

**COMMENTS OF THIRTY ANTITRUST PRACTITIONERS  
(AND THEIR FIRMS) RESPONDING TO THE ANTITRUST MODERNIZATION  
COMMISSION'S MAY 19, 2005 QUESTIONS RE ANTITRUST REMEDIES**

**June 17, 2005**

**I. INTRODUCTION**

These comments are submitted on behalf of thirty antitrust practitioners with a great deal of collective experience litigating complex antitrust cases on behalf of plaintiffs and defendants.<sup>1</sup> It is the considered view of the below-listed practitioners that the system of private antitrust enforcement in this country does not require or need legislative modification. Indeed, Congressional action at this time would likely be counter-productive. While no system is perfect, whatever problems exist within the current system of private antitrust enforcement are being, or have been, adequately addressed by the courts.<sup>2</sup>

**II. RESPONSES TO CERTAIN OF THE AMC'S QUESTIONS RE "REMEDIES"**

**A. Treble Damages**

**1. Are treble damage awards appropriate in civil antitrust cases?**

**Yes.** Treble damages awards are appropriate and necessary in civil antitrust cases because they serve the important antitrust policy goals of deterrence, private enforcement, and adequate compensation. We believe that the current law with respect to treble damages under the Sherman

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<sup>2</sup> We are responding to questions published by the Antitrust Modernization Commission on May 19, 2005. *See* 70 Fed. Reg. 28902-28907. Given the shortness of time provided to respond to these broad and detailed questions (fewer than 30 days), our comments here are merely an outline of our collective considered views on these topics. Moreover, we have not addressed all of the questions posed (*e.g.*, we do not address either question set out under "E. Remedies Available to the Federal Government.").

Act should remain unchanged.

The weight of existing evidence is that mandatory trebling of damages deters antitrust violations. Because (a) many, if not most, antitrust violations are committed in secret (in whole or part), and hence can be difficult or impossible to detect, and (b) proving antitrust liability is often difficult, time consuming, and expensive, the practical reality is that the risk of being caught and punished for engaging in illegal anticompetitive conduct is not commensurate with the potentially enormous rewards for getting away with it.

Theoretically, a potential violator, in evaluating whether to engage in illegal conduct, compares the often-great magnitude of its potential illicit gains, against the likelihood of being caught and its attendant potential liability, discounted by the odds of actually being held liable. Since the potential gains from illegal conduct can be both enormous and near-certain, in order to deter such conduct, prospective liability must be sufficient, even after discounting for the likelihood of being caught and held liable at some point in time that can stretch years into the future, to deter the anticompetitive conduct. *See, e.g.,* Edward D. Cavanagh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 TUL. L. REV. 777, 786-788 (1987). Indeed, despite the existence of treble damages, cartels continue to be formed and antitrust laws continue to be violated on a fairly frequent basis. The prospective illicit gains are that great.

For this reason, prominent commentators have frequently suggested that the treble damages remedy is, if anything, set *too low* for achieving optimal deterrence. *See, e.g.,* Robert H. Lande, *Why Antitrust Damage Levels Should Be Raised*, 16 LOY. CONSUMER L. REV. 329 (2004).

Furthermore, eliminating treble damages (or making them more difficult to obtain) would undermine the effectiveness and one of the prime purposes of the Antitrust Criminal Penalty

Enhancement and Reform Act of 2004, Pub. L. No. 108-237, 118 Stat. 661, 666-67 (2004) (the “2004 Act”). The 2004 Act provides incentives for an antitrust transgressor to reveal the violation, by providing that if a defendant is the first to report an antitrust violation under the Justice Department’s Leniency Policy, its liability for damages in a subsequent private action is limited to single damages, instead of treble damages, and damages are to be based only on “the commerce done by the corporation granted leniency in the goods affected by the violation.” In other words, the 2004 Act eliminates both treble damages and joint and several liability for a defendant qualifying for and fulfilling the requirements of the leniency program, thereby creating significant incentives for defendants to report antitrust violations.

