Chapter III
Civil and Criminal Remedies

Congress has provided for both private and public enforcement of the antitrust laws. Anticompetitive conduct may be challenged by the Antitrust Division of the Department of Justice, the Federal Trade Commission, state attorneys general, and private parties who have been injured by the antitrust violation and have standing to sue.

When the federal government sues, it can seek a wide range of injunctive relief, including "positive" relief requiring the restructuring of a company or the implementation of certain practices, as well as recover its own damages as a purchaser. In addition, the Department of Justice is uniquely empowered to seek substantial criminal fines against both corporations and individuals and prison sentences against individuals. In more limited circumstances, the federal government may seek civil fines or equitable monetary remedies, including the disgorgement of ill-gotten gains and restitution.

State attorneys general can sue in a *parens patriae* capacity on behalf of injured citizens of their states. They also can recover for state entities where they have been directly injured.

Private parties injured by an alleged antitrust violation can sue to recover three times their actual damages, plus costs and attorneys' fees, and for equitable relief similar to what the government can obtain. Private antitrust enforcement has been more vigorous in the United States than anywhere else in the world. The vitality of private antitrust enforcement in the United States is largely attributed to two factors: (1) the availability of treble damages plus costs and attorneys' fees, and (2) the U.S. class action mechanism, which allows plaintiffs to sue on behalf of both themselves and similarly situated, absent plaintiffs. An aggressive and capable antitrust plaintiffs' bar has developed to pursue class actions following on to government criminal prosecutions and in situations where individual plaintiffs might not have the ability or incentive to sue. Congress, state legislatures, and the courts have developed rules governing who can recover for injuries that are "passed on" to various levels of consumers, the availability of attorneys' fees and prejudgment interest on damages, and how liability is allocated among alleged participants in an antitrust conspiracy.

Over the years, observers have debated the effectiveness of this public-private enforcement framework in achieving optimal levels of deterrence and compensation to victims. With respect to private civil actions, for example, the availability of treble damages has been both lauded as the key to an effective enforcement system and blamed for burdening business with litigation of questionable merit. Some observers contend that treble damages are insufficient to deter and compensate at optimal levels and should be increased to some higher multiplier; others take the opposite view. With respect to government civil and criminal enforcement, observers similarly have suggested both that the government has too great an enforcement arsenal at its disposal and that it has too little.

Because of the interrelated nature of the rules and procedures governing private and public enforcement, the Commission decided to study a range of issues together covering both private and public enforcement. The recommendations described in this chapter accordingly address (A) the availability of treble damages and the rules relating to prejudgment interest and attorneys' fees, as well as the liability of each defendant for the full harm caused by all participants in an antitrust conspiracy (known as "joint and several liability"); (B) which parties in a chain of distribution should be allowed to sue to recover antitrust damages; (C) whether new authorization should be provided for the Department of Justice or the Federal Trade Commission to obtain civil fines for substantive, non-criminal antitrust violations or to seek monetary equitable remedies on an expanded basis; and (D) whether any changes to current criminal antitrust enforcement and sentencing are needed.

Chapter III.A
Private Monetary Remedies and Liability Rules

1. INTRODUCTION

Private antitrust enforcement plays a critically important role in implementing the U.S. antitrust laws. From the outset, Congress contemplated that private parties would play a central role in enforcement of the Sherman Act. Indeed, Senator Sherman believed that individuals should act as "private attorneys general," and that the antitrust laws should encourage such enforcement.[1]

The central feature of private antitrust remedies is its provision for treble damages, which allows plaintiffs in all cases to recover "threefold the damages by him sustained."[2] Successful antitrust plaintiffs may, in addition, recover attorneys' fees and, in certain circumstances, prejudgment interest. The effect of these monetary remedies is reinforced by rules that make defendants jointly and severally liable for damages. That is, each defendant is liable for the full amount of damages even if several defendants jointly engage in the unlawful conduct.

The Commission studied several aspects of private remedies to determine whether they remain sensible and properly serve these goals in light of the development of antitrust law over more than 100 years. In particular, the rule of treble damages has long been questioned by some as potentially too punitive in at least some types of antitrust cases. Much conduct potentially subject to the antitrust laws can be procompetitive, or at least competitively neutral, and the rules on the lawfulness of such conduct are not always clear. As a result, treble damages arguably discourage some conduct that would benefit consumers because the damage exposure exceeds the benefits of the conduct for the company and its customers. Particularly where the law or facts are not clear, imposing treble damages may be considered unfairly punitive. Similarly, the availability of attorneys' fees for plaintiffs has led to criticism that awarding such fees, in addition to treble damages, encourages the filing of frivolous antitrust cases, particularly if successful defendants are not entitled to recover their fees. Finally, limitations on the availability of prejudgment interest have been criticized for failing to provide successful plaintiffs with full compensation, including compensation for the time from when they suffer harm to when they ultimately recover.

The Commission also reviewed the consequences of the current rule of joint and several liability that applies in antitrust cases. Joint and several liability makes all defendants fully liable for the damages caused by unlawful joint conduct, such that a plaintiff may recover the full amount of the judgment from any one of the defendants. A related rule applicable in antitrust cases bars claims for contribution among defendants. Contribution claims, if allowed, would permit one defendant to seek "contribution" from another defendant if it has paid more than a "fair" share of the judgment. A second, related rule substantially limits "claim reduction" in antitrust cases. Claim reduction in the antitrust context reduces the plaintiff's total remaining post-trebling claim to reflect settlement payments already made.

The existing rules of joint and several liability without a right of contribution and only limited claim reduction have given rise to substantial criticism regarding fairness. These rules permit plaintiffs to settle with some defendants at an early stage for a relatively small amount of damages, leaving remaining, non-settling defendants potentially liable for nearly the entire damages caused by the joint conduct, trebled. As a result, these rules can cause a "race" to settle, potentially leaving defendants that had a small or no role in the overall anticompetitive scheme with disproportionately large potential liability.

The Commission recommends the following.

43. No change is recommended to the statute providing for treble damages in antitrust cases.*

44. No change is recommended to the statute that provides for prejudgment interest in antitrust cases; prejudgment interest should be available only in the circumstances currently specified in the statute.†

45. No change is recommended to the statute providing for attorneys' fees for successful antitrust plaintiffs. In considering an award of attorneys' fees, courts should consider whether, among other factors, the principal development of the underlying evidence was in a government investigation.**

46. Congress should enact a statute applicable to all antitrust cases involving joint and several liability that would permit non-settling defendants to obtain reduction of the plaintiffs' claims by the amount of the settlement(s) or the allocated share(s) of liability of the settling defendant(s), whichever is greater. The recommended statute should also allow claims for contribution among non-settling defendants.††

* Commissioners Carlton, Garza, and Warden do not join this recommendation in full.

† Commissioners Carlton, Delrahim, Garza, Shenefield, and Warden do not join this recommendation.

** Commissioners Cannon, Litvack, and Warden do not join this recommendation in full.

†† Commissioners Carlton and Garza do not join this recommendation with respect to contribution among non-settling defendants.

2. TREBLE DAMAGES

A. Background

Section 4 of the Clayton Act allows "any person . . . injured in his business or property by reason of anything forbidden in the antitrust laws" to "recover threefold the damages by him sustained."[3] This provision directly descends from the original Sherman Act, passed in 1890, which included the same treble damages provision.[4] At the time of the Sherman Act's passage, congressional debate centered on whether to provide for double or treble damages; single damages were not seriously considered as an alternative.[5] Senator Sherman and others argued that multiple damages should be "commensurate with the difficulty of maintaining a private action," punitive, and provide incentives to plaintiffs to act as private attorneys general.[6]

Treble damages have remained the rule in antitrust cases, despite periodic efforts to eliminate or limit their availability.[7] There are a few instances in which treble damages are not available. For example, Congress has created a small number of statutory exemptions pursuant to which plaintiffs' damages are not automatically trebled.[8] Congress has also provided for the elimination of treble damages, in specified circumstances, for organizations that participate in the Department of Justice's (DOJ) corporate leniency program, which provides incentives to participants in cartel activity to provide evidence to the DOJ for use in criminal prosecutions.[9]

B. Recommendation and Findings

43. No change is recommended to the statute providing for treble damages in antitrust cases.*

* Commissioners Carlton, Garza, and Warden do not join this recommendation in full.

Commissioners Carlton and Garza believe further consideration should be given to increasing treble damages in international price-fixing conspiracies where certain victims of the conduct may not seek compensation in U.S. courts through operation of the Foreign Trade Antitrust Improvements Act. In addition, they believe it would be appropriate to reduce the multiplier in cases where conduct is overt because the likelihood of such conduct's evading detection and, if unlawful, being prosecuted is much lower than for covert conduct.

