



MEMORANDUM

From: AMC Staff[†]

To: All Commissioners

Date: May 4, 2006

Re: Civil Remedies-Indirect Purchaser Discussion Memorandum

The Commission adopted the following issue for study: “Should the substantive law and procedures applicable to indirect purchaser litigation be modified to reduce the complexity and inefficiency now present?”¹ In particular, the Commission sought to study concerns arising from the fact that, while under *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), only direct purchasers may recover for antitrust violations, indirect purchasers actions are permitted under the law of most states to recover for competition-related offenses. The Commission received numerous calls to study the several issues that arise under current law, such as the burden of duplicative litigation and the existence of different remedies across states. This issue was

[†] This memorandum is a brief summary prepared by staff of the comments and testimony received by the AMC to assist Commissioners in preparing for deliberations. All Commissioners have been provided with copies of comments and hearing transcripts, which provide the full and complete positions and statements of witnesses and commenters.

¹ See Civil Procedure and Remedies Issues Recommended for Commission Study Memorandum, at 3-5 (December 21, 2004); AMC Meeting, Jan. 13, 2005, Trans. at 89-90, 105; Remedies Study Plan at 2-3 (May 4, 2005).

recommended for study by several groups, including the American Bar Association and a group of forty-one state attorneys general.²

The Commission requested comment on May 19, 2005, on the following questions:

1. What are the costs and benefits of antitrust actions by indirect purchasers, including their role and significance in the U.S. antitrust enforcement system? Please be as specific as possible.
2. What burdens, if any, are imposed on courts and litigants by the difficulty of consolidating state court antitrust actions brought on behalf of indirect purchasers with actions brought on behalf of direct purchasers, and how have courts and litigants responded to them? What impact, if any, will the Class Action Fairness Act of 2005 have in this regard?
3. Does *Illinois Brick*'s refusal to provide indirect purchasers with a right of recovery under federal antitrust law serve or disserve federal antitrust policies, such as promoting optimal enforcement, providing redress to victims of antitrust violations, preventing multiple awards against a defendant, and avoiding undue complexity in damage calculations?
4. What actions, if any, should Congress take to address the inconsistencies between state and federal rules on antitrust actions by indirect purchasers? For example, should Congress establish *Illinois Brick* as the uniform national rule by preempting *Illinois Brick* repealer statutes, or should it overrule *Illinois Brick*? If Congress were to overrule *Illinois Brick*, should it also overrule *Hanover Shoe*, so that recoveries by direct purchasers can be reduced to reflect recoveries by indirect purchasers (or *vice versa*)? Assuming both direct and indirect purchaser suits continue to exist, what procedural mechanisms should Congress and the courts adopt to facilitate consolidation of antitrust actions by indirect and direct purchasers?³

The Commission received several comments from members of the public, including from the American Antitrust Institute, Thirty Antitrust Practitioners, and the Business Roundtable.⁴

² Report of the Section of Antitrust Law of the American Bar Association (“ABA”) to the Antitrust Modernization Commission, at 2-3; Comments of Attorneys General of 41 States and the District of Columbia, at 4-5. The ABA Antitrust Section recently appointed a Task Force to address this issue, whose report was issued in 2004.

³ 70 Fed. Reg. 28,902, 28,903-04 (May 19, 2005).

⁴ Comments of the American Antitrust Institute Working Group on Remedies to the Antitrust Modernization Commission, at 15-19 (July 17, 2005) (“AAI Comments”); Comments of Thirty Antitrust Practitioners (and their Firms) Responding to the Antitrust Modernization Commission’s May 19, 2005, Questions re Antitrust Remedies, at 13-15 (June 17, 2005) (“Thirty

The Commission also held a hearing with two panels on June 27, 2005. The witnesses on the first panel were Mark J. Bennett, Attorney General, Hawaii; Jonathan W. Cuneo, partner at Cuneo Gilbert & LaDuca; H. Laddie Montague, Jr., shareholder at Berger & Montague; David B. Tulchin, partner at Sullivan & Cromwell; and Margaret M. Zwisler, partner at Latham & Watkins. The witnesses on the second panel were Ellen Cooper, Chief, Antitrust Division, Maryland Attorney General's Office; Michael L. Denger, partner at Gibson, Dunn & Crutcher LLP; Andrew I. Gavil, Professor, Howard University Law School; Daniel E. Gustafson, partner at Gustafson Gluek; and Richard M. Steuer, partner at Mayer, Brown, Rowe & Maw, and Chair, ABA Remedies Task Force.⁵ Certain of the testimony and comments raised concerns with indirect purchaser litigation, and possible ways in which it might be reformed. Other testimony and comments raised questions about the asserted problems with the operation of indirect purchaser litigation, and raised concerns regarding certain possible reforms.

I. Background

In *Hanover Shoe, Inc. v. United Shoe Machinery*, 392 U.S. 481 (1968), the Supreme Court held that a direct purchaser "is injured by the full amount of any overcharge paid," rejecting defendant's claim that the direct purchaser had not been injured since he had "passed-on" the overcharge to downstream purchasers.⁶ In *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the Court held (6-3) that, under the federal antitrust laws, only direct purchasers could

Antitrust Practitioners Comments"); Comments of the Business Roundtable, at 7-10 (Nov. 4, 2005).

⁵ Unless otherwise noted, all citations to "Trans." are to the transcript of the June 27, 2005, Indirect Purchaser Actions hearing.

⁶ Edward D. Cavanagh, *Illinois Brick: A Look Back and a Look Ahead*, 17 Loy. Consumer L. Rev. 1, 4 (2004) ("Cavanagh, Illinois Brick"). See generally ABA Section of Antitrust Law, *Report on Remedies*, at 1 (2004) ("2004 Task Force Report"), available at <http://www.abanet.org/antitrust/comments/2004/RemediesReportCouncil.doc>.

bring an antitrust action for damages resulting from alleged overcharges, citing three reasons: (1) promoting more effective private enforcement, (2) avoiding inconsistent and multiple liability for defendants, and (3) avoiding the need to “trace complex economic adjustments” to determine the impact on indirect purchasers.⁷

Illinois Brick immediately aroused controversy,⁸ and legislative efforts to overturn it in Congress ensued.⁹ All of these proved unsuccessful; the last serious legislative proposal was introduced in the early 1980s.¹⁰

States, however, beginning with California in 1978, started passing “*Illinois Brick* repealers” permitting indirect purchasers to recover under state antitrust laws; in other states, courts interpreted existing statutes to permit recovery by indirect purchasers.¹¹ Today, over 30 states (representing over two-thirds of the population) provide some opportunity for recovery by indirect purchasers,¹² although there is substantial variation among state laws.¹³ These *Illinois Brick* repealers are not preempted by federal antitrust law.¹⁴

⁷ Cavanagh, *Illinois Brick*, at 10-12; *Illinois Brick*, 431 U.S. at 737-47. The Court also based this decision on its determination that the rule regarding pass-on must apply equally to plaintiffs and defendants, *i.e.*, that indirect purchasers should not be permitted to recover for losses due to “pass-on” unless defendants could assert pass-on as a defense. *Illinois Brick*, 431 U.S. at 728, 730-35.

