COMMENTS ON CIVIL REMEDIES PROPOSALS AND TOPICS
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The public expects to enjoy the fruits of a free market, but competition pursued without any restraint can produce harsh results for many, even as it produces technological benefits and prosperity. Measures to take the sting out of competition tend to compromise its vitality; excessive regulatory and enforcement measures will distort competition. The difference between beneficial and harmful competition turns on a fine line that is not susceptible to a precise identification and where that line belongs can depend on one's perspective.

In antitrust jurisprudence the application of basic principles to myriad experiences has given the law its life and attempts at broad comprehensive schemes to anticipate and harness the competitive process have produced numerous unexpected harmful consequences. Prudence and experience counsel against bold measures that impress but interfere with the ability of economic forces to produce balance naturally.

[1] All the comments set forth here are my individual views. I am not offering them on behalf of any clients I have represented.

In formulating recommendations to improve the functioning of antitrust civil remedies, the AMC should concentrate on measures that channel the process rather than attempting to impose a defined structure. The AMC should identify a few well-defined steps that will address specific problems directly, then allow the course of litigation and policy debate to respond as the recommended measures take effect. The AMC probably should be reconstituted after an appropriate period, perhaps ten years, to re-examine the changed antitrust landscape at that time.

SUMMARY

1. Indirect purchaser litigation as conducted today effectively prevents any examination of the substantive merits of the plaintiffs' claims, in particular the element of injury, and imposes pressure on defendants to settle claims regardless of their degree of merit.

2. The procedural conditions in indirect purchaser litigation threaten to alter the fundamental requirement that each plaintiff prove with certainty that the alleged antitrust violations caused him an actual monetary loss.

3. The AMC should recommend adoption of an amendment to Clayton Act § 4(a), 15 U.S.C. § 15(a), that permits any person who proves he suffered an actual injury as a result of the antitrust law violation shown may recover damages based on the actual loss he incurred, without regard to whether it occurred in the course of a direct relationship with the defendant.

4. The AMC should not recommend pre-emption, removal, or consolidation measures at this time because they may not be necessary defending on the effects from

the Class Action Fairness Act and the amendment to Clayton Act § 4(a), and the proposals may generate opposition in Congress and from the states.

5. The AMC should not recommend "structured proceedings" to achieve an allocation of "total damages" because supporting the use of a "total damages" concept contradicts and would undermine the legal standard in Clayton Act § 4(a) that requires each plaintiff to prove the actual losses it incurred as a result of the alleged antitrust violation.

6. The proposals to change the standard for recovery of damages under Clayton Act § 4(a)to single damages or to greater than treble damages do not serve any defined purpose and the effects of such changes cannot be identified so that the AMC cannot determine whether they would be likely to achieve a defined purpose or produce some unintended effects.

7. Committing the determination of whether a plaintiff would recover single, treble or some other multiple of damages would introduce uncertainty and confusion into the process that would encourage inconsistent results where at present the results are generally consistent and not subject to any material or extensive criticism from the affected parties.

8. The AMC should not recommend the determination and distribution of "unlawful gains" because that procedure, like the proposed "total damages" procedure, would make a radical change in the legal standard that requires a plaintiff to prove that it suffered an actual loss of money as a result of the alleged antitrust violation.

9. The "unlawful gains" proposal would not achieve its apparent purpose of a reduction in the litigation expense and burdens faced by defendants in treble damages cases, because it would not limit the availability of treble damages claims and would not apply to most of the cases brought.

10. The "unlawful gains" proposal would not alleviate the problems generated by the current indirect purchaser class action litigation, and actually would undermine the standard that requires a plaintiff to prove with certainty that it suffered a an actual loss as a result of the antitrust violation shown.

EVALUATION METHODOLOGY

In considering proposals for recommendations the AMC should apply a methodology that examines:

1. What exactly is the problem you are trying to address and the harm that warrants rectifying? Does the problem result from multiple influences?

