PREPARED STATEMENT OF MICHAEL L. DENGER[1]
BEFORE THE ANTITRUST MODERNIZATION COMMISSION
HEARING PANEL ON "STATE INDIRECT PURCHASER ACTIONS: PROPOSALS FOR REFORM"
JUNE 27, 2005
WASHINGTON, D.C.

EXECUTIVE SUMMARY

Private rights of action for damages under the antitrust laws are designed to provide deterrence and to compensate those actually injured. They also should efficiently employ scarce judicial resources and minimize the costs and burdens on the parties. Post-*Illinois Brick*, we have operated in a balkanized and fragmented system of federal and state direct and indirect purchaser litigation that ill serves these objectives. *Illinois Brick* and *Lexecon* should be legislatively overruled, removal of state actions arising out of the same antitrust misconduct should be facilitated, and all state and federal actions to the maximum extent feasible should be consolidated in a single MDL proceeding. Such a proceeding could procedurally be structured with phased discovery and a trifurcated trial (liability, determination of the overall overcharge at the direct purchaser level, and allocation of damages among the claimants) to more efficiently and fairly resolve private and government antitrust claims.

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STATEMENT

I am pleased to have the opportunity to appear before the Antitrust Modernization Commission to address indirect purchaser litigation issues. While I have participated as a member of various task forces which have issued reports addressing indirect purchaser issues, the views expressed herein are solely my own, and not those of other task force members or my law firm.

This statement first addresses the questions contained in the Commission's May 19 Request for Public Comments, as well as supplemental questions received from the Commission's staff. It then considers a potential legislative solution to address the situation.

A. THE COSTS AND BENEFITS OF INDIRECT PURCHASER ANTITRUST ACTIONS.

Indirect purchaser antitrust actions have, in my judgment, one principal benefit – they offer the *prospect* of providing financial redress to many entities and persons who actually have been injured by the underlying antitrust violation. This is the strategic role they play. If the damage remedies provided for in federal and state antitrust laws are to compensate those who are in fact injured, as they are in substantial part intended to do,[2] then permitting indirect purchasers to recover is necessary. This is because direct purchasers, depending on industry conditions and supply and demand elasticities, will frequently pass on some or all of any overcharge to their customers, sometimes with a markup added.[3] I stressed that indirect purchaser actions offer the

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[2] *See, e.g., Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977) (the damage remedy "is also designed to compensate victims of antitrust violations for their injuries"); *see also Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 485-86 (1977).

[3] *See* "Report of the American Bar Association Section of Antitrust Law Task Force to Review the Supreme Court's Decision in *California v. ARC America Corp.*," 59 *Antitrust L. J.* 271,

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prospect of recovery in the case of individual indirect purchasers, because in many instances it will be difficult in a chain of distribution to determine with any degree of accuracy the amount of the overcharge a particular indirect purchaser has borne.

From the standpoint of deterrence,[4] I am not convinced that indirect purchaser litigation in state court is beneficial – in fact, the multiple venues, increased litigation costs, time, and complexity attendant to resolving indirect purchaser litigation may serve to deter – rather than incent – cartel participants from cooperating with antitrust enforcement agencies.[5]

The costs of indirect purchaser litigation are clear. First, indirect purchaser actions brought in numerous state courts substantially increase the complexity and external costs – both private and public sector – to resolve follow-on damage litigation. The number of participants increase geometrically – 20 or 30 judges are involved rather than a single judge supervising an MDL proceeding, local counsel have to be retained in each jurisdiction for multiple defendants, one or more new class counsel is involved in each state – all with attendant increases in costs. Coordination becomes more difficult, and depends on the voluntary efforts of counsel and the courts involved. The sparsity or total lack of relevant state law precedent on many key issues –

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284 (1990) ("1990 Task Force Report") (noting "[i]n most cases in which an effective cartel or monopolist imposes an overcharge on someone other than the ultimate consumer, one would expect that entity to pass at least some of the overcharge on to subsequent purchasers"); Harris & Sullivan, "Passing On the Monopoly Overcharge: A Comprehensive Policy Analysis," 128 *U. Pa. L. Rev.* 269, 276 (1979) ("[I]n a multiple-level chain of distribution, passing on monopoly overcharges is not the exception; it is the rule.").

[4] Deterrence is the other objective underlying private damage actions under the antitrust laws. *See Illinois Brick, supra*, 431 U.S. at 746.

