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The American
Antitrust Institute

COMMENTS OF THE AMERICAN ANTITRUST INSTITUTE WORKING GROUP ON CIVIL REMEDIES

July 10, 2006

INTRODUCTION

These are the comments of a Working Group on Civil Remedies established by the American Antitrust Institute for purposes of responding to the AMC's June 12, 2006 request for public comments. These comments reflect a consensus of the Working Group (hereinafter sometimes referred to generally as "AAI"), but it should not be assumed that all necessarily agree with every statement or position herein. The Working Group is chaired by Michael Freed, and the members of the Working Group contributing to these Comments include: Kenneth Adams, Eric L. Cramer, Jonathan Cuneo, Albert Foer, Joseph Goldberg, Robert Lande, and Bernard Persky, with additional assistance from Daniel Berger, Joshua Davis, Pamela Gilbert, Jean Janes, David F. Sorensen, and Robert Wozniak.

TOPICS AND COMMENTS[1]

AMC Topic No. 1

> *The Commission is evaluating a proposal to reform indirect purchaser litigation. The potential reform would consist of three principal components: (1) Legislative overruling of* Illinois Brick Co. v. Illinois, *431 U.S. 720 (1977), so that indirect purchaser claims could be brought under federal antitrust law, and* Hanover Shoe, Inc. v. United Shoe Machinery, *392 U.S. 481 (1968), so as to allow assertion of the pass-on defense; (2) Statutory provisions either (a) to allow removal of all state indirect purchaser actions to federal court to the full extent permitted under Article III, or (b) to preempt state indirect purchaser laws; and (3) Statutory provisions to allow the consolidation of all related direct and indirect purchaser actions in a single federal district court for pre-trial and trial proceedings.*
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> *Should the Commission recommend such reform to Congress? Should the proposal be modified in any respects? In responding, please also comment on the following:*

[1] Throughout this document, the text of the AMC's Topics for Comment is set forth in italics.

2919 ELLICOTT ST, NW • WASHINGTON, DC 20008
PHONE: 202-276-6002 • FAX: 202-966-8711 •
www.antitrustinstitute.org

a. *Is a provision that would allow removal of state indirect purchaser actions necessary or desirable, in light of the generally applicable removal provisions contained in the Class Action Fairness Act?*

b. *Is preemption of state indirect purchaser actions necessary or desirable if state indirect purchaser actions may be removed to federal court?*

c. *Should the Commission also recommend to Congress that courts be required to use structured proceedings to resolve purchaser claims? Those proceedings would resolve liability in the one phase, determine total damages in another, and allocate damages among direct and indirect claimants in a separate phase. Would structured proceedings work better if courts could combine certain of the proceedings, especially liability and total damages, in appropriate cases in the exercise of their discretion?*

d. *To what extent would the legislative overruling of* Hanover Shoe *create new challenges in the process of certifying appropriate classes of claimants? Can any such challenges be resolved fully through the structured approach suggested in (c) above?*

AAI Working Group's Comment:

Because the most radical and far-reaching aspect of the AMC's proposal in Topic 1 may be the "legislative overruling" of *Hanover Shoe* "so as to allow assertion of the pass-on defense," AAI will begin by making some observations about the possible impact on the effectiveness of private enforcement of the antitrust laws if Congress were to overrule this nearly forty-year-old Supreme Court precedent.

As we note below, AAI is concerned that overruling *Hanover Shoe* (even in the context of a broader package of reforms) would undermine deterrence of anticompetitive conduct by: (a) reducing recoverable damages to purchasers of products at artificially inflated prices, (b) introducing untold complexities into damages computations and even to assessments of antitrust impact, (c) making certification of direct purchaser class actions far more difficult – an especially problematic outcome because in many instances the *only* purchasers with non-remote and ascertainable damages are direct purchasers (such as in some cases where the product at issue is an input that changes down the chain of distribution, which can make tracing the overcharge to the end user quite difficult).

First, as the Supreme Court has observed, the principle of antitrust deterrence would be served better by "holding direct purchasers to be injured to the full extent of the overcharge paid

by them than attempting to apportion the overcharge among all that may have absorbed part of it."[2] By allowing direct purchasers to recover the full extent of the overcharge, direct purchaser damages are likely to be substantial, relatively straightforward, and simple to compute, thereby supporting "the legislative purpose in creating a group of 'private attorneys general' to enforce the [antitrust] laws[.]"[3] The Supreme Court rightly eliminated the pass-on defense in *Hanover Shoe* because its mere recognition, the Court held, would add enormous and unnecessary complexity to assessments of impact and damages, substantially dilute those damages that are ascertainable, and, ultimately, undermine deterrence. As the Supreme Court stated:

> [W]e are unwilling to carry the compensation principle to its illogical extreme by attempting to allocate damages among all "those within the defendant's chain of distribution," [] especially because we question the extent to which such an attempt would make individual victims whole for actual injuries suffered rather than simply depleting the overall recovery in litigation over pass-on issues. . . . And given the difficulty in ascertaining the amount absorbed by any particular indirect purchaser, there is little basis for believing that the amount of the recovery would reflect the actual injury suffered.[4]

Accordingly, absent clear empirical data showing that the current system is broken, and that illegal behavior is being "over deterred," AAI believes that it would be extremely unwise to overrule *Hanover Shoe*. That case, moreover, followed a string of prior, unbroken Supreme Court decisions – authored by some of this nation's most eminent jurists – holding that a plaintiff's overcharge claim is not affected by subsequent or alleged collateral benefits.[5] A recommendation to overturn *Hanover Shoe*, accordingly, should be based on firm, empirical evidence that the decision has created a significant problem that can be corrected only by its legislative overruling. AAI is aware of no such evidence. Nor has the AMC produced or cited to any.

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[2] *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746-47 (1977).

[3] *Id*.

[4] *Id.* at 746-47.

[5] *See Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390, 396 (1906) ("[a] person whose property is diminished by a payment of money wrongfully induced is injured in his property"); *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533-34 (1918) (Holmes, C.J.) (the question of whether plaintiffs who paid an overcharge could recover even if the overcharge was passed on was "not difficult" because the overcharge claim "accrued at once" and "the law . . . does not inquire into later events"; the "plaintiffs have paid cash out of pocket that should not have been required of them" and the defendant "ought not to be allowed to retain his illegal profit"); *Adams v. Mills*, 286 U.S. 397, 407 (1932) (Brandeis, J.) ("claim for damages arose at the time the extra charge was paid"; subsequent reimbursement of plaintiffs by third parties is of no concern to the wrongdoers).

Second, as explained below, overturning *Hanover Shoe*, and thereby introducing the complexities of the "pass on" defense, risks eliminating many direct purchaser class actions without substituting an effective or workable replacement. Under *Hanover Shoe*, direct purchasers are entitled to recover the entire amount they were overcharged: (a) regardless of whether they pass on that overcharge, in whole or part, down the chain of distribution, and (b) whether or not they suffer actual economic harm (such as, *e.g.*, "lost profits"). Direct purchasers suffer antitrust injury as soon as they pay for a good or service whose price is artificially inflated due to illegal anticompetitive conduct. And injury to direct purchasers is measured by the total amount of the overcharge. These legal rules greatly simplify the proof necessary to show that direct purchasers suffered injury (or impact) in antitrust cases. It also enables plaintiffs in proposed class actions to prove antitrust injury on a predominantly class-wide basis, an essential step for class certification in direct purchaser cases. The direct purchaser rule eliminates any need to consider individual questions of pass on, or economic harm, or lost profits, to prove impact or damages. Instead, to prove impact under *Hanover Shoe*, one need only know the price paid and the price that would have been paid in the but-for world -- information typically in the hands of the defendants.