⁸ Andrew I. Gavil, *Federal Judicial Power and the Challenges of Multijurisdictional Direct and Indirect Purchaser Antitrust Litigation*, 69 Geo. Wash. L. Rev. 860, 861 (2001) (“Gavil, *Federal Judicial Power*”).

⁹ Stephen Calkins, *Illinois Brick and Its Legislative Aftermath*, 47 Antitrust L.J. 967, 967 (1979); Cavanagh, *Illinois Brick*, at 18-19.

¹⁰ Cavanagh, *Illinois Brick*, at 19, 26 (the bills to repeal *Illinois Brick* all died in committee; the most recent, introduced in 1983, would have allowed state attorneys general to sue on behalf of indirect purchasers); *see also* Edward D. Cavanagh, *The Illinois Brick Dilemma: Is There a Legislative Solution?*, 48 Alb. L. Rev. 273, 294-307 (1984).

¹¹ Ronald W. Davis, *Indirect Purchaser Litigation: Arc America’s Chickens Come Home to Roost on the Illinois Brick Wall*, 65 Antitrust L.J. at 391-93.

¹² Cavanagh, *Illinois Brick*, at 19; 2004 Task Force Report, at 2 (reporting that “more than half the states in America now permit indirect purchasers to recover”); Kevin J. O’Connor, *Is the*

Litigation by indirect purchasers invoking state law has become increasingly common, especially since the mid-1990s.¹⁵ Many commentators contend that the current system results in wasteful, duplicative litigation and/or multiple liability exceeding that which the *Illinois Brick* Court sought to avoid.¹⁶ A number of ABA task forces have voiced such concerns, a recent one endorsing the view that “the availability of indirect purchaser suits in various jurisdictions results in a multiplicity of related lawsuits in state and federal courts that are difficult to coordinate, and the very real specter of duplicative recovery.”¹⁷

Illinois Brick Wall Crumbling?, 15-SUM Antitrust 34, 34-35 (2001) (“O’Connor, *Is the Illinois Brick Wall Crumbling?*”) (reporting that “thirty-six states and the District of Columbia, representing over 70 percent of the nation’s population, now provide for some sort of right of action on behalf of some or all indirect purchasers”).

¹³ See Testimony of Mark J. Bennett and Ellen S. Cooper Concerning Indirect Purchaser Actions Before the Antitrust Modernization Commission, at 18-19 (“Bennett and Cooper Statement”) (describing a variety of different types of state indirect purchaser provisions and other state law remedies available to indirect purchasers, including consumer protection and Little FTC Acts); Trans. at 103 (Cooper) (same); Prepared Statement of Dan E. Gustafson, Gustafson Gluek PLLC, For the Antitrust Modernization Commission, at 6-7 (June 27, 2005) (“Gustafson Statement”); Joel M. Cohen & Trisha Lawson, *Navigating Multistate Indirect Purchaser Lawsuits*, 15-SUM Antitrust 29, 30-31 (Summer 2001) (“Cohen & Lawson, *Navigating*”) (describing features of *Illinois Brick* repealers that vary by state).

¹⁴ *California v. ARC America Corp.*, 490 U.S. 93, 102-05 (1989).

¹⁵ Trans. at 41 (Zwisler); Trans. at 111 (Gustafson); Trans. at 43-44 (Cuneo). William H. Page, *Class Certification in the Microsoft Indirect Purchaser Litigation*, 1 J. Competition L. & Econ. 303 (2005) (Appendix) (“Page, *Class Certification*”) (listing class certification decisions in indirect purchaser actions, nearly all dating since the mid-1990s).

¹⁶ See, e.g., Gavil, *Federal Judicial Power*, at 863 (“the artificial division of cases that now flows from *Illinois Brick* imposes unnecessary litigation burdens on the parties and leads to unjustifiable systemic inefficiencies”); Gavil Statement, at 13; Cavanagh, *Illinois Brick*, at 30 (proliferation of state indirect litigation outside the scope of federal consolidation poses a “logistical nightmare for the courts” that has been “ameliorated by efforts of state attorneys general through [NAAG] to cooperate on discovery issues”); Donald I. Baker, *Federalism and Futility: Hitting the Potholes on the Illinois Brick Road*, 17-FALL Antitrust 14, 15 (Fall 2002) (the current regime “has produced duplicative litigation and multiple recoveries” on a scale the Court could “scarcely have imagined”).

¹⁷ ABA Section of Antitrust Law, *The State of Federal Antitrust Enforcement—2004*, at 50. See also 2004 Task Force Report at 1-2 (expressing concern for multiple recovery, duplicative litigation, and lack of recovery for indirect purchasers in states without repealers); ABA Task

II. Discussion of Issues

A. What are the costs and benefits of antitrust actions by indirect purchasers, including their role and significance in the U.S. antitrust enforcement system?

The current substantive rules and procedural mechanisms regarding indirect purchaser litigation have led to a host of interrelated criticisms that are relevant to potential reform. As described more fully below, these criticisms, which are disputed as to whether they should be concerns at all, are:

- Creates waste and inefficiency from duplicative state and federal proceedings;
- Provides an ineffective mechanism for enforcement and deterrence;
- Provides insufficient compensation to victims of anticompetitive conduct;
- Creates the potential for duplicative liability;
- Creates difficulty in allocating damages between categories of purchasers;
- Lacks nationwide uniformity.

These criticisms, and the arguments advanced for and against them, are examined below. The limited amount of empirical evidence on these questions that Commission was able to obtain is also reviewed. Each of these criticisms motivates, to differing degrees, the various proposals for reform, which are discussed in the subsequent section.

Force, *Report of the Indirect Purchaser Task Force*, 63 Antitrust L.J. 993, 995-96 (1995) (“1993 Task Force Report”) (expressing concern over the waste of judicial resources and the potential for inconsistent and multiple recoveries); ABA Task Force, *Report of the American Bar Association Section of Antitrust Law Task Force to Review the Supreme Court’s Decision in California v. ARC America Corp.*, 59 Antitrust L.J. 273, 283-87 (1990) (“1990 Task Force Report”) (discussing potential for multiple liability); ABA Task Force, *Report of the American Bar Association Section of Antitrust Law Task Force to Review Proposed Legislation to Repeal or Modify Illinois Brick*, 52 Antitrust L.J. 841, 841 (“1983 Task Force Report”) (identifying problems of “dilution of the deterrent effect of treble damage recoveries, overcomplication of treble damage proceedings, introduction of unwieldy investigations to trace overcharges, and the possibility of double recoveries and inconsistent judgments”).