[5] *See* Denger and Arp, *supra* note 1, at 44; *see also* D. Baker, "Punishing Antitrust Offenses As Crimes: The Role of Fines and Imprisonment," 69 *Geo. Wash. L. Rev.* 693, 703 (2001) (noting private recovery of treble damages "continues to be an even bigger economic threat to a corporation than the amount of the Sherman Act fine.").

class certification, the availability of the pass-on defense, etc. – and state judiciaries who are generally unfamiliar with the complexities of antitrust litigation give rise to uncertainty and the prospect of substantial motions practice, delay and appeals. Global settlements are more difficult to achieve. There is also duplicative motions practice (*e.g.*, class certification, personal jurisdiction, summary judgment) and the potential for duplicative discovery. Simply stated, 20 to 30 separate actions in different jurisdictions applying different – and largely undeveloped – substantive law involving numerous counsel and judges with no formal or procedural mechanism to mandate coordination increases exponentially the external costs to resolve follow-on damage actions.

a. Meaningful Recoveries.

Indirect purchaser actions in a number of matters have given rise to meaningful recoveries for *individual* plaintiffs. In the *Vitamins* litigation, for example, commercial indirect purchaser plaintiffs in various class actions in over 20 jurisdictions have recovered over $150 million, and commercial opt out plaintiffs have recovered tens of millions more. In *Vitamins*, over $150 million was also recovered on behalf of indirect purchaser consumers by class plaintiffs and state attorneys general, but was distributed *cy pres*. In other indirect purchaser litigation, such as *Cardizem*,[6] consumers also received significant recoveries.

b. Non-Follow-On Indirect Purchaser Litigation.

While most indirect purchaser litigation has followed government enforcement actions or direct purchaser damages actions, an indirect purchaser plaintiffs' bar has developed which, on occasion, has initiated antitrust actions without benefit of prior suits. The *Vitamins* litigation is

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[6] *See In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 518, 529 (E.D. Mich. 2003).

perhaps the most well known. The first case alleging a vitamins cartel was an indirect purchaser action filed in Alabama state court in December 1997, before a direct purchaser lawsuit was filed and well before the government announced the first criminal pleas.[7] Generally, however, indirect purchaser actions have piggybacked on government and direct purchaser actions.

c. The Potential for Multiple Liability.

An indirect purchaser settlement or judgment is not an offset against a direct purchaser settlement or judgment and vice versa. There is thus a possibility that a defendant would have multiple liability under federal and state antitrust laws arising from the same original sale.[8] The

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[7] *See* H. First, "The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law," 68 *Antitrust L.J.* 711, 712-16 (2001); *see also* D. Boies, *Courting Justice* 236 (2004). Other indirect purchaser class actions, like direct purchaser class actions, have been filed soon after a government investigation becomes public and have been pursued – with varying degrees of success – even where the government closes its investigation without taking any enforcement actions.

[8] The potential for multiple liability is enhanced where the product goes through multiple sales before it reaches the ultimate user (*i.e.*, there are several layers of indirect purchasers) and the applicable state antitrust law does not recognize a pass-on defense. There are also issues of "multiple recovery" arising from the alternative maximum fine for Sherman Act violations of the "greater of twice the gross gain or twice the gross loss" provided for in 18 U.S.C. § 3571(d). This fine provision is designed to deprive the defendant of any profit or, alternatively, to make the defendant pay for the overcharge to the victim. In antitrust cases, the U.S. Sentencing Guidelines makes the base fine 20% of the volume of affected commerce, which is a defendant's entire volume of sales of the relevant product in the U.S. during the period of the charged conspiracy. *See* U.S. Sentencing Guidelines Manual § 2R.1.1 (2000). None of the fine – although based on loss to the alleged victims of a cartel – is paid to direct or indirect purchasers who were injured by the overcharge or credited as an offset against a treble damage award to a direct or indirect purchaser. *See* Denger and Arp, *supra* note 1, at 42. To the extent that defendants are also required to make restitution of their gains by the sentencing court in the criminal proceeding as a condition of probation, such restitution is not statutorily treated as an offset against any treble damage award.

potential for duplicative liability has been widely discussed.[9] Determining whether any defendants have in fact been subject to "multiple liability" first requires that the term be defined. "Multiple liability" as the term was used in *Illinois Brick* means damages under Section 4 of the Clayton Act greater than the treble damages it authorizes.[10] Post-*Illinois Brick*, defendants have not been subject to "multiple liability" under Section 4 as the term was used by the Supreme Court. However, defendants have been exposed to potential multiple liability under federal and state antitrust laws.