Eliminating the direct purchaser overcharge rule would fuel arguments that proof of impact is an individualized question. Proving antitrust injury might no longer involve a simple assessment of whether the product was purchased at an artificially inflated price (which is relatively easy to do with class-wide proof), but rather might require an examination of each class member and the extent to which it passed on some (or all) of the overcharge. Analyzing the pass-on could require assessing the elasticities of demand faced by individual class members, determining whether class members operated on a percentage mark-up basis (and thus could potentially benefit from the higher prices), and analyzing the effect of an artificially inflated price on sales volume. Not only would this analysis be time consuming, complicated, and expensive, it could create issues that might very well make proving impact on a predominantly class-wide basis difficult in the view of some courts. For example, AAI is aware of no antitrust class actions certified where the class had sought damages in the form of lost profits. Proving lost profits often implicates a number of individual issues, which create barriers to class certification. And even in the current regime where the direct purchaser is entitled to the full amount of its overcharge, without certification of a direct purchaser class, some direct purchasers

forego individual litigation, both because of the high costs of such litigation and out of fear of retribution from, or disrupting business relationships with, suppliers. Without *Hanover Shoe*, therefore, direct purchaser class *and* individual actions might very well dry up. As a result, guilty defendants would be able to retain their ill-gotten gains, and those who contemplate violating the antitrust laws would not be adequately deterred.

Overturning *Hanover Shoe* therefore would imperil the direct purchaser class action as an effective antitrust enforcement mechanism. Of course, indirect purchaser actions would be available to pick up some of the private enforcement slack. While indirect purchaser actions are a critical part of the existing antitrust enforcement scheme (and would become even more so if *Hanover Shoe* and *Illinois Brick* were legislatively overruled), they cannot substitute for direct purchaser actions. This is because indirect purchaser actions are: (a) sometimes difficult to bring due to "remoteness" issues raised by tracing the pass-on down the chain of distribution, and (b) even where remoteness concerns do not substantially restrict their effectiveness, class certification often is difficult to obtain due to individual issues stemming from assessing the nature and extent of the pass-on.

Where, for instance, the price-fixed product at issue is an "input" into other products (such as linerboard or high fructose corn syrup, or most industrial chemicals), there is often no end purchaser of the price-fixed product in its pure form. The product at issue is either used to make another product, or is an input into a final product. Either way, by the time the overcharge on the input wends its way down the chain of distribution, its impact on any particular consumer may be uncertain, remote, or cognizable only through individualized analysis (at least as many courts currently interpret these issues), thereby rendering the indirect purchaser remedy an ineffective substitute for the role that direct purchaser actions currently play.

Moreover, while AAI is not endorsing the decisions cited on this point (and, indeed, believes some of them to have been decided in error), indirect purchaser plaintiffs often face substantial barriers to class certification, including, *inter alia*: (a) complications in devising acceptable formulae for calculating damages on a class basis in cases involving many defendants or a multitude of transactions;[6] (b) problems in proving an overcharge through common evidence

[6] *See, e.g.*, *Keating v. Philip Morris, Inc.*, 417 N.W.2d 132 (Minn. Ct. App. 1987).

where value is added to the price-fixed product throughout a chain of distribution;[7] and (c) lack of reliable data for tracing an overcharge down the chain to end-users.[8]

The court in *A&M Supply v. Microsoft*,[9] for instance, in reversing a trial court's certification of an indirect purchaser class, exemplifies many of the obstacles courts (however wrongly) place in front of indirect purchaser actions:

> The class, if certified, would likely be immense, numbering in the hundreds of thousands. While the size of the class and other factors certainly suggest that joinder would be impracticable and that a number of the factors favoring certification in *MCR 3.501(A)(2)* exist, the paradox we have discussed makes the many variations between class members problematic when it comes to proving actual damages. In short, this case has all the hallmarks of being unmanageable. Dr. **[*642]** Leffler's methodologies, even if they were to work with respect to small, well-defined subclasses that group class members by a very few strongly unifying characteristics, will essentially require separate trials to determine the different pass-on rates affecting the class as a whole. *MCR 3.501(A)(2)(c)* suggests that when a proposed class action is unmanageable, a trial court should deny class certification. Though the trial court was willing to accept the task of handling a case this large and complex, we are left with the definite feeling that it made a mistake when it concluded that the plaintiffs had a satisfactory method of demonstrating that a class action was the superior form of adjudicating this dispute.[10]

In sum, while indirect purchaser cases are a crucial part of the private enforcement regime – and can and do succeed on behalf of victims of anticompetitive conduct despite the roadblocks that many courts unfortunately have placed in their way – they cannot, by themselves, substitute for direct purchaser actions. Therefore, by making direct purchaser class certification far more difficult, overturning *Hanover Shoe* would undermine antitrust enforcement more generally.

Indeed, courts have long recognized that class actions play a pivotal role in punishing, and thereby deterring anticompetitive conduct. The Supreme Court itself noted that private antitrust actions are "a bulwark of anti-trust enforcement."[11] The Supreme Court further

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[7] *See, e.g., City of St. Paul v. FMC Corp*., No. 3-89-0466, 1990 WL 259683 (D. Minn. Nov. 14, 1990).

[8] *See, e.g., Fischenich v. Abbott Labs., Inc.*, No. MC 94-6869 (Minn. Dist. Ct. May 26, 1995).

[9] 654 N.W.2d 572 (Mich. Ct. App. 2002).

[10] *Id.* at 641-42.

[11] *Perma Life Mufflers v. International Parts Corp.*, 392 U.S. 134, 139 (1968). *See also Pillsbury Co. v. Conboy*, 459 U.S. 248, 262-63 (1983) ("This Court has emphasized the importance of the private action as a means of furthering the policy goals of certain federal regulatory statutes, including the federal antitrust laws.") (citations omitted).

observed that class actions are an important tool in enforcing the antitrust laws.[12] As one district court recently stated:

> The allowance for treble damages in antitrust actions was designed to encourage private enforcement of the antitrust laws by offering generous recompense to those harmed by the proscribed conduct and simultaneously to erect a deterrent to those contemplating similar conduct in the future. . . Courts have noted that class actions are a particularly appropriate mechanism for achieving such enforcement . . . , and, therefore, courts resolve doubts in favor of certifying the class.[13]

Finally, overturning *Hanover Shoe* would weaken antitrust enforcement by eliminating a critically effective tool: overcharge damages unaffected by a "pass on" defense. The Third Circuit recently reaffirmed the importance of the very mechanism that the AMC proposes to eliminate:

> "Lost" profits damages are disfavored, at least in part because they are more difficult [*375] to prove than overcharge damages. *See* ABA Section of Antitrust Law, supra, at 171 ("The overcharge measure has the virtues of conceptual simplicity [**28] . . . and relative ease of calculation."); Roger D. Blair & William H. Page, "Speculative" Antitrust Damages, 70 Wash. L. Rev. 423, 433-34 (1995) ("Overcharge damages . . . were recognized by the Supreme Court [in *Chattanooga Foundry*] primarily because of the difficulty of proving lost profits in price-fixing cases. **Rather than require the complex netting associated with lost profits, and thus practically deny recovery, the Court permitted plaintiffs to prove damages by showing a price enhancement."); Harrison, supra, at 756 ("The advantage to plaintiffs of using a gross overcharge measure is that it is less speculative and therefore easier to prove than lost profits.").**
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> Furthermore, overcharge damages, unlike lost profits, may induce antitrust plaintiffs to make arguments that will protect rather than injure consumers. See Frank H. Easterbrook, Treble What?, 55 Antitrust L.J. 95, 96-97, 100-01 (1986). Judge Easterbrook argues that the overcharge to consumers, not lost profits, "should be the basis of all [antitrust] damages." Id. at 101. He reasons that the lure of damages for lost profits induces firms to [**29] make arguments that will injure rather than protect consumers. Profits get lost primarily from hard competition or from the elimination of monopoly. . . . The more competitive the

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[12] *See Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 266 (1972) ("Rule 23 of the Federal Rules of Civil Procedure provides for class actions that may enhance the efficacy of private [antitrust] actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture.").