The 2004 Act, a vital regulatory tool for United States antitrust authorities, thus relies upon the current treble damages civil remedy to create the incentive for a violator to come forward. Companies have already taken advantage of this statute in such cases as *Rubber Chemicals*, *EPDM*, *Plastic Additives* and *D-RAM*. Eliminating treble damages would also eliminate the powerful incentives purposely built into the 2004 Act to induce and encourage antitrust defendants to report anti-competitive, illegal conduct.

Moreover, the federal government has limited resources at its disposal, and thus cannot adequately investigate and prosecute all (or even most) illicit anti-competitive behavior. The treble damages civil remedy encourages private litigants to complement government enforcement agencies by investigating and prosecuting illegal cartel and other anticompetitive behavior. Indeed, private litigants (such as, *e.g.*, direct purchasers), because of their position in the marketplace, are often likely to be among the first to learn of antitrust violations, and may be in the best position to prosecute them. *See* Joseph P. Bauer, *Reflections on the Manifold Means of Enforcing the Antitrust*

*Laws: Too Little, or Just Right?*, 16 LOY. CONSUMER L. REV. 303, 310 (2004); Stephen Calkins, *An Enforcement Official's Reflections on Antitrust Class Actions*, 39 ARIZ. L. REV. 413, 443-44 (1997); Matthew Bender, 11-78 Federal Antitrust Law § 78.2 (2004).

The availability of treble damages also helps ensure adequate compensation of the victims of illegal anticompetitive behavior because available damages (and thus damages awards and settlements) in antitrust actions often greatly *understate* the actual amount of the harm caused by the anticompetitive conduct. Elements of real harm that may not be explicitly compensated include: (a) the time value of money, exemplified by the general unavailability of prejudgment interest and the restrictions imposed by the statute of limitations (where the doctrine of fraudulent concealment is unavailable) for anticompetitive behavior of long duration or effect; (b) the allocative inefficiency harms from the exercise of market power (*i.e.*, transfer of wealth from the victim(s) to the firm(s) with market power); (c) the “umbrella effects of market power” (where non-participants in the cartel nonetheless reap the benefits by being able to raise their prices along with the conspirators); (d) the value of plaintiffs’ time spent pursuing the case, where otherwise uncompensated; and (e) the tax effects of damage awards. *See, e.g.*, Steven C. Salop & Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 GEO. L.J. 1001, 1033 (1986); William M. Landes, *Optimal Sanctions For Antitrust Violations*, 50 UNIV. CHI. L. REV. 652, 656-57 (1983); Robert H. Lande, *Are Antitrust Treble Damages Really Single Damages?*, 54 OHIO ST. L.J. 115, 118 (1993).

Trebling of damages also reduces the likelihood of error in assessing liability and damages. Because the stakes are higher in a lawsuit with a damages multiplier, all parties involved are more likely to be extra diligent in gathering evidence and providing the court with better analysis. Accordingly, the costs of erroneously deterring efficient businesses conduct and erroneously

permitting inefficient conduct are reduced. *Salop & White* at 1035-36.

- 2. Should other procedural changes be considered to address issues relating to treble damage awards, such as providing courts with discretion in awarding treble (or higher) damages, limiting the availability of treble damages to certain types of offenses (e.g., *per se* unlawful price fixing versus conduct subject to rule of reason analysis), or imposing a heightened burden of proof?**

For the reasons set out above (among others), the current treble damages remedy well serves the important goals of deterrence, private enforcement, and adequate compensation. Insofar as there is a problem, it relates to *under*-deterrence and enforcement, *not* over-deterrence. Accordingly, imposing additional procedural hurdles or steps – such as those suggested by this question – that would make treble damages more uncertain or more difficult to obtain, would be a step in the wrong direction.