Assessing whether defendants have in fact paid more than treble damages (three times the overcharge) is notoriously difficult because (1) few cases are litigated against all defendants, (2) most non-class settlements are not public[11] and (3) calculating overcharges (after taking into

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[9] *See, e.g.*, "Report of the Indirect Purchaser Task Force," 63 *Antitrust L. J.* 993, 994 (1995) (noting that the full amount of the overcharge, trebled, can be recovered by direct purchasers under federal law, by indirect purchaser customers of the direct purchasers under many state laws, and in many states, by indirect purchasers at every level in the chain of distribution down to the ultimate consumer and that indirect purchasers potentially can seek as damages any markups intermediate sellers imposed on top of the original overcharge); *see also* "Report of the American Bar Association Section of Antitrust Law Task Force to Review Proposed Legislation to Repeal or Modify *Illinois Brick*," 52 *Antitrust L. J.* 841, 849 (1983).

[10] *See Illinois Brick, supra*, 431 U.S. at 730; 1990 Task Force Report, 59 *Antitrust L. J.* at 283 ("*Hanover Shoe* and *Illinois Brick* simply did not consider the effect of any liability imposed by a separate sovereign for the same anticompetitive conduct.")

[11] For example, the publicly disclosed direct purchaser class settlement with the six leading defendants in the *Vitamins* litigation involved $1.1 billion (not including attorneys fees). However, 75% of the direct purchaser class volume opted out of the settlement. One of the lawyers who represented the largest group of opt outs is publicly reported to have said that his direct purchaser clients (accounting for approximately 40% of the settlement class volume) in the aggregate received nearly $2 billion in settlements versus $400 million they would have received had they remained in the settlement class. *See* "Dickstein's Big Bet," *Legal Times*, July 19, 2004. If this $2 billion is added to what the class received after opt outs (approximately $370 million) and one assumes that the other opt outs (approximately

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account a myriad of factors such as discounted sales below list prices, the effect of foreign exchange rates, estimating "but for" prices in an oligopolisitic market, factoring in the time value of money, etc.) is often complex and uncertain (producing widely varying estimates from leading economists in particular cases). However, in major cartel cases, where defendants have paid criminal fines approximating 20-25% of affected sales, followed by settlements with direct purchasers of 20-30% of affected sales (not including plaintiffs' attorneys' fees and costs), then defendants' exposure could well exceed 50% of total *sales* of the relevant product during the conspiracy period *before* taking into account indirect purchaser class recoveries, actions brought by state attorneys general, and the substantial cost of defending a myriad of actions (including opt out litigation) which typically span from three to seven years.[12] Based on public information in the *Vitamins* litigation, and making some estimates of the cost of defense, it is not unlikely that the defendants paid fines, settlements and litigation expenses from the U.S. criminal and civil litigation which, in the aggregate, averaged over 100% of their U.S. sales.[13] From the

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35% of the class volume) also received on average settlements substantially in excess of the class settlement of 18-20% of sales, then the total direct purchaser recovery in *Vitamins* from the six lead defendants could easily have been between $3 and $4 billion, or more than triple what was reported.

[12] Under federal (and presumably most states') antitrust law, a defendant is jointly and severally liable for the damages resulting from the overcharges on sales made by all participants in the conspiracy. Since litigation costs are often unrelated to sales volumes, the costs of defense (measured as a percentage of sales) are disproportionately higher for the smaller defendants.

[13] *See* K. O'Connor, "Is the *Illinois Brick* Wall Crumbling?," 15 *Antitrust* 34, 37 (Summer 2001) (estimating that the six lead "defendants have paid approximately two-and-a-half times a reasonable estimate of single damage overcharges when one combines the approximately $875 million in criminal fines, the $1.1 billion in direct damages, and approximately $400 million in indirect damages."). If this estimate is adjusted to take into account non-reported direct and indirect opt-out settlements and other settlements occurring after the article was written (*see* note 11, *supra*), as well as very substantial legal and expert costs (probably

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Vitamins defendants' standpoint, the total cost to resolve their antitrust liability was clearly a multiple of any overcharge on their U.S. sales during the period of the conspiracy.

d. Indirect Purchaser Actions Involving Solely or Primarily Intrastate Conduct.

While there may be indirect purchaser actions limited primarily to *intra*state conduct, none come immediately to mind.

B. BURDENS IMPOSED BY STATE INDIRECT PURCHASER LITIGATION.

The burdens imposed on courts and the parties from a fragmented system of multiple state court actions have been previously discussed.[14] The additional costs imposed by such a system over and above a more efficient system to handle indirect purchaser damage claims are, in my judgment, both unnecessary and detrimental to consumers, since they will ultimately be passed on.