As set forth in his separate statement, Commissioner Warden (with whom Commissioner Garza joins) would permit the award of treble damages where there is proof by clear and convincing evidence of clearly unlawful conduct.

Treble damages serve five related and important goals:

(1) Deterring anticompetitive conduct;

(2) Punishing violators of the antitrust laws;

(3) Forcing disgorgement of the benefits of anticompetitive conduct from those violators;

(4) Providing full compensation to victims of anticompetitive conduct; and

(5) Providing an incentive to victims to act as "private attorneys general."[10]

Although it has been argued that, in certain circumstances, something more or less than treble damages would better advance one or more of these goals,[11] the Commission concludes that an insufficient case has been made for changing the treble damages rule, either universally or in specified instances.[12] The Commission concludes that, on balance, the treble damages rule well serves the defined goals.

Deterrence. The first broadly recognized purpose of treble damages is deterrence. To eliminate the incentive to engage in anticompetitive conduct, a violator must be exposed to forfeiture of potential gains from such conduct. Treble damages compensate for the reality that some anticompetitive conduct is likely to evade detection and challenge.[13] If a company realizes that its anticompetitive conduct has only a 50 percent chance of being detected, and if its liability were limited to single damages, it would be more likely to engage in that conduct because the reward exceeds the risk.[14]

Punishment of violators. The second recognized purpose of treble damages is to punish offenders, similar to punitive damages under the common law and other statutes.[15] This reason is closely related to the deterrence justification: providing a multiple of damages helps deter such conduct and highlights societal disapproval of such conduct. Furthermore, in addition to raising prices, anticompetitive conduct causes allocative inefficiency (for example, forgone purchases and substitution of less optimal alternatives) that, while reducing consumer welfare, is not reflected in damage calculations.[16] Treble damages help to ensure that the violator pays damages that more fully reflect the harm to society caused by the anticompetitive conduct.[17]

Disgorgement of gains. Treble damages also serve the purpose of requiring the disgorgement of unlawfully obtained gains (or profits) that result from anticompetitive conduct.[18] Preventing violators from profiting removes incentives to engage in such conduct and thereby enhances deterrence.[19]

Compensation to victims. A fourth purpose of treble damages is to ensure full compensation to the victims of anticompetitive conduct. Indeed, in light of the fact that some damages may not be recoverable (*e.g.*, compensation for interest prior to judgment, or because of the statute of limitations and the inability to recover "speculative" damages) treble damages help ensure that victims will receive at least their actual damages.[20]

Creating incentives for "private attorneys general." Finally, providing treble damages creates incentives for private enforcement of the antitrust laws. This is of particular importance in light of limited government resources to identify and prosecute all anticompetitive conduct.[21] Incentives for private enforcement reinforce the other objectives of treble damages by increasing the likelihood that claims will be brought against violators, thereby enhancing deterrence, appropriate disgorgement and punishment, and compensation to victims.[22]

The Commission was not presented with substantial evidence or empirical support that treble damages do not advance these goals. However, some have argued that treble damages, along with other remedies, can overdeter some conduct that may not be anticompetitive and result in duplicative recovery.[23] No actual cases or evidence of systematic overdeterrence were presented to the Commission, however.[24]

The Commission carefully considered a variety of circumstances in which it was proposed that the damages multiplier might be decreased (or increased). As described more fully below, the Commission considered the following (among others): (1) providing treble damages only in cases where the conduct is clearly unlawful and devoid of competitive benefit; (2) limiting damages to single damages when the conduct is overt; and, (3) placing the damages multiplier in the discretion of the trial judge. Ultimately, the Commission declined to recommend these approaches for the reasons set forth below.

There is broad consensus that treble damages are appropriate for hard-core cartel conduct. Even those who advocate eliminating treble damages in some circumstances agree that price-fixing and similar conduct should be subject to treble damages.[25] Moreover, some argue that the multiplier should be higher in these cases to compensate for the low likelihood of detection.[26] Nonetheless, because the Commission recommends retention of a single, uniform multiplier in all antitrust cases, and because hard-core cartel conduct is often subject to criminal prosecution,[27] the Commission does not recommend any increase to the multiplier for hard-core conduct.

The Commission also declines to recommend a change to provide for only single damages in rule of reason cases. Several fundamentally similar proposals were advanced to the Commission to limit treble damages to per se antitrust violations, where the conduct is clearly unlawful and bereft of procompetitive benefits.[28] These advocates argue that in cases other than those—where conduct may be procompetitive or is subject to unclear legal standards—treble damages may deter or “chill” potentially procompetitive behavior.[29] Although such concerns are reasonable, the Commission concluded that statutorily defining whether conduct was a per se violation or subject to the rule of reason would prove difficult.[30] Furthermore, there is anticompetitive conduct that is not per se unlawful can cause as much damage as per se violations such as price-fixing.[31] Indeed, eliminating treble damages for such cases could greatly hamper incentives to bring actions, and thus reduce deterrence too much.[32]

The Commission also evaluated, but declined to recommend, limiting treble damages to conduct that is covert.[33] For conduct that is publicly open (or “overt”)—such as mergers, and most joint ventures, distribution contracts, and single-firm conduct—the probability of detection is close to 100 percent.[34] By comparison, much covert cartel activity likely goes undetected.[35] Given that a principal justification for treble damages is to account for the likelihood of detection, there may be no need for multiple damages where the public is aware of the conduct or it is otherwise overt.[36] The Commission declined to recommend the creation of such a distinction, however, because some overt conduct, such as aspects of a legitimate joint venture, may be a disguised cartel, or otherwise cause severe harm.[37] As with the proposed division between per se and rule of reason conduct, such a distinction might result in increased litigation over whether treble damages are available on the facts of the conduct.

In light of the concerns with these two proposals, as well as several other similar proposals, the Commission also considered, but rejected, a rule that would leave the decision whether to award treble damages to the discretion of a judge. A court may be best positioned to evaluate the severity of the violation, in light of a range of possible factors, and tailor the penalty accordingly.[38] This approach would allow a court to decline to award treble damages if, for example, the questions of fact are close or the legal standards unclear, the conduct was overt, or the conduct had sizable procompetitive benefits.[39] Allowing judges to award only single damages in such cases would therefore potentially reduce overdeterrence and the chilling of procompetitive conduct that may result from mandatory trebling.[40] It would also avoid the need for drafting a statute that defines types of conduct that are and are not subject to treble damages. The Commission concluded, however, that such an approach would increase the length and cost of trials as the parties contest factual issues relevant to the factors to be considered.[41] Moreover, judges would be required potentially to balance multiple, conflicting factors, leading to inconsistency across courts and forum shopping.[42]

3. PREJUDGMENT INTEREST

A. Background

Prior to 1980, prejudgment interest was not available for antitrust claims. In 1980, in response to a recommendation by the National Commission for the Review of Antitrust Law and Procedure, Congress amended Section 4 of the Clayton Act to permit courts to award prejudgment interest when it is "just in the circumstances."[43] The statute permits a court to award prejudgment interest when:

(1) A party filed motions or asserted claims "so lacking in merit" that they could only have been intended for delay, or "otherwise acted in bad faith";
(2) A party violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior; or
(3) A party engaged in conduct primarily intended to delay litigation or raise its cost.[44]

In the twenty-six years since the amendment, there has been no reported decision awarding prejudgment interest in an antitrust case.[45]

B. Recommendation and Findings

44. No change is recommended to the statute that provides for prejudgment interest in antitrust cases; prejudgment interest should be available only in the circumstances currently specified in the statute.*

The purpose of the current provision regarding prejudgment interest is to compensate plaintiffs for dilatory tactics by defendants, which is appropriate. Prejudgment interest is not, however, more broadly available. When available, prejudgment interest helps to ensure that a plaintiff harmed by a defendant's unlawful conduct is fully compensated for its injury. Where a legal violation has caused harm many years before a plaintiff receives an award of damages, the plaintiff has not earned interest on the lost money for that period of time; conversely, the defendant may have earned returns on the unlawful gains until paying the judgment.[46] That is, some argue, "the time value of money works in [the] defendants' favor . . . [allowing] defendants to profit from their wrong."[47] Because antitrust cases can take several years to resolve, prejudgment interest is particularly appropriate.[48]

Treble damages, a rule to which the Commission recommends no change, adequately compensate for the general unavailability of prejudgment interest in antitrust cases.[49] Treble damages help ensure that injured parties are indirectly compensated for the loss of the time value of their money and that defendants are not able to profit from their wrongs. Antitrust damages are not easily calculated at the time of injury in most cases. The current rule making prejudgment interest unavailable in antitrust cases is thus consistent with the traditional rule in tort lawsuits, which makes prejudgment interest unavailable because damages are not readily quantifiable at the time of injury.[50] Finally, some courts have effectively compensated for the lack of prejudgment interest by including in the determination of damages elements such as inflation and interest paid on borrowed capital.[51] Changing the rule relating to prejudgment interest could deter courts from developing sounder rules regarding the treatment of opportunity and capital costs. These considerations, together with lim-

* Commissioners Carlton, Delrahim, Garza, Shenefield, and Warden do not join this recommendation.