2. Can the problem be reduced into separate that can be addressed individually?

3. What exactly is the proposed solution and what specific measures does it encompass?

4. What goals would the solution promote?

5. How well does the proposed solution fit the problem? Does the solution do more than necessary to address the problem?

6. What are the direct consequences of applying the proposed solution to the problem? Would addressing only part of the problem be more effective or less harmful

than a solution that also produces changes outside the scope of the problem and the harm to be addressed?

7. What are the collateral and the unintended consequences of the proposed solution?

PROPOSALS

1. Reforming Indirect Purchaser Litigation. (Topic 1)

Indirect purchaser litigation clearly needs reform. The Supreme Court's decisions in *Hanover Shoe* and *Illinois Brick* attempted to avoid the extremely complicated and inherently subjective process that presenting proof of "pass-on" injury allegations would entail, but the subsequent legislation and court decisions in approximately 30 states allowing "indirect purchaser" claims nevertheless has developed a different and possibly more troublesome situation than the one the Court was attempting to avoid.

NATURE OF THE PROBLEM

The combination of state indirect purchaser laws with minimal pleadings standards for complicated factual claims, state court systems with heavily loaded dockets and no experience with antitrust claims, nationwide product markets, class action procedures that accept claims at face value and vary by state, scores of plaintiffs' attorneys representing multiple plaintiffs, the limited ability of corporate defendants to devote attention and resources to complex litigation over a several year period, and the immense risk of exposure to defendants from aggregating claims of all potential claimants has produced a "perfect storm" that effectively prevents any testing of the

substantive merits of the various asserted claims and imposes irresistible pressure on defendants simply to buy peace.

The accumulation of multiple claims, magnified by the class action procedure, produces a huge, disproportionate incentive to file complaints. Plaintiffs' attorneys respond to those attractive opportunities by investing in a program that virtually assures them of a payout within a few years and can yield rewards beyond their actual efforts. The cases produce little benefit to the class members whose potential claims provide the leverage, as only rarely do more than 6-8 % of the eligible claimants ever receive any payment despite the elaborate machinery created for that purpose. The attorneys are the principal beneficiaries of the litigation, which is not the purpose for which Congress created the antitrust treble damages remedy.

The combined high risks of exposure, uncontrollable litigation expenses, the long time horizon, and plaintiffs' ability to proceed on the basis of sweeping conclusory allegations through much of the case, especially class certification, has rendered even the most confident and committed defendants fatalistic. The market realities that corporations face today require them to move on to new challenges and put such risks behind them, without the opportunity to have a day in court and even at arbitrary costs that do not reflect the real liability and losses incurred.

Because of their size, the breadth of the claims being asserted, and the complex factual inquiry they entail, these cases become a war of cross-contentions that proceed on the basis of generous presumptions of validity accorded to the plaintiffs' claims and never provide an opportunity to assess their evidentiary support. Even without the

advantage of prior criminal investigations or judgments, plaintiffs have little trouble creating a presumption that the defendants have engaged in a violation of the antitrust laws. The limited pleadings requirements and the processes in many courts permit the plaintiffs to withhold or obscure whatever factual basis they have for the claims an enable them to avoid identifying the nature of the violation in anything but general terms. Whether any of the host of plaintiffs, especially indirect purchasers, actually has a basis to seek a recovery for a loss it incurred can remain unknown throughout the progress of the case. The presumptions plaintiffs enjoy and their litigation strategies obscure the critical significance of proving that each one suffered an actual monetary loss caused by the violation. Individuals that have no way of proving that they sustained any loss at all are able to claim recoveries from the aggregated settlement funds.

Distortion of Legal Standards

This blend of procedural and substantive conditions has produced a serious problem: the generation of inconsistent standards that affect certification of antitrust class actions and pressures that threaten to alter the essential elements of proof required to recover damages by establishing that each claimant suffered an actual monetary loss as a result of the antitrust violation. Proof that the individual plaintiff actually suffered an injury in the form of a monetary loss is the essential element in every case seeking to recover treble damages.