There is no factual basis to conclude that the filing or prosecution of frivolous antitrust cases is a serious problem at all, much less a problem that justifies cutting back on longstanding antitrust remedies through legislation. Weak or frivolous cases can be, and are, adequately addressed and discouraged by existing rules and mechanisms, including by summary judgment and Rule 11 of the Federal Rules of Civil Procedure. For instance, courts have clearly been willing to grant summary judgment in antitrust cases. *See, e.g., Williamson Oil Co., v. Philip Morris, USA*, 346 F.3d 1287 (11<sup>th</sup> Cir. 2003); *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028 (8<sup>th</sup> Cir. 2000); and *In re Citric Acid Litig.*, 191 F.3d 1090 (9<sup>th</sup> Cir. 1999).

Moreover, making treble damages discretionary or more difficult to obtain would only inject additional uncertainty into the law, thereby reducing the deterrent effect of this important remedy.

**B. Prejudgment Interest**

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

The factors set forth in 15 U.S.C. § 15(a)(1)-(3) should not be changed. The important antitrust policy goals of deterrence and adequate compensation are served by ensuring that the antitrust victim is fully compensated and that violators pay. If treble damages were to be eliminated (or restricted), then antitrust plaintiffs would need, at minimum, to be able to recover pre-complaint interest, cost of capital damages, and opportunity cost damages – elements of real harm but which are not typically recoverable – if they are to be made whole (and/or if the antitrust violator is to be forced to pay for the social welfare losses it caused).<sup>3</sup>

Although the award of prejudgment interest, as a general matter, is becoming the norm in federal cases,<sup>4</sup> the award of prejudgment interest in antitrust cases is reserved for those rare cases where the defendant acts to compound the damage its actions caused by unnecessarily delaying an award of damages through dilatory litigation tactics. *See* 15 U.S.C. §15(a). While few cases report prejudgment interest being awarded on antitrust claims,<sup>5</sup> removal of the deterrent effect of a prejudgment interest remedy would simply encourage dilatory tactics.

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<sup>3</sup>Treble damages are a much more certain deterrent than the harder-to-prove-and-calculate damages for cost of capital and opportunity cost. Thus, in our view, the treble damages remedy should remain unfettered.

<sup>4</sup>*Matter of Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1331-32 (7th Cir.1992), *citing West Virginia v. United States*, 479 U.S. 305, 310 (1987).

<sup>5</sup>*Westport Taxi Service, Inc. v. Westport Transmit District, No. 15199*, 664 A.2d 719 (Conn. 1995).

C. Attorneys' Fees

**1 & 2. Should courts award attorneys' fees to successful antitrust plaintiffs?  
Are there circumstances in which a prevailing defendant should be  
awarded attorneys' fees?**

**Yes to the first question; No to the second.** Attorneys' fee awards for successful antitrust plaintiffs are appropriate and necessary in civil antitrust cases. We believe that the current law with respect to attorneys' fee awards under the Sherman Act should remain unchanged. As Edward D. Cavanagh wrote, "In providing for attorneys' fees, Congress intended to promote private enforcement of the antitrust laws and to insulate the treble damages recovery from expenditures for legal fees." Edward D. Cavanagh, *Attorneys' Fees in Antitrust Litigation: Making the System Fairer*, 57 *FORDHAM L. REV.* 51, 52, 57-58 (1988) ("Congress purposely adopted this one-way fee shifting provision favoring prevailing plaintiffs, with the intention that the private civil damages remedy should benefit the 'great mass of people' rather than 'rich corporations and rich men.' Providing attorneys' fees for prevailing plaintiffs assures that impecunious victims will have access to counsel to redress antitrust violations.") (quoting 21 Cong. Rec. 2564 (1890)).

Corporate defendants in antitrust actions, especially in large and complex cases, typically have the resources to hire the finest law firms and experts to assist in defending their conduct. The availability of fee awards for successful antitrust litigants is a step in the direction – the *right* direction – of leveling the playing field between antitrust violators and those injured by the violations. Eliminating or restricting the existing fee-shifting provision would deter persons, especially those with relatively small (compared to the potential costs of litigation), but nonetheless meritorious, claims from bringing actions.