1. Waste associated with conducting duplicative state and federal proceedings addressing the same conduct

The inefficiency and waste that results from trying essentially the same matter in multiple courts constitutes one of the most significant criticisms of current indirect purchaser litigation. Because indirect purchaser class actions are limited to state courts, they cannot be consolidated for pre-trial purposes, leading to duplicative discovery and other inefficiencies.¹⁸ Witnesses testified, for example, that the current rules create a “waste of judicial resources [and] societal resources,” so that “in some cases dozens of lawyers – in each state on each side [are] working on what really is the same matter.”¹⁹ Although voluntary cooperation have reduced the burden to some extent, it depends on voluntary cooperation and does not “grapple with the fundamental problems” posed by multiple litigations.²⁰

Duplicative state and federal litigation also creates difficulty for defendants pursuing a global settlement, because “all parties are not before the same court.”²¹ Without being subject to a federal court’s pressure to settle, plaintiffs may “behave strategically to exact more favorable settlement terms.”²² Furthermore, the combination of liability of direct purchasers under federal law and further potential liability to indirect purchasers under state law “may create some

¹⁸ See, e.g., Cavanagh, *Illinois Brick*, at 30 (absence of mechanisms for consolidating discovery); Gavil, *Federal Judicial Power*, at 876-78 (using the Microsoft litigations as an example, emphasizing the costs of relying on informal coordination of litigation presenting common questions); John E. Lopatka & William H. Page, *Indirect Purchaser Suits and the Consumer Interest*, 48 *Antitrust Bull.* 531, 565-66 (2003) (“Lopatka & Page, *Indirect Purchaser Suits*”).

¹⁹ Trans. at 7-8 (Tulchin); Tulchin Statement, at 2; Zwisler Statement, at 3 (“The costs of indirect purchaser litigation in the first instance relate to the tremendous complexity of dealing with groups of indirect purchaser plaintiffs who are proceeding under the separate laws of fifty states.”); Denger Statement, at 3 (multiple state court indirect purchaser actions “substantially increase the complexity and external costs – both public and private” – of litigation).

²⁰ Cavanagh, *Illinois Brick*, at 31.

²¹ *Id.* at 4.

²² Cavanagh, *Illinois Brick*, at 27.

necessity for antitrust defendants to settle cases.”²³ Finally, litigation in multiple courts can create unfairness through the asymmetric application of collateral estoppel. A single loss at trial to one indirect purchaser plaintiff can have collateral estoppel effect in the other litigations, but a win will not provide a corresponding benefit.²⁴

Others believe that much of the inefficiency can be eliminated by informal coordination of the various actions.²⁵ For example, one witness testified that in many cases, the federal judge presiding over a direct purchaser action would “contact the various state judges in an attempt to coordinate discovery, thus avoiding duplicative efforts; in most instances, those attempts were successful.”²⁶ Another called such “negotiated coordination” the norm for litigation in which he was involved.²⁷

Finally, some have warned that changes in the trends in antitrust class action litigation have affected the extent of the difficulties posed by indirect purchaser actions. Professor Gavil cautioned that concerns about indirect purchaser actions may be “exaggerated and outmoded,”²⁸

²³ 1990 Task Force Report at 287-88.

²⁴ Trans. at 8-9 (Tulchin) (stating that this “domino effect of collateral estoppel” makes it exceedingly difficult for defendants to go to trial); *see also* Zwisler Statement, at 7-8; Trans. at 14, 90-91 (Zwisler) (emphasizing the “colossal exposure” from potential liability to indirect purchasers).

²⁵ O’Connor, *Is the Illinois Brick Wall Crumbling?*, at 34, 37 (“recent attempts at coordination initiated by state attorneys general, in conjunction with private plaintiffs’ and defendants’ counsel,” have reduced costs and facilitated settlement); *see also* Trans. at 16-17 (Montague); Montague Statement, at 11-13 (citing cases); Cohen & Lawson, *Navigating*, at 31-32 (“indirect purchaser litigation has the potential to become unmanageable and extraordinarily expensive,” but plaintiffs’ counsel are “frequently receptive to efforts to avoid unnecessary burden”).

²⁶ Montague Statement, at 2; *see* Bennett and Cooper Statement, at 10 (“the vast majority” of state AG actions on behalf of indirect purchasers “are brought in a coordinated fashion” and often consolidated and “successfully coordinated” with private class actions).

²⁷ Trans. at 137 (Gustafson).

²⁸ Gavil Statement, at 5-9 (cautioning that the perceptions of the problem may be “exaggerated and outmoded” particularly because shifts in antitrust standards have reduced the

due, for example, to the higher barriers facing antitrust plaintiffs and lower levels of antitrust class action litigation.²⁹ Ms. Zwisler argued that the increased use of the consumer class action vehicle in antitrust cases exacerbated the problems.³⁰

Two fairly recent developments may reduce some of the asserted problems. The first is the Class Action Fairness Act (“CAFA”),³¹ which was enacted in June 2005 (shortly before the AMC Indirect Purchaser hearings). Second, a number of indirect purchaser suits have been brought in federal court, under the court’s supplemental jurisdiction, appended to a claim for injunctive relief under federal law.

Class Action Fairness Act

CAFA was designed to move many state-law-based class actions into federal court. Under CAFA, “[f]ederal jurisdiction, with a few exceptions, now exists over class actions in which (1) minimal diversity exists (that is, where at least one plaintiff and one defendant are diverse), (2) the putative class contains at least 100 members, and (3) the amount in controversy is at least \$5 million.”³²

chances for successful claims and a decrease in federal antitrust class action activity since 2000); *see also* Gavil Statement, at Appendix.

²⁹ Gavil Statement, at 5-9; Trans. at 116-17 (Gavil).

³⁰ Trans. at 41 (Zwisler) (“now, at the whisper of an investigation” [we see] both indirect and direct class actions”); Zwisler Statement, at 7-8.

³¹ Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(3), 119 Stat. 4 (codified as amended at 28 U.S.C. § 1711 note).

³² Ian Simmons & Charles E. Borden, *The Class Action Fairness Act of 2005 and State Law Antitrust Actions*, 20-FALL Antitrust 19, 19 (2005) (“Simmons & Borden, *Class Action Fairness Act*”); Cuneo Statement, at 8 (CAFA “will, without doubt, have the effect of moving the vast majority of state direct purchaser class actions from state to federal court”); Montague Statement, at 3, 5 (“there is good reason to believe that [under CAFA] the federal courts can manage the direct and indirect purchaser cases in the same manner in which they managed them pre-*Illinois Brick*”—*i.e.*, “together in federal court.”); Trans. at 48-49 (Bennett) (predicting that state AGs would file in federal court if *Illinois Brick* were overruled and that few private cases would stay there).

Some experts predict CAFA will bring a large majority of indirect purchaser actions into federal court, where they will be consolidated before a single federal judge for pretrial purposes through the MDL process.³³ According to these experts, the three requirements of CAFA “will be satisfied in the overwhelming majority of indirect purchaser class actions.”³⁴ Moreover, while there are exceptions to CAFA, some experts predict that they will rarely apply to indirect purchaser class actions.³⁵ As a consequence, some experts believe that CAFA should “dramatically reduce the duplication in discovery and work product that defendants currently incur when facing multiple statewide indirect purchaser class actions.”³⁶ Furthermore, under CAFA a federal court will decide the class certification and summary judgment motions.³⁷

Others have questioned whether CAFA will be effective in channeling indirect purchaser litigation into federal court. In particular, they argue that plaintiffs’ lawyers may prefer to stay in state court, and will avoid removal by taking advantages of CAFA’s exceptions.³⁸ Others acknowledged the possibility that “plaintiffs may try strategies to stay in the state court,” but doubted that they would be successful.³⁹ Furthermore, CAFA will not fully solve the problems associated with state indirect purchaser litigation. First, “multiple layers of antitrust plaintiffs

³³ Simmons & Borden, *The Class Action Fairness Act*, at 19. The consolidation is for pretrial purposes only, since CAFA did not overrule *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998).

