



MEMORANDUM

From: Civil Procedure and Remedies Working Group
To: All Commissioners
cc: Andrew J. Heimert and Commission Staff
Date: December 21, 2004
Re: Civil Procedure and Remedies Issues Recommended for Commission Study

The Antitrust Modernization Commission assigned to the Civil Procedure and Remedies Working Group the responsibility to analyze issues relating to antitrust civil procedure and remedies and, based on that analysis, to make recommendations to the Commission as to the issues within that category that warrant substantive review. This memorandum outlines those recommendations. The memorandum addresses first the issues the Working Group recommends for substantive consideration and then addresses those issues not recommended for further study at this time. In each instance, comments are provided to allow insight into the Working Group's analysis. The issues are listed in approximate order of priority that the Working Group believes each issue should have for Commission study.

This memorandum reflects the consensus of a majority of the Working Group members. Some members of the Working Group may disagree with a recommendation and/or with aspects of the discussion and comments associated with a recommendation. In addition, a recommendation that the Commission should not study a particular issue at this time does not constitute a recommendation on the merits of the issue, nor does it preclude the possibility that the Commission report ultimately will endorse any particular recommendation.

SUMMARY OF RECOMMENDATIONS

Issues recommended for study. The Working Group recommends that the Commission study the following issues:

1. **Should the substantive law and procedures applicable to indirect purchaser litigation be modified to reduce the complexity and inefficiency now present?**
2. **What changes, if any, should be made to the enforcement role that the states play with respect to federal antitrust laws?**
3. **What should be the remedies and legal liabilities in private antitrust proceedings?**
4. **Should the FTC be given greater authority to weigh antitrust and economic expertise when selecting Administrative Law Judges?**
5. **Should the use of neutral experts in antitrust cases be encouraged?**

Issues not recommended for study. The Working Group recommends that the Commission not study the following issues:

6. **Should the agencies establish timetables for investigating and deciding civil non-merger matters?**
7. **Should government remedies be expanded, restricted, or clarified?**
8. **Should the Federal Trade Commission be provided with a limited exception to the Sunshine Act so that its Commissioners could deliberate matters without going through formal Sunshine Act procedures?**
9. **Should the Commission recommend different standards for filing or certifying class actions, for separating “common injury” and “common damages” issues, or propose other changes in class action procedures, in light of evolving jurisprudence and/or increasingly evident problems with the current system?**

DISCUSSION OF RECOMMENDATIONS

Issues recommended for study

The Working Group recommends that the Commission study the following issues:

1. **Should the substantive law and procedures applicable to indirect purchaser litigation be modified to reduce the complexity and inefficiency now present?**

Indirect purchaser litigation has become costly and inefficient since the Supreme Court's ruling in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). In that case, the Court held that "indirect" purchasers (those not purchasing directly from the seller allegedly engaged in anticompetitive conduct), to whom overcharges may (or may not) have been passed through, do not have standing to bring antitrust claims. (*Illinois Brick* followed on *Hanover Shoe, Inc. v. United Machinery Shoe Corp.*, 392 U.S. 481 (1968), in which the Court strictly limited the circumstances in which a defendant can assert that the purchaser passed along any of the overcharges and therefore did not, in fact, suffer injury.) The result of *Illinois Brick* has been a checkerboard of state laws, some of which permit indirect purchaser lawsuits in state court and others that do not. See ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 811-12 & nn.61-63 (5th ed. 2002) (cataloging varying state laws); see also *California v. ARC America Corp.*, 490 U.S. 93 (1989) (state laws allowing indirect purchaser suits are not preempted by federal law). As a result of these differing state laws, defendants face claimants at multiple levels in the purchasing chain, are not easily able to consolidate related actions in a single forum, incur increased litigation costs, and run the risk of inconsistent outcomes.

Indirect purchaser litigation has been further complicated by limitations on the consolidation of related actions. The Supreme Court held in *Lexecon, Inc. v. Milberg, Weiss, Bershad, Hynes & Lerach*, 523 U.S. 26 (1998), that a court to which multidistrict litigation is transferred for pretrial proceedings, pursuant to 28 U.S.C. § 1407, does not have the authority to

transfer the matter to itself for trial pursuant to 28 U.S.C. § 1404(a). A number of bills have been introduced in Congress that would overrule the *Lexecon* decision and provide a federal district court conducting coordinated pretrial multidistrict proceedings pursuant to 28 U.S.C. § 1407 with the authority to transfer the proceedings to itself (or to another district court) for purposes of trial. *See, e.g.*, Multidistrict Litigation Restoration Act of 2004, H.R. 1768, 108th Cong. § 2 (2004); Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 1999, H. REP. NO. 106-276, at 1 (1999).

