of ill-gotten gains, or merely acts as a deterrent.

4. Congress Should Not Meddle With the Status of Indirect Purchasers.

I urge that Congress not legislate concerning the rights of indirect purchasers to sue under the antitrust laws, either federal or state. Their claims under various state laws are not now preempted and should not be. Each state has its own interests in

whether to allow indirect purchasers to sue under its antitrust laws, just as each state determines the scope and breadth of its antitrust laws, if indeed it has any (Pennsylvania & Georgia, for instance, have no antitrust laws). For example, a state may want greater deterrence of antitrust violations, where as another state conversely may want to appear “friendly” to industry; some may adopt the philosophy of Illinois Brick while others may not. As the Supreme Court said in ARC America, supra, Illinois Brick only relates to the federal antitrust laws, and Congress has not pre-empted the state’s right to enact (or not to enact) their own antitrust laws, as long as they are not inconsistent in the conduct required by the federal statute. Congress should not do so now.

Just as important, the federal courts have demonstrated a careful flexibility enabling them to deal with related federal and state law cases. Some of the procedures used have been described in an earlier section herein. Other examples include:

a. In the Canadian Automobile case, the federal court, after dismissing the damage claims of consumers (indirect purchasers) under Illinois Brick but allowing the injunctive case to

proceed, allowed plaintiffs-indirect purchasers to amend their consolidated complaint to allege state antitrust claims as ancillary to the claim for injunctive relief. See, In re New Motor Vehicles Canadian Export Antitrust Litigation, 335 F. Supp. 2d 126 (D. Me. 2004) and 350 F. Supp. 2d 160 (D. Me. 2004).

b. Recently, in Crane v. International Paper Co., 2005-1 CCH Trade Cas. ¶ 74,789 (D.S.C. 2005), the court adopted the “first non-conspirator in the distribution chain” to allow plaintiffs-indirect purchasers who purchased from distributors who are allegedly co-conspirators but whom the plaintiff class did not name as defendants, to proceed with their claims under the Sherman Act. Likewise, see, Paper Systems, Inc. v. Nippon Paper Indus. Co., Ltd., 281 F.3d 624, 631-32 (7th Cir. 2002).

c. In in re Linerboard Antitrust Litigation, 305 F.3d 145, 159 (3d Cir. 2002), plaintiffs who bought corrugated boxes from the defendants were permitted to assert their claims under Section 1 of the Sherman Act as a class action on behalf of direct purchasers of linerboard since the defendants incorporated linerboard as a major ingredient into the corrugated boxes which

they sold to plaintiffs. See also, In re Sugar Indus. Antitrust Litigation, 579 F.2d 13 (3d Cir. 1978). Significantly, both the District Court and the Court of Appeals found that plaintiffs could offer a manageable method of proving damages (since many class members had very substantial individual claims) even though the defendant was accused of overcharging for a product which was only an ingredient in what the defendant sold to the plaintiff.

All of the foregoing demonstrates that the federal courts have in the past and are efficiently and effectively dealing with issues of direct purchasers and related indirect purchaser claims under state law without further help from Congress. The Court in Illinois Brick concluded that “until there are clear directions from Congress to the contrary”, its holding provided the best method to further private enforcement of the federal antitrust laws. I do not believe Congress is now in a position to give “clear directions” to the contrary in light of all of the diverse circumstances that arise in various cases. On the other hand, the federal judges have demonstrated that they are willing and able to deal with those diverse issues as they arise.

Thank you.