The Supreme Court has noted the "clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the

measure of proof necessary to enable the jury to fix the amount." *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931). The Court acknowledged the established rule that precludes the recovery of damages unless they are "the certain result of the wrong" and "definitely attributable to the wrong." *Id.*

Proof of injury is especially significant in a class action, because the plaintiff's evidence must be applicable to each other member of the proposed class with certainty. In indirect purchaser cases the element of injury takes on even greater importance, because it identifies those individuals that actually have a basis for a claim out of all those who may have filed claims. Clayton Act § 4(a) "makes awards available only to injured parties" measured by "the injury actually proved." *Brunswick Corp. v Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486-87 (1977). The prevailing class action process tends to give little or no meaningful effect to this requirement.

Defining "Indirect Purchaser"

A "direct purchaser" is easy to identify as a person who bought a product from one of the defendants charged with violating the antitrust laws. The legislation and case law do not define the term "indirect purchaser" so claims on behalf of "indirect purchasers" have included: persons who have had direct contact with the product that is the subject of the antitrust claims ("repurchasers"), persons who have had derivative or attributed contact with the product because it was a component or an ingredient in another product the plaintiff bought, or was used in making such a product ("component claimants"), and persons who generally claim they purchased various consumer products affected by the antitrust conduct ("consumer claimants") . The

artificial nature of the term "indirect purchaser" obscures the absence of any actual relationship with any of the defendants. Calling plaintiffs that bought another product altogether "indirect purchasers" conveniently implies that the products they purchased were affected by the antitrust violation, even though the conduct was directed at another product altogether.

Each of these plaintiffs is claiming that the price it paid for whatever product it bought and the price each prior purchaser paid had been inflated as a consequence of the antitrust violation. Whether any subsequent price was affected by the antitrust violation or was determined by the relevant market forces depends on the nature of the violation and the economics of the markets in which the various products were sold. Describing all these different situations under the single label of "indirect purchaser" obscures what may be fundamental differences among them and impedes a determination of which of them suffered an actual loss. Drawing no distinction among various grades of indirect purchaser and consumer claimants who are asserting an attenuated effect for the violation inflates the size of the claimant population hugely and disregards the difficult realities of marshaling proof that those persons actually suffered losses.

ADDRESSING THE PROBLEM

Complicated and intertwined problems like this one rarely succumb to broad, bold strokes, but yield to more gradual resolution. The number and nature of all the steps that could overcome the situation is beyond prediction. A few steps that address

the most significant factors can have a material effect and may induce collateral changes.

The primary concern for the AMC must be securing consistent substantive antitrust law under state or federal statutes and across state and federal courts. States that have adopted versions of the Sherman Act should not be developing principles and standards that differ from the standards applied in federal courts. Nor should federal courts fail to give full effect to the requirement that injury from the violation be certain in their class action analyses and conducting trials.

Clayton Act Amendment

The most constructive step the AMC can take to improve the treatment of civil remedies in treble damages call action cases would be to endorse the significance of the fact of injury standard and propose an amendment to Clayton Act § 4(a), 15 U.S.C. § 15(a), that would permit all potential claimants the opportunity to pursue claims, so long as they prove the actual monetary losses that the antitrust violation caused to them.

The amendment to Clayton Act § 4(a), 15 U.S.C. § 15(a), would add a sentence immediately after the first existing sentence, providing that any person who proves he suffered an actual injury as a result of the antitrust law violation shown may recover based on the actual loss he incurred, without regard to whether it occurred in the course of a direct relationship with the defendant. The additional language should use the existing terms in the statute and not introduce any new terms that might be inconsistent

with the standard set out by the existing language. With this amendment the first two sentences of § 4(a) would read [additional provision in italics]:

"(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. *A person who has been injured by reason of the defendant's violation of the antitrust laws may recover the monetary amount of the actual loss he sustained, as provided in the first sentence of this section, without regard to whether the injury occurred through a direct relationship with the defendant.* "

This change would allow each claimant, whether a direct purchaser from a defendant, a subsequent purchaser from a reseller, or a consumer plaintiff, to prove that it had suffered a monetary loss cause by the violation and to recover the actual amount of its individual loss. Showing a relationship between the defendant and the plaintiff and the nature of that relationship would not be a prerequisite to bringing a claim but would continue to be part of the evidence necessary to prove that the plaintiff actually had been injured.