Moreover, imposing fee-shifting in favor of defendants would further chill persons from

bringing actions. Here again, there is simply no factual or empirical support for the claim that the existing antitrust system has resulted in over-deterrence or a plague of frivolous actions.

As noted, there are established civil rules, such as Rule 11 of the Federal Rules of Civil Procedure (which includes fee-shifting provisions) that already address bad faith litigation and protect defendants. And, various trends in the development of antitrust law and enforcement in recent years – including the imposition of more rigorous standards in vertical conspiracy cases, the antitrust injury doctrine, movement away from *per se* rules, and changes in federal enforcement policies – have created significant disincentives to private enforcement, thereby undermining Congress’ original intent in enacting fee-shifting legislation in the first place. There is little question that limiting attorneys’ fees available to prevailing plaintiffs, or allowing prevailing defendants to obtain attorneys’ fees, by decreasing the available recovery and/or by imposing the specter of substantial costs, would further “chill the vigor of private antitrust enforcement.” *Id.*

As Cavanagh notes, the award of attorneys’ fees to successful plaintiffs is necessary to help to offset and overcome the substantial *disincentives* in existing law – including time, costs, and fear of retaliation – to the initiation of major antitrust litigation by “private attorneys general.” And, as noted above with respect to treble damages, there is no empirical evidence – *none* – that the existing set of incentives results in too much private antitrust litigation. The evidence shows instead that incentives for private enforcement are, if anything, too weak.

**D. Joint and Several Liability, Contribution, and Claim Reduction**

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

No to both questions. The current joint and several liability rules are adequate and the proposed changes would be counter-productive to the primary goals of the antitrust laws. We believe that the current law with respect to joint and several liability, contribution, and claim reduction under the Sherman Act should remain unchanged.

As the law currently stands, antitrust defendants: (1) are subject to joint and several liability for co-conspirators for violations of the Sherman Act; (2) are not entitled to contribution from co-conspirators; and (3) are not entitled to have damages reduced by the amount paid by a settling defendant. *See City of Atlanta v. Chattanooga Foundry & Pipe Works*, 127 F. 23 (6th Cir. 1903), *aff'd*, 203 U.S. 390 (1906) (applying joint and several liability to the Sherman Act); *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981) (“*Texas Industries*”) (holding that conspiring co-defendants have neither a statutory nor a common-law right of contribution in antitrust cases); *Matter of Oil Spill by Amoco Cadiz*, 954 F.2d 1279, 1315 (7<sup>th</sup> Cir. 1992) (finding no claim reduction under the antitrust and civil rights laws, which are silent on the subject, citing *Texas Industries*). The current law thus promotes the legislative goals of deterrence, adequate compensation, settlement finality, and judicial economy.

Because most commentators agree that joint and several liability is appropriate under the Sherman Act, recent debate has focused on whether contribution and claim reduction could make joint and several liability “more fair” to defendants. It has been argued that denying contribution

and claim reduction to a conspiring defendant is unfair because the defendant faces damages in excess of the actual harm it may have individually caused. However, those who conspire to violate the antitrust laws do so intentionally – and violators also intentionally seek to impair and reduce competition by *combining* with other co-conspirators. Having reaped illicit gains that may have been available only through and because of their illegal combination, an individual conspirator should not be heard to complain of the “unfairness” of being held to account, at the very least, for the total harm caused.

As discussed above, the recently passed 2004 Act eliminates joint and several liability for a defendant who meets the requirements of the leniency program. If the present rule of no contribution or claim reduction were changed and every defendant were granted these benefits, this incentive for a violator to come forward under the 2004 Act would be eliminated.