³⁴ Simmons & Borden, *The Class Action Fairness Act*, at 19.

³⁵ See, e.g., Bruce V. Spiva & Jonathan K. Tycko, *Indirect Purchaser Litigation on Behalf of Consumers After CAFA*, 20-FALL Antitrust 12, 14 (2005) (“Spiva & Tycko, *Indirect Purchaser Litigation*”) (the exceptions are “so narrow that most indirect purchaser actions, no matter how narrow the class definition, are likely to be subject to federal jurisdiction”); see also Simmons & Borden, at 20 (opining that “[m]ost of these exceptions will rarely, if ever, apply in the context of indirect purchaser class actions”).

³⁶ Simmons & Borden, *The Class Action Fairness Act*, at 19.

³⁷ *Id.* at 19-23; Spiva & Tycko, *Indirect Purchaser Litigation*, at 16.

³⁸ Trans. at 137-38 (Gustafson); Trans. at 54 (Tulchin); Trans. at 145 (Gavil).

³⁹ Trans. at 51-52 (Zwisler); Trans. at 49-50 (Montague).

attacking the same defendant for the same conduct will remain and perhaps intensify as a result of [CAFA].”⁴⁰ Moreover, because CAFA does not repeal *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998) (“*Lexecon*”), consolidation for trial will still not be possible, leaving open the possibility of duplicative trial litigation.⁴¹ *Lexecon*’s continued applicability also means that defendants are still subject to the coercive effects of asymmetric collateral estoppel once the cases are returned to their originating courts for trial.⁴²

Supplemental Jurisdiction

Several sources have described a “new phenomenon” that state indirect purchasers have used to get their state law damage claims before a federal judge.⁴³ Under this method, indirect purchasers assert a federal claim seeking injunctive relief (which is not barred by *Illinois Brick*), and request that the federal court hear their state law claims for damages pursuant to the court’s supplemental jurisdiction.⁴⁴ This procedure appears to have been used fairly frequently in past five years: at least 11 federal court pharmaceutical indirect purchaser actions may have been consolidated in this manner.⁴⁵

There are limits to the effectiveness of this procedure. First, it requires that the plaintiff be able to seek injunctive relief, which may not be possible in all cases. For example, while injunctive relief may be sought against an ongoing anticompetitive practice, it may not be

⁴⁰ Zwisler Statement, at 1-2.

⁴¹ Trans. at 135-36 (Denger).

⁴² Trans. at 37-38 (Tulchin).

⁴³ Trans. at 49-50 (Montague).

⁴⁴ See 28 U.S.C. § 1367.

⁴⁵ Pamela A. MacLean, *Federal Courts May Face Flood of Price-Fixing Allegations*, Nat’l L.J., (Sept. 21, 2005) (reporting that “[i]ndirect purchaser antitrust cases have flooded back to federal court using pendant state law antitrust claims”). Appendix A lists 11 indirect purchaser actions settled in federal court in recent years, some or all of which may have been brought relying on supplemental jurisdiction.

available against a cartel that has disbanded after criminal prosecution. Second, while it is an option available to plaintiffs, it cannot be used by a defendant to compel consolidation.

2. Ineffective mechanism for private enforcement and deterrence

Several commentators have argued that permitting direct purchasers to collect the full overcharge best promotes effective private enforcement of the antitrust laws, as the *Illinois Brick* Court held, based on the view that direct purchasers are in the best position to learn of illegal conduct and bring an enforcement action.⁴⁶ Several witnesses before the AMC argued that direct purchasers are best situated to act as effective private enforcers and predicted that private enforcement would be “diminished tremendously” if *Illinois Brick* (and *Hanover Shoe*) were reversed, observing that indirect purchasers “have not had the track record of success of private enforcement that direct purchasers have.”⁴⁷ Furthermore, some witnesses noted that there have been few cases in which indirect purchasers took the main role in enforcement. One testified that he was “aware of very, very few cases where the indirect purchasers sued and no direct purchasers sued.”⁴⁸

Others contend that that indirect purchaser suits promote deterrence. First, some argue that in many situations direct purchasers may not be reliable enforcers, and fail to sue.⁴⁹ For example, distributors and franchisors may not bring price fixing actions against the manufacturers, and in some cases direct purchasers may benefit from the conspiracy.⁵⁰ They cite the *Microsoft* case as an example in which direct purchasers, the OEMs, failed to bring suit while

⁴⁶ 1983 Task Force Report at 856-57.

⁴⁷ Trans. at 18, 37, 92-93 (Montague); *see also* Montague Statement, at 3; Zwisler Statement, at 13.

⁴⁸ Trans. at 31 (Montague); Denger Statement, at 4-5 (though at times indirect purchasers are the first to sue, they generally “piggyback[] on government and direct purchaser actions”).

⁴⁹ Gavil Statement, at 17-19; AAI Public Comments, at 18-19; Trans. at 24-25 (Bennett).

many indirect purchasers did.⁵¹ (It appears, however, that some OEMs and a number of competitors did sue Microsoft.⁵²) One witness identified three indirect purchaser actions alleging antitrust violations that had not been challenged by other private or public enforcers.⁵³ Still other witnesses argued that, even though dividing the right to damages among direct and indirect purchasers could dilute recoveries available to direct purchasers in some cases, this would have little or no impact on incentives of direct purchasers to act as effective private enforcers.⁵⁴ However, others suggest that any increase to deterrence provided by direct purchasers could be obtained more efficiently by increasing the treble-damages multiplier than by allowing indirect purchaser actions.⁵⁵

Second, even if enforcement by government or private parties is likely, some argue that added liability payments resulting from awards to indirect purchasers enhance deterrence.⁵⁶ Such arguments depend on a judgment of the adequacy of the deterrence provided by the rest of the civil and criminal system. Others claim simply that it is a “good thing” for wrongdoers to

⁵⁰ Cuneo Statement, at 5-6.

⁵¹ Trans. at 24 (Bennett); Cuneo Statement, at 6.

⁵² Trans. at 31 (Tulchin). Furthermore, the government’s case did not establish the existence of an overcharge. *Id.* at 31-32 (Tulchin); see Page, *Class Certification*, at 317-19.

⁵³ See Gustafson Statement, at 13 (citing *Federal Guarantee Antitrust Litig.* (D.D.C.); *In re Canadian Import Antitrust Litig.* (D. Minn); and *In re New York Vehicle Canadian Export Antitrust Litig.* (D. Maine)); see also Cuneo Statement, at 6.

⁵⁴ Trans. at 130-31 (Cooper); Trans. at 131 (Denger) (“there is no shortage of plaintiffs’ lawyers willing to bring actions”); Trans. at 134 (Steuer) (“even though the incentive may be then then divided up . . . there remains ample incentive collectively to pursue the suit”).

⁵⁵ Lopatka & Page, *Indirect Purchaser Suits*, at 566-69 (2003); see Trans. at 179 (Gustafson) (acknowledging one “could raise the deterrent and leave indirect purchasers out,” while maintaining that indirect purchaser suits are a deterrent).