The consequences of making this single change cannot be predicted but they certainly will be wide-reaching. Rather than attempt to provide other collateral measures to avoid against possible negative or unintended effects, the AMC should limit itself to this well-defined and important step.

Hanover Shoe Concerns

The change suggested above is intended to allow the plaintiff to recover only the amount of the loss it actually bore. If a plaintiff had mitigated or escaped any portion of

the amount by which the defendant had inflated its price to that plaintiff, then that plaintiff could only recover the remainder that it actually had absorbed. The plaintiff's customer then would have a claim for the amount that the plaintiff had mitigated its loss by selling to the customer.

The defendant should bear the burden of proving the mitigation and the evidence required should be sufficient to prove that the plaintiff's customer actually incurred a loss of its own to the extent of the amount that the plaintiff had been able to raise its price to the customer. If no mitigation was shown, the plaintiff's customer would face that additional difficulty in showing that it suffered a loss.

The term "actual loss" in the suggested change may be susceptible to an argument reflecting the view in *Hanover Shoe* and prior cases that the person who purchases from the defendant has sustained a loss to the full extent of the amount by which the antitrust violation raised the price it paid, without going further. In passing indirect purchaser legislation the states effectively rejected the *Hanover Shoe* philosophy and adopted the mitigation view of loss recovery.

A mitigation concept is consistent with the general approach to damages under Clayton Act § 4 in other types of antitrust cases where the measure of recovery is the plaintiff's ***net*** lost profits. Originally antitrust damages analyses drew on principles of damages applied in contracts claims where the purpose is to make the plaintiff whole for his net losses and the plaintiff had a duty to mitigate his potential loss. A mitigation standard for recovering damages in antitrust price fixing cases is consistent with the

remedial compensation purposes of the statute. Trebling the damages and awarding attorneys fees still provides plaintiffs with an ample recovery.

Benefits of the Amendment

Amending Clayton Act § 4(a) to allow indirect purchaser claims would tend to draw those suits into federal courts where the development of the jurisprudence is more likely to be consistent than among the approximately 30 state courts. Plaintiffs have already begun to bring indirect purchaser cases under state statutes into federal courts under the Class Action Fairness Act (CAFA), despite the advantages that the various state statutes and procedures allow them. Federal court management of indirect purchaser claims would provide an example for the state courts to follow, encouraging consistent standards that can be applied across all such cases, assuming plaintiffs continue to bring them in some state courts.

Practical Trial Realities

The suggested amendment is directed towards testing the antitrust claims of the multiple types of "indirect" or remote plaintiffs through evidence showing whether they in fact have suffered injury and actual monetary losses. Because that proof is complex and involved, one consequence of amending Clayton Act § 4(a) will be an expansion of the analysis, time, and effort required of courts and parties to resolve the validity of claims by different types of plaintiffs.

Currently, courts do not reach these issues except in limited instances when they consider the nature of plaintiffs' proof of injury for class action certification analysis. Including indirect purchaser claims may lead the courts to play closer attention to how

each type of plaintiff would prove its injury, thus making the class action analysis more meaningful in managing the flood of litigation. Ideally, such a determination should be a central part of any management analysis for maintaining a class action as it affects the size and extent of the responsibility undertaken by the court.

ADDITIONAL MEASURES

Pre-emption, Removal or Consolidation

Measures that effectively take indirect purchaser cases out of state courts and out them into federal court would permit a single court to sort out the conflicts and inconsistencies among the claims asserted by the various plaintiff groups.