The existence of the 2004 Act also answers the traditional deterrence arguments made in favor of a contribution rule. In *Texas Industries*, for example, the Supreme Court heard arguments in favor of contribution including that contribution: (1) would make it more likely that wrongdoers will be come forward (because they will not face liability beyond their own sales); (2) would lead to more vigorous private enforcement of antitrust laws (because more wrongdoers would come forward); (3) would increase the incentive for a defendant to provide evidence against co-conspirators (because they would sue each other); and, (4) would deter participation in antitrust conspiracies. 451 U.S. at 636. All of these incentives are now provided by the 2004 Act, and thus no further legislation in this regard is necessary or appropriate.

Moreover, since all co-conspirators in a cartel have created the conditions that cause losses to all purchasers, not just the purchasers from a particular violator, it is appropriate to make each co-

conspirator responsible for the damages suffered by all purchasers from the cartel. In other words, to fully compensate the victims of cartels, there should be joint and several liability by the cartel members that have affected the entire market.

**F. Private Injunctive Relief**

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

**The ability of states and private plaintiffs to seek injunctive relief HAS provided benefit to consumers; standing to pursue such relief should NOT be different for states than it is for private parties; and current safeguards ARE sufficient.** The private right of action to obtain injunctive relief ought to be maintained. It provides an efficient means of ensuring the maintenance of a competitive marketplace. Injunctive relief allows a legitimately threatened party to compel adherence to the antitrust laws – and thus to ensure a competitive marketplace – *before* social welfare harms of antitrust violations occur or cause significant competitive harm. Injunctions also provide private litigants the opportunity to put a stop to ongoing harms of anticompetitive conduct.

The efficiency argument for preventing anticompetitive conduct through the private injunctive process has both feasibility and opportunity cost components. With respect to feasibility, a *post hoc* attempt to “unscramble” the egg (*i.e.*, construct a market devoid of the anticompetitive behavior and completely free of all effects of that behavior on the market) cannot be accomplished. In essence, the judicial system is not capable of completely removing all anticompetitive effects and perfectly

restoring the pre-existing confluence of incentives and expenditures of capital for competitive purposes that characterize truly competitive markets. Obviously, in the case of ongoing harm, it is both feasible and appropriate to arrest it in order to prevent social welfare harms from compounding. Moreover, with regard to opportunity cost, a *pre hoc* injunction has the effect of directing all market participants to pursue other, legal, pro-competitive alternatives, further benefitting consumer welfare at large and minimizing wasted capital through the pursuit of anticompetitive behaviors.

The only question, then, is whether private litigants ought to continue to have the right to seek injunctions, or whether such remedies should be the exclusive province of government regulators. A major problem with removing the private injunctive remedy is that federal and state antitrust enforcement agencies have limited resources. For decades, many federal courts have recognized the critical role played by private parties in detecting and litigating anticompetitive abuses. Indeed, many federal courts have gone so far as to characterize the important role played by private litigants as that of “private attorneys general.” Furthermore, many federal courts, and the United States Supreme Court in particular, have, for example, noted that private direct purchaser litigants are in the best position to detect, prevent, and prosecute anticompetitive behavior due to their daily participation in the marketplace.

Critics of private injunctive relief argue that these suits are sometimes motivated by the sour grapes of bested rivals who are attempting to restructure markets to their benefit. While no system of law can be completely free of abuse, such isolated incidents are better dealt with through existing judicial remedies and jurisprudence. This criticism also overlooks the gate-keeping and filtering function achieved by the exacting standing and proof requirements under sections 4 and 16 of the Clayton Act, which include:

1. A private party in order to obtain a preliminary injunction against a violation of the antitrust laws must show that the danger of irreparable loss or damage is immediate or is ongoing. 15 U.S.C.A. 26.
2. There must be a threatened injury of the type that the antitrust laws were designed to prevent and that flows from that which makes the defendant's acts unlawful.
3. Plaintiffs seeking injunctive relief in an antitrust case are required to demonstrate a significant threat of injury or ongoing injury from the impending or ongoing violation of the antitrust laws.
4. The loss of goodwill simply arising out of the plaintiff's inability to meet the defendant's price does not necessarily constitute irreparable injury justifying the entry of a preliminary injunction.

