



MEMORANDUM

From: Remedies Study Group
To: All Commissioners
cc: Andrew J. Heimert and Commission Staff
Date: May 4, 2005
Re: Remedies Study Plan

Issues Adopted by the Commission for Study

- A. What should be the remedies and legal liabilities in private antitrust proceedings?
- B. Should government remedies be expanded, restricted, or clarified?
- C. Should the substantive law and procedures applicable to indirect purchaser litigation be modified to reduce the complexity and inefficiency now present?

Questions for Public Comment

Treble Damages

1. Are treble damage awards appropriate in civil antitrust cases? Please support your response, addressing issues such as inducements to private enforcement, evidence indicating that treble damage awards have led to either over-deterrence or under-deterrence, the probability of antitrust violations being detected, and how “optimal” deterrence levels can best be determined.
2. Should other procedural changes be considered to address issues relating to treble damage awards, such as providing courts with discretion in awarding treble (or higher) damages, limiting the availability of treble damages to certain types of offenses (*e.g.*, *per se* unlawful price fixing versus conduct subject to rule of reason analysis), or imposing a heightened burden of proof?

Prejudgment Interest

1. Should successful antitrust plaintiffs be awarded pre-complaint interest, cost of capital, or opportunity cost damages?
2. Are the factors used to determine when prejudgment interest is available set forth in 15 U.S.C. § 15(a)(1)-(3) appropriate? If not, how should they be changed?

Attorneys’ Fees

1. Should courts award attorneys’ fees to successful antitrust plaintiffs?

2. Are there circumstances in which a prevailing defendant should be awarded attorneys' fees?
3. In areas of law other than antitrust, how effective is fee shifting as a tool to promote private enforcement?

Joint and Several Liability, Contribution, and Claim Reduction

1. Should Congress and/or the courts change the current antitrust rules regarding joint and several liability, contribution, and claim reduction?
2. Is the evolution of rules regarding joint and several liability, contribution, and claim reduction in other areas of the law instructive in the context of antitrust law?

Remedies Available to the Federal Government

1. Should DOJ and/or the FTC have statutory authority to impose civil fines for substantive antitrust violations? If so, in what circumstances and what types of cases should such fines be available? If DOJ and/or the FTC are given such authority, how, if at all, should it affect the availability of damages awarded to private plaintiffs?
2. Should Congress clarify, expand, or limit the FTC's authority to seek monetary relief under 15 U.S.C. § 53(b)?

Private Injunctive Relief

1. Has the ability of states and private plaintiffs to seek injunctive relief under 15 U.S.C. § 26 benefited consumers or caused harm to businesses or others? Please provide any specific examples, evidence, or analyses supporting this assessment. What would be the consequences if the availability of injunctive relief to states and private plaintiffs under 15 U.S.C. § 26 were changed? Should standing to pursue injunctive relief under federal antitrust law be different for states than it is for private parties?
2. Are there currently sufficient safeguards (*e.g.*, judicial discretion and the *Cargill* requirement that private plaintiffs establish antitrust injury) to limit injunctions to appropriate circumstances?

Indirect Purchaser Litigation

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?

Hearings

- Five panels of approximately two to four hours each.
1. Treble damages, prejudgment interest, and attorneys' fees
 - Representative(s) from plaintiffs' bar
 - Representative(s) from defense bar
 - Representative(s) from business community
 - Scholar(s)
 2. Joint & several liability/contribution/claim reduction
 - Representative(s) from plaintiffs' bar
 - Representative(s) from defense bar
 - Representative(s) from business community
 - Scholar(s)
 3. Government civil remedies
 - Representative from DOJ
 - Representative from FTC
 - Representative(s) from NAAG or plaintiffs' bar
 - Representative(s) of business community
 - Representative(s) from defense bar
 - Scholar(s)
 4. State indirect purchaser actions in the U.S. antitrust enforcement system
 - Scholar(s)
 - Representative(s) from plaintiffs' bar
 - Representative(s) from defense bar
 - Trial judge
 - Representative from NAAG
 5. Solutions to the substantive and procedural complications raised by the conflict between *Illinois Brick* and state *Illinois Brick* repealer statutes
 - Representative(s) from plaintiffs' bar
 - Representative(s) from defense bar
 - Representative of ABA Remedies Task Force
 - Representative from NAAG
 - Scholar(s)

- Trial judge

Also Private injunctive relief

- Address through Enforcement Institutions panel