Pre-emption of state court indirect purchaser claims in order to remove potential contrary proceedings or jurisprudence would seem to be the simplest and most effective measure for consolidating cases, but implementing pre-emption faces several obstacles that make it impractical. Congress has not pre-empted state antitrust laws so why would it pre-empt state law antitrust damages remedies, many of which parallel the Sherman Act? How would Congress formulate a pre-emption statute that could not be circumvented under state consumer protection statutes that encompass antitrust claims? Pre-emption probably is not politically feasible and may generate attempts to manipulate the process for other purposes.

Removal and consolidation would leave state antitrust laws in place but just create a by-pass around them. Thus they also would require Congressional consensus on a topic that will generate a wide variety of views and divergent political objectives. Moreover, the existing removal provisions of CAFA will apply to most such cases. Our

experience with the effects of CAFA is too new and too limited to begin proposing other removal measures that may not be necessary.

These procedural measures might afford some assurance that virtually no cases would be brought in state courts, but they may not be necessary. Direct purchasers bring few cases in state courts now, so amending Clayton Act § 4(a) to create an avenue for indirect purchaser cases in federal courts would tend to draw cases from many state courts into federal courts. Some plaintiffs' attorneys have already shown a preference for consolidating their indirect purchaser cases before federal judges through CAFA. Amending the Clayton Act § 4(a) should encourage this practice further. Pre-emption and formal consolidation measures could be considered as a subsequent support if state court proceedings continue to produce divergent jurisprudence and results.

Structured Proceedings and Class Action Effects

The proposal for "structured proceedings," while somewhat general, rests on several premises that warrant close examination. The term itself implies a hope that a procedural device can be developed that will address the problems saddling indirect purchaser litigation. The proposal described addresses stages of a trial yet, few cases get that far and the root of the problems raised by indirect purchaser litigation lie to a very large degree in their class action aspects.

Trials in class action cases, such as they are, do not proceed in the same manner as trials in non-class action cases. The attenuated period of limitless discovery and convoluted class action arguments during which the plaintiffs' allegations and contentions are treated as if they were fact tends to shift the balance of the litigation in

favor of the plaintiffs. For the few cases that do reach trial, the prior proceedings often have altered the dynamics at trial, particularly for the defendants.

Defendants naturally carry a significant burden of persuasion in antitrust cases, but the tendency in many class action indirect purchaser cases is to force on the defendants a burden of disproving the plaintiffs' allegations. This disadvantage may be natural in cases where the defendants have been the subject of a price fixing investigation and have pleaded guilty to particular charges. However, plaintiffs frequently assert claims beyond the violation defined by the indictments, usually to expand the scope of the persons covered by the proposed classes and thus the damages that may be recovered.

More importantly, the violation does not establish defendants' liability to pay damages; each plaintiff still must prove it suffered an injury caused by the violation. However, long, drawn out antitrust cases have a tendency to suppress or even assume away the critical element of each individual's injury. Injury may be determined more readily in some circumstances than others, but that depends entirely on the nature of the violation that is the subject of the case. Not every price fixing agreement can be compared to "a rising tide [that] floats all boats"; some resemble erratic wave actions and boats above the high water line would not be affected. For example, if a group of defendants agreed to raise the list prices of their basic product by a dollar, but sold at the old list price to favored customers, then the favored group would have been excluded from the effects of the conspiracy. Nevertheless, in a class action proceeding few courts engage in the detailed and searching analysis required to recognize such

realities. Courts also display a reluctance to deny class action motions because that might foreclose a collection of de minimis claims, which otherwise would not be brought.