[13] *In re Carbon Black Antitrust Litig.*, No. 03-10191-DPW, 2005 U.S. Dist. LEXIS 660, at *44 (D. Mass. Jan. 18, 2005) (internal quotes and citations omitted). *See also In re Vitamins Antitrust Litig.*, 209 F.R.D. 251, 258 (D.D.C. 2002) (observing that "class actions play an important role in the private enforcement of antitrust actions"); *In re Lorazepam and Clorazepete Antitrust Litig.*, 202 F.R.D. 12, 21 (D.D.C. 2001) (noting "long ago the Supreme Court recognized the importance that class actions play in the private enforcement of antitrust class actions").

> market, the more profits are 'lost.' . . . [Because] it is hard to tell competition apart from exclusion, [] we must be wary of remedies that give the victims of hard competition a strong incentive to sue.[14]

In sum, the AAI believes that this proposal is, effectively, a "solution" in search of a problem. Because overturning *Hanover Shoe* would impede antitrust enforcement and deterrence, AAI opposes this "reform."

a. Is a provision that would allow removal of state indirect purchaser actions necessary or desirable, in light of the generally applicable removal provisions contained in the Class Action Fairness Act?

AAI Working Group's Comment:

The AAI believes it is premature to contemplate radically altering the landscape for private antitrust actions given that the vast majority of indirect purchaser cases will now be coordinated or consolidated in a single federal court under the Class Action Fairness Act (CAFA). There is inadequate experience under CAFA to reach any conclusions about it; Congress likely would not be impressed that there is any urgency for further revising this area of law at this time.

Indeed, in the extremely unlikely event that CAFA did not apply to an indirect purchaser action, a single state presumably would have a very strong interest in the dispute, and the AAI is opposed to legislation that would allow for removal under such circumstances.

b. Is preemption of state indirect purchaser actions necessary or desirable if state indirect purchaser actions may be removed to federal court?

AAI Working Group's Comment:

The AAI is strongly opposed to any changes in federal law that would result in preemption of state indirect purchaser remedies (for the reasons set forth in the June 17, 2005 Comments of the AAI Working Group on Remedies). No empirical evidence was presented to the AMC demonstrating the need for preemption, although several Commissioners clearly recognized the political desirability of speaking about "removal" rather than "preemption." In the absence of a pressing empirical case for expanding federal power at the expense of the states, we understand their sensitivity.

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[14] *Howard Hess Dental Laboratories, Inc. v. Dentsply Int'l, Inc.*, 424 F.3d 363, 374-75 (3d Cir. 2005) (emphasis added).

Despite the obstacles these cases sometimes face, indirect purchaser actions nevertheless play an important role in promoting deterrence and compensating injured parties, and should not be eliminated or preempted. In the prescription drug industry, to take one recent example, indirect purchaser actions have recovered hundreds of millions of dollars on behalf of consumers and end-payors overcharged by drug company efforts to stifle competition.

c. Should the Commission also recommend to Congress that courts be required to use structured proceedings to resolve purchaser claims? Those proceedings would resolve liability in the one phase, determine total damages in another, and allocate damages among direct and indirect claimants in a separate phase. Would structured proceedings work better if courts could combine certain of the proceedings, especially liability and total damages, in appropriate cases in the exercise of their discretion?

AAI Working Group's Comment:

As set forth above, AAI strongly opposes any proposal that would legislatively overturn *Hanover Shoe*. There is no sound empirical evidence that the current enforcement scheme results in the over-deterrence of violations of the antitrust laws. If anything, just the opposite is true. Accordingly, in AAI's view, a radical legislative overhaul to "fix" a non-existent problem which would weaken private enforcement is unwarranted and unwise.

If the Commission nevertheless recommends, despite a lack of empirical justification, that Congress overrule *Illinois Brick* and *Hanover Shoe*, it would be imperative that the Commission also think through and propose a practical means for private enforcement of the antitrust laws by private parties, especially classes of purchasers. Otherwise the law will fail to deter illegal conduct and compensate victims. The Working Group therefore proposes below the outlines of what could become, after careful study, analysis, and review, a possible form of "structured proceedings" that might serve to ameliorate *some* of the drawbacks of the AMC's proposal.

If handled correctly, dividing complex antitrust litigation into several stages (or, in appropriate circumstances, combining in one stage the determinations of liability and total damages to all purchaser plaintiffs) might foster some of the goals of deterrence and compensation that are inherent in the current system if set up along the lines described below.

A possible structure is as follows: First, all of the purchasers, direct and indirect, who seek to prosecute an alleged antitrust violation would collaborate on proving liability and damages. The litigation would automatically be treated, in effect, as a class action. All of the

purchasers (who do not opt out) would be bound by the judgment. To the extent that a real and substantial conflict of interest exists between classes of purchasers, different named plaintiffs and attorneys would be selected to represent each class. The purchasers as a group would be entitled to recover three times the overcharge to direct purchasers, one of the current measures of damages under federal antitrust law. After liability and the total amount of damages has been determined, presumably by a jury, the different classes of purchasers would then litigate over the allocation of the damages. Defendants would not participate in this allocation stage of the litigation. At this stage, the court would take into account the pass on, if any, at each level of distribution. If the direct purchasers passed on all of the overcharges, they would not be entitled to any recovery; if they absorbed all of the overcharge, they would be entitled to all of the damages; if they absorbed some of the overcharge, that would dictate the proportion of the overall damages to which they are entitled. A similar analysis would apply to each class of purchasers.

A couple of points are worth making about this approach at the outset. First, although all of the purchaser victims would attempt to collaborate on proving the total market overcharges, they might not reach perfect agreement. Different purchaser classes might put forward different theories about how to measure damages, and the finder of fact would be free to choose among the theories. Second, if the plaintiffs prevail on liability and damages, the defendant or defendants would have no further role in the litigation. They simply would deposit the damages they are obligated to pay. The final stage of allocating funds among different purchaser plaintiffs need not involve any defendant at all. In that stage, and only that stage, the assessment might be done of the extent to which any overcharge was passed on by any purchaser or class of purchasers. Third, assuming the actions are closely enough related to be consolidated, the defendant or defendants would get the benefit of the resolution of liability and damages under federal antitrust law in a single proceeding. It not only would be efficient, but fair, for plaintiffs to receive the reciprocal benefit of automatically proceeding as, in effect, a class action.