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aggregating well over $250 million) to defend litigation lasting almost eight years, the six lead *Vitamin* defendants probably paid more to resolve their U.S. antitrust liability than their total U.S. sales during the conspiracy period. The remaining *Vitamin* defendants (accounting for less than 10% of total vitamin sales during the conspiracy period) paid direct purchasers multiples of their profits. They paid the direct purchaser class (accounting for 25% of direct purchaser volume) $225 million, plus many millions more to opt out direct purchasers and indirect purchasers. *See* D. Boies, *Courting Justice*, *supra* at 256-260 (noting E-Merck settled for 89% of total revenue from sales to class members during the conspiracy period; that Sumitomo settled for 82% of its total revenue from the sale of vitamins to class members and many times its profits on such sales; that four Niacin suppliers settled for 63% of their total sales to class members; that Tanabe settled for $45 million, "more than forty times the company's profits" on vitamin sales to class members; and that Mitsui, which did not directly make any sales in the U.S., settled with the class for $53 million").

[14] Indirect purchasers can sue for injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. § 26. In a number of cases, indirect purchaser class plaintiffs have elected to bring state law indirect purchaser claims in federal court as supplemental claims under 28 U.S.C. § 1367 to a federal Section 16 claim.

The present system – including the recently enacted Class Action Fairness Act of 2005 ("CAFA"),[15] and the *ad hoc*, voluntary methods of coordination and cooperation developed by counsel are not, in my judgment, a substitute for legislation directly addressing the problems.

a. The Likely Impact of CAFA on Indirect Purchaser Litigation.

CAFA was not designed to address the specific issues posed by indirect purchaser litigation in state courts. While CAFA should have some beneficial effects, it will not remedy a number of problems posed by the current fragmented system of direct and indirect purchaser litigation. Specifically, CAFA will not ensure that indirect purchaser litigation is efficiently consolidated in a single federal court:

1) Absent a *Lexecon*[16] legislative repealer, indirect purchaser cases removed to federal court, even if transferred by the Judicial Panel on Multidistrict Litigation ("JPML") to a single district for pre-trial proceedings, would be returned to the various districts to which they were removed absent an agreement of the parties.

2) Because of the differences in substantive state antitrust laws, the prospect, in my judgment, that single nationwide indirect purchaser classes regularly would be certified is low.[17]

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[15] Pub. L. No. 109-002.

[16] *Lexecon, Inc. v. Milberg, Weiss, Bershad, Hynes & Lerach*, 523 U.S. 26 (1998).

[17] All six federal circuits (the Third, Fifth, Sixth, Seventh, Ninth and Eleventh) to address the issue, as well as twenty-six federal district courts, have refused to certify class actions (under other substantive areas of state law) pursuant to Rule 23 of the Federal Rules of Civil Procedure based on disparate state laws applicable to the members' claims, which the courts

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3) If indirect purchaser classes are not certified (even on a statewide basis), then the individual actions would return to state courts.[18] Similarly, opt outs from any class that was certified would be able to file in state court with little likelihood of removal.[19]

4) In those states in which judicial precedents for state law indirect purchaser claims are few or nonexistent, and that allow for certification of state law questions to the state Supreme Court, delays could easily ensue where the federal district court elects to refer the matter to the applicable state Supreme Court for guidance.

5) Direct purchasers may be expected to resist the transfer of indirect purchaser actions to the same federal MDL proceeding.[20] While discovery related to direct purchaser plaintiffs' pass-on of the overcharge could be arguably irrelevant to a direct purchaser action in light of *Illinois Brick*, indirect purchaser

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found made such class actions "unmanageable." *See* 151 CONG. REC. S1166 (daily ed. Feb. 9, 2005) (statement of Sen. Feinstein).

[18] Indirect purchaser class actions have not been certified in a number of states principally on the ground the issues common to the class do not predominate. *See* W. Page, "The Limits of State Indirect Purchaser Suits: Class Certification in the Shadow of *Illinois Brick*, 67 *Antitrust L.J.* 1, 3 (1999).

[19] This assumes the federal court presiding over the class action does not choose to exercise supplemental jurisdiction over the class opt outs pursuant to 28 U.S.C. § 1367, and that the opt outs don't join together as a mass action large enough to be removed under CAFA's mass action provision (more than 100 plaintiffs and $5 million in controversy).

[20] Indirect purchasers removed to federal court under CAFA's mass action provision may avoid transfer to the MDL court as long as a majority of them do not request the transfer. 28 U.S.C. § 1332(d)(11)(C).

plaintiffs would clearly need to develop such information from the direct purchaser plaintiffs to establish their derivative damage claims.[21] Consolidating indirect and direct purchaser actions would thus impose additional discovery burdens on direct purchasers, which they could be expected to resist by arguing that combining such actions would unduly complicate the direct purchaser MDL proceeding.[22]

b. Existing Informal Coordination Among Direct and Indirect Purchaser Class Actions.