The suggestion to separate a case into stages of liability (violation and injury) and quantification of damages determinations as a "structured proceeding" resembles the bifurcation approaches that courts currently have available and regularly use. What amelioration of the condition of indirect purchaser litigation needs is, however, a means of getting to a substantive consideration of issues like violation and injury without the overburden of massive class action proceedings. Given that groups of very experienced counsel bring most treble damages cases, there seems to be no benefit in creating huge classes when the individual plaintiffs have the ability to bring the claims and prove them. Subsequent proceedings could enable counsel to realize the benefits of their successful claims across a class of plaintiffs who were similarly affected.

Aggregating Damages

The suggestion of structured proceedings, as described, entails a fundamental concept that would alter the existing legal standards for proving antitrust liability but only for treble damages class action cases. A determination of "total damages" and a subsequent "allocation" of various amounts among all the claimants amounts to an endorsement of the "aggregate damages" concept that the courts have uniformly rejected. *E.g. In re Hotel Tel. Charges*, 500 F.2d 86, 90 (9th Cir. 1974) ("allowing gross damages by treating unsubstantiated claims of class members collectively significantly alters substantive rights under the antitrust statutes"); *accord, Newton v. Merrill Lynch,*

Pierce, Fenner & Smith, Inc., 259 F.3d 154, 188 (3d Cir. 2001); *Windham v. American Brands, Inc.*, 565 F.2d 59, 66, 72 (4th Cir. 1977); *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1018 (2d Cir. 1973).

Plaintiffs' attempts to promote aggregate damages determinations, while making their lives a great deal simpler, plainly contradict the requirement under Clayton Act § 4(a) that each individual claimant prove it had suffered a particular loss, for example, that it had had paid an inflated price on its particular transactions. Under a "total" or "aggregate "damages theory a plaintiff, or more accurately all the plaintiffs encompassed by a proposed or certified class (possibly still subject to decertification), no longer would be required to prove that it individually suffered an actual loss caused by the antitrust violation. Instead, "total" damages would ascribe a number to each individual claimant regardless whether he could prove he actually had been subjected to the antitrust violation. Under a "total damages" regime favored purchasers who did not pay the unlawfully increased prices still would be counted in calculating the gross amount to be allocated and would share in the allocation.

The problems exhibited by indirect purchaser litigation require greater concentration on the element of injury and whether every individual claimant, whether represented within a class or not, can establish he suffered that harm. They are not resolved by measures that essentially remove that factual determination as the critical element of a plaintiff's proof. Adopting a total or aggregate damages approach would formally recognize and adopt this fundamental change to the legal standards that currently control antitrust damages claims. This approach may appeal to defendants

who are sick of the bloated and wastefully expensive indirect purchaser litigation and simply want to buy out of it despite the high price, but it does not advance the ability of defendants to obtain a fair hearing in which to defend themselves against unfounded or excessive claims.

A further flaw in the "total damages" scheme is the demonstrated fact that a very low percentage of potential claimants actually file for recoveries from class action settlement funds, which are essentially the same thing as a total damages fund. A total claims approach will not solve this serious problem, but only entrench the current system that makes the plaintiffs' attorneys the real beneficiaries of the recoveries and practically the only ones.

2. Court Discretion to Award Treble or Single Damages. (Topics 2 and 3)

The provision in Clayton Act § 4(a) that the plaintiff recover treble its actual loss does not appear to present any problem that requires the removal or the enhancement of trebling. The proposals imply that only single damages should apply to rule of reason and similar cases, but that damages for private litigation asserting per se violations, essentially price fixing, should be increased. The accumulated experience does not provide any grounds for altering the present treble damages standard.

The problems in indirect purchaser treble damages class actions are not the result of the treble damages provision. In that context the general experience has been that the final settlement figures tend to reflect single damages rather than treble damages. To be sure, the exposure to trebled damages enhances the settlement pressure on defendants that think they probably will be found to have committed an antitrust violation. The

general experience in rule of reason cases, which do not carry the effects produced by exposure to classes encompassing all purchasers and countless indefinite claimants, has been that defendants are most concerned about protecting and justifying particular business practices and less concerned about the monetary exposure.