Commissioners Carlton, Delrahim, Garza, and Shenefield would provide mandatory prejudgment interest from the time of injury in order to compensate injured parties fully for the time value of money.

Commissioner Warden would provide mandatory prejudgment interest from the time of injury in any case where damages are not trebled.

ited evidence and argument in support of greater availability of prejudgment interest in the Commission's record,[52] leads the Commission not to recommend any change to the current statute.

4. ATTORNEYS' FEES

A. Background

Section 4 of the Clayton Act, as the Sherman Act did before it, permits successful plaintiffs to recover reasonable attorneys' fees and costs.[53] A plaintiff is considered to be "successful," and an award of attorneys' fees is mandatory, whenever any damages are awarded.[54] In addition, a plaintiff seeking injunctive relief under Section 16 of the Clayton Act may, if it "substantially prevails," recover attorneys' fees.[55] The purpose of awarding attorneys' fees to prevailing plaintiffs is to help ensure that plaintiffs with meritorious claims will have access to counsel to redress antitrust violations.[56] They also provide additional incentives to private parties to bring lawsuits prosecuting anticompetitive conduct.[57] A successful defendant, however, is not entitled to recover attorneys' fees.[58]

Although the Clayton Act entitles a successful antitrust plaintiff to recover reasonable attorneys' fees, the courts still must determine whether the requested fees are in fact "reasonable."[59] Some courts consider factors such as the novelty of the issues in the case, the skill required to perform the legal services properly, the attorney's experience and reputation, the undesirability of the case, and numerous other factors.[60] Many courts start with a "lodestar" figure, which is the attorney's hourly rate multiplied by the attorney's hours worked.[61] The court then makes adjustments to that lodestar figure if appropriate.[62]

B. Recommendation and Findings

45. No change is recommended to the statute providing for attorneys' fees for successful antitrust plaintiffs. In considering an award of attorneys' fees, courts should consider whether, among other factors, the principal development of the underlying evidence was in a government investigation.*

* Commissioners Cannon, Litvack, and Warden do not join this recommendation in full.

Commissioner Cannon would not make any recommendation regarding the factors to be considered by courts in awarding attorneys' fees, but otherwise joins the recommendation.

Commissioner Litvack would make attorneys' fees available to prevailing defendants as well.

As set forth in his separate statement, Commissioner Warden would award attorneys' fees to prevailing defendants in cases brought by competitors.

By statute, successful antitrust plaintiffs are entitled to mandatory attorneys' fees. But it is within a court's discretion to determine when those fees are reasonable, and to make upward or downward adjustments when necessary. These fees are intended to compensate plaintiffs for undertaking risky, costly litigation.[63]

Because fees are intended to provide an incentive to discover and prosecute anticompetitive conduct, they are less necessary where much of that evidence has been developed as part of a government investigation. In such cases the plaintiff's case is often already made by the underlying criminal conviction.[64] Courts should therefore consider whether the plaintiffs were relying on such evidence, and reduce fees appropriately in such cases to reflect the relative lack of risk and burden.

5. CONTRIBUTION AND CLAIM REDUCTION

A. Background

Under the antitrust laws, liability is joint and several for all defendants, with no right of contribution among defendants.[65] Thus, a plaintiff may obtain treble the damages resulting from the entire conspiracy from a single participant of a price-fixing conspiracy or other anticompetitive agreement. An antitrust defendant may not seek contribution from any other co-conspirator, however. In addition, if one or more defendants settle an antitrust claim, under the rule governing claim reduction, the plaintiff's remaining claim is reduced, after trebling, by the amount of the settlement.[66] Under these combined rules, if an alleged co-conspirator settles for less than the full amount of damages fairly attributable to it, trebled, non-settling defendants arguably remain liable for more than their "fair" share of damages.[67]

The policy questions raised by these rules have been debated extensively over the past two decades, particularly preceding and in the immediate wake of the Supreme Court's 1981 decision in *Texas Industries, Inc. v. Radcliff Materials, Inc.*[68] That decision explained that any change to the traditional, existing rule was for Congress, not the courts, to make.[69] Up to now, however, Congress has declined to legislate in the area.[70] Indeed, Congress recently reconfirmed the general application of the rule of joint and several liability in antitrust cases when it passed the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA) in June 2004.[71]

B. Recommendation and Findings

46. Congress should enact a statute applicable to all antitrust cases involving joint and several liability that would permit non-settling defendants to obtain reduction of the plaintiffs' claims by the amount of the settlement(s) or the allocated share(s) of liability of the settling defendant(s), whichever is greater. The recommended statute should also allow claims for contribution among non-settling defendants.*

The current rules concerning contribution and claim reduction are fundamentally unfair.[72] Antitrust defendants are jointly and severally liable, but defendants may seek reduction of plaintiffs' claims only of the amount paid by settling defendants, after total damages have been determined and trebled, and also may not seek contribution from non-settling defendants. The combination of a very limited right to claim reduction and no right of contribution means that one defendant may be responsible for nearly all of the damage caused by an antitrust conspiracy.[73] These rules create significant pressure on defendants to settle antitrust claims, even those claims of questionable merit, simply to avoid the potential for excessive liability.[74] This dynamic permits plaintiffs to engage in "whipsaw" settlement tactics, playing defendants off one another to race to settle early or be left potentially liable for nearly the full remaining amount of the claims.[75] As a result, less culpable defendants may pay an unfairly large share of total damages, while more culpable defendants escape significant (or any) liability.[76] Although the existing rules can maximize deterrence and encourage the resolution of antitrust claims through quick settlement,[77] they may also overdeter conduct that may not be anticompetitive by exposing individual defendants to potential liability for damages far in excess of the benefits they derived from their conduct.

Congress should enact legislation applicable to all antitrust cases involving joint and several liability that would address both concerns. The legislation should permit non-settling defendants to obtain reduction of the plaintiffs' remaining claims against the non-settling defendants by the ratable share of liability of the settling defendants or the amount of the settlement, whichever is greater. (As explained below, the ratable share of liability would be based in most cases on the defendants' market shares.) The contribution provision should permit non-settling defendants to seek contribution from other non-settling defendants to

[*] Commissioners Carlton and Garza do not join this recommendation with respect to a right of contribution among non-settling defendants. Commissioner Carlton believes that pursuit of claims for contribution among non-settling defendants would be a misuse of judicial resources. Commissioner Garza believes that current policy better furthers the goal of deterrence by destabilizing cartels and discouraging their formation and that the goals of deterrence and judicial efficiency outweigh any concern for "fairness" among defendants in cartel cases.

the extent a plaintiff has collected a disproportionate share of its judgment from one or more of the non-settling defendants. Together, these provisions would enhance fairness among both settling and non-settling defendants, while not undermining overall deterrence or the efficient resolution of antitrust litigation through settlement. Indeed, the combination of claim reduction and contribution results in defendants paying a properly allocated share of damages. It also helps ensure that all defendants face an appropriate level of deterrence.[78] The two principal components of the proposed legislation are more fully described below.

Illustration of Effect of Commission's Recommendation

Companies A, B, and C enter into an arrangement to fix prices. The violation is per se illegal. Plaintiff sues all three companies for a total of $100m (to be trebled). Plaintiff settles with A before trial for $80 million, and a court finds B and C liable as alleged.

Defendant	Market Share	***Liability Under Current Law***	***Liability Under Proposed Law***
A	50%	$80 million in settlement	$80 million in settlement
B	30%	$220 million (joint and several with C)	$150 million, with claim for contribution against C for up to $60 million
C	20%	$220 million (joint and several with B)	$150 million, with claim for contribution against B for up to $90 million
Plaintiff's Total Recovery		$300 million, with $220 million coming from B and/or C as Plaintiff sees fit to collect.	$230 million, with $150 million coming from B and/or C as Plaintiff sees fit to collect.

First, the claim reduction provision would reduce the remaining liability of the non-settling defendants by the amount of the settlement or the ratable share of liability of the settling defendant(s), whichever is greater. This ensures that non-settling defendants are not made worse off, in the form of liability potentially greatly disproportionate to their relative contribution to the anticompetitive conduct, as a result of settlements between the plaintiffs and other defendants.[79] Claim reduction can thus provide much greater fairness between settling and non-settling defendants.[80] Plaintiffs' total possible recovery will not be reduced by the availability of claim reduction, however. The only reduction in plaintiffs' recovery will come from its decision to settle a claim rather than pursue it through to judgment, thereby gaining a certain recovery in exchange for forgoing a chance at larger recovery while avoiding the risk of no recovery at all.