Finally, under this approach, it is essential that total damages be assessed practically and efficiently. That is why AAI suggests making antitrust violators liable for the same overall measure of damages as under current federal antitrust law (such as, *e.g.*, total overcharges at the direct purchaser level). That would minimize the disruption of current legal doctrine, even though it would entail an inadequate compensation for indirect purchasers whose damages in

theory should include intermediary mark-ups that were foreseeable by the defendant. Because of the inadequacy of this compensation, among other reasons, overruling *Illinois Brick* and *Hanover Shoe* should not result in preemption of state antitrust laws.

d. To what extent would the legislative overruling of Hanover Shoe *create new challenges in the process of certifying appropriate classes of claimants? Can any such challenges be resolved fully through the structured approach suggested in (c) above?*

AAI Working Group's Comment:

AAI discussed above some of the problems that would be created by overturning *Hanover Shoe*. However, should the AMC recommend that *Hanover Shoe* be overruled, it must adjust the current class action regime to maintain effective private antitrust enforcement. One possible approach would be to work with the AAI's proposal for structured litigation, and thereby obviate the need for certain onerous aspects of current class certification practice entirely.

The new approach would give defendants the benefit of the resolution of all claims through a single action in a single court. In these circumstances, there should be no need to go through the full process of class certification at the outset of litigation. There would be no need, for instance, to establish that predominantly common evidence is available to prove that each "class member" was injured (or most were injured) by the anticompetitive conduct because all potentially injured purchaser parties would be before the court, and the damages permissible would be the overcharge to all of those parties in the aggregate. Questions about whether only one, or dozens, or each class member was injured by the conduct are not particularly pertinent to the first two stages of the structured litigation (liability and total damages). And, because those are the only stages in which the defendants would participate, the predominance requirement of Rule 23(b)(3) of the Federal Rules of Civil Procedure with regard to proof of impact could be eliminated entirely (or substantially reduced as a focus of class action practice), promoting judicial efficiency and preventing meritorious cases from being side-tracked on procedural grounds.

Instead, once the court determines that a case involves the kind of complex antitrust litigation that warrants consolidation of all related purchaser actions in a single federal district court for pre-trial and trial proceedings, and that efficiencies would be gained by dealing with all of the actions in a single case (due perhaps to common issues in all of the cases with regard to

proof of liability), it should treat the action as representative. The court could use some of the same standards and reasoning that the Judicial Panel on Multidistrict Litigation uses to decide whether to send all pending cases to a single jurisdiction.

After determining this threshold issue, the question then should not be whether the litigation proceeds as a class or with classes, but only who should take the lead in prosecuting the action. The court should accept applications for lead counsel for the different classes or subclasses of affected purchasers, ensure the adequacy of the named plaintiffs and class counsel, provide appropriate notice to the class or classes, and permit opt outs, as under current class certification practice.

Counsel for the classes and for any individual plaintiffs should be permitted to present one or more theories of liability and damages at trial, cooperating to the extent possible. As discussed above, liability and damages to purchasers and/or victims as a whole may be assessed in separate stages or in a single stage. Once these matters are determined, a judgment should be entered in the action that ends the participation of the defendants at the trial level. (All defendants would, of course, retain the appellate rights they currently possess.) Counsel for the various classes of plaintiffs and for individual plaintiffs could then adjudicate allocation of the damages between the classes and individual plaintiffs. Settlement should be possible at each stage, subject to court approval. Class counsel and individual counsel should be compensated as under current law. Thus, the core rules governing class litigation should remain in place (albeit with many of the more onerous roadblocks removed).

By correcting for some of the possible class certification and damages problems that would arise if Congress were to overturn *Hanover Shoe*, the AAI's proposal would at least partially ameliorate some of the problems for antitrust enforcement that the AMC's proposed reform would create.

Closing Thoughts

In closing, it must be understood that the AAI's proposal: (a) is offered *only* as a way of addressing the deleterious effects of overturning *Hanover Shoe*, and *not* as an endorsement of such action; in fact, AAI *opposes* legislative overturning of that venerable Supreme Court case; (b) represents merely the outlines of what must be a more detailed, fully formed set of procedural and substantive rules and practices to govern the new world of private antitrust enforcement that the AMC's proposal would herald. As is clear from the discussion above, replacing more than

forty years of precedent inherent in the current private enforcement regime would require extensive study and careful planning.

For instance, a staged process might introduce untold inefficiencies and introduce undue delay into the process, which itself could weaken enforcement. Also, such a procedure, if not correctly handled, could impinge on the right to have the same jury hear evidence of liability and damages. One other concern with this approach is that it does not permit indirect purchasers to recover for any reasonably foreseeable "mark ups" passed on down the chain of distribution, a problem that might result in under-compensation and under-deterrence. Finally, we are concerned that in a post-*Hanover Shoe* world, there would not be sufficient incentive in certain cases for direct purchasers to pursue their portion of any overcharge.

In sum, we note that the AMC held no hearings and, until now, to our knowledge, sought no input on replacing the private enforcement regime that has developed around *Hanover Shoe* and its progeny. Should the AMC wish to pursue a private enforcement mechanism to replace the one in existence, the AAI would be pleased to offer any assistance that the AMC believes would be useful to that major undertaking.

AMC Topic No. 2:

> *The Commission is evaluating a proposal to alter the circumstances in which treble damages are awarded to successful antitrust plaintiffs. The proposal would provide as follows:*
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> *The court, in its discretion may limit the award to single damages based on consideration of the following factors:*
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> *a. whether the violation was per se or rule of reason;*
> *b. whether the violation involved single-firm or multi-firm conduct;*
> *c. whether the violation was related to an otherwise pro-competitive joint venture;*
> *d. the state of the development of the law with respect to the challenged conduct as an antitrust violation;*
> *e. whether the challenged conduct was overt or covert;*
> *f. whether the challenged conduct was criminal;*
> *g. whether there has also been a related government action;*
> *h. whether it is a competitor that is alleging the conduct was anticompetitive; and,*
> *i. whether the violation was proven by clear and convincing evidence.*

Should the Commission recommend such reform to Congress? Should any of the factors listed above be removed? Are there any other factors that should also be included?

AAI Working Group's Comment:

Virtually all of the witnesses at this Commission's hearing on civil remedies observed that the antitrust laws as a whole, including the remedy of treble damages, do *not* adequately deter illegal conduct. Despite increases in criminal enforcement, "firms continue to find it profitable and rational to violate the antitrust laws."[15] No one testifying at any of the hearings or submitting comments to the AMC presented *any* empirical evidence that the current regime has resulted in over-deterrence, windfalls for plaintiffs, or has thwarted desirable economic conduct.[16] What, then, is the "problem" that needs "correcting"?

It seems to us that those who would replace the reliable certainty of treble damages with an uncertain and unpredictable multi-factor mélange should be required to satisfy a high standard of proof that there is a real problem requiring correction. Simple theoretical, personal or ideological dissatisfaction should not be enough.

In fact, in light of the evidence of under-deterrence, it is our conclusion that the AMC's proposal – if enacted – would promote, rather than deter, illegal conduct and recidivism, while simultaneously decreasing the incentives for victims to pursue antitrust claims. Further, the proposal fails to consider off-setting changes in other aspects of antitrust law that would be necessary to avoid unfairness to victims and to continue incentives at the corporate level to follow the law. For example, as David Boies stated in his testimony before the Commission, any proposal to change the treble damages remedy also must consider imposing mandatory prejudgment interest, extending the statute of limitations, permitting a broader range of damages (including those currently considered to be speculative) to compensate fully the injured parties and to deter parties from violating the law, and changing the substantive rules that have

[15] *See Written Testimony of David Boies Before the Antitrust Modernization Comm'n, July 28, 2005 Hearing on Civil Remedies Issues: The Continuing Need for Treble Damages*, at 11 (2005), *at* http://www.amc.gov/commission_hearings/civil_remedies_issues.htm [hereinafter Boies Statement].