⁵⁶ Thirty Antitrust Practitioners Comments, at 13-14, 19; Trans. at 24 (Bennett).

“be subject to more liability or different kinds of liability.”⁵⁷ Some witnesses reported on large settlements recently obtained by indirect purchaser classes and state governments.⁵⁸

Case information provided to the Commission by lawyers experienced in indirect purchaser litigation provides some insight into the importance of indirect purchaser actions in compensation and deterrence.⁵⁹ They provided information on 11 cases in which indirect purchasers brought actions in federal court, and on four large-scale cases in which indirect purchasers brought actions in a variety of state courts—Vitamins, Brand Name Prescription Drugs, Infant Formula, and Microsoft (as well as several smaller cases also involving state indirect purchaser actions). The data show that, in over half the federal cases, indirect purchasers were the first to file actions against the defendants. Indirect purchasers were also there first to bring an action in one of the large-scale, state-court cases, against the *Vitamins* cartel.⁶⁰

In all of the cases, direct purchasers and/or the federal government were also involved. In all four of the large-scale cases, there were enforcement efforts separate from the indirect purchaser suits. In two of those cases (Infant Formula and Brand Name Prescription Drugs), there were direct purchaser lawsuits; in the other two cases (Microsoft and Vitamins), there were federal government enforcement actions, direct purchaser suits, and civil actions brought by state attorneys general.⁶¹ With respect to the eleven pharmaceutical cases, there were direct purchaser or government actions in addition to the indirect purchaser actions.

⁵⁷ Trans. at 99 (Bennett).

⁵⁸ Bennett and Cooper Statement, at 8-10 (*Mylan*—approximately \$137 million total payouts to indirects; *Buspirone*—\$240 million; *Taxol*—\$136 million).

⁵⁹ Appendix A to this Memorandum contains the data and a description of how they were obtained.

⁶⁰ One witness identified the *Vitamins* case as the most recent case in which private parties arguably discovered the violation. Trans. at 173-74 (Denger).

⁶¹ The *Microsoft* case also included actions by competitors.

The data also provide information on total recovery for indirect purchasers. In the eleven pharmaceutical cases brought in federal court, indirect purchasers received over \$900 million in recovery, or over \$80 million for each case. In each case, large payments for consumers, states, and third party payers were reported.⁶² With respect to the large-scale cases involving state indirect purchaser actions, three—Vitamins, Brand Name Prescription Drugs, and Infant Formula—resulted in settlements totaling \$585.4 million, of which \$160.5 was in product. In each of those cases, some funds were distributed through a claims distribution process, and some were distributed through *cy pres* programs. In the Microsoft cases, indirect purchaser classes were awarded up to \$1.9 billion in vouchers through various settlements.

3. Compensation of victims

Numerous commentators have criticized *Illinois Brick* on the ground that it leaves many of those actually injured by antitrust violations, including many final consumers, without compensation.⁶³ According to these commentators, denying recovery to downstream purchasers “worked a significant injustice,” which *Illinois Brick* repealers and other state laws were specifically designed “[t]o correct.”⁶⁴ They argue that “the serious antitrust offender is hardly a

⁶² In pharmaceutical cases, it may be easier to locate and process payment records, facilitating payments to injured parties. Similarly, third-party payers and likely had relatively complete transactions records and a potentially sizable claim.

⁶³ See, e.g., Cavanagh, *Illinois Brick*, at 23-24 (*Illinois Brick* “failed to compensate the real victims of price-fixing”). Defenders argue that *Illinois Brick* protects indirect purchasers by promoting efficient enforcement efforts. William M. Landes & Richard A. Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick*, 46 U. Chi. L. Rev. 602, 608 (1979).

⁶⁴ Bennett and Cooper Statement, at 3-5.

sympathetic figure.”⁶⁵ Indirect purchaser actions “provide[] an effective vehicle for compensating certain victims . . . including individual consumers.”⁶⁶

Several witnesses emphasized the large size of recoveries in many indirect purchaser actions.⁶⁷ Attorney General Bennett and Ms. Cooper report that there were substantial sums paid to the injured class members in three pharmaceutical cases—*Mylan* (over 200,000 consumer checks averaging \$211 each); *Buspirone* (\$30 million distributed to consumers; average check almost \$650); and *Taxol* (nearly 13,000 checks averaging nearly \$570 per check).⁶⁸

Critics argue only a very small amount of the recoveries in indirect purchaser actions are actually paid to allegedly injured class members, despite nominally large awards, so that little compensation is provided to allegedly injured parties.⁶⁹ Because indirect purchasers seldom sign up to receive compensation even when it has been awarded, they claim, indirect purchaser litigation imposes very large costs relative to the benefits received by actual victims.⁷⁰ Instead, much of the relief is distributed *cy pres* or in the form of free product, typically benefiting

⁶⁵ Gavil Statement, at 11-13.

⁶⁶ Thirty Antitrust Practitioners Comments, at 15.

⁶⁷ See Bennett and Cooper Statement, at 7-9; Trans. at 25, 60-61, 64 (Bennett); Gustafson Statement, at 11-12; Trans. at 180 (Cooper) (highlighting average payouts to class members in pharmaceutical cases).

⁶⁸ See Bennett and Cooper Statement, at 7-9 (also reporting large sums recovered by third party payers). See also Trans. at 25, 60-61, 95-96 (Bennett); Trans. at 180 (Cooper).

⁶⁹ Tulchin Statement, at 9-10; Zwisler Statement, at 8-9.

⁷⁰ Trans. at 58-59 (Zwisler); Tulchin Statement, at 9-10. For example, even using extraordinary efforts to contact potential claimants in the United States Tobacco litigation, plaintiffs still achieved only a 26 percent participation rate among class members. Zwisler Statement, at 8-9.

worthy causes, but not victims.⁷¹ Accordingly, “very often the lawyers gain much more than the class members.”⁷²

While, as discussed above, the data in Appendix A show that large awards have been made in private class actions and *parens patriae* actions by state attorneys general on behalf of indirect purchasers, the data do not include information on the amounts of total actual amounts distributed to class members.⁷³ However, there were indications that there were distribution processes through which some money was distributed to consumers. In addition, according to the information supplied, substantial sums were paid to third-party payers in the pharmaceutical cases.

4. Potential for duplicative liability

A series of ABA reports and some commentators have emphasized that defendants might be subject to multiple treble-damage recovery for the same overcharge.⁷⁴ This possibility results from paying full damages, with no offset for pass-through, to direct purchasers, coupled with paying damages to indirect purchasers. One witness acknowledged that although it is “notoriously difficult” to determine whether a defendant has paid more than three times the actual damages, in some cases, total payments appear to be a large portion of (or even exceed) total sales.⁷⁵

⁷¹ Trans. at 61-62 (Zwisler); Trans. at 63 (Tulchin).

⁷² Tulchin Statement, at 10 (“The primary beneficiaries of the present system of duplicative federal and state antitrust litigations have been the lawyers—on both sides.”).

⁷³ As noted above, for some of the pharmaceutical cases in Appendix A, Bennett and Cooper report that there were substantial sums paid to the injured class members. *See* Bennett and Cooper Statement, at 7-10; *see also* Trans. at 25, 60-61, 95-96 (Bennett); Trans. at 180 (Cooper).