Congress provided a treble damages remedy in the Sherman Act § 7 that Clayton Act § 4(a) restated without any alteration its elements. The legislative history plainly shows that the purpose of this provision was to provide "ample", i.e. generous, compensation for a successful plaintiff. The Supreme Court has recognized that " the treble-damages provision . . . is designed primarily as a remedy" although it has deterrent and punitive effects as well. *Brunswick Corp. v Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486-87 (1977), discussing the legislative history. Congress provided separate criminal penalties that obviously punish and therefore deter conduct.

Reducing damages recoveries to single damages would alter the original purpose of Congress and reward successful plaintiffs with a less than generous measure of recovery. Raising recoveries more than triple the actual loss would go well beyond providing compensation and must be motivated by other goals.

Those goals would appear to be punishment, deterrence, incentives, or disgorgement. Using a measure designed to compensate injured persons for their injuries is not an appropriate vehicle for meting out punishment. The criminal provisions of the Sherman Act assign punitive enforcement to the government, not to private parties. Punishing a losing defendant in a dispute over a dealer termination, a

marketing program, a refusal to deal, or a similar business dispute does not recognize the fine balance that may turn beneficial competitive efforts into anticompetitive acts.

Treble damages recovery has not been shown to have an actual effect of deterring future antitrust violations. In rule of reason contexts the remedies should not act to deter future creative initiatives. The law should deter only conduct that by its nature invariably harms competition, i.e., price fixing, but the criminal penalties serve that purpose better than paying claimants increasingly larger amounts. Given that such claims invariably are brought as class action cases that are settled, raising the multiple for damages would unfairly put more pressure on defendants that may have meritorious defenses.

The case for creating further deterrence for price fixing is more appealing, but not realistic. Price fixing continues. Increased criminal penalties may have removed some conduct but empirical confirmation is lacking. If capital punishment for stealing bread did not eliminate the practice (except for the individuals who were caught), increasing civil damages for price fixing beyond treble damages would not eliminate those practices either. The criminal penalties already include a measure for requiring convicted defendants to pay their ill-gotten gains to the government. Would increasing the multiplier of damages result in any more benefit for individual plaintiffs? Would it merely increase the fees sought and received by lawyers?

If the purpose of reducing the damages that plaintiffs may recover to single damages were to reduce the incentives for attorneys to bring class action treble damages cases, reducing the attorneys fee awards to a simple loadstar with no

multiplier, or prohibiting contingency fees in cases based on prior criminal proceedings would likely be more effective in reducing the number of cases brought.

If a goal of increasing damages beyond trebling is intended to benefit foreign citizens, they would have to be given standing to sue. Otherwise, they would not benefit from any increase in the amount of damages awarded.

Finally, judges should not be given discretion to adjust the multiplier on damages. Such a system invites widespread disputes and misuse. The only possible result would be rampant inconsistencies and highly subjective decisions. Statutory trebling has the great benefit of providing certainty; judicial discretion will vary from judge to judge across the country. The analyses of attorneys fee awards gives some indication of what would happen. Antirust cases have been spared the wrangling over punitive damages experienced in personal injury cases by the treble damages provision; adopting a discretionary system would add problems to antitrust jurisprudence where it has none now.

Moreover, the suggestion of committing the application of a variable range of multipliers to the amount of compensation a plaintiff could recover as a result of an antitrust violation that harmed him shows that effects the proposal would have are not understood. The AMC should not recommend measures that are likely to have unpredictable effects.

3. Changing the Current Regime for Private Antitrust Actions. (Topic 4)

Like the proposal for "total damages" the proposal for determination and distribution of "unlawful gains" would require a radical change in the legal standard

for a plaintiffs' recovery of damages and introduces generalized concepts with which the courts have no experience in litigated cases. It also represents an attempt to make a substantive change in the controlling legal principles for proof of injury and damages in order to resolve problems created by procedural processes.

