



MEMORANDUM

From: AMC Staff

To: Commissioners

Date: July 21, 2006

Re: Removal versus Preemption of State Indirect Purchaser Actions

During the Commission's deliberations on May 8, 2006, it considered on a proposal that would (1) legislatively overrule *Illinois Brick* and *Hanover Shoe*; (2) allow removal of all state indirect purchaser actions to federal court to the full extent permitted under Article III; (3) provide for resolution of all direct and indirect purchaser claims relating to the same allegedly anticompetitive conduct in a single forum for pre-trial as well as trial proceedings; and (4) preempt state indirect purchaser laws. Per the Commission's request, this memorandum briefly addresses (i) the extent to which additional provisions in regard to removal may be appropriate after the Class Action Fairness Act of 2005 ("CAFA"), and (ii) the different effects of removal versus preemption.

Removal and CAFA

- Under a removal regime, most actions will be resolved in federal court. Some actions may remain in state courts because of limits on Article III jurisdiction, limits on the Article I commerce power, or because of statutory limits on removal authority.
 - ▶ Under the ABA's proposal, any action (whether on behalf of a class or not) alleging injury from direct or indirect purchases or sales under state law provisions comparable to the federal antitrust laws could be removed,

so long as there is “minimal diversity” (*i.e.*, removal is allowed up to the limits of Article III diversity jurisdiction).¹

- ▶ Under CAFA²:
 - Any class action may be brought in or removed to federal court in which (1) the aggregate value of the claims exceeds \$5,000,000, (2) there are at least 100 members of the putative class, and (3) any member of the plaintiff class is a citizen of a state diverse from any defendant.³
 - However, there are two main limits on application of CAFA (there are a number of additional limiting provisions omitted here for the sake of clarity):
 - (A) “CAFA’s jurisdictional provisions do not apply to class actions if (1) two-thirds of the proposed class members are citizens of the state in which the action was filed; (2) there is at least one in-state defendant whose conduct forms a significant basis of the putative class’s claims; (3) the principal injuries occurred in the state where the class action was brought; and (4) no class action making the same claims has been filed against any of the defendants in the preceding three years.”⁴
 - (B) A federal court has discretion to take jurisdiction over a class action in which “between one-third and two-thirds of the members of the putative class are citizens of the same state as the defendant or defendants.”⁵

Preemption versus Removal

- Express preemption occurs when Congress specifies that federal law fully precludes state and local regulation in the same area. Thus, assuming there was a

¹ See ABA Section of Antitrust Law, *Report on Remedies* (Oct. 2004) (proposed new 15 U.S.C. § 15(f)). Under the ABA’s proposal, the federal court must remand the action to state court if the conduct alleged in the complaint appears neither to be in nor affecting interstate commerce. *Id.*

² For further discussion of CAFA and its likely impact on indirect purchaser litigation, see Civil Remedies-Indirect Purchaser Discussion Memorandum, at 9-11 (May 4, 2006).

³ Ian Simmons & Charles E. Borden, *The Class Action Fairness Act of 2005 and State Law Antitrust Actions*, 20 ANTITRUST 19, 20 (Fall 2005) (citing 28 U.S.C. § 1332(d)(2), (d)(5), (d)(6))

⁴ *Id.* (citing 28 U.S.C. § 1332(d)(4)(B)).

⁵ *Id.* (citing 28 U.S.C. § 1332(d)(3)). The Act sets forth six specific factors that a district court is to consider and balance, in deciding whether to exercise its discretion, as to whether the action has interstate implications and the nexus between the conduct and the state in which the action was filed. *Id.* at 20 n.13.

federal right of action for indirect purchasers, all indirect purchaser actions would be brought and fully resolved in federal court, under federal antitrust law.

- Under a removal regime, cases removed to a federal court would still be largely governed by the law of the state where the action was filed, under *Erie*.⁶ For example, state law could permit indirect purchasers to sue for the full amount of any overcharge (without any limit on direct purchasers doing the same), and the federal court would likely be obliged to apply this rule to actions removed from that state. Currently several states with *Illinois Brick* “repealers” by statute bar “duplicative” recovery, and several appear to have authoritative judicial rulings barring it. No state law expressly calls for permitting duplicative recovery of this type.
- If state law governs the claims in federal court, courts will be required to interpret and apply different state legal standards to largely identical claims from citizens of different states.
- There may be some areas where the governing law may be unclear under choice of law rules, increasing legal uncertainty. It is not clear, however, that a removal system exacerbates this problem, rather than just transfer it to federal court for resolution.
- Under a removal regime, a single plaintiff could arguably bring a federal claim and a state law claim for the same cognizable injury, and both could be adjudicated by the federal court. The plaintiff’s relief could be limited to the claim providing the greater recovery, but a plaintiff might try to assert a right to recover under both the federal and state claims.⁷
- Under a removal regime, defendants retain some degree of discretion regarding the packaging of law suits, and may elect to remove or not remove specific cases to federal court (perhaps, for example, electing to settle particular cases at the state level without combining them at the federal level).
- Without overruling *Lexecon*, defendants could still be subject to the “whipsaw” effect that the application of collateral estoppel for the benefit of plaintiffs, but not for defendants, can cause. Preemption, assuming a federal right of action for indirect purchasers, may reduce that problem, however, because plaintiffs would be able to plead a single, national class action under federal law, whereas under removal, plaintiffs would have to sue under the laws of numerous different states.

⁶ *Erie RR Co. v. Tompkins*, 304 U.S. 64 (1938).

⁷ See ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS, 822-24 (5th ed. 2002) (while this question has not been settled, *ARC America* suggests that double (federal and state) recovery might be available, but several federal decisions predating *ARC America* seem to assume the exemplary damages portion of the state and federal claims are “mutually exclusive” and that a plaintiff must elect a state or federal remedy).