The Commission understands that allowing claim reduction will likely reduce incentives for settlement, at least to some extent.[81] Nonetheless, reducing "whipsaw" settlements is worth the reduction in the likelihood of settlements and deterrence that claim reduction may create.[82] To be sure, some plaintiffs may be deterred from settling out of fears that they will be doing so "too cheaply."[83] But incentives for settlement will remain, and claim reduction will have the salutary effect of encouraging plaintiffs to consider more carefully the proper amount of the settlement with each defendant.[84] Finally, claim reduction should not significantly hamper overall deterrence, because non-settling defendants will still face significant, joint and several treble damages liability for the remainder of the plaintiffs' claim.

Second, the recommended statute should allow claims for contribution, but only among non-settling antitrust violators. Contribution would not be available against settling defendants. By making contribution available only among non-settling defendants, defendants will not be deterred from settling by the threat that their liability may later be increased through a contribution action.[85] Accordingly, defendants can "buy peace" through settlement without concern over future claims for contribution. Furthermore, this rule should not reduce incentives to settle; on the contrary, it leaves the same incentives to settle as the current rule barring contribution altogether.[86] Finally, and perhaps most importantly, providing this limited right of contribution in no way reduces the total recovery of the plaintiff, as it serves solely to apportion liability among defendants after a plaintiff has recovered a judgment against them.

This limited right of contribution should not significantly reduce overall deterrence of antitrust violations. First, it helps ensure all defendants will be liable for a fair share of the damages caused; no guilty party can get off "free."[87] Second, companies do not appear to consider whether their conduct will give rise to joint and several liability, let alone whether they will have contribution rights, until they are in litigation.[88] Furthermore, the proposed statute will enhance fairness by ensuring that liability among non-settling defendants is more equitably allocated.[89] The rule thus also protects innocent parties, or those with a very minor role in an anticompetitive scheme, from having to settle claims due to the threat of liability for industry-wide damages in great disproportion to their role (if any) in the conduct.[90]

Adoption of a rule providing for claim reduction and for contribution requires a method of allocating shares of liability for purposes of determining the plaintiffs' claims remaining after a settlement. The Commission recommends that each defendant's allocated share of liability, for either claim reduction or contribution, be equal to each defendant's market share or gain from the antitrust violation. Allocation based on market share should be relatively easily accomplished in the substantial majority of multiple-defendant cases, such as price-fixing conspiracies, and should not significantly increase litigation costs. For those cases in which market share would not be an appropriate basis for allocating liability, use of relative gain makes for an appropriate substitute that is also reasonably straightforward to calculate. The Commission does not recommend that the statute contain more tailored calculation mechanisms for various types of violations,[91] because such approaches could potentially complicate the contribution proceeding and add to the burden on the courts.

The Commission has provided a possible statute in Annex A that would implement the Commission's recommendation. It is generally consistent with, although somewhat more comprehensive than, several other proposals considered by Congress that would implement either claim reduction or contribution, or both.[92] The model set out here is based largely on a substitute/alternative to S. 995, proposed by Assistant Attorney General William Baxter in 1981. The American Bar Association, Section of Antitrust Law proposed model legislation to the Commission that is also worthy of congressional consideration and would, in large part, implement the Commission's recommendations as well.[93]

ANNEX A

Proposed Statute

The Clayton Act (15 U.S.C. § 12 et seq.) is amended by inserting after Section 4H the following new section:

SEC. 4I. (a) In any action under Section 4, 4A, or 4C of this Act, the court shall reduce the claim of any person releasing any person from liability or potential liability for damages by the greatest of: (1) any amount stipulated for this purpose; (2) the amount of the consideration paid for the release; or (3) treble the actual allocated share of damages of the person released.

(b) Any person who is liable for damages in an action brought under Section 4, 4A, or 4C of this Act may claim contribution, in accordance with this Section, from any other person jointly liable for such damages.

(c) Contribution may not be claimed by or from a person who, pursuant to a settlement agreement entered into in good faith with a plaintiff in the action in respect of which contribution rights are claimed, has been released from liability or potential liability for the underlying claim.

(d) A claim for contribution may be asserted by cross-claim, counterclaim, or third-party claim in the same action as that in respect of which contribution rights are claimed, or in a separate action.

(e) Claim reduction and contribution rights shall, to the extent consistent with the fair and expeditious conduct of litigation, be determined in a proceeding following the trial of the action in respect of which claim reduction or contribution rights are claimed.

(f) A claim for contribution shall be forever barred unless filed within six months after the entry of the final judgment for which contribution is sought.

(g) For the purposes of claim reduction and contribution, the allocated share of damages of each defendant shall be determined on the basis of each defendant's market share, unless so doing would be impractical or unjust in light of the nature of the unlawful conduct. If use of market share is not practical or is unjust, the court shall, in its discretion, use the gain of each defendant from the violation or any other method that would be equitable.

(h) Claim reduction and contribution rights shall be determined by the court sitting without a jury.

(i) Nothing in this section shall affect the joint and several liability of any person.

Section-by-Section Analysis

Subsection (a) provides for claim reduction. Claim reduction would be available for all types of antitrust violations, as explained with respect to Subsection (b). The plaintiff's claim would be reduced by the greatest of the amount of the settlement, the amount stipulated to in the settlement agreement, or treble the allocated share of the settling defendant's damages, as calculated pursuant to Subsection (g).

Subsection (b) makes the right of contribution applicable to all actions brought under the relevant sections of the Clayton Act. Although the substantial majority of cases in which these rules would have significant application are likely to be horizontal price-fixing cases, there is no reason specifically to limit the applicability of the statute to those types of antitrust cases.

Subsection (c) limits contribution claims to non-settling defendants. This limitation ensures that settling defendants will be able to remove themselves completely from the litigation without worrying about subsequent claims of contribution from co-conspirators or other defendants (it also prevents settling defendants who paid "too much" from seeking to recover a portion of their overpayment from non-settling defendants).

Subsection (d) provides non-settling defendants with multiple procedural options for bringing a claim for contribution, and thus maximizes the flexibility of defendants in seeking contribution.

Subsection (e) provides that claim reduction and contribution issues should be adjudicated after the trial on the main action wherever possible. This provision achieves three objectives. (1) It ensures that contribution issues remain exclusively among defendants; (2) it prevents the main action from becoming unduly complicated; and (3) it eliminates unnecessary adjudication of issues relating to contribution if liability is not established. If, however, the court determined that some issues relating to contribution could be resolved more expeditiously during the main case, this provision would permit the court to allow for such issues to be addressed during the main proceeding.

Subsection (f) creates a statute of limitations of six months after the entry of final judgment for contribution claims to be brought.

Subsection (g) addresses the method of allocating liability among multiple antitrust defendants for purposes both of claim reduction and contribution. This provision makes market share the presumptive basis for allocating liability among defendants for purposes of contribution and for purposes of determining the proper claim reduction of plaintiff's claims. It calls for the use of gain from the conduct as a secondary method, or any other method equitable in the circumstances.

Subsection (h) provides that claim reduction and contribution issues are to be decided without the use of a jury.

Subsection (i) reaffirms that the joint and several liability of antitrust defendants is not affected by any of the provisions. This provision ensures that plaintiffs will not bear any risk of reduced recovery from insolvent defendants and thus will be able fully to recover their damages (so long as at least one defendant is sufficiently solvent to pay the entire claim).

Notes

1 *See* Edward D. Cavanagh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 TUL. L. REV. 777, 782 (1987) [hereinafter Cavanagh, *Detrebling Antitrust Damages*] (stating that Senator Sherman expressed concerns about providing a remedy that would be "commensurate with . . . maintaining a private action"); David Boies, Statement at AMC Civil Remedies Hearing, at 2 (July 28, 2005) [hereinafter Boies Statement].

2 15 U.S.C. § 15(a).

3 *Id.*

4 Sherman Act, ch. 647, § 7, 26 Stat. 209, 210 (1890); *see* Cavanagh, *Detrebling Antitrust Damages*, at 778 (citing Section 7 of the Sherman Act as originally enacted).

5 *See* Cavanagh, *Detrebling Antitrust Damages*, at 782.

6 *Id.*; *see also* Boies Statement, at 2 (stating that Senator Sherman viewed multiple damages as being necessary to "deputiz[e] plaintiffs as private attorneys general by creating effective incentives to pursue what was even then viewed as costly and complex litigation").

7 *See, e.g.*, Boies Statement, at 2–4 (recounting statutory proposals in early 20th century to move to single damages, through calls in mid-20th century to make treble damages discretionary, to legislative efforts in 1980s to limit treble damages to per se violations).