The Commission should study whether *Illinois Brick* (and *Hanover Shoe*) should be overruled by statute. Regardless of whether federal law allows or does not allow indirect purchaser suits, should federal law preempt inconsistent state laws relating to purchaser actions and/or broaden federal removal jurisdiction, in order to promote nationwide uniformity, facilitate consolidation of private antitrust actions, and eliminate potentially duplicative recovery? Finally, should *Lexecon* be overruled (through amendment to Sections 1404 and 1407) so that consolidation of actions is more feasible?

Comments: There is broad consensus that this issue merits consideration, that differing state and federal rules on direct and indirect purchasers make little sense, and that this is the type of issue that the Commission could fruitfully address with a pragmatic and balanced proposal that could gain serious adherents in a broader community. In addition, the ABA Antitrust Section's Remedies Task Force has done substantial work in this area upon which the Commission could build. *See* ABA Section of Antitrust Law, *Report on Remedies* (2004), available at <http://www.abanet.org/antitrust/comments/2004/RemediesReportCouncil.doc>.

With respect to consolidation of actions, while the issue regularly arises in antitrust cases, the problem is not limited to antitrust matters, but rather is more generally applicable. The Commission should consider possible changes to purchaser litigation that would both work within the current transfer statute and in an amended transfer framework. Furthermore, Commission recommendations addressing problems resulting from the *Lexecon* decision in antitrust litigation may resonate more broadly as well, leading to a more comprehensive consideration of current multi-district litigation rules.

2. What changes, if any, should be made to the enforcement role that the states play with respect to federal antitrust laws?

The value of state enforcement of federal antitrust laws has been debated for decades. In particular, the Commission should seek to assess actual benefits and costs of such enforcement by studying the following: 1) What benefits and harms does state enforcement pose? 2) Should states bring federal law-based antitrust actions only in federal court? Should states focus on claims under state antitrust laws? 3) To what extent is state *parens patriae* standing useful or needed? 4) Could state and federal enforcers productively allocate responsibility for antitrust matters based on whether the primary locus of alleged harm (or primary relevant market) is intrastate, interstate, or global? 5) What role should states play in merger investigations, and what should be their authority to enjoin a merger? 6) Should state attorneys general have authority to sue under the FTC Act so as to enable state consumer protection cases to be removed and consolidated in federal court?

Comments: Numerous commenters suggested that the Commission address these federalism issues. These questions, although always important, have become prominent in recent years, as some states have actively pursued enforcement of the antitrust laws. While such enforcement is not itself problematic, it raises issues of comity and state

sovereignty when it would impact consumers in other states, some of which may have different views of the merits. Likewise, it can present similar problems with respect to federalism when the federal government and some states are at odds, as was the case after the *Microsoft* settlement. Regardless of the ultimate allocation of authority between the states and federal antitrust agencies, there is undoubtedly much room for improving the current system.

3. **What should be the remedies and legal liabilities in private antitrust proceedings?**

Many liability and damages rules in antitrust cases differ from those in other civil litigation. The Commission should consider whether these different rules should remain in existence, be modified, or be eliminated. In particular, the Commission should study the following.

a. Treble damages. The treble damages provision of the Clayton Act, a damages rule rarely seen in American law, has been the source of a great deal of debate. Advocates of detrebling cite the risk of overdeterrence, unfairness, market distortions, and baseless lawsuits as arguments to abolish or at least limit the applicability of this provision. *See, e.g.*, Edward D. Cavanagh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 TUL. L. REV. 777 (1987). Others claim that evidence of underdeterrence should caution against any detrebling, and even suggest that awards greater than treble damages might be appropriate for all types of antitrust cases. *See, e.g.*, Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 OHIO ST. L.J. 115 (1993). Accordingly, this issue raises many questions: Should treble damages be abolished altogether? Should treble damages be limited to certain situations (*e.g.*, only *per se* cases or only when the unlawful conduct is covert)? Should there be awards greater than treble damages? Should enforcers and judges have discretion to apply a

damage multiplier less than or greater than three depending on the seriousness of the alleged offense? Should plaintiffs be required to meet a higher or lower standard of proof depending on the damages multiplier? What is the probability of catching and proving antitrust violations that should be used in optimal-deterrence models?