The goals that the proposed changes would serve are not apparent. The proposal applies only to criminal proceedings, which means price fixing cases or similar conduct, such as market allocation and an agreement to cut production, that have the same effect. As the proposal is stated, a district court judge who received the guilty pleas of all the defendants arising from a particular investigation would make a prompt determination of the "unlawful gains" the defendants had realized.

The effect of this proceeding would not increase the amount of the civil damages defendants would be forced to pay for price fixing nor would it increase the amount of fines and monetary penalties to the government, since it incorporates existing penalty measures. It would not increase the compensation that plaintiffs would receive since only an amount corresponding to single damages would be available for claims. Nor would produce any greater potential deterrent to price fixing or act as an additional punishment.

The principal purpose of the measure would appear to be the reduction for the convicted defendants of exposure to potentially overlapping or cumulative claims in multiple state courts, which would reduce the length, burden and costs of such litigation. However, the proposal would not produce any such reduction in the price

fixing class action cases that were not related to a criminal proceeding, which is the majority of such cases.

In criminal cases where the investigation was drawn out over several years, plaintiffs would initiate treble damages cases well before the proposed proceeding could come into play. In those cases it would not appear to have much effect in reducing the litigation burdens.

The proposal includes no measure that would eliminate the plaintiffs' current ability to seek treble damages under Clayton Act § 4(a) and state laws. The proposal thus only would add a further proceeding to those that already exist. The proposal could include a set off for amounts received, or require that those amounts be treated as full satisfaction for a claimant's claims. Administration of the latter would be difficult in view of the creativity plaintiffs have shown in asserting expanded claims beyond the criminal offenses. Only a preemption provision would prevent the additional litigation but that also would be difficult to formulate and seems unlikely to resolve the problem or to gain universal support.

The process of determining the "unlawful gain" also presents particular difficulties. The proposal's treatment of damages as a single aggregated fund, similar to the theory of allocating "total damages," instead of the results of the proofs of the individuals that were injured, introduces a fundamentally different principle and philosophy for receiving payments. Courts would no longer be acting as dispute resolvers that address claims to recover particular losses, but would be dispensers of trust fund payments guided by subjective sense of relative equities.

The proposal provides no suggestion of how a criminal court would calculate the "unlawful gains." The limited 90-day period available for that determination, however, means that the total gain would have to be determined without evidence of its actual impact on individuals. A court would not be able to gauge the extent and scope of the gain to the defendants without some sense of the aggregate losses sustained by the claimants. Therefore, in most cases the unlawful gains determination would require a largely theoretical exercise.

Calculation could be simple and straightforward where the defendants' scheme involved agreements to raise the prices for a common product by specific amounts at specific times and they had actually implemented that agreement uniformly for all customers. Few cases are that simple. In more complicated cases the court would have no choice but to proceed on the basis of a host of assumptions about the operation of the markets affected and the behavior of the parties. The AAI comments on the criminal proposals before the AMC describe this process succinctly. Some price fixing conspiracies, where cheating is widespread, involve many agreements simply because the parties' efforts are ineffectual. The agreements are plainly illegal, but the defendants may have realized little gains. Such situations and many others would be difficult to evaluate in a summary proceeding with truncated evidence.

The adoption of such a process and the development of proceedings that rely on theoretical analyses would not have a beneficial effect on all the other treble damages cases that did not have guilty pleas. In some instance the development of that process would be likely to undermine a defendant's right to require the plaintiff to prove that

the alleged antitrust violation actually caused it to suffer a monetary loss. If so, it would contribute to the existing situation that makes it difficult for defendants to get their cases decided on the merits of the claims.

Finally, creation of a fund open to claims from anyone who can muster a claim and call himself an indirect purchaser in any of the various guises of that term would promote spurious claims, as the mass product liability claims have experienced. The promise of sure money generates a surprising explosion of the persons claiming the right to recover. Sorting out such claims can overwhelm a court. While antitrust has not had this experience, the creation of a procedure to define a total unlawful gains fund will certainly have many unimagined consequences.

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