⁷⁴ *See supra* n.17.

⁷⁵ Denger Statement, at 6-8.

Others argue that multiple liability has not arisen in practice, citing research suggesting that defendants actually pay at most only single damages.⁷⁶ Some witnesses characterized duplicative recovery as “more of a theoretical concern than a real problem,”⁷⁷ and testified that they knew of no instance in which duplicative recovery had occurred.⁷⁸ One witness observed that to the extent multiple liability occurs, it is desirable because it maximizes deterrence and compensation.⁷⁹ No witness identified an instance of “unfair multiple recovery.”⁸⁰ Moreover, one expert observed that a number of states expressly instruct courts to avoid duplicative damages, and none expressly require duplicative damages.⁸¹

5. Difficulty of determining damages incurred by indirect purchasers and allocating damages among direct and indirect purchasers

The difficulty of estimating the extent of the damages incurred by indirect purchasers—*i.e.*, the extent of the pass-on—was emphasized by commentators at the time *Illinois Brick* was decided,⁸² and has remained an important concern.⁸³ Several witnesses agreed that evaluating

⁷⁶ Thirty Antitrust Practitioners Comments, at 14, 19; *see* Montague Statement, at 3-4; Trans. at 23 (Bennett); Cuneo Statement, at 9.

⁷⁷ Cuneo Statement, at 9; *see also* Gavil Statement, at 22 (multiple recovery is a “theoretical problem”).

⁷⁸ Montague Statement, at 3-4 (“I 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.”); *Id.* at 9; Trans. at 23 (Bennett) (“The testimony from both panels, I think, is stark in that no one could actually point to any case, despite the large number of *Illinois Brick*-repealers, in which any defendant had actually paid too much.”)

⁷⁹ Gustafson Statement, at 15 (quoting Cavanagh, *Illinois Brick*), at 44.

⁸⁰ Trans. at 39 (Tulchin). Two witnesses noted that identifying such an instance is difficult because determining what “fair recovery is in a given situation is very, very complicated.” Trans. at 42 (Tulchin); *see id.* (Zwisler) (settlements provide limited information about fairness).

⁸¹ Trans. at 166 (Steuer).

⁸² *See* William M. Landes & Richard A. Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick*, 46 U. Chi. L. Rev. 602, 615-21 (1979); *see also In re Brand Name Prescription Drugs Litigation*, 123 F.3d

injury to indirect purchasers would make proceedings very complex or even “totally unworkable.”⁸⁴ In particular, estimating pass-on on a class-wide basis can be a significant barrier to class certification in many cases, “confirm[ing], in a new context, the magnitude of the problems of proof that the Court sought to avoid in *Illinois Brick*.”⁸⁵

Others contend that the difficulty of determining the injury to indirect purchasers is overstated, citing advances making such assessments more manageable.⁸⁶ One witness testified that these concerns have not materialized, noting “sophisticated economic and statistical techniques,” expert testimony and the use of *cy pres* awards when damages are small.⁸⁷ Others complained that *Illinois Brick* and *Hanover Shoe* are overbroad, creating an irrebuttable presumption that prevented recovery even when an indirect purchaser could reasonably estimate his loss, and argued that in fact many indirect purchaser claims are “non-speculative.”⁸⁸

599, 605 (7th Cir. 1997) (Posner, J.) (explaining that “[t]racing a price hike through successive resales is an example of what is called ‘incidence analysis,’ and is famously difficult”). *But see* Robert G. Harris & Lawrence A. Sullivan, *Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis*, 128 U. Pa. L. Rev. 269 (1979) (*passim*).

⁸³ 1983 Task Force Report, at 852-55; Chris S. Coutroulis and D. Matthew Allen, *The Pass-on Problem in Indirect Purchaser Class Litigation*, 44 Antitrust Bull. 179 (1999); William H. Page, *The Limits of State Indirect Purchaser Suits: Class Certification in the Shadow of Illinois Brick*, 67 Antitrust L.J. 1, 12-19 (1999) (“Page, *The Limits of State Indirect Purchaser Suits*”).

⁸⁴ Trans. at 111 (Montague); *see* Tulchin Statement, at 3-8.

⁸⁵ Page, *The Limits of State Indirect Purchaser Suits*, at 5; Chris S. Coutroulis and D. Matthew Allen, *The Pass-on Problem in Indirect Purchaser Class Litigation*, 44 Antitrust Bull. 179 (1999).

⁸⁶ Bennett and Cooper Statement, at 6-7 (while difficulties remain, advances in “data capture, storage and manipulation, as well as in econometric modeling has made such allocation less problematic”).

⁸⁷ Gustafson Statement, at 4. Another witness disputed the claim that mechanisms for estimating and allocating damages have improved, on the ground that there is very limited evidence from actual trials in which courts and juries have used models to determine damages to indirect purchasers and apportion them. Trans. at 13-14 (Zwisler); *see* Zwisler Statement, at 14-16.

⁸⁸ Bennett and Cooper Statement, at 13-14; *see also* Gavil Statement, at 21-22.

6. Lack of nationwide uniformity

Critics of state indirect purchaser litigation argue that the current system leads to balkanization of the national economy and an improper allocation of state and national authority. Federalism principles should make federal law controlling over matters involving the national economy or of an interstate character.⁸⁹ Others argue that there should be a single national rule in this area, at least when interstate commerce is implicated.⁹⁰

The authority of states to establish antitrust standards that differ from federal law is well established, however, including specifically with respect to indirect purchaser remedies.⁹¹ Numerous state attorneys general have opposed “federal preemption of any state antitrust statutes, including indirect purchaser statutes.”⁹² In particular, they expressed concern regarding preemption of the right of state attorneys general to bring actions on behalf of their citizens.⁹³ Indeed, they observed, the federalism criticisms regarding indirect purchaser litigation can be made about federalism itself.⁹⁴ Furthermore, some argued that state indirect purchaser laws enable states to act as experimental “laboratories” to determine the most effective means of deterrence and compensation,⁹⁵ though others objected that there seemed to be little need for

⁸⁹ Trans. at 7-8 (Tulchin).

⁹⁰ See Tulchin Statement, at 12.

⁹¹ See *California v. ARC America Corp.*, 490 U.S. 93 (1989).

⁹² See Resolution on Principles of Antitrust Enforcement adopted by the National Association of Attorneys General (Mar. 2005), available at <http://www.abanet.org/antitrust/committees/state-antitrust/pdf/naag-sp2005-res.pdf>; see also Bennett and Cooper Statement, Appendix. Others share these views. See AAI Comments, at 17 (citing “[r]espect for state sovereignty, as well as the proven effectiveness of this dual antitrust enforcement”).

⁹³ Trans. at 103, 105-06, 161 (Cooper); Bennett and Cooper Statement, at 19.

⁹⁴ Trans. at 25-26 (Bennett).