Comments: Given the ongoing debate about the appropriate level of damages in antitrust cases, this would be an appropriate area for Commission study. In addition to commentary from antitrust scholars and practitioners, existing empirical studies and data sets could prove particularly helpful. *See, e.g.,* Steven C. Salop & Lawrence J. White, *Treble Damages Reform: Implications of the Georgetown Project*, 55 ANTITRUST L.J. 73 (1986) (encouraging use of database containing information on over two thousand antitrust cases).

b. Joint and several liability; contribution. Under the antitrust laws (and most claims sounding in tort), liability is joint and several for all defendants, with no right of contribution among defendants. *See Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981); ABA ANTITRUST SECTION, MONOGRAPH NO. 11, CONTRIBUTION AND CLAIM REDUCTION IN ANTITRUST LITIGATION 4 (1986); Jonathan M. Jacobson, *Contribution Among Antitrust Defendants: A Necessary Solution to a Recurring Problem*, 32 U. FLA. L. REV. 217 (1980). Thus, a plaintiff can sue a single member of a price-fixing conspiracy, and obtain treble the damages resulting from the entire conspiracy from that defendant, but that defendant cannot seek recovery from the other coconspirators. Is joint and several liability appropriate? If so, should defendants have a right of contribution so that they can recover from each of the coconspirators the share of the damages attributable to them? In addition, when some defendants settle an antitrust claim, the remaining defendants do not have a right to claim reduction — *i.e.*, reduction

of a subsequent damage award by the amount of damages attributable to the settling defendants. See Edward D. Cavanagh, *Contribution, Claim Reduction, and Individual Treble Damage Responsibility: Which Path to Reform of Antitrust Remedies?*, 40 VAND. L. REV. 1277 (1987); ABA CONTRIBUTION MONOGRAPH, *supra*, at 1. Should antitrust defendants have a right of claim reduction?

Comments: The *Texas Industries* decision refused to extend contribution as a matter of statutory interpretation, and was viewed “by many as an invitation for congressional action on the contribution issue.” ABA CONTRIBUTION MONOGRAPH, *supra*, at 1. The time may be ripe for the Commission to revisit the area and recommend Congressional action. On the other hand, these issues have been debated extensively, especially since *Texas Industries*, and Congress has not taken action.

c. Prejudgment interest. The availability of prejudgment interest in civil cases varies widely by jurisdiction and type of action. In antitrust cases, Section 4 of the Clayton Act provides that a court may award prejudgment interest for the period between the filing of the complaint and judgment, if such an award “is just in the circumstances,” a determination based on three quite restrictive factors. 15 U.S.C. § 15(a); *see also Fishman v. Estate of Wirtz*, 807 F.2d 520, 561-62 (7th Cir. 1986) (identifying “unnecessary delay” by defendant as a necessary condition for an award of prejudgment interest under Section 4). There are no reported antitrust cases in which prejudgment interest has been awarded under this authority. ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 882 (5th ed. 2002). Moreover, the ability to recover pre-complaint interest (as well as “cost of capital” or “opportunity cost” damages) is in doubt.

Comments: Various commentators argue that prejudgment interest should routinely be available on antitrust and other tort claims to promote deterrence, provide compensation, and avoid enabling defendants to profit from delaying proceedings. *See, e.g.,* Michael S. Knoll, *A Primer on Prejudgment Interest*, 75 TEX. L. REV. 293 (1996). Although interest is currently authorized, it appears that no court has yet encountered circumstances that justify an award of interest. Whether this results from a lack of appropriate circumstances or from restrictive statutory terms is unclear. For example, courts may find interest is not “just” because plaintiffs already receive treble damages. If the problem arises from a perceived statutory deficiency, the Commission could recommend a statutory change. In any event, were the Commission to recommend detrebling of damages, the availability of prejudgment and precomplaint interest should also be evaluated.

d. Attorney’s fees. Section 4 of the Clayton Act expressly provides that a successful plaintiff may recover “the cost of the suit, including a reasonable attorney’s fee.” 15 U.S.C. § 15(a). “Unique when adopted as part of the Sherman Act in 1890, [the antitrust laws’] fee-shifting provision has been imitated, at least in part, in over 100 federal statutes.” Edward D. Cavanagh, *Attorneys’ Fees in Antitrust Litigation: Making the System Fairer*, 57 FORDHAM L. REV. 51, 52 (1988) (footnotes omitted). (Congress replaced the original fee-shifting provision in the Sherman Act with the current Clayton Act provision.) This provision deviates both from the traditional American Rule, under which each side pays its own fees, and from the British Rule, under which the losing side pays both parties’ attorney’s fees. Similar “prevailing plaintiff” provisions appear in a variety of other federal laws that rely on private actions for enforcement (*e.g.,* employment discrimination, civil rights protection). Some perceive fee-shifting rules as

unfair to defendants and unduly favorable to plaintiffs. Certain commentators even criticize the routine award of attorney’s fees to successful antitrust plaintiffs as promoting unmeritorious litigation. The rule’s defenders claim that it is essential to the antitrust laws’ reliance on “private attorneys general.”