[16] In its initial comments to the AMC in June 2005, the AAI set forth the reasons why the current treble damages regime is crucial to the effective enforcement of the antitrust laws. One year later, following numerous proceedings before the AMC, the AAI continues to maintain that there should be no recommendation to Congress that alters the circumstances in which treble damages are awarded to successful antitrust plaintiffs.

developed to restrict damages.[17] Without careful study and consideration of whether these (or any other) remedies can fully compensate for the elimination of treble damages, however, it would be unwise simply to substitute them for the treble damages remedy.

Making the treble damages remedy discretionary will create numerous practical difficulties as each court applies multi-factored tests and differing standards. There currently is no workable standard for differentiating among different categories of antitrust violations (nor has one been proposed) that could result in a consistent approach to discretionary trebling. In addition, placing this determination in the hands of the judge rather than the jury would raise serious questions under the Seventh Amendment.[18] If some form of the AMC proposal were enacted, the determination of whether to award treble damages properly should be made by the jury.

Further, eliminating the certainty of treble damages likely would engender unintended consequences, including providing antitrust defendants with greater incentive to risk violations, providing antitrust plaintiffs with inadequate incentives to pursue valid claims, or increasing the likelihood that plaintiffs would choose to pursue pendant state law claims rather than federal claims. This would only complicate and lengthen antitrust proceedings.[19]

Another inevitable consequence of the proposed regime is that the uncertainty it would create ultimately would reduce the number of valid cases prosecuted as attorneys become reluctant to invest in cases on a contingent basis because, although otherwise meritorious, the cases are too difficult or are insufficiently rewarding. **Without contingent fee representation, there will be fewer private plaintiffs in antitrust cases, thus eliminating a primary deterrent to wrongful conduct and leaving the victims of violations uncompensated.**

The many factors the AMC lists as potential determinants on the issue of whether a court should limit an antitrust award to single damages are unworkable because they will add complexity to antitrust enforcement and will result in inconsistent rulings and piecemeal

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[17] *See* Transcript of Antitrust Modernization Commission Public Hearing, July 28, 2005, at 23-24 (testimony of David Boies), *at* http://www.amc.gov/commission_hearings/civil_remedies_issues.htm. [hereinafter "7/28/2005 Hearing Transcript"].

[18] *See Antitrust Modernization Comm'n Hearing Regarding Civil Remedies Issues (July 28, 2005), Written Testimony of Stephen D. Susman Regarding Treble Damages, Attorneys' Fees and Prejudgment Interest*, at 10 (2005), *at* http://www.amc.gov/commission_hearings/civil_remedies_issues.htm. [hereinafter "Susman Written Testimony"]

[19] *See id.* at 10-11.

litigation. Indeed, the proposal as drafted ignores the enormous benefits of certainty in counseling clients. Currently, lawyers counsel their clients that they will pay treble damages if they violate the antitrust laws. If the imposition of treble damages depends on the discretionary application of nine new and untested factors, however, the deterrent impact of the advice will diminish markedly. Counseling clients can provoke tensions between a client's focus on achieving a certain result and a lawyer's obligations to the legal profession and the law. In this setting, the certainty of exposure to treble damages provides the lawyer a valuable tool in aiding and persuading the client to conform its conduct to the law. Replacing such certainty with a new, nine-factor test would undermine the lawyer's position, as clients would expect that their counsel could (and should) be able to take advantage of the uncertainties and ambiguities inherent in any multi-factor test to their benefit.[20] Put another way, any competent lawyer, if asked, could use the proposed factors to argue against treble damages.

Deterrence depends, in part, on the *certainty* of punishment. Eliminating such certainty, as the AMC proposes to do, therefore would lessen deterrence, as few companies would be convinced that they would, at the end of the day, have to pay treble damages. Here again, despite numerous hearings before the Commission and submissions to it, no solid, verifiable evidence has been presented showing that the nation faces a problem of too much deterrence. Stray anecdotes to the contrary do not come close to justifying such a dramatic change in antitrust law.

AAI Working Group's Comment on the AMC's Proposed Factors:

a. Whether the violation was per se or rule of reason.

Making treble damages discretionary for rule-of-reason violations would lead to less deterrence than currently exists, would be more complicated, and, because of the uncertain line between *per se* and rule-of-reason antitrust violations, would lead to less business certainty.[21] Further, rule-of-reason violations, just like *per se* violations, cause harms in addition to the higher prices they force consumers to pay, such as allocative inefficiency and umbrella effects.[22]

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[20] Nothing in the proposal, for example, explains which, if any, factors are more important than others; or whether a certain number of factors must be present to eliminate treble damages; or what happens if different factors point in different directions (a very likely outcome).

[21] *See* Robert H. Lande, *Five Myths About Antitrust Damages*, 40 U.S.F. L. REV. (forthcoming July 2006).

[22] *Id.*

The rationale underlying the treble damages remedy applies in rule-of-reason cases just as it does in *per se* cases. The law provides for award of multiple damages at least in part to compensate for the difficulty in detecting antitrust violations and in proving that the conduct at issue is anticompetitive. While rule-of-reason violations on average may be easier to detect than *per se* violations (which often are covert), they are much harder to prove, thus justifying the same multiplier for both kinds of cases.

Indeed, it is possible that treble damages are even more important in rule-of-reason cases than they are in *per se* cases.[23] In addition to the goal of deterrence, the treble damages remedy also serves to provide an incentive for private litigants to investigate and prove violations. Rule-of-reason cases are risky, protracted, and expensive. Abolishing treble damages in rule-of-reason cases or making them discretionary likely would decrease the number of plaintiffs willing to prosecute such actions, would decrease the number of such cases, and would increase the incidence of rule-of-reason violations as defendants determine that the risks of being sued are insufficient to outweigh the benefits of their anticompetitive conduct. This would severely undermine rule-of-reason antitrust enforcement.[24]

Letting judges decide whether damages will be trebled at the end of trial would affect significantly lawyers' incentives to undertake rule-of-reason cases on a contingency basis. As the risk/reward ratio becomes more uncertain and decreases dramatically, the number of plaintiffs with legitimate complaints who cannot secure effective legal representation will increase.[25] This is undesirable for several reasons, including the likelihood that such a regime would lead to lower settlement rates.[26] And because criminal penalties are irrelevant in rule-of-reason cases (whereas they may supply some measure of deterrence in *per se* cases), there would be no chance of achieving the full measure of optimal deterrence in rule-of-reason cases.[27]

b. Whether the violation involved single-firm or multi-firm conduct.

Conduct by a single firm that has a significant market share can damage markets and harm consumers as much as cartel conduct. The threat of treble damages as a deterrent to

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[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.* (citing Steven C. Salop & Lawrence J. White, *Economic Analysis of Private Antitrust Litig.*, 74 GEO. L.J. 1001, 1022-23 (1986)).

[27] *Id.*

engaging in such anticompetitive conduct thus is as important and as appropriate as treble damages for cartel conduct.

c. Whether the violation was related to an otherwise pro-competitive joint venture.

The fact that a joint venture arrangement may have passed muster with the FTC or DOJ because it has pro-competitive aspects does not warrant a blanket rule absolving such arrangements from treble damages when the joint venture later violates the antitrust laws. Although joint ventures may be more transparent given the scrutiny that occurs during the formation process, they also may conceal conduct lacking any consumer benefit and conduct threatening enormous damage to the economy. There is no justification for reducing damages in such instances.[28]

d. The state of the development of the law with respect to the challenged conduct as an antitrust violation.