The parties and the judges involved have developed various informal means of reducing the burdens and potential for duplication resulting from the existing system of fragmented federal and state court damage litigation. In a number of cases, counsel have agreed on various methods to coordinate between direct and indirect purchaser actions and among indirect purchaser actions pending in different states. For example, agreements have been worked out to stay state court indirect purchaser proceedings in their entirety or to stay discovery, conditioned upon discovery in the MDL direct purchaser proceeding being made available to plaintiffs' counsel in the indirect purchaser actions. Counsel for indirect purchaser plaintiffs, in some cases, have been allowed to participate in direct purchaser case depositions of defendants' employees. Expert discovery in the direct purchaser case has been exchanged and global

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21 This is a particular problem of state indirect purchaser litigation today since the parties with relevant evidence about the extent of the pass-on to indirect purchasers – the direct purchasers – are not parties to the litigation.

22 The JPML has generally not been sympathetic to such objections. *See, e.g., In re Microsoft Corp. Windows Operating Sys. Antitrust Litig.*, 2000 U.S. Dist. Lexis 5559, *5 (JPML 2000) (transferring direct and indirect purchaser classes to the same MDL district over the objection of the direct purchasers).

settlements have been reached among class plaintiffs in indirect purchaser actions pending in multiple states.

While such cooperative efforts have reduced the burden, it is all dependent on the voluntary cooperation of counsel and the courts. Where, for various reasons, the interests of the parties diverge, informal cooperation simply will not work.[23]

Moreover, none of the mechanisms grapple with the fundamental problems that (1) 20-30 separate actions (and judges) are involved, (2) defendants will need to retain local counsel in each jurisdiction, (3) the substantive and procedural law will be both more complex (numerous laws apply, each with differences and many that are largely undeveloped and lacking precedent in key areas), and (4) the number of actors whose agreement is necessary for voluntarily coordination is a multiple of that in an MDL proceeding (and their interests may not coincide).

c. Difficulties of Indirect Purchase Class Certification in Various States.

The difficulties in obtaining certification of indirect purchaser classes in various states has a number of implications. First, where class certification is denied, the potential for a substantial recovery on behalf of indirect purchasers in such states is significantly diminished, absent substantial commercial indirect purchaser opt outs who pursue individual actions. Second, removal under CAFA to federal court will be unlikely to have significant benefits absent certification. Third, in states where indirect purchaser class certification is unlikely, defendants may have less incentive to settle and more reason to press for an earlier resolution of class certification.

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23 *See* Remarks of J. Himes before the AAI Colloquium on Issues Confronting States and Plaintiffs Class Action Bar, November 5, 2003, at 13-14.

C. THE POST-*ILLINOIS BRICK* SYSTEM AND THE GOALS OF ANTITRUST POLICY

In my judgment, the ruling in *Illinois Brick* that indirect purchasers cannot recover damages under federal antitrust laws disserves federal antitrust policy in several ways. First, if we assume (as is reasonable) that some or all of an overcharge is passed on by direct purchasers, then *Illinois Brick* creates a class of injured persons that are denied compensation as a matter of law, contrary to one of the two principal purposes of Section 4 of the Clayton Act – providing redress to those actually injured. The corollary of this denial is that in the name of deterrence, direct purchasers are frequently given a windfall. They are allowed to recover damages even in cases where they passed on the full overcharge and added a markup, (*i.e.*, when they were not injured at all and may have benefited from the overcharge).[24] This is wrong and, in my judgment, is too steep a price to pay for an unproven marginal gain in deterrence.[25]

Second, we have a situation now where indirect purchasers injured by a national or international conspiracy can recover damages in some states but not others; from a federal enforcement standpoint, uniformity in the right to recover is appropriate.

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24 *See* P. Areeda, ANTITRUST ANALYSIS: PROBLEMS, TEXT, CASES 75 (2d ed. 1974) (it is "paradoxical to deny recovery to the ultimate consumer while permitting the middlemen a windfall recovery"), quoted by Mr. Justice Brennan, dissenting in *Illinois Brick*, 431 U.S. at 761.

25 There is little empirical work relating to what (*i.e.*, level of damages, imprisonment, probability that a cartel is discovered) constitutes adequate deterrence. *See* D. Klawiter, "After the Deluge: The Powerful Effect of Substantial Criminal Fines, Imprisonment, and Other Penalties in The Age of International Cartel Enforcement," 69 *Geo. Wash. L. Rev.* 745, 758 n.79 (2001) (surveying literature showing lack of consensus regarding what constitutes adequate deterrence and the impact of severe monetary penalties in deterring cartel behavior).