Comments: Antitrust damages rules awarding treble damages are (aside from the deterrent function) designed to encourage the participation of private attorneys general. Is the award of attorney’s fees also necessary to encourage such participation? Does awarding a fee to plaintiffs, but not to successful defendants, create an unfair bias in favor of plaintiffs? While the complete debate goes well beyond the antitrust laws, the combination of treble damages and attorney’s fees makes examination of the need for both appropriate.

e. Standing to pursue injunctive relief. Section 16 of the Clayton Act provides that a private plaintiff (including a state attorney general) may obtain injunctive relief for “threatened loss or injury.” 15 U.S.C. § 26. Both permanent and preliminary relief is available. The award of such relief is governed by traditional equitable standards. A wide range of relief may be granted — for example, private parties may seek divestiture when challenging a merger. *See California v. American Stores Co.*, 495 U.S. 271 (1990). Courts limit private-party injunctive relief, however, by requiring that plaintiffs establish a causal connection between the anticompetitive effects of the alleged violation and the threatened harm to them. *See, e.g., Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986).

Comments: Some commenters suggested that the Commission address this issue, due to concerns that the antitrust laws effectively empower private parties to restructure or regulate an industry. The availability of injunctive relief has been particularly

controversial where private plaintiffs have sought to prevent or undo mergers that the agencies have not blocked, or have sought orders that would restructure or regulate the conduct of an alleged monopolist. Even the threat of such relief can arguably chill beneficial business conduct. Others maintain that Commission study is not warranted, observing that federal judges, not private parties, control the decision, that there is little evidence that courts award burdensome structural relief in private antitrust cases, and that the standards governing the award of equitable relief to private parties are best left to the courts. On balance, the Working Group believes that this question should be studied as part of a broader consideration of remedies.

4. **Should the FTC be given greater authority to weigh antitrust and economic expertise when selecting Administrative Law Judges?**

Under current Office of Personnel Management (“OPM”) regulations, the FTC can hire only Administrative Law Judges (“ALJs”) that OPM deems qualified. 5 C.F.R. § 930.203a(a). Generally, the FTC cannot require expertise in antitrust law or in economics when selecting from that pool. Rather, the FTC must select from interested candidates with the highest ranking by OPM, which employs more general criteria. As a result, the FTC often must choose among candidates who do not necessarily have expertise in the substantive areas in which it brings Part III proceedings. (The problem has been exacerbated by litigation regarding OPM’s application test, which has led OPM to freeze new applications to the ALJ pool.) Moreover, regulations limit the ability of agencies to remove less competent ALJs. *See* 5 C.F.R. § 930.214.

As an expert agency charged with administering the antitrust laws, the FTC should be able to select decision-makers with a strong background in antitrust law and economics. Ensuring that the FTC is able to hire ALJs with appropriate backgrounds would both improve the quality of decision-making and increase the agency’s efficiency. The recent increase in Part III

proceedings has only heightened concerns about this perceived problem with the current ALJ hiring system. Respondents and FTC staff may waste time and resources by having to explain fundamental antitrust and economics concepts to inexperienced ALJs, lengthening administrative trials and increasing their expense. The perception is also that ALJs with greater antitrust background would be more likely to issue well-thought initial decisions, which would ease the Commission's burden when it hears the internal appeal. A special selection mechanism for ALJs (and comparable positions) would not be unique: the Patent and Trademark Office has been given authority to select administrative judges outside of OPM. *See* 35 U.S.C. § 6(a) (giving director of PTO authority to appoint administrative patent judges).

Comments: Changing the FTC's selection authority appears to be a "good government" idea that could improve FTC decision-making. As an expert agency, it is entirely sensible for its front-line decision-makers to have expertise comparable to that of other leadership within the agency. The issue is discrete, making study and a recommendation relatively easy. It does, however, apply solely to internal FTC procedures that could be left to the FTC to address directly with OPM or, if necessary, through pursuit of legislative modification. Furthermore, OPM is likely to defend its system, which is designed to ensure neutrality among ALJs and avoid the perception that agencies are hand-picking judges sympathetic to the agency's position. On balance, the Working Group recommends Commission study of this issue.