By placing a high burden on plaintiffs, the legislature(s) and the judicial system have more than adequately protected against the possibility of frivolous claims or over-deterrence.

**G. Indirect Purchaser Litigation**

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

Indirect purchaser actions have provided and continue to provide substantial benefits to the United States antitrust system, complementing direct purchaser actions. In addition to any actions that governmental entities and other private parties may prosecute, indirect purchaser actions provide deterrence and, further, provide an important means of compensating many victims of antitrust violations, particularly individual consumers.

As has been long recognized, the Department of Justice, the Federal Trade Commission, and state Attorneys General have limited resources. *See Reiter v. Sonotone Corp.*, 442 U.S. 329, 344 (1976) (“private suits provide a significant supplement to the limited resources available to the

Department of Justice for enforcing the antitrust laws and deterring violations”). In determining the focus of enforcement activities, those entities make decisions about what actions to pursue on the basis of their legislative and administrative mandates, available resources and other factors. *See* Joseph P. Bauer, *Reflections on the Manifold Means of Enforcing the Antitrust Laws: Too Much, Too Little or Just Right*, 16 LOY. CONSUMER L. REV. 303 (2004) (criminal prosecution for antitrust violations is integral, and is often most exclusively reserved for bid-rigging and other forms of price-fixing). Government activity is low. *Id.* at n.22 (In 2003, 729 of 762 civil antitrust cases (95.6%) were filed by private plaintiffs while, during the same period, 11 criminal cases were filed against 14 defendants). Indeed, the great majority of cartels proceed without detection. Robert H. Lande, *Why Antitrust Damage Levels Should be Raised*, 16 LOY. CONSUMER L. REV. 329, 330 n. 24 (2004) (citing testimony that government authorities catch less than 10% of all cartels, and noting that even if this percentage has increased, “there is still no evidence that it exceeds 1/3, so there is no reason to believe that the treble damages remedy should be lowered”). Private litigants help fill the gap by identifying and prosecuting violations and helping to shift the expense of enforcement away from governmental agencies, thereby conserving public resources.

Contrary to claims of some, as discussed above, there is no evidence of over-enforcement of the antitrust laws, even with the combination of government enforcement (federal and state) and private enforcement (direct purchaser and indirect purchaser). *Lande* at 330 (“There is no convincing evidence that the aggregate of direct purchaser damages, indirect purchaser damages, and the like produces damage levels so high that they have led to real duplication or overdeterrence”). For example, governmental agencies have not decided to devote significant resources to pursuing claims regarding price manipulation in the prescription drug field. Indirect purchasers, including insurance

companies, Taft-Hartley funds, and other entities that pay for pharmaceuticals, have pursued such claims. There is no reason to provide special protection to those accused of antitrust violations by limiting enforcement to the government or to a limited subset of injured private parties, or by limiting the rights of states to establish means of compensating some of their citizens injured by anticompetitive conduct.

In addition, indirect purchaser litigation under the various state laws that permit it provides an effective vehicle for compensating certain victims of antitrust violations, including individual consumers. As recognized by the Supreme Court in *Hanover Shoe, Inc. v. United States Mach. Corp.*, 392 U.S. 481 (1968) and *Illinois Brick v. Illinois*, 431 U.S. 720 (1977), antitrust overcharges can often be passed on to some extent by direct purchasers to their own customers and other indirect purchasers. Indirect purchaser class action cases have produced substantial compensation to such entities and persons, far above the amount of any fees or expenses awarded. *See, e.g., In re Buspirone Patent & Antitrust Litig.*, MDL No. 1413 (S.D.N.Y.); *California Vitamins Cases*, J.C.C.P. No. 4076 (San Francisco Superior Court); *In re California Indirect Purchaser X-Ray Antitrust Litig.*, No. 960886 (San Francisco Superior Court).