8 For example, the National Cooperative Research and Production Act limits the liability of certain joint research and development ventures and standards development organizations notified under the Act to single damages (plus interest and reasonable attorneys' fees). *See* 15 U.S.C. § 4303(a). The Export Trading Company Act similarly limits a plaintiff to recovering only actual damages for injuries resulting from conduct engaged in pursuant to a certificate of review granted under the Act. *See* 15 U.S.C. § 4016(b)(1).

9 *See* Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 213(a), 118 Stat. 661, 666 (2004) (codified as amended at 15 U.S.C. § 1 note) [hereinafter ACPERA]. The provision expires in 2009. *Id.* § 211(a), 118 Stat. at 666.

10 Cavanagh, *Detrebling Antitrust Damages*, at 783; Boies Statement, at 6–7; Edward D. Cavanagh, Statement at AMC Civil Remedies Hearing, at 3–7 (July 28, 2005) [hereinafter Cavanagh Statement]; *see* Blue Shield of Va. v. McCready, 457 U.S. 465, 472 (1982).

11 *See, e.g.*, U.S. Chamber of Commerce, Public Comments Submitted to AMC, at 15–18 (Nov. 8, 2005) [hereinafter U.S. Chamber of Commerce Comments]; Business Roundtable, Public Comments Submitted to AMC, at 3–4 (Nov. 4, 2005) [hereinafter Business Roundtable Comments]; Abbott B. Lipsky, Jr., Statement at AMC Civil Remedies Hearing, at 14 (July 28, 2005) [hereinafter Lipsky Statement]; Cavanagh Statement, at 9–10.

12 *See, e.g.*, Thirty Antitrust Practitioners, Public Comments Submitted to AMC (June 17, 2005) [hereinafter Thirty Antitrust Practitioners Comments]; American Antitrust Institute, Comments Submitted to AMC Regarding Civil Remedies (June 17, 2005) [hereinafter AAI Comments re Civil Remedies].

[13] Frank H. Easterbrook, *Detrebling Antitrust Damages*, 28 J.L. & Econ. 445, 454 (1980) [hereinafter Easterbrook, *Detrebling Antitrust Damages*]; Robert H. Lande, Statement at AMC Civil Remedies Hearing, at 7 (July 28, 2005) [hereinafter Lande Statement] ("No one knows the percentage of antitrust violations that are detected and proven."); Civil Remedies Transcript at 161–62 (Easterbrook) (July 28, 2005) (suggesting multiplier for concealed cartels might appropriately be higher than three); Cavanagh, *Detrebling Antitrust Damages*, at 813.

[14] For a richer discussion of factors impacting deterrence, see Easterbrook, *Detrebling Antitrust Damages*, at 449–51; Cavanagh Statement, at 4–6; Steven C. Salop & Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 Geo. L.J. 1001, 1017–20 (1986); Thirty Antitrust Practitioners Comments, at 2.

[15] Cavanagh Statement, at 6; Cavanagh, *Detrebling Antitrust Damages*, at 786–87.

[16] Lande Statement, at 4–6; *see also* Thirty Antitrust Practitioners Comments, at 4 (identifying harms that are not compensated for by antitrust damages).

[17] *See* Lande Statement, at 5; Easterbrook, *Detrebling Antitrust Damages*, at 455.

[18] Boies Statement, at 12; *see also* John D. Graubert, Statement at AMC Government Civil Remedies Hearing, at 3 (Dec. 1, 2005) ("[A]n essential element of the response to an antitrust violation is to deprive violators of the gains from their unlawful conduct.") (citing, *inter alia*, United States v. Grinnell Corp., 384 U.S. 563 (1966); United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316 (1961)).

[19] *See* Cavanagh Statement, at 6 (treble damages make it unlikely violators will profit); Cavanagh, *Detrebling Antitrust Damages*, at 787; Boies Statement, at 12; *see also* Dissenting Statement of Commissioners Orson Swindle and Thomas B. Leary, Hearst Trust and Hearst Corporation's Acquisition of J.B. Laughrey Inc., FTC File No. 991-0323 (stating that "private remedies are adequate to ensure that respondents do not benefit from any possible wrongdoing" in that case).

[20] *See* Lande Statement, at 2, 3–8 (the "'treble damages' remedy . . . really only amounts to approximately single damages," because there is no prejudgment interest, damages do not compensate for allocative inefficiency, and other factors); Boies Statement, at 12 (delay in reaching trial and judgment is particularly long); *see also* Thirty Antitrust Practitioners Comments, at 4 (identifying harms that are not compensated for by antitrust damages); Stephen D. Susman, Statement at AMC Civil Remedies Hearing, at 5-6 (July 28, 2005) [hereinafter Susman Statement]; Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 Ohio St. L.J. 115, 124, 130–34 (1993)

[21] *See* Thirty Antitrust Practitioner Comments, at 3 ("[T]he federal government has limited resources at its disposal, and thus cannot adequately investigate and prosecute all (or even most) illicit anticompetitive behavior."); Cavanagh, *Detrebling Antitrust Damages*, at 790 ([The] "private remedy permits prosecution of illegal conduct which the federal government is without resources to pursue."); *see also* Harry M. Reasoner, Statement at AMC Civil Remedies Hearing, at 2 (July 28, 2005) [hereinafter Reasoner Statement] ("[G]overnmental resources are plainly inadequate to police the American economy."). *But see* Business Roundtable Comments, at 3 ("The legislative history suggests that Senator Sherman envisioned private suits as a little-used tool.") (citing Cavanagh, *Detrebling Antitrust Damages*, at 783).

[22] *See* Easterbrook, *Detrebling Antitrust Damages*, at 451–52; Cavanagh, *Detrebling Antitrust Damages*, at 786.

[23] *See, e.g.*, U.S. Chamber of Commerce Comments, at 17; Lipsky Statement, at 4–5 (referring to a "cluster bomb" of other remedies, such as equitable disgorgement, state suits, indirect purchaser rights); Cavanagh, *Detrebling Antitrust Damages*, at 792 (stating that mandatory treble damages may far exceed the harm caused).

[24] *See* Lande Statement, at 9 (stating that "duplicative recovery" has never occurred).

[25] *See* Business Roundtable Comments, at 3 (proposing elimination of treble damages except for "per se illegal conduct—horizontal price-fixing, market allocation, and bid-rigging"); U.S. Chamber of Commerce Comments, at 17 (suggesting limiting treble damages to per se offenses); *see also* Cavanagh Statement,

at 7–8 (while not necessary in every antitrust case, "trebling is absolutely critical in . . . horizontal price-fixing and horizontal divisions of markets" cases); Lipsky Statement, at 10.

[26] Thirty Antitrust Practitioners Comments, at 2 (citing Robert H. Lande, *Why Antitrust Damage Levels Should be Raised*, 16 Loy. Consumer L. Rev. 329 (2004)); Lande Statement, at 7–8; Civil Remedies Trans. at 162 (Easterbrook) (suggesting multiplier for concealed cartels might appropriately be higher than three).

[27] *See* Cavanagh Statement, at 6–7 (citing recent increases in criminal penalties and enhancement of criminal penalties under 18 U.S.C. § 3571(d)); Lipsky Statement, at 4.

[28] U.S. Chamber of Commerce Comments, at 20–23; Business Roundtable Comments, at 3–4; Exclusionary Conduct Transcript at 64–65 (Tom) (Sept. 29, 2005) (suggesting the elimination of treble damages for certain single-firm conduct); Edward Cavanagh, *Antitrust Remedies Revisited*, 84 Oregon L. Rev. 147, 175–77 (2005) [hereinafter Cavanagh, *Antitrust Remedies Revisited*] (discussing various proposals for selective detrebling, including limiting trebling to per se offenses); *see also* Lipsky Statement, at 14; Cavanagh, *Detrebling Antitrust Damages*, at 794 ("Trebling is particularly harsh where liability turns on close questions of law or fact, on a novel interpretation of a statute, or on reversal of prior precedents upon which defendants have relied.") (citation omitted).

[29] Lipsky Statement, at 10 (treble damages can "over deter, . . . thus creating an undesirable chilling effect for legitimate competitive conduct"); Business Roundtable Comments, at 3 ("Trebling for all antitrust cases can lead to over-deterrence because trebling discourages businesses from engaging in legitimate and beneficial competitive conduct."); *see also* Cavanagh, *Detrebling Antitrust Damages*, at 801–02; Easterbrook, *Detrebling Antitrust Damages*, at 449–50; William Breit & Kenneth G. Elzinga, Antitrust Penalty Reform 8–12 (1986).

[30] Lande Statement, at 16 (trebling only for per se offenses would be "complicated" due to "the uncertain line between per se and rule of reason antitrust violations"); *see* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 104 n.26 (1984) ("[T]here is often no bright line separating per se from Rule of Reason analysis.").