Based on the available record, it is not clear what courts would consider under this factor. The AAI notes, however, that Congress already has enacted statutes that eliminate treble damages in particular situations so as to protect some potentially pro-competitive conduct (*e.g.*, the National Cooperative Research Act for joint ventures) or to provide incentives to firms that are engaging in cartel activity to report such conduct earlier rather than later (*e.g.*, the Antitrust Criminal Penalty Enhancement and Reform Act). With statutes such as these in place, there is no need to eliminate the treble damages remedy or to give courts discretion to award single rather than treble damages.

Further, it is obvious that while international cartel activity is increasing, there is little cartel enforcement in many areas of the world. The U.S.'s treble damages remedy is one of the few significant deterrents to such activity, and the U.S. Supreme Court (in *Empagran*) already has rendered that remedy less forceful. Further reduction of the threat of treble damages in the manner proposed will only increase the economic incentives for international cartels to violate the law. And, given that other nations have looked to the U.S. antitrust enforcement system as a model for improving their own enforcement regimes, any reduction in the U.S. private

[28] *See* 7/28/2005 Hearing Transcript, *supra* n.17, at 163-64 (Judge Easterbrook stating that most joint ventures are "not concealable. But the things that make them antitrust problems may be concealable; that is, there may be a productive integration, coupled with some hidden stuff – and if it's the hidden stuff that's involved, you certainly don't want to reduce damages.").

enforcement arsenal would send an additional undesired message to cartel participants (that they can feel free to violate the law) and enforcement officials (that cartels are not a problem).

e. Whether the challenged conduct was overt or covert.

This factor would inject further uncertainty into the damages analysis, as it fails to acknowledge that some conduct may be generally overt, but still may have aspects that are anticompetitive and that have been concealed, that are devoid of any consumer benefit, or that pose enormous potential damage to the economy. One example of this is the area of joint ventures, which Judge Easterbrook discussed during the AMC's panel on joint and several liability. He noted that such arrangements generally are overt to the extent that they are scrutinized at formation by the FTC or the DOJ, but may engage in anticompetitive conduct that was not revealed to the agencies or that developed over the course of the joint venture.[29] Such hybrid situations increase the complexity of the case, and because the covert conduct potentially is as serious as naked cartel behavior, there should be no reduction in damages.

f. Whether the challenged conduct was criminal.

As David Boies noted in his written testimony for the AMC, despite extraordinary increases in criminal enforcement, firms continue to find it profitable and rational to violate the antitrust laws.[30] Treble damages thus serve an important role in providing additional deterrence. Eliminating treble damages except for conduct deemed criminal (*see* Topic No. 4) will only encourage continued violations and recidivism. This is particularly true in the international context. Because there are relatively few countries that impose fines or damages for antitrust violations, many international cartels are willing to pay a penalty in the U.S. while they continue to overcharge the rest of the world. Further, as we noted in our July 2005 comments to the Commission, the current regime, even with the addition of criminal fines, rarely results in defendant payouts approaching the true threefold level.[31]

g. Whether there has also been a related government action.

Eliminating treble damages in civil cases that follow government enforcement actions would decrease civil enforcement of the antitrust laws significantly, because civil plaintiffs

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[29] 7/28/2005 Hearing Transcript, *supra* n.17, at 163-64.

[30] Boies Statement, *supra* n.15, at 11.

[31] *Comments of the American Antitrust Institute Working Group on Remedies*, at 3 (June 17, 2005), *at* http://www.amc.gov/commission_hearings/civil_remedies_issues.htm. [hereinafter "AAI Comments"]

would lose an important incentive to prosecute these highly complex and protracted cases.[32] As panelist Harry Reasoner testified, the government's resources for prosecuting the antitrust laws are more severely limited than ever before, given the increasing internationalization of our economy.[33] These limited resources result in inadequate enforcement, a gap that only private civil cases can fill. Private litigants can and have supplemented successfully government enforcement efforts, as we discussed in our June 2005 comments,[34] but their incentive to do so would decrease dramatically if they faced complex and protracted antitrust litigation with no prospect of treble damages.

Further, as many of the Commissioners and AMC witnesses observed during the hearings (along with public comments to the AMC; *see, e.g.*, submissions by John M. Connor), cartels are difficult to detect. While the government is often the best source of detection because of its subpoena and related investigatory powers, there is no doubt that private plaintiffs also play a role in detecting cartels and are instrumental in prosecuting actions for which the government lacks resources. Detrebling for follow-on lawsuits also likely would decrease a wrongdoer's incentive to participate in the amnesty program, which in turn would delay significantly the ultimate resolution of these cases. As Stephen Susman testified, the availability of treble damages in follow-on cases may serve as an important deterrent to potential violators.[35]

Beyond these obvious negative effects on deterrence and incentives to detect and prosecute antitrust violations, however, is the basic problem of how to determine whether a particular private action really is a follow-on to a government enforcement action.[36] The government often will investigate possible anticompetitive behavior, shelve the investigation for a long period, and then re-open it. In the meantime, private counsel may be conducting their

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[32] It simply is not true (as some contend) that little work need be done in civil cases following a guilty plea. The plea is admissible in the civil case but is not conclusive with regard to the defendants' liability. Civil plaintiffs still must prove their case, both as to liability and as to damages. The government's evidence is not made available to the civil plaintiffs, so the guilty plea does not dispense with the need for pretrial discovery.

[33] 7/28/2005 Hearing Transcript, *supra* n.17, at 122 (stating also that "the stimulation – or at least not creating barriers to legitimate private actions, ought to be a critical goal of this Commission.").

[34] AAI Comments, *supra* n.31, at 4 (noting also that victims of cartel conduct have led the way to enforcing the antitrust laws in numerous high-profile cases such as *Brand Name Prescription Drugs* and *NASDAQ*).

[35] 7/28/2005 Hearing Transcript, *supra* n.17, at 29.

[36] Private cases arguably could be characterized as "follow-on" actions if: (a) the private action was filed after the defendants were convicted or pled guilty; (b) the private action was filed after a government case was filed; (c) the private action was filed following public rumors of a government investigation; or (d) the private action was filed after the government investigation started.

own investigation, which may uncover evidence not previously known to the government and which may or may not prompt the government to re-open its investigation and institute an enforcement action. Because the government does not provide access to its files or discuss the origin of its cases, it often is extremely difficult to determine whether its action arose from its own investigation or private counsel's.

A prime example of the potential problems inherent in this inquiry lays in the *Vitamins* cartel cases, which illustrate how difficult it would be to determine whether many particular cases truly are follow-on cases.[37] The determination likely would require its own trial. And since private counsel could not know in advance what the results of this trial would be, their incentives to investigate cartels vigorously would be undermined. This result is undesirable.

h. Whether it is a competitor that is alleging the conduct was anticompetitive.

If a plaintiff has standing to sue under the antitrust laws, the issue of whether or not to award treble damages should not turn on the relationship of the plaintiff *vis á vis* the defendants. Rather, the focus should be on fair compensation for the victims of anticompetitive conduct and what will deter the wrongdoer. Automatic detrebling for competitor plaintiffs results in a remedy that likely would fall short of fair compensation and optimal deterrence, and would reward the wrongdoer (thus also encouraging recidivism).

The issue is not whether a competitor was injured, but whether competition was injured. In many cases, however, it is the injury to a competitor that is the injury to competition. It would make no sense to create a special set of less stringent rules to apply to injured parties who happen to be competitors of the malfeasor.

i. Whether the violation was proven by clear and convincing evidence.

