

Civil Remedies-Indirect Purchaser Discussion Outline

Note: Italicized text is based on the questions on which the Commission requested comment from the public.

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?*
2. *What actions, if any, should Congress take to address the inconsistencies between state and federal rules on antitrust actions by indirect purchasers? For example, should Congress establish Illinois Brick as the uniform national rule by preempting Illinois Brick repealer statutes, or should it overrule Illinois Brick? If Congress were to overrule Illinois Brick, should it also overrule Hanover Shoe, so that recoveries by direct purchasers can be reduced to reflect recoveries by indirect purchasers (or vice versa)? Assuming both direct and indirect purchaser suits continue to exist, what procedural mechanisms should Congress and the courts adopt to facilitate consolidation of antitrust actions by indirect and direct purchasers?*

- No statutory change is appropriate, and law should be allowed to develop subsequent to passage of the Class Action Fairness Act.
- Recommend statutory change to preempt state laws that permit indirect purchasers to recover in a manner inconsistent with the federal rule on indirect purchaser recoveries set forth in *Illinois Brick*, and retain the current *Illinois Brick* rule under federal law.

If so:

- Recommend preemption only with respect to private actions, but allow state attorneys general to recover on behalf of indirect purchasers to the extent permitted by state law.
- Recommend preemption of all actions except those regarding *per se* unlawful offenses such as price fixing and other cartel conduct.
- Recommend preemption of all actions, both private and those brought by state attorneys general.

- Recommend that *Illinois Brick* be overruled by statute so that indirect purchasers may sue under federal law to recover damages.

If so:

A.

- Recommend that the rule in *Hanover Shoe*, barring the pass-on defense, also be overruled by statute, and include a mechanism to allocate damages between direct and indirect purchasers.
- Recommend that the rule in *Hanover Shoe*, barring the pass-on defense, be retained.

B.

- Recommend that such legislation also preempt state laws permitting indirect purchasers to recover so that any claim for damages by an indirect purchaser must be brought in federal court.
- Recommend that such legislation not preempt any state laws regarding indirect purchaser recoveries, so that indirect purchasers may continue to recover under state law.

C.

- Recommend that indirect purchasers be able to sue under federal law for damages only if no direct purchaser has sued regarding the same conduct.
 - Recommend that indirect purchasers be able to sue under federal law to recover damages without regard to direct purchaser lawsuits.
- Recommend a statute containing multiple elements to improve the existing indirect purchaser regime, as proposed by the American Bar Association, including:
 - (1) an overruling of the *Illinois Brick* rule to allow indirect purchaser lawsuits under federal antitrust law;
 - (2) no preemption of state laws allowing for indirect purchaser recovery;
 - (3) resolution of all claims in a single forum;
 - (4) changes to federal rules regarding diversity jurisdiction, removal, and consolidation; and/or
 - (5) allowing pre-judgment interest to plaintiffs.

If so:

A.

- Recommend that the statute provide for “trifurcated” proceedings.
- Make no specific recommendations in this regard.

B.

- Recommend adjustments in the treatment of class action certification decisions to reduce the difficulty in certifying classes in indirect purchaser cases.
- Make no specific recommendations in this regard.