[31] *See* Cavanagh, *Detrebling Antitrust Damages*, at 828; Civil Remedies Trans. at 71 (Lipsky) ("I can still imagine cases of exclusionary conduct where you might be sorry that you didn't have trebling available."); AAI Comments re Civil Remedies, at 5; Civil Remedies Trans. at 143–44 (Constantine) (citing *Microsoft* as an example of a rule of reason case in which the injury was potentially large and treble damages were therefore sensible).

[32] Lande Statement, at 18 ("Abolishing treble damages in rule of reason cases could effectively destroy rule of reason private antitrust enforcement."); Civil Remedies Trans. at 32 (Lande) (still need treble damages to create incentive for plaintiffs to challenge anticompetitive rule of reason conduct); Susman Statement, at 10–11.

[33] *See* U.S. Chamber of Commerce Comments, at 23; Civil Remedies Trans. at 162 (Easterbrook); Cavanagh, *Antitrust Remedies Revisited*, at 175–76.

[34] Cavanagh Statement, at 7 ("[O]ne could argue that from a deterrence prospective, trebling is unnecessary in the case of conduct that is open and notorious—as opposed to clandestine—because in such cases, there is no problem of detection.").

[35] Lande Statement, at 7 (citing estimate by then-Assistant Attorney General Douglas Ginsburg that no more than 10 percent of cartels were detected); Boies Statement, at 11.

[36] *See* William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. Chi. L. Rev. 652, 657 (1983); Civil Remedies Trans. at 161–62 (Easterbrook) (multiplier should be set by dividing harm by probability of successful prosecution); Cavanagh, *Detrebling Antitrust Damages*, at 831–32.

[37] *See* Cavanagh, *Detrebling Antitrust Damages*, at 832; Civil Remedies Trans. at 162 (Reasoner) (noting difficulty of defining concealed and non-concealed conduct).

[38] Cavanagh Statement, at 9; *see also* Exclusionary Conduct Trans. at 139 (Pitofsky) (advocating treble damages at a judge's discretion).

[39] Cavanagh Statement, at 9; Cavanagh, *Detrebling Antitrust Damages*, at 838–39 (The factors a court might take into account include the "willfulness of the violation"; "whether a reasonably well-informed person should have known that the conduct was illegal"; the possibility of the conduct's procompetitive benefits; the duration of the illegal acts; whether the conduct was covert; "the scope of the illegal activity"; "the benefits derived by the defendants from the illegal activity"; and the impact of treble damages on the defendant's business.)

[40] Cavanagh Statement, at 9.

[41] *Id.* at 10.

[42] *Id.*; Susman Statement, at 10; Civil Remedies Trans. at 61–62 (Boies) (leaving trebling to judicial discretion will introduce undesirable uncertainty).

[43] National Commission for the Review of Antitrust Laws and Procedures, Report to the President and the Attorney General 5 (1979); 15 U.S.C. § 15(a).

[44] *See* 15 U.S.C. § 15(a).

[45] American Bar Association, Section of Antitrust Law, Antitrust Law Developments 846 (6th ed. 2007) [hereinafter Antitrust Law Developments]. Some courts, while not awarding prejudgment interest, have permitted damages to be increased to account for inflation. *See* Law v. Nat'l Collegiate Athletic Ass'n, 185 F.R.D. 324, 346–48 (D. Kan. 1999) (adjustment based on CPI to account for reduced purchasing power is permitted and is not the functional equivalent of prejudgment interest); Concord Boat Corp. v. Brunswick Corp., 21 F. Supp. 2d 923, 935–36 (E.D. Ark., 1998) (adjustments to award to reflect present value were proper and not an award of prejudgment interest), *rev'd on other grounds*, 207 F.3d 1039 (8th Cir. 2000). Post-judgment interest is mandatory in antitrust cases "as it is in all civil actions." Antitrust Law Developments, at 847 (citation omitted).

[46] Fishman v. Estate of Wirtz, 807 F.2d 520, 584 (7th Cir. 1986) (Easterbrook, J., dissenting) ("The denial of prejudgment interest systematically undercompensates victims and underdeters putative offenders. We should allow, indeed require, such awards.").

[47] Lande Statement, at 3 (quoting *Fishman*, 807 F.2d at 583-84 (Easterbrook, J., dissenting)).

[48] *Fishman*, 807 F.2d at 583 (Easterbrook, J., dissenting) (noting that the antitrust litigation at issue took 14 years to resolve, including a 2½-year lag between a finding of liability and the award of damages); *see also* Lande Statement, at 3 (citing evidence that the average cartel lasts six to nine years "with an additional 3–4 years lag before judgment") (citing Richard A. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & Econ. 363, 381 (1970)); AAI Comments re Civil Remedies, at 2-3 ("[T]he average cartel probably lasts 7–8 years, with an additional 4-plus-year lag before judgment.") (citing Robert H. Lande, *Why Antitrust Damage Levels Should be Raised*, 16 Loy. Consumer L. Rev. 329, 337 (2004)).

[49] *See, e.g.*, Cavanagh Statement, at 15; Thirty Antitrust Practitioners Comments, at 6.

[50] *See* Wickham Contracting Co., Inc. v. Local Union No. 3, Int'l Bhd. of Elec. Workers, 955 F.2d 831, 835 (2d Cir. 1992) ("The Supreme Court initially embraced the strict common law view that interest may not be recovered where damages are . . . difficult to ascertain with precision at the time of the alleged wrongdoing."); *id*. at 836 (The speculative nature of damages "will always be relevant to a sound decision on . . . whether prejudgment interest should be awarded . . . .").

[51] *See, e.g.*, *Law v. NCAA*, 185 F.R.D. at 347–48 (inflation); *Concord Boat*, 21 F. Supp. 2d at 935–36 (inflation); Minpeco S.A. v. Hunt, 686 F. Supp. 420, 425–27 (S.D.N.Y. 1988) (interest on borrowed capital).

[52] *See* Cavanagh Statement, at 15; Thirty Antitrust Practitioners Comments, at 6.

[53] 15 U.S.C. § 15(a); *see* Edward D. Cavanagh, *Attorneys' Fees in Antitrust Litigation: Making the System Fairer*, 57 Fordham L. Rev. 51, 52 (1988) [hereinafter Cavanagh, *Attorneys' Fees in Antitrust Litigation*].

[54] Antitrust Law Developments, at 988–89. In some circuits, fees may be available to a victorious plaintiff even if nominal damages are awarded. *See id.* at 989; United States Football League v. Nat'l Football League, 887 F.2d 408, 411–13 (2d Cir. 1989).

[55] 15 U.S.C. § 26; Antitrust Law Developments, at 989–90.

[56] Cavanagh, *Attorneys' Fees in Antitrust Litigation*, at 57–58.

[57] *Id.* at 58.

[58] *See* Antitrust Law Developments, at 990; Cavanagh, *Attorneys' Fees in Antitrust Litigation*, at 57.

[59] Refuse & Envtl. Sys., Inc. v. Indus. Servs. of Am., 732 F. Supp. 1209, 1215 (D. Mass. 1990) ("The award of reasonable attorney's fees incurred in prosecution of the antitrust claims . . . is mandatory. This Court must only determine what award is reasonable."), *rev'd on other grounds*, 932 F.2d 37 (1st Cir. 1991); *see also* Antitrust Law Developments, at 990–94.

[60] *See* Antitrust Law Developments, at 990–91.

[61] Hensley v. Eckerhart, 461 U.S. 424, 433 (1982) ("The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate."); *see also* Antitrust Law Developments, at 991–93.

[62] Antitrust Law Developments, at 993–94.

[63] Civil Remedies Trans. at 27 (Boies) (fee shifting is intended "to encourage the private attorneys general, to encourage people to bring lawsuits"); Cavanagh Statement, at 13 (fee shifting creates "an important incentive for bringing a private antitrust action"); Thirty Antitrust Practitioners Comments, at 8; AAI Comments re Civil Remedies, at 7–8; Susman Statement, at 13.

[64] *See* Emich Motors Corp. v. Gen. Motors Corp., 340 U.S. 558, 570–71 (1951) (holding that "the criminal judgment was prima facie evidence of the general conspiracy" in an antitrust follow-on civil proceeding).

[65] *See* Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 646 (1981) (noting the "judicial determination that defendants should be jointly and severally liable" in antitrust cases, while holding that there is no right of contribution); Antitrust Law Developments, at 1003–06; *see also* Flintkote Co. v. Lysfjord, 246 F.2d 368, 397 (9th Cir. 1957) (joint and several liability is both "firmly rooted" and a "well settled principle").