Third, we have created a system with the potential for exposing defendants to multiple liability under a system of damages that -- even without duplicative exposure -- trebles the full overcharge.[26]

Fourth, we have imposed unnecessary costs on the judiciary and the parties, made settlement more difficult by fragmenting the litigation and multiplying the number of counsel involved, and created a patchwork system of differing substantive state laws which makes consolidation of state indirect purchaser classes into a single national indirect purchaser class difficult.

Finally, *Illinois Brick* in the overall federal and state context does not make damage calculations easier – it simply pushes off to state court litigation difficult pass-on issues where the direct purchasers with the relevant evidence are not parties.

a. Promoting Private Enforcement

In my judgment, the incentive to bring cases is to be found in the statutory provision for a reasonable attorney's fee, the automatic trebling of actual damages, the rule of joint and several liability with no right of contribution, the availability of class actions, access to evidence provided by amnesty applicants and other cooperating defendants to the U.S. and foreign governments, and the *prima facie* effect of a government plea or judgment under Section 5 of the Clayton Act. There was no shortage of plaintiffs' counsel willing to bring private damage actions before *Illinois Brick* and no shortage today for direct purchaser classes, indirect purchaser

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[26] Because sales by indirect purchasers are often *inter*state, it is not always clear in what state (or states) given indirect purchasers can bring damage actions. This complicates the effectiveness of class releases in settlements and magnifies the potential for multiple damages.

classes and opt-outs. If anything, there is overrepresentation marked by unnecessary redundancy among plaintiffs' counsel in private antitrust class action litigation.

b. Likelihood of Direct Purchaser Suits

My impression is that direct purchasers in the vast majority of cases will bring suit (or remain in a direct purchaser class) where a viable antitrust claim exists. The vigilance of the plaintiffs' bar suggests that direct purchaser class actions will be brought in virtually every plausible case of possible cartel behavior or arguably monopolistic conduct by a dominant firm. With directors increasingly vigilant to pursue potential corporate recoveries to protect shareholders' interests, the situations where corporate direct purchasers elect to opt out of class actions and not seek redress on their own behalf to avoid disrupting supplier relations are probably relatively small in number. Cost-plus contracts might be another circumstance that could lead direct purchasers not to seek redress, but these situations also seem rare. In short, direct purchasers can ordinarily be expected to pursue their federal damage remedies.

c. The Complexity Of Damage Calculations If Indirect As Well As Direct Purchasers Could Sue Under Federal Law

Under current law, direct purchaser damage calculations are not complicated by pass-on issues. However, the pass-on issue is not avoided, but simply transferred to numerous state courts who must determine the extent to which overcharges were passed on by direct purchasers to the first level of indirect purchasers and the extent to which such overcharge was passed on through each level of the chain of distribution. One point that needs emphasizing in this regard is that because the risks to defendants are often so immense with joint and several liability, treble damages, no right of contribution and class actions, most direct (and many indirect) purchaser actions settle and very few are tried. Courts and juries are thus spared the burden, complexity and difficulty of dealing with pass on issues. Permitting direct and indirect purchasers to sue in

federal court would add complexity to federal court damage determinations in comparison to the *Illinois Brick/Hanover Shoe* rules, but would limit inconsistent determinations and the risk of duplicative recovery faced in the dual federal/state damage system we have today. Procedural devices also could be employed to reduce the complexity and burden in a combined direct and indirect purchaser trial. *See* pp. 18-21, *infra*. In addition, any "real world" complexity and burden would be substantially reduced by the tendency of most cases to settle prior to trial.

D. POSSIBLE LEGISLATION TO ADDRESS INDIRECT PURCHASER ISSUES

Various task forces and thoughtful observers over the nearly forty years since *Illinois Brick* was decided have increasingly found the present fragmented and balkanized system of private antitrust damage actions to be deficient and problematic, although sometimes in different (and conflicting) respects. Proposals to preempt state antitrust actions have triggered political controversy given our long history of dual state and federal antitrust enforcement. The legislative (and procedural) suggestions set forth below, however, have at various times been made by observers with plaintiff, state attorney general, and defendant perspectives, and may provide a framework for a legislative solution.