5. Should the use of neutral experts in antitrust cases be encouraged?

Antitrust litigation has become enormously complex, and often requires extensive economic analysis that is challenging for both juries and all but the most economically versed judges to comprehend. Many jury trials become a "battle of experts," leaving a lay jury to

choose between two dueling theories of the case. There are possible solutions — for example, a judge could appoint a “neutral” expert, selected from the parties’ nominees, who would assess the competing arguments of each party’s expert for the benefit of both the judge and the jury.

Comments: Any sensible solution to the confusion that competing economic testimony can create in a jury is deserving of some consideration. There does not appear to be a statutory obstacle to such an appointment; generally the use of neutral experts is left to the discretion of the district judge. Ultimately, whether a Commission recommendation encouraging consideration of such experts would gain traction remains in the hands of the judiciary.

Issues not recommended for study

The Working Group recommends that the Commission not study the following issues:

6. **Should the agencies establish timetables for investigating and deciding civil non-merger matters?**

As a general matter, FTC and DOJ should strive to conduct civil non-merger investigations expeditiously, so that parties are not burdened with pending investigations any longer than necessary and the business community may conduct its affairs without the uncertainty that an investigation into certain conduct may create. The Commission could study whether there are lessons to be learned from the merger context, with its statutory deadlines, or other ways to ensure that investigations are conducted promptly, without compromising the agencies’ ability adequately to examine the allegedly anticompetitive conduct and reach an informed conclusion.

Comments: Although a relevant issue, the Working Group does not believe that it is sufficiently critical, given the Commission’s limited resources, to merit Commission study. The agencies are well aware of this problem and are best positioned to remedy it

by improving internal working processes. With merger activity far from the late-1990s surge, this would be an appropriate time for the agencies to address this issue.

7. **Should government remedies be expanded, restricted, or clarified?**

The government's civil remedies are varied. Some commenters have suggested that the Commission should study whether structural remedies should be encouraged or their applicability clarified. In addition, some have suggested that DOJ should have authority to seek civil fines or disgorgement. Similarly, some have suggested that the FTC's disgorgement authority should be clarified.

Comments: There is general agreement that the agencies have made considerable efforts recently to address these issues and that they are not a high priority for additional reform efforts.

8. **Should the Federal Trade Commission be provided with a limited exception to the Sunshine Act so that its Commissioners could deliberate matters without going through formal Sunshine Act procedures?**

The Sunshine Act, 5 U.S.C. § 552b, generally requires that the Commission hold its meetings open to the public with advanced notice. Although there are exceptions that permit the Commission to close its meetings to the public, *see, e.g.*, 5 U.S.C. § 552b(c)(10) (exempting certain matters including civil actions and agency adjudications), the public must nonetheless be notified of meetings one week in advance, *id.* § 552b(e)(1). Because a "meeting" occurs any time three commissioners meet (the number sufficient to take action, *see id.* § 552b(a)(2)), Commissioners are limited in their ability to deliberate informally about the merits of particular matters, such as draft opinions in Part III proceedings or whether to seek a preliminary injunction.

Comments: The Working Group believes that limiting non-public communications among FTC Commissioners likely impairs the quality and efficiency of FTC decision-making. Moreover, increasing non-public communications need not impair the integrity of the decision-making process. But while improving the internal functioning of the FTC is a worthwhile goal, the Working Group believes that the FTC itself is best positioned to determine what flexibility it needs and request a corresponding change to the Sunshine Act. Equally important, other agencies such as the Federal Communications Commission and the Securities and Exchange Commission are likewise subject to the Sunshine Act, and any proposed change raises more general issues of administrative procedure that are not the focus of this Commission.

9. **Should the Commission recommend different standards for filing or certifying class actions, for separating “common injury” and “common damages” issues, or propose other changes in class action procedures, in light of evolving jurisprudence and/or increasingly evident problems with the current system?**

Comments: Changes to class action procedures are best treated as part of more general tort reform efforts. Creating special rules for antitrust cases is not a desirable approach. Furthermore, it is likely that if this Commission were to act alone, it would not be viewed as a leading player in this arena. Alternatively, it would have to engage in a much broader and time-consuming dialogue with numerous interested parties to achieve any possibility of carrying significant gravitas in this area.