[66] *See* Burlington Indus. v. Milliken & Co., 690 F.2d 380, 392 (4th Cir. 1982) (rejecting creation of claim reduction remedy); Hydrolevel Corp. v. Am. Soc'y of Mech. Eng'rs., 635 F.2d 118, 130 (2d Cir. 1980); *Flintkote*, 246 F.2d at 398; Edward D. Cavanagh, *Contribution, Claim Reduction, and Individual Treble Damage Responsibility: Which Path to Reform of Antitrust Remedies?*, 40 Vand. L. Rev. 1277, 1324 (1987) [hereinafter Cavanagh, *Contribution, Claim Reduction, and Individual Treble Damage Responsibility*]; Antitrust Law Developments, at 1006.

[67] Assume for example, that total overcharges resulting from a conspiracy are found to be $20 million pretrebling. If one defendant settles for $1 million, the court will subtract that amount from the final award of $60 million ($20 million trebled). Each non-settling defendant will remain potentially liable for the remaining $59 million. *See* Cavanagh, *Contribution, Claim Reduction, and Individual Treble Damage Responsibility*, at 1283, 1289 n.68.

[68] *Texas Indus.*, 451 U.S. 630.

[69] *See id.* at 646 (holding that the "far-reaching" policy questions presented by the defendant's claim for contribution were "a matter for Congress, not the courts, to resolve").

[70] *See, e.g.*, H.R. 1155, 100th Cong. (1987); H.R. 5794, 97th Cong. (1982); S. 1468, 96th Cong. (1979); *see also* Cavanagh, *Contribution, Claim Reduction, and Individual Treble Damage Responsibility*, at 1314–22 (describing legislative proposals).

[71] ACPERA, § 214 (Section 214 of the Act provides that nothing in the Act "shall be construed to . . . affect, in any way, the joint and several liability of any party to a civil action . . . other than that of the antitrust leniency applicant and cooperating individuals . . . .").

[72] American Bar Association, Section of Antitrust Law, Public Comments Submitted to AMC Regarding Contribution and Claim Reduction, at 4 (Dec. 5, 2005) [hereinafter ABA Comments re Contribution and Claim Reduction] ("This inequity has been condemned by most commentators.").

[73] *See, e.g.*, *id.* at 9; Reasoner Statement, at 7.

[74] *See* Cavanagh, *Contribution, Claim Reduction, and Individual Treble Damage Responsibility*, at 1288–93; Jonathan M. Jacobson, *Contribution Among Antitrust Defendants: A Necessary Solution to a Recurring Problem*, 32 U. Fla. L. Rev. 217, 220–21 (1980) [hereinafter Jacobson, *Contribution Among Antitrust Defendants*] (innocent defendants frequently must settle due to the staggeringly high potential liability); Reasoner Statement, at 12–13.

[75] *See, e.g.*, ABA Comments Re Contribution and Claim Reduction, at 9–10 (describing "extraordinary pressure on a defendant to settle" due to "exposure greatly disproportionate to its gain from the alleged conspiracy and its size"); Cavanagh, *Contribution, Claims Reduction, and Individual Treble Damage Responsibility*, at 1288–90; Michael D. Hausfeld, Statement at AMC Civil Remedies Hearing, at 5, 7 [hereinafter Hausfeld Statement]. Joint and several liability thus increases the likelihood that any defendant will be held liable for a conspiracy and should also increase deterrence. Hausfeld Statement, at 5.

[76] *See, e.g.*, Reasoner Statement, at 5–6; *see also* Jacobson, *Contribution Among Antitrust Defendants*, at 219, 221; ABA Comments re Contribution and Claim Reduction, at 9.

[77] *See* Civil Remedies Trans. at 105–06 (Easterbrook).

[78] *See* A. Mitchell Polinsky & Steven Shavell, *Contribution and Claim Reduction Among Antitrust Defendants: An Economic Analysis*, 33 Stan. L. Rev. 447, 456 (1981).

[79] ABA Comments re Contribution and Claim Reduction, at 11; Reasoner Statement, at 21; *see Antitrust Equal Enforcement Act of 1979, S. 1468: Hearings Before the Subcomm. on Antitrust, Monopoly & Business Rights of the S. Comm. on the Judiciary*, 96th Cong. 78–79 (1979) (statement of Donald G. Kempf, Jr.) [hereinafter Kempf Statement at Senate Hearing].

[80] *See, e.g.*, Reasoner Statement, at 21; *see also* Kempf Statement at Senate Hearing, at 68–70.

[81] American Antitrust Institute, Comments Submitted to AMC Regarding Contribution and Claim Reduction, at 3–4 (Feb. 19, 2007).

[82] ABA Comments re Contribution and Claim Reduction, at 26–27.

[83] *See, e.g.*, Hausfeld Statement, at 15–16; Reasoner Statement, at 21–22 ("[P]laintiffs would bear the risk of settling too cheaply (i.e., for less than the settling defendant's actual liability) because their ultimate recovery will be reduced by the greater of the settlement or the settling party's trebled liability."); Civil Remedies Trans. at 167 (Easterbrook); Cavanagh, *Contribution, Claims Reduction, and Individual Treble Damage Responsibility*, at 1326.

[84] *See Antitrust Equal Enforcement Act: Hearing on S. 995 Before the S. Comm. on the Judiciary*, 97th Cong. 34 (1981) (statement of Griffin B. Bell, former Attorney General of the United States).

[85] Frank. H. Easterbrook, William M. Landes & Richard A. Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J.L. & Econ. 331, 363 (1980) [hereinafter Easterbrook et al., *Contribution Among Antitrust Defendants*]; ABA Comments re Contribution and Claim Reduction, at 16.

[86] *See* Easterbrook et al., *Contribution Among Antitrust Defendants*, at 363–64 (A "rule that allows contribution only from not-settling defendants . . . is equivalent in its effect on settlement to a rule of no contribution. . . . There are attractive features to this type of contribution rule."); ABA Comments Re Contribution and Claim Reduction, at 16.

[87] *See* Jacobson, *Contribution Among Antitrust Defendants*, at 233 ("The absence of contribution can operate to the advantage of equally guilty conspirators by permitting them to go 'scott free.'") (quoting Professional Beauty Supply Inc. v. Nat'l Beauty Supply, Inc., 594 F.2d 1179, 1185 (8th Cir. 1979)) (internal quotation marks omitted).

[88] *See* Don T. Hibner, Jr., Statement at AMC Civil Remedies Hearing, at 15 (July 28, 2005); *see also* ABA Comments re Contribution and Claim Reduction, at 12, 24.

[89] ABA Comments re Contribution and Claim Reduction, at 11; *Antitrust Equal Enforcement Act of 1979, S. 1468: Hearings Before the Subcomm. on Antitrust, Monopoly & Business Rights of the S. Comm. on the Judiciary*, 96th Cong. 2 (1979) (statement of Senator Bayh) [hereinafter Bayh Statement]; Antitrust Damage Allocation: Hearing Before the Subcomm. on Monopolies and Commercial Law of H. Comm. on the Judiciary, 97th Cong. 63 (1981) (statement of William F. Baxter, Assistant Attorney General, Antitrust Div., Dep't of Justice) ("[T]here are significant equitable justifications for allowing contribution.").

[90] *See* Bayh Statement, at 1–2 (contribution would reduce the likelihood that "a small or medium-sized company could . . . face legal responsibility on behalf of the entire industry . . . while larger, more culpable businesses go relatively free"); *see* Kempf Statement at Senate Hearing, at 78–79.

[91] *See, e.g.*, *Antitrust Damage Allocation: Hearings Before the Subcomm. on Monopolies and Commercial Law of the H. Comm. on the Judiciary*, 97th Cong. 119 (1981) (statement of James F. Rill) (proposing formula).

[92] *See, e.g.*, S. 1468, 96th Cong. (1979); S. 995, 97th Cong. (1981); S. 2162, 99th Cong. (1986); S. 1300, 99th Cong. (1985).

[93] *See* ABA Comments re Contribution and Claim Reduction, at 28–35.

Chapter III.B
Indirect Purchaser Litigation

1. INTRODUCTION

When an antitrust violation occurs, it may harm many firms and consumers in connected markets. To remedy such injuries, the Clayton Act allows parties to sue for treble damages if they suffer antitrust injury—"injury of the type the antitrust laws were intended to prevent"—as the result of an antitrust violation.[1] Not everyone claiming an antitrust injury may sue, however. The courts have used factors such as whether a plaintiff's injury is "too remote" from the antitrust violation to determine whether an injured private party is a "proper plaintiff" to bring suit under the Clayton Act.[2] In addition, even some parties that may sue to enjoin a defendant's antitrust violation are not permitted to sue for damages. The Supreme Court has limited the standing of parties to sue for antitrust damages, because "Congress did not intend the antitrust laws to provide a remedy in damages for *all* injuries that might conceivably be traced to an antitrust violation."[3]

One difficult question is whether all parties in a chain of distribution may sue to recover damages resulting from the same antitrust violation. As an illegal overcharge is passed through a distribution chain, each of the parties in that chain may suffer antitrust injury. For example, when a price-fixing manufacturer overcharges for the goods it sells, the party who purchases the goods directly from that manufacturer pays the overcharge in the first instance. This "direct purchaser" then may incorporate the price-fixed good into the products it sells and pass on to its distributors all or some portion of the manufacturer's overcharge. In turn, the distributors may be able to pass on all or part of that overcharge to consumers. Because neither the distributors nor the consumers have purchased directly from the price-fixing manufacturer, they are called "indirect purchasers." Thus, the damages from the original antitrust violation may flow from direct to indirect purchasers.