⁹⁵ Trans. at 21 (Cuneo) (“state experiment[ation] . . . should not be short-circuited”); Trans. at 26 (Bennett); Trans. at 113-14 (Gustafson); Gustafson Statement, at 7-9, 18-19; AAI Comments, at 17-18.

additional experimentation on this subject.⁹⁶

- B. What actions, if any, should Congress take to address the inconsistencies between state and federal rules on antitrust actions by indirect purchasers? For example, should Congress establish *Illinois Brick* as the uniform national rule by preempting *Illinois Brick* repealer statutes, or should it overrule *Illinois Brick*? If Congress were to overrule *Illinois Brick*, should it also overrule *Hanover Shoe*, so that recoveries by direct purchasers can be reduced to reflect recoveries by indirect purchasers (or *vice versa*)? Assuming both direct and indirect purchaser suits continue to exist, what procedural mechanisms should Congress and the courts adopt to facilitate consolidation of antitrust actions by indirect and direct purchasers?

There was substantial argument that no legislative action should be taken to address indirect purchaser litigation.⁹⁷ Those arguing for no change point out that the courts are effectively dealing with the difficulties posed by indirect purchaser litigation.⁹⁸ They argue that a case-by-case, state-specific approach is superior to “legislation based on hypothetical situations and imagined problems.”⁹⁹ A number of developments in favor of retaining the *status quo* were identified, including CAFA, revised criminal penalties, revisions to the leniency program, and class certification standards.¹⁰⁰

Others commenters and witnesses made serious arguments for possible reforms, which are described below, with references to the policy issues discussed above where appropriate.

⁹⁶ Trans. at 118 (Gavil) (declaring that “[a] generation, I think, is a long enough time for an experiment”).

⁹⁷ Trans. at 16, 75 (Montague); Cuneo Statement, at 2-3; Trans. at 113-115 (Gustafson); Trans. at 23 (Bennett).

⁹⁸ Montague Statement, at 10-13; Gustafson Statement, at 18.

⁹⁹ Thirty Antitrust Practitioners Comments, at 19-20.

¹⁰⁰ Trans. at 20-21, 43-45 (Cuneo); Trans. at 111-13, 170-71 (Gustafson); AAI Comments, at 18-19; Trans. at 90 (Montague) (CAFA “is a very new step forward” and we should wait and see how judges use this authority).

1. Preempt state laws to the extent that they permit indirect purchaser actions, thereby preventing indirect purchasers from bringing actions in any court.

Some argue that state laws providing a remedy to indirect purchasers should be preempted in favor of federal law.¹⁰¹ This proposal addresses concerns that have been expressed with respect to the current regime by reducing (or eliminating) duplicative litigation, creating nationwide uniformity, and avoiding duplicative liability and complex allocation of damages. It does not, however, address concerns about compensation to victims.¹⁰² Finally, it presumes that enforcement by direct purchasers is more effective than that by indirect purchasers.

Two alternatives to total preemption have been proposed. First, preemption might be limited to private actions, leaving indirect purchaser actions to the sole responsibility of state attorneys general.¹⁰³ (Several witnesses argued, however, that state attorneys generals should not be given sole responsibility for bringing indirect purchaser actions, in part because they lack sufficient resources to fill this role.¹⁰⁴) Second, indirect purchaser actions could be permitted to recover damages only for *per se* illegal offenses, since the policy considerations militating against indirect purchaser actions are less strong in such cases.¹⁰⁵

¹⁰¹ Trans. at 11 (Zwisler); Zwisler Statement, at 1; *see also* Tulchin Statement, at 13 (stating a preference for national rule based on *Illinois Brick*, but recognizing that uniform system permitting indirect purchaser actions could be preferable to the current divided system).

¹⁰² *Illinois Brick*, 431 U.S. at 737-47.

¹⁰³ 1993 Task Force Report, at 995-96 (recommending such an approach and additional measures).

¹⁰⁴ Trans. at 40 (Bennett) (“State attorneys general simply do not have the nationwide resources to handle all indirect purchaser cases.”); Gustafson Statement, at 16.

¹⁰⁵ Trans. at 30 (Zwisler) (explaining that, in price fixing cases, there is less sympathy for the defendant, less concern over the risk analysis the defendant faces, and less difficulty with calculating damages).

Several witness argued that preemption was politically infeasible.¹⁰⁶ Representatives of state attorneys general strongly opposed preemption on sovereignty grounds.¹⁰⁷ In addition, they and others argued that state indirect purchaser laws, and their enforcement by state attorneys general, play an important role in deterring antitrust violations and compensating victims.¹⁰⁸ Preemption of state antitrust claims by indirect purchasers also faces the challenge of determining which state laws should be preempted. Several witnesses noted that indirect purchasers may seek to recover under a variety of state laws, including consumer protection laws, “Little FTC Acts,” or be compensated through equitable remedies.¹⁰⁹ Extending preemption to these statutes would raise additional federalism concerns, and could lead to extended litigation over the scope of preemption.¹¹⁰ Finally, one witness argued that preemption is justified here since the particular problems posed by indirect purchaser lawsuits are not present in other contexts, such as under state “blue sky” laws.¹¹¹

2. Repeal *Illinois Brick* so that indirect purchasers can bring actions in federal court.

Several commentators have called for legislative repeal of *Illinois Brick*, which would allow indirect purchaser actions to be brought in federal court.¹¹² There are several alternative

¹⁰⁶ Trans. at 16 (Montague); Trans. at 121 (Steuer); Trans. at 161-62 (Denger).

¹⁰⁷ See subsection II.A.6.

¹⁰⁸ See subsections II.A.2 and II.A.3.

¹⁰⁹ Trans. at 103 (Cooper); Trans. at 26 (Bennett); Bennett and Cooper Statement, at 18-19; Zwisler Statement, at 5-6 (the ability of indirect purchasers to obtain relief under state consumer protection laws is the “most hotly contested issue” currently)

¹¹⁰ Trans. at 26 (Bennett); Bennett and Cooper Statement, at 18.

¹¹¹ Trans. at 163-65 (Gavil).

¹¹² Trans. at 23 (Bennett); Bennett and Cooper Statement, at 11; see Gavil Statement, at 4 (supporting overruling *Illinois Brick* in tandem with measures to preempt state indirect purchaser rights and other procedural safeguards); Denger Statement, at 1 (advocating the *Illinois Brick* be overruled together with other measures).

approaches under this option, relating to whether the *Hanover Shoe* rule should also be overruled, and whether state indirect purchaser laws should be preempted. As a general matter, repealing *Illinois Brick* through legislation would resolve concerns over compensation to victims and a lack of nationwide uniformity. How issues of effective private enforcement, damage allocation, duplicative damages, and duplicative litigation are addressed depends on whether *Hanover Shoe* is reversed and whether state laws are preempted.

Preemption of state law

One witness proposed the possibility of preempting state indirect purchaser laws while giving indirect purchasers the right to recover under the federal antitrust laws by repealing *Illinois Brick*.¹¹³ Preemption in these circumstances would permit indirect purchasers a federal remedy, but deny them the option of a state remedy. Preemption of state law would address the problem of duplicative litigation. It would also ensure nationwide uniformity, whereas no preemption would permit states potentially to allow state remedies beyond that permitted under federal law.

Repeal of Hanover Shoe

A repeal of the rule of *Hanover Shoe* would also address certain concerns. As a supplement to a repeal of *Illinois Brick*, it would eliminate the possibility of duplicative liability (assuming no state laws permitted it).