The purported rationale for changing the burden of proof for civil antitrust actions is that the treble damages remedy is analogous to tort remedies. But antitrust violations are not torts, which generally are private matters between two people. Antitrust violations affect entire

[37] Professor John M. Connor provided a detailed analysis of the events leading to the private and government actions, ultimately giving private counsel full credit for uncovering the first solid evidence of collusion. *See* John M. Connor, *The Great Global Vitamins Conspiracy: Sanctions and Deterrence*, Draft of 2/14/06, *available at* http://www.antitrustinstitute.org. Although the prefiling history is complex, however, it is clear that both private counsel and the DOJ were on parallel tracks, discovered much of the critical evidence at around the same time, and that each group's investigations assisted that of the other.

markets and cause far-reaching damages.[38] Given the complexity of antitrust cases and the significant substantive obstacles to civil plaintiffs obtaining meaningful recovery under current law (including the well-defined and narrow substantive liability standards and courts' willingness to dispose of weak claims on motions to dismiss or for summary judgment[39]), requiring a higher standard of proof to obtain treble damages would decrease incentives for victims to sue and embolden defendants to engage in anticompetitive conduct. Further, the current enforcement regime already imposes a higher burden of proof for the most serious antitrust violations through criminal prosecutions. Raising the threshold for civil actions in light of the other, numerous obstacles facing civil enforcers thus is neither necessary nor desirable.

AMC Topic No. 3:

> *Should the Commission recommend to Congress that courts in their discretion be permitted to increase the damages multiplier above three? For example, should courts be able to increase the multiplier above three where the conduct has significant effects outside the United States for which treble damages will not be paid?*

AAI Working Group's Comment:

AAI would oppose a scheme that gave judges discretion to increase the antitrust multiplier if the plan includes discretion to also decrease, or eliminate, the multiplier, as proposed in Topic No. 2. AAI believes that taking away the certainty of treble damages will result in further under-deterrence of antitrust violations, will decrease the incentive of victims to prosecute antitrust claims and will increase violators' incentive to continue and repeat their illegal conduct. These effects would not be mitigated by giving judges the additional discretion to increase the multiplier. That possibility simply would be too uncertain to overcome the negative effects of detrebling on deterrence and compensation.

The testimony of David Boies, referred to in the comment to Topic No. 2, is relevant to this point as well. If the antitrust laws are to provide effective incentives against corporate misbehavior and sufficient compensation for victims, any changes in the treble damage formula must be accompanied by other significant changes in antitrust jurisprudence. These include adding mandatory prejudgment interest, extending the statute of limitations, permitting a broader

[38] 7/28/2005 Hearing Transcript, *supra* n.17, at 46 (R. Lande response to questions from the Commission).

[39] *See* Susman Written Testimony, *supra* n.18, at 4-5.

range of damages to ensure full compensation, and changing current restrictive rules on damages.

AMC Topic No. 4:

> *The Commission is evaluating a proposal to change the current regime regarding private antitrust actions. The proposal would provide as follows:*
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> *a. In all matters where the government institutes criminal proceedings and obtains a guilty verdict by plea or trial, all unlawful gains made by the defendants and pre-complaint and prejudgment interest thereon shall be disgorged in that proceeding, together with such fines as may be provided by law and a civil penalty of 200% of the amount disgorged.*

AAI Working Group's Comment:

The AMC proposal is not entirely clear, but as we understand it, the AMC proposes to *eliminate entirely* the right of private plaintiffs to sue defendants for antitrust violations "where the government institutes criminal proceedings and obtains a guilty verdict." That is, the AMC proposes to prohibit private suits under these circumstances, apparently (we assume) because private plaintiffs would be compensated to some extent through the disgorgement remedy proposed.

The AMC proposal is radical. It would provide the worst offenders (those guilty of criminal conduct) with immunity from private lawsuits. Even if all "unlawful gains" were disgorged (putting aside for the moment such vital questions as how a resource-stretched government without private incentives would ensure that the amount disgorged was maximized), it is simply *not* the case that the injuries to purchasers from an antitrust violation equal the incremental gain to defendants. To the contrary, the harm can and typically does *greatly exceed* the incremental unlawful gain. How would this shortfall be made up to the victims? The AMC does not say.

AAI strongly opposes such a radical change in the calculation and imposition of damages on antitrust violators. Where is the evidence that such a dramatic change is needed or justified? **The practical effect of the proposed change would be to reduce dramatically the amounts that companies engaging in the most egregious antitrust violations are required to pay their victims.** The proposed changes would apply only in cases where the Justice Department elects to pursue a criminal prosecution and obtains a conviction. By definition those are more

egregious cases than the ones which are declined for prosecution, or not considered at all. It makes no sense from any enforcement perspective to adopt changes that would result in greater leniency for those who commit egregious criminal violations than for others who violate the antitrust laws.

Under the AMC proposal, civil damages would be a function of the amount of "unlawful gains made by the defendants." The measure of civil damages presently is the amount of damage caused by the defendants' unlawful conduct, not the amount of the incremental profit earned by the defendants. Routinely the damage caused exceeds the net profit gained by the defendants. Changing the standard from damages (caused the plaintiffs) to unlawful gains (enjoyed by the defendants) would reduce the economic cost of illegal conduct, and would do so only in the most egregrious cases – those which result in criminal convictions. We know of no reasoned basis for doing so.

Even if the defendant were required to disgorge an amount equal to the damages caused by the unlawful conduct, under Proposal #4(a) the determination of that amount apparently would be made by the sentencing judge unless agreement were reached in a plea bargain between the Justice Department and the defendant.

Determining the amount of damages inflicted by antitrust defendants' unlawful conduct is a difficult, time-consuming, and complex process that accounts for a significant portion of the litigation that presently takes place in civil antitrust cases. At the outset the defendants control completely the information bearing on the quantification of unlawful gains. In a typical civil case the defendants throw up every possible procedural obstacle to plaintiffs' efforts to obtain that information from the defendants' files and personnel. At the end of what is commonly several years of pretrial discovery battles, expert reports are submitted by economists who opine as to the difference between the prices actually paid by plaintiffs and the prices they would have paid in the absence of the illegal conduct. These economists typically employ competing estimation methods, such as predictive econometric modeling versus regression analysis, and disagree not only over the method which should be used but also over how each method should be implemented. Typically there is a sizeable gap between the conclusions of the plaintiffs' and defendants' experts. If no settlement is reached, it is up to the trier of fact to decide which expert's opinion makes the most sense. At present, all that is required to support that conclusion is a preponderance of the evidence. If the quantification of damages were made by the

sentencing judge in the criminal case, defendants would argue that it must be proven "beyond a reasonable doubt" (citing *United States v. Booker*, 543 U.S. 220 (2005)). That higher burden of proof undoubtedly would lead the prosecutors to shoot for a much lower target, just as it presently leads the government sometimes to decline criminal prosecution altogether in cases which nonetheless result in sizeable civil recoveries.[40]

Wholly apart from the higher burden of proof, quantification of damages/gains is not a process in which the Department of Justice has been involved in the past. While the DOJ presumably could develop the capability to do what plaintiffs' counsel and experts do to prove up the damages caused by defendants' unlawful conduct, it would require significant new resources and a dramatically changed institutional culture.[41] The government has little incentive to invest resources in battling the defendants over quantification of damages, once it has achieved its primary goal of obtaining a conviction.[42] The practical result of the proposed change is that the dollar amount would likely become a subject of plea bargaining, in which the defendants would have a huge information advantage and a disproportionate incentive to resist agreeing to a number they did not like. In the criminal case arising from alleged price fixing in the DRAM market, one defendant (Hynix) and the government stipulated to an amount that is far lower than the damages the civil plaintiffs are asserting.