- 2. What burdens, if any, are imposed on courts and litigants by the difficulty of consolidating state court antitrust actions brought on behalf of indirect purchasers with actions brought on behalf of direct purchasers, and how have courts and litigants responded to them? What impact, if any, will the Class Action Fairness Act of 2005 have in this regard?**

Antitrust actions frequently are, by their nature, complex, multiparty cases and, like other types of cases, can pose management challenges to courts and litigants. But as compared to other types of complicated cases, antitrust actions ordinarily present and involve many common issues among plaintiffs (and plaintiff groups), are more suitable to class determination, and are more readily

subject to standard case management devices than others types of complex, multiparty litigation seen in federal courts. For at least the last forty years, courts have been developing experience, expertise and procedures to manage such cases. For example, the procedures of the Judicial Panel on Multidistrict Litigation provide a mechanism to centralize, coordinate, and consolidate cases for pretrial purposes. In addition, the Manual for Complex Litigation, now in its fourth edition, provides specific guidance, gleaned from four decades of practice, that courts can use and adapt to the individual needs and circumstances of the case before them.

Courts have developed mechanisms and procedures for eliminating or preventing duplication of effort, waste, and inefficiency where there have been parallel direct and indirect purchaser cases in federal and state courts, respectively. These include pretrial orders which can provide for coordinated, non-duplicative discovery, coordinated briefing and trial schedules, and regular communication between judges charged with managing concurrent federal and state litigation.

Furthermore, in many cases, direct and indirect purchaser litigation has been prosecuted in the same federal court. *See, e.g., In re Cardizem CD Antitrust Litig.*, 99-MD-1278 (E.D. Mich.); *In re Terazosin Hydrochloride Antitrust Litig.*, 99-MD-1317 (S.D. Fla.); *In re Buspirone Patent & Antitrust Litig.*, 01-MD-1413 (S.D.N.Y.); *In re Ciprofloxacin Antitrust Litig.*, 00-MD-1383 (E.D.N.Y.); *In re Relafen Antitrust Litig.*, 01-CV-12239 (D. Mass.). In such cases, courts have employed the mechanisms and devices described above to manage the litigation successfully, and to eliminate duplication of effort. Significantly, antitrust litigation focuses predominantly on proof of the substantive violation of the antitrust law, an issue that is often completely common to the claims of direct and indirect purchasers alike.

For example, in a price-fixing conspiracy case, direct and indirect purchasers share a

common interest in proof of the conspiracy. Likewise, in a monopolization or attempt to monopolize case, direct and indirect plaintiffs share a common interest in proving the defendant's monopoly power (and the relevant market pertinent to the case if such proof is required). Consequently, pursuant to judicial authority to manage such cases, and consistent with the Federal Rules of Civil Procedure, and where the circumstances of the case warrant it, courts issue orders providing for the coordinated production of documents and electronic records, a single protective order, single depositions of witnesses, and coordinated briefing and trial schedules.

To the extent the Class Action Fairness Act ("CAFA") will preclude litigation of separate class claims in state court, CAFA should minimize costs that may have arisen in the past from parallel proceedings in multiple jurisdictions. CAFA brings with it a host of new rules regarding removal jurisdiction. One can reasonably expect that defendants will try to remove all cases to federal court and that some plaintiffs will file complaints to avoid it. Collateral litigation in this area, related to the interpretation of CAFA jurisdictional rules and unrelated to substantive antitrust law, can be expected, at least until the rules are settled by appellate courts.

In the end, since in many cases as noted above, federal courts have already successfully managed cases in which direct and indirect claims have been pending in the same court, CAFA brings little marginal burden. To the extent CAFA reduces or eliminates parallel proceedings, management difficulties associated with coordinating concurrent litigation in federal and state court will be reduced. In any event, federal courts that handle antitrust cases are well-equipped to handle such proceedings consistent with past practice.