1. Consolidation in a Single Forum

The federal judges who have handled major MDL antitrust actions who I have heard address the subject have generally expressed the view that it is more efficient if a single judge (with appropriate magistrate and special master assistance) handles all aspects of a complex antitrust damage action. Various plaintiffs and defense counsel have voiced the same view.[27] A

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[27] The 2001 Antitrust Task Force on the Federal Antitrust Agencies, for example, noted:

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consolidated action would ideally include all federal and state direct and indirect purchaser actions, including state government and *parens patriae* actions, arising out of the same violation. It would include consolidation for trial as well as pre-trial purposes. To achieve this result, a number of legislative changes would be required. First, *Illinois Brick* would have to be legislatively overruled permitting indirect purchasers to sue for damages under Section 4 of the Clayton Act. This would allow all indirect purchasers – not just those in the states with legislative repealers or judicial decisions permitting indirect purchasers to sue – to bring damage actions. If indirect purchasers had a federal cause of action, the various differences among state laws on indirect purchaser issues would no longer impose a constraint on nationwide indirect purchaser class certification. If *Illinois Brick* were repealed, it also seems likely that most indirect purchaser cases would be filed in federal court under federal law.[28] Second, *Lexecon*[29]

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> consolidating all civil penalty or damages litigation in one court, and thereby reducing the burden on judicial resources, limiting unnecessary attorneys' fees and litigation costs, expediting resolution of damage claims, avoiding windfalls and duplicative and inconsistent recoveries, and making the process more rational and efficient, is a notion worth considering, since the problem is a serious one.

See Report of ABA Section of Antitrust Law Task Force on the Federal Antitrust Agencies – 2001, at 23-24; 1990 Task Force Report, 59 *Antitrust L. J.* at 287 (noting benefits of consolidating direct and indirect purchaser claims in a single federal forum); "Report of the American Bar Association Antitrust Law Section Task Force on Legislative Alternatives Concerning *Illinois Brick Co. v. Illinois*," 46 *Antitrust L. J.* 1137, 1144-50 (1978) (single federal forum "best available mechanism"); J. Himes, *supra* note 23, at 14 (noting benefits of a single federal forum to prosecute indirect purchaser cases on a consolidated basis).

[28] *See* J. Himes *supra* note 23, at 17 (a federal damage remedy for indirect purchasers would likely result in plaintiffs' counsel and state attorneys general filing in federal court where a uniform, nationwide cause of action existed, with pendent state claims as occurred prior to *Illinois Brick*).

[29] *Lexecon, Inc. v. Milberg, Weiss, Bershad, Hynes & Lerach*, 523 U.S. 26 (1998).

would have to be legislatively overruled allowing MDL cases to be consolidated for trial by the JPML and/or the transferee court. Third, removal jurisdiction would need to be legislatively broadened to allow any state antitrust or related claim (*i.e.*, unjust enrichment, state "little FTC Act" or deceptive practices claims) for monetary recovery (damages, restitution, etc.) arising from the alleged antitrust conduct to be removed to federal court regardless of the jurisdictional amount and less than complete diversity.[30] Fourth, it would also be worthwhile to create a legislative presumption that all removed actions found to arise from the alleged antitrust misconduct should be transferred by the JPML to the same district as the related federal antitrust litigation. Fifth, any opt outs from a direct or indirect purchaser class would be required to participate in the consolidated MDL proceeding. Having all the claimants before the same court should reduce litigation costs, conserve judicial resources, and prevent inconsistent judgments and duplicative liability for the same overcharge.

2. Structuring Discovery and Trial

To better manage the consolidated litigation, phased discovery and a trifurcated trial (liability, aggregate overcharge determination, and allocation of damages) would be employed.

To begin with, the Court, as it has the authority to do today, could enter appropriate orders to require plaintiffs' and defendants' counsel to coordinate discovery effectively (*e.g.*, limiting the number of counsel at depositions, requiring consolidated interrogatories and document requests) with respect to liability and determination of the aggregate overcharge. This

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[30] The legislation also could preclude additional recoveries under state law unless the state specifically authorizes duplicative recoveries beyond the treble damages provided by Section 4 of the Clayton Act.

would be the first phase of discovery preceding the trifurcated trial procedure recommended below.

The first part of the trifurcated trial would be limited to a determination of liability.[31] If liability were determined, the trial would proceed to a second phase against the defendants found to be liable in which the overall amount of the overcharge at the direct purchaser level would be determined.[32] Since defendants would be liable for the overcharge irrespective of whether it was passed through, deterrence would be served because defendants would be liable for the full overcharges at the direct purchaser level.[33] Defendants would not be permitted to defensively raise the pass on issue in the second phase of the trial to determine the aggregate overcharge.[34] Thus, as to defendants use of pass on , *Hanover Shoe* need not be legislatively overruled.

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31 *See* Minority Views of Lee A. Freeman, Jr., 1983 Task Force Report, 52 *Antitrust L.J.* at 859, 860 ("One approach is to collect all possible plaintiffs in one court and adjudicate the liability of the defendants for the initial overcharge. After the adjudication on the amount of the initial overcharge, the defendants may be excused while it is determined who was harmed by the overcharge found in the initial trial."); *accord*, 1978 Task Force Minority Report, 46 *Antitrust L. J.* at 1167-68 (same recommendation); *see* 1978 Task Force Report, 46 *Antitrust L. J.* at 1154-56 (recommending that the court be given flexibility to structure the proceeding to allow multi-stage trials to determine distinct issues (*e.g.*, liability, aggregate damages, and allocation of damages) and that courts be permitted to use statistical and sampling methods to measure damages in the aggregate).