The same thing routinely occurs in an analogous (and far less complex) area of proof – the duration of the unlawful conspiracy. It matters a great deal to the defendants if they can get

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[40] A typical example is *In Re Methionine Antitrust Litigation*, C-01-0944-CRB, MDL No. 1311 (N.D. Cal.). While the defendants admitted participating in a price-fixing cartel in Europe, they insisted that even though prices in the U.S. rose and fell in a very similar pattern to European prices, the larger U.S. market had not been rigged. Lacking a whistleblower witness, and uncertain of their ability to prove beyond a reasonable doubt that the cartel operated in the U.S. market, the Justice Department elected not to prosecute. Nonetheless U.S. methionine purchasers recovered overcharges in the hundreds of millions of dollars in private litigation.

[41] There does not appear any public policy need or justification for shifting to the taxpayers the cost of proving damages/gains, which presently is borne by civil defendants and plaintiffs. It would be ironic indeed (and politically controversial) to shift this function from the private sector to the federal government, at a time when a growing number of functions formerly performed by the government are being privatized and contracted out.

[42] It seems unlikely the government would want to burden the criminal sentencing process with complex adversary proceedings over quantifying damages/gains. In one recent sentencing proceeding, the prosecutors explained in the following terms their decision not to seek restitution as part of the criminal sentence: "A number of civil suits have been filed by potential victims against [the defendants]. In light of the pending civil actions and because of the complicated nature and large number of contracts involved, the Government respectfully submits that determining the amount of a victim's losses would complicate or prolong the sentencing process to a degree that the need to prove restitution to any victim is outweighed by the burden on the sentencing process. Accordingly, the Government is not seeking a restitution order in this case." *Gov't Sentencing Mem. and Mot. for Guidelines Downward Departure, United States v. Odfjell Seachem AS, Criminal No. 03-654, at 9 (E.D. Pa. Oct. 16, 2003).*

the government to accept a plea to a shortened period, as the duration of the conspiracy is a significant factor in the calculation of civil damages. It matters little to the government, as long as the plea period is long enough to encompass all the essential participants in the illegal conduct, and to justify the DOJ's recommended sentence and fine.

As an example, in the criminal pleas arising from the bulk vitamins price fixing cartel, the DOJ accepted pleas with respect to nine vitamins for time periods shown in the table below. In contrast, after three years of pretrial discovery, plaintiffs' expert report documented the workings of the cartel with respect to seven additional vitamins and, as to the original nine vitamins, the private plaintiffs established that the conspiracy's duration lasted considerably longer than the DOJ pleas had indicated:

Vitamin	Conspiracy Period According to DOJ Pleas	Conspiracy Period Proved by Private Plaintiffs
Premix	Jan 1991 − Dec 1997	Jan 1991 − Dec 1997
Vitamin E	Jan 1990 − Feb 1999[43]	Jan 1985 − Feb 1999
Vitamin A	Jan 1990 − Feb 1999	Jan 1985 − Feb 1999
Vitamin C	Jan 1991 − Nov 1995	Jan 1985 − Nov 1995
Choline Chloride (B4)	Jan 1988 − Sep 1998	Jan 1988 − Sep 1998
Beta Carotene	Jan 1991 − Dec 1998	Jan 1988 − Dec 1998
Calpan (B5)	Jan 1991 − Feb 1999[44]	Jan 1985 − Feb 1999
Niacin (B3)	Jan 1992 − Mar 1998[45]	Sep 1990 − Mar 1998
Riboflavin (B2)	Jan 1991 − Fall 1995	Jan 1985 − Sep 1995
Biotin (H)	No prosecution	Jan 1985 − Sep 1995
Thiamine (B1)	No prosecution	Jan 1985 − June 1994
Vitamin B12	No prosecution	Jan 1990 − Dec 1997
Pyridoxine (B6)	No prosecution	Jan 1985 − Dec 1994
Carotenoids	No prosecution	Jan 1988 − Dec 1998
Vitamin D3	No prosecution	Jan 1985 − Feb 1999
Folic Acid (B9)	No prosecution	Jan 1991 − June 1994

The differences summarized above correspond to hundreds of millions of dollars of overcharges suffered by purchasers that simply were left out of the criminal plea.

[43] For one defendant, the plea period for Vitamin E began in January 1991.

[44] For two defendants, the plea period for Vitamin B5 ended in December 1998.

[45] There were two additional plea periods for Vitamin B3: September 1994 to March 1998 and January 1992 to July 1995.

In addition, the notion that the amount of damages can easily or quickly be determined as part of the criminal sentencing process is either naïve or disingenuous. With hundreds of millions (and sometimes billions) of dollars at stake, it must be assumed that the defendants will do all in their power to minimize the damages calculation. This is simply not an arena where the Justice Department is well equipped or has the incentive to keep guilty defendants honest. Indeed, the present Sentencing Guidelines presume that the effect of price fixing is equal to 10 percent of the selling price precisely "to avoid the time and expense that would be required for the Court to determine the actual gain or loss."[46] Even if the DOJ obtained the necessary resources and resolve to do it, there is no obvious efficiency gain in substituting the DOJ for private plaintiffs in thrashing out that dispute.

If one believes that deterrence is affected by the expected cost of getting caught, there is little to be said for adopting a new procedure that is likely to reduce the cost of getting caught and thereby reduce the deterrent effect of the antitrust laws.

Even those who argue (without verifiable data) that current rules "over deter" by imposing unfairly high economic risks on "rule of reason" conduct presumably would not apply that argument to cases involving criminal convictions, which by definition involve egregious violations. What problem, therefore, is the AMC proposal intended to "fix"? The antitrust enforcement system employed in this country for the past 100 years has proved to be the most effective in the world at deterring anti-competitive conduct. Many countries are presently trying to emulate the U.S. model by strengthening their own private remedies.[47] We have seen no empirical evidence of a need or justification for moving in the opposite direction in the U.S.

Even if it made sense to shift the quantification of damages/gains from the civil to the criminal proceedings in "follow-on" cases, it is often unclear whether and to what extent civil proceedings have flowed from the government's investigation and prosecution, or vice versa. For example, would Proposal #4 block civil proceedings against *all* cartel participants if *any* one of them was convicted? Would it block civil proceedings with respect to products and time periods that are different from those encompassed by the criminal plea/conviction? How would

[46] U.S. SENTENCING GUIDELINES MANUAL § 2R1.1 cmt. n.3.

[47] *See* Green Paper, Damages actions for breach of the EC antitrust rules (Dec. 19, 2005). *at* http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/gp_en.pdf.

the right of a private plaintiff to allege a *different* time period or a *different* set of products be preserved?

There are other serious unanswered questions. Would Proposal #4 block civil proceedings in a case where a violator was first uncovered by a private plaintiff, and only *later* prosecuted by the Justice Department?[48] If so, that would seriously undermine or eliminate the incentives for private plaintiffs and their lawyers to invest time and money investigating suspicious conduct, thereby weakening a key component of antitrust enforcement – pursuit of treble damages cases by "private attorneys general."

[48] According to several sources, that is precisely what happened in the case of the bulk vitamins cartel. *See* DAVID BOIES, COURTING JUSTICE: FROM THE NY YANKEES V. MAJOR LEAGUE BASEBALL TO BUSH V. GORE 1997-2000, at 226-30 (2004); John M Connor, *The Great Global Vitamins Conspiracy: Sanctions and Deterrence*, Draft of 2/14/06, at 26, *available at* http://www.antitrustinstitute.org.