3. **Does *Illinois Brick*'s refusal to provide indirect purchasers with a right of recovery under federal antitrust law serve or disserve federal antitrust policies, such as promoting optimal enforcement, providing redress to victims of antitrust violations, preventing multiple awards against a defendant, and avoiding undue complexity in damage calculations?**

Indirect purchaser actions and direct purchaser actions complement one another. The “direct purchaser rule” that resulted from the *Hanover Shoe* and *Illinois Brick* can further a number of goals, including deterrence. If direct purchasers are unable or unwilling to sue their suppliers under federal law, however, state law permits indirect purchasers to seek redress and a remedy, to the extent federal law denies damage claims to indirect purchasers. On the other hand, to the extent indirect purchaser plaintiffs may have too small a claim to possess sufficient incentive to sue under state law, *Illinois Brick* provides such incentives to direct purchasers. Moreover, given that the critical concern we currently face is under-enforcement, and not “over-deterrence,” the prospect of direct and indirect purchaser actions proceeding simultaneously should be welcomed by those who have consumer welfare at heart, and not greeted with derision.

Strong arguments exist to show that federal remedies for direct purchasers alone are not enough. Like ordinary tortfeasors, antitrust violators should be required to fully compensate their victims, as well as to pay for the inefficiencies and welfare losses they have imposed on society. See Herbert H. Hovenkamp, *Antitrust's Protection Classes*, 88 MICH. L. REV. 1, 17-20 (1989). Moreover, because the cost of the violators' activities must be multiplied by a factor based on the risk of their being caught, in order to deter anticompetitive conduct the potential violator must be made to realize that the costs of violation (multiplied by the chances of getting caught and successfully prosecuted) outweigh the benefits of the conduct. Michael K. Block, Frederick C. Nold, & J. Gregory Sidark, *The Deterrent Effect of Antitrust Enforcement*, 89 J. Pol. Econ. 429, 430-34 (1981). As noted,

chances of detection (and subsequent successful prosecution) are typically low. Thus, permitting direct and indirect purchaser actions to proceed simultaneously serves the dual laudable goals of promoting deterrence and compensating the victims of anticompetitive conduct.

Indirect purchasers actions have been historically important in augmenting antitrust enforcement by other parties. Indeed, prior to *Illinois Brick*, indirect purchasers had grown increasingly vigilant as private attorneys general. See R. Harris and C.A. Sullivan, *Passing on the Monopoly Overcharge A Comprehensive Policy Analysis*, 128 U. PA. L. REV. 269, 353 nn. 154, 163, 163 (1979) (at the time of *Illinois Brick*, two-thirds of all private treble damage actions were brought by indirect purchasers).

Additionally, there is no reliable empirical evidence of multiple damage awards leading to “over-deterrence.” Academic research shows that, even if one were to include criminal fines in the calculation, there is *no case* in which a cartel as a whole has paid even treble damages. See *Lande* at 341-42. Indeed, it is rare for plaintiffs in any case to obtain more than single damages. See *Lande* at 344 (“the real effective total is only single fold damages or less”). In fact, many academics and commentators have shown that current levels of damages in antitrust are too low. *Lande* at 344.

Since *Illinois Brick*, economic and statistical analyses have been developed to provide sophisticated techniques on which businesses, government, and academics can rely to calculate which parties in the chain of distribution paid any antitrust overcharge. And courts already can exercise control over the admissibility of expert testimony. See *Daubert v. Merrell Dow Pharmaceuticals*, 516 U.S. 869 (1995). CAFA will now necessitate consideration of such methodologies in joint direct purchaser and indirect purchaser cases.

In sum, it is our considered view that courts should be permitted to continue their case-

specific development, based on fully developed factual records, of the best ways to manage antitrust litigation, including the coordination of complementary direct and indirect purchaser actions. This conservative approach is far better, in our view, to the imposition of legislation based on hypothetical situations and imagined problems. Consistent with the principles underlying the antitrust laws, complexities (real or imagined) should not be used as a basis (or pretext) for the creation of new impediments to vigorous enforcement of the antitrust laws.

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