32 Bifurcation of liability and damage issues is permissible under Fed. R. Civ. P. 42(b) and is regularly employed in antitrust and other complex cases. *See* ABA Section of Antitrust Law, ANTITRUST LAW DEVELOPMENTS 1000 (5th ed. 2002).

33 "[F]rom the deterrence standpoint, it is irrelevant to whom the damages are paid, so long as someone redresses the violation. Antitrust violators are equally deterred whether the judgments against them are in favor of direct or indirect purchasers." *Illinois Brick*, 431 U.S. at 760 (Brennan, J., dissenting); *see also id.* at 746.

34 In passing *parens patriae* authority for state attorneys general in Section 4E of the Clayton Act, Congress provided for aggregation of damages in price fixing actions. *See* H. R. Rep.

[Footnote continued on next page]

At some point before the second (or even first) phase of the trial was completed, some (or all) defendants may well settle with some (or all) of the plaintiffs. Prior to *Illinois Brick*, allocations among direct and indirect purchaser classes in overall settlements were reached in cases where direct and indirect purchaser classes were consolidated in a single MDL proceeding.[35] The same result could be expected today.[36]

In the event settlements did not resolve the issue, a third phase of the trial would allocate the damages among the direct and indirect purchaser and other claimants (*e.g.*, government purchasers).[37] Because the defendants would not possess any evidence relevant to whether the overcharges had been passed through by direct purchasers and others in the chain of distribution, there would seem to be no need for defendants to participate in the third phase of the

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94-499, 74th Cong., 1st Sess. 14-15 (1976); 15 U.S.C. § 15d (2000). *See Pfizer, Inc. v. Lord*, 449 F.2d 119, 120 (2d Cir. 1971) (awarding damages on an aggregate basis and then processing individual claims to allocate damages).

35 In *In re Gypsum Cases*, 386 F. Supp. 959 (N.D. Cal. 1974), counsel for the direct purchaser class (21.15%), the first level indirect purchaser class (21.15%), the second level indirect purchaser class (10.8%) and two third level indirect purchaser classes (10% and 36.9%), respectively, agreed on a distribution allocation among the classes of an overall settlement. The same result occurred in the *In re Chicken Antitrust Litigation*, 669 F.2d 228, 234 (5th Cir. 1982), involving two direct purchaser and a first and second level indirect purchaser class. *See* 52 *Antitrust L. J.* at 861 and ns. 2-3 (minority views of H. Ladie Montague). Similar allocations have also been made post-*Illinois Brick* in various drug litigations involving classes of direct purchaser, indirect purchaser consumer and third-party payors.

36 *See, e.g., In re Cardizem CD Antitrust Litigation, supra*, 218 F.R.D. at 515-16 ($80 million overall settlement allocated among state agencies, consumers and third party payors).

37 The exemplary damages would ordinarily be awarded in proportion to the allocation of actual damages.

proceeding.[38] Pass-on discovery would take place after the second trial phase determining the aggregate overcharge.

By agreement of the parties, the third party allocation proceeding might even be handled less formally using magistrates or special masters without need for a trial (or trials) before the court or a jury.[39]

This approach offers the prospect of a private enforcement system that better achieves the dual goals of Section 4 – providing deterrence and compensating the actual victims of antitrust overcharges – while avoiding inconsistent judgments, duplicative recoveries, and multiple proceedings which are expensive and burdensome to the courts and parties alike. Hopefully, such an approach would also resolve the litigation in a shorter period of time and at less cost.

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[38] *See* note 31, *supra*.

[39] If desirable and justifiable, rebuttable legislative presumptions also could be enacted addressing the extent of pass-ons and which purchasers bore the overcharge. *See* Freeman, *supra* note 31, at 860; *see also* 1995 Task Force Report, 63 *Antitrust L.J.* at 996. In some *Illinois Brick* repealer states, attorneys general and private plaintiffs both have authority to represent indirect purchasers. *See* J. Cohen and T. Lawson, "Navigating Multistate Indirect Purchaser Suits," 15 *Antitrust* 29, 30-31 (2001). In the event that *Illinois Brick* is overruled, it also would seem desirable to provide attorneys general with exclusive authority to bring parens patriae actions under federal law on behalf of injured natural persons (i.e., consumers) who are indirect purchasers.