One witness argued that retaining *Hanover Shoe* is essential to preserve deterrence.¹¹⁴ Some argued that overturning *Hanover Shoe* and *Illinois Brick* and trying to allocate damages among various classes of plaintiffs would be highly complex, and even “create a whole new level

¹¹³ Gavil Statement, at 27-28. However, Professor Gavil would exempt actions by state attorneys general from preemption. Trans. at 162 (Gavil).

of litigation” to determine impact on indirect purchasers, which “would be totally unworkable.”¹¹⁵ However, several witnesses, in contrast, argued that overturning *Hanover Shoe* would have little impact on enforcement incentives of direct purchasers.¹¹⁶

Several specific proposals were made regarding allocation. One witness suggested that indirect purchasers should be entitled to recover the full overcharge where direct purchasers do not sue, to promote deterrence.¹¹⁷ Several witnesses before the AMC proposed trifurcating proceedings into three phases—liability determination, total damage determination, and the allocation of damages among claimants.¹¹⁸ One benefit of this approach is that complexities of allocation issues would be addressed separately in the final phase—when they may be easier to address or made unnecessary due to settlement.¹¹⁹

3. Proposals combining substantive and procedural measures

The ABA Task Force on Remedies proposed a comprehensive package of indirect purchaser reforms in its August 2004 Report. The Task Force sought to determine whether there was “any proposal which might improve the present situation,” recognizing that any such

¹¹⁴ Trans. at 18, 37, 92 (Montague); *see also* Montague Statement, at 3.

¹¹⁵ Trans. at 92 (Montague); *see also* Zwisler Statement, at 14-15.

¹¹⁶ Trans. at 130-31 (Cooper); Trans. at 131 (Denger) (“there is no shortage of plaintiffs’ lawyers willing to bring actions”); Trans. at 134 (Steuer) (“even though the incentive may be then then divided up . . . there remains ample incentive collectively to pursue the suit”).

¹¹⁷ Trans. at 103-04, 150 (Cooper).

¹¹⁸ Gavil Statement, at 29-30; Denger Statement, at 18-20. Mr. Steuer indicated that the ABA proposal contemplated bringing all claimant into a single proceeding to resolve their claims and that such a trifurcated procedure “certainly could be” the procedure adopted. Trans. at 152 (Steuer).

¹¹⁹ Denger Statement, at 18-21; Trans. at 156-57 (Denger) (“it is clearly easier to manage the case” through trifurcation); *see also* discussion of trifurcation below.

proposal would involve compromise.¹²⁰ The goal of the ABA Task Force was to “illustrate what a compromise might look like that could actually get enough support to be passed.”¹²¹

The 2004 Task Force Report identified five key features of its proposed reforms.¹²²

1. Repeal *Illinois Brick*. All indirect purchasers and sellers would be able to recover under the Clayton Act for federal antitrust violations.¹²³
2. Do not preempt state law. The 2004 Task Force Report found that preemption would be too politically divisive to include in a “realistically achievable compromise measure.”¹²⁴ There were some differences among the panelists as to whether preemption was needed to avoid duplicative recovery.¹²⁵ In addition, the panelists expressed some differences as to the extent to which CAFA, with or without repeal of *Illinois Brick*, will be successful in consolidating indirect purchaser litigation in federal court.¹²⁶
3. Resolve all claims in a single forum. Facilitate consolidation of actions in federal court by relaxing requirements of diversity jurisdiction and adopting more

¹²⁰ 2004 Task Force Report, at 2.

¹²¹ Trans. at 124 (Steuer).

¹²² The 2004 Task Force Report included draft legislation designed specifically to address indirect purchaser actions. See 2004 Task Force Report, at Appendix.

¹²³ 2004 Task Force Report, at 3.

¹²⁴ *Id.*, at 4; see also Trans. at 122 (Steuer) (preemption “a political non-starter”).

¹²⁵ Compare Gavil Statement at 27-28, 30, and Trans. at 151 (Gavil) (arguing that preemption is “a more effective and better solution,” and necessary to avoid duplicative recovery), with Trans. at 166-67 (Steuer) (characterizing the multiple damages problem as a “theoretical” concern, since state currently do not provide for duplicative damages). In particular, several state *Illinois Brick* repealers expressly direct courts to avoid duplicative recovery. Trans. at 166-67 (Steuer).

¹²⁶ See Trans. at 46-54 (various); see also *supra* at pp. 9-11.

permissive rules for removal and consolidation.¹²⁷ Resolving all claims in a single forum will assist in avoiding duplicative recovery.¹²⁸

4. Permit plaintiffs to recover pre-judgment interest. While this provision does not address concerns identified with the current regime, it apparently was included in the ABA Task Force proposal as a political “trade” to induce plaintiffs groups to agree to other aspects of the proposal.¹²⁹
5. Consolidate cases for all purposes, including trial, thereby overruling *Lexecon* as to actions covered by these procedures.¹³⁰ A number of the witnesses before the AMC agreed that repealing *Lexecon* would be desirable so that cases could be consolidated for trial.¹³¹

Other witnesses offered similar proposals, emphasizing the goal of consolidating all actions in a single federal court.¹³²

Witnesses before the AMC generally commented favorably on the elements of the ABA Task Force proposal described, with the exceptions noted above in discussing specific aspects of it.¹³³ However, a number of witnesses emphasized that additional provisions would be desirable or necessary to achieve a suitable solution, including class certification standards and “trifurcation” of trials.

¹²⁷ 2004 Task Force Report, at 3.

¹²⁸ *Id.* at 3.

¹²⁹ *Id.* at 3; Trans. at 147 (Steuer).

¹³⁰ See 2004 Task Force Report, Appendix at 2; Trans. at 121-22 (Steuer) (proposal designed to “provide one forum for both discovery and trial, so in other words to repeal *Lexecon*”).

¹³¹ Bennett and Cooper Statement, at 15; Denger Statement, at 1, 17-18. *But see* Gustafson Statement, at 17 (stating that “Congressional interference with the *Lexecon* decision at this time appear premature”).

¹³² Gavil Statement, at 27-30; Denger Statement, at 18-21; Trans. at 106-10 (Denger).

¹³³ Trans. at 151-54 (various).

Class certification standards. Under the ABA proposal, federal courts would have the responsibility for deciding class certification issues. One witness, however, expressed the concern that federal courts generally would decline to certify indirect purchaser classes and suggested that any legislative reform should seek to ensure that indirect purchaser classes would be certified, for example, by legislating “almost a presumption of pass-on to the consumer.”¹³⁴

Trifurcation. As discussed above, trifurcation was a key feature of the proposals made by Professor Gavil and Mr. Denger, and involves splitting the proceeding into three phases: determination of liability, determination of aggregate damages, and allocation of damages among the claimants.¹³⁵ There was agreement that most cases would settle without a third-stage allocation proceeding.¹³⁶

¹³⁴ Trans. at 140-41, 153-54 (Gustafson); Trans. at 154 (Gustafson) (“if all you have to show is that you have, in fact, been injured as an indirect purchaser and here is my damage, I can get behind this proposal”).

¹³⁵ Denger Statement, at 18-21; Gavil Statement, at 29-30.

¹³⁶ Trans. at 149 (Denger); Trans. at 149 (Gavil).