Such fact patterns raise a question for antitrust law: Should only direct purchasers, or both direct and indirect purchasers, be allowed to sue to recover damages stemming from the same antitrust violation? The Supreme Court first considered a related question in 1968. In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.* the Court held that an antitrust defendant could not avoid liability to a direct purchaser by arguing that the plaintiff, a direct purchaser, had "passed on" to indirect purchasers the illegal overcharges initially paid by the plaintiff.[4] Almost ten years later, in 1977, the Court addressed specifically whether indirect, as well as direct, purchasers could sue for damages under federal antitrust law. In *Illinois Brick Co. v. Illinois* the Court held that only direct purchasers may sue under federal antitrust law to recover for damages from anticompetitive overcharges.[5]

State governments have largely refused to take the same approach under state antitrust laws. Through legislation or court decisions, many states have adopted policies that allow indirect, as well as direct, purchasers to sue under state antitrust law to recover damages. The result typically has been that direct purchasers sue in federal court, and indirect purchasers sue in state court, to recover damages resulting from the same antitrust violation.

Vigorous debate over whether to allow only direct, or both direct and indirect, purchasers to seek antitrust damages has continued for almost thirty years. During that time, the conflict between federal and state approaches has itself spawned problems. For example, because indirect purchasers typically cannot join direct purchasers in pursuing remedies in federal court under federal antitrust law, direct and indirect purchasers have often brought multiple, duplicative lawsuits in federal and state courts, where one proceeding might have sufficed to resolve all liability and damage issues in a single forum. During this time, the conflict also has increased the potential for duplicative and otherwise inconsistent recoveries, which then skews the incentives of plaintiffs and defendants to settle.

The Class Action Fairness Act (CAFA), which Congress passed in June 2005, may mitigate certain of these problems to some extent.[6] Among other things, CAFA allows defendants to remove certain indirect purchaser class actions from state to federal court, where they can be consolidated with direct purchaser actions filed in federal court. However, there are exceptions to removal under CAFA. In addition, CAFA does not permit the consolidation of cases in a single federal court for trial. These limitations have lead some to question whether CAFA provides a sufficient remedy.

The problems created by duplicative lawsuits in federal and state courts have led many observers to seek a way to eliminate the current conflict between federal and state indirect purchaser policies. Some advocate a federal statute to allow recovery by both direct and indirect purchasers. Others would prefer that Congress preempt the state statutes and case law that allow indirect purchasers to sue and recover damages. The Commission examined the problems that conflicting federal and state policies on indirect purchaser recovery create, and whether the benefits of changing either federal or state law would be worth the costs.

These are difficult and contentious issues. Half of the Commissioners believe that, if one could address this issue on a clean slate, the best policy would be to permit only direct purchaser claims.* Nonetheless, the Commission recognizes that the issue must be addressed

* Commissioners Carlton, Garza, Jacobson, Litvack, Valentine, and Warden would favor allowing only direct purchaser claims, if writing on a clean slate. They believe that allowing only direct purchasers to sue would provide the most effective deterrence mechanism, and would avoid duplicative recoveries, speculative inquiries about how damages may have been passed on through the chain of distribution, and complex litigation. (Commissioner Carlton would allow for minor exceptions to the rule allowing only direct purchasers to sue.) Three of those Commissioners—Carlton, Litvack, and Warden—would recommend preemption of state law to implement that rule because they believe that achievement of those goals overrides considerations of federalism and political pragmatism.

Commissioners Burchfield, Delrahim, Kempf, Shenefield, and Yarowsky would allow suits by both direct and indirect purchasers.

in light of the history of the past thirty years. Accordingly, despite disagreement about which policy would be best *a priori*, the Commission largely reached consensus on a practical approach to reduce the complexity and costs generated by the existing conflict between federal and state policies. The Commission makes the following recommendation.

47. Direct and indirect purchaser litigation would be more efficient and more fair if it took place in one federal court for all purposes, including trial, and did not result in duplicative recoveries, denial of recoveries to persons who suffered injury, and windfall recoveries to persons who did not suffer injury. To facilitate this, Congress should enact a comprehensive statute with the following elements:*

- **Overrule *Illinois Brick* and *Hanover Shoe* to the extent necessary to allow both direct and indirect purchasers to sue to recover for actual damages from violations of federal antitrust law. Damages in such actions could not exceed the overcharges (trebled) incurred by direct purchasers. Damages should be apportioned among all purchaser plaintiffs—both direct and indirect—in full satisfaction of their claims in accordance with the evidence as to the extent of the actual damages they suffered.**
- **Allow removal of indirect purchaser actions brought under state antitrust law to federal court to the full extent permitted under Article III.†**
- **Allow consolidation of all direct and indirect purchaser actions in a single federal forum for both pre-trial and trial proceedings.**
- **Allow for certification of classes of direct purchasers, consistent with current practice, without regard to whether the injury alleged was passed on to customers of the direct purchasers.**

* Commissioners Cannon, Carlton, and Garza do not join this recommendation.

† Commissioner Delrahim does not join this aspect of the recommendation.

2. BACKGROUND

The following explains the history of the controversy over direct and indirect purchaser litigation and discusses the problems that conflicting federal and state policies have created, as well as attempts so far to address those problems.

A. History

As noted above, the question of how to treat the "pass on" of antitrust damages from one purchaser to the next first arose in *Hanover Shoe, Inc. v. United Shoe Machinery*.[7] There, the Supreme Court held that an antitrust defendant could not assert the pass on of overcharges from one purchaser to the next as a defense in a suit brought by the direct purchaser.[8] The ruling thus enabled direct purchasers to recover all overcharges they suffered from an antitrust violation, even if the direct purchasers passed on some or all of the overcharge to their customers (that is, indirect purchasers). In 1977, nearly ten years later, the Supreme Court in *Illinois Brick Co. v. Illinois* applied what it saw as the logical corollary, holding that federal antitrust law allowed only direct purchasers, and not indirect purchasers, to sue to recover the overcharge they had paid.[9] The Court viewed this as applying the same rule to both plaintiffs and defendants: neither could rely on the pass on of overcharges to either bring, or defend against, a suit based on federal antitrust law.[10] The Court further reasoned that restricting suits solely to direct purchasers would promote more effective private enforcement and avoid multiple and inconsistent liability for defendants and the need to "trace the complex economic adjustments" to determine the impact on indirect purchasers.[11]

A vigorous dissent, however, argued that the holding "frustrates both the compensation and deterrence objectives of the treble-damages action."[12] The dissenters emphasized congressional intent that consumers recover for their antitrust injuries, as had been recently expressed in 1976, when Congress passed legislation to allow state attorneys general to use *parens patriae* authority to sue for Sherman Act violations on behalf of state citizens.[13] The dissenters were not persuaded that the complexity of assessing and allocating damages for both direct and indirect purchasers was any greater than the complexity of other antitrust issues.[14]

The Court's decision in *Illinois Brick* immediately sparked a heated controversy.[15] Critics, including leading Senators and Representatives, agreed with the dissent that the decision ignored the will of Congress by leaving consumers and other indirect purchasers without a remedy to redress serious antitrust injuries.[16] Bills to overrule the decision by federal statute were quickly introduced.[17] Despite intensive efforts, however, these bills failed, and the rule of *Illinois Brick* has continued to govern in federal courts.[18]

Attacks on *Illinois Brick* were not limited to efforts in Congress; opponents brought their case to state legislatures and courthouses as well. Starting with California in 1978, legislatures in many states began passing *Illinois Brick* "repealers"—that is, statutes that specifically authorized indirect purchasers to recover damages under state antitrust laws.[19] In some states, courts interpreted existing state laws to allow recoveries by indirect purchasers alleging antitrust violations.[20] In 1989 the Supreme Court confirmed the validity of state laws permitting indirect purchasers to sue for damages, holding that those laws were not impliedly preempted by federal antitrust law.[21] At the present, more than thirty-five states permit indirect, as well as direct, purchasers to sue for damages under state law.[22]

B. Problems and Attempts to Address Them

Indirect purchaser litigation under state law has become increasingly common, especially since the mid-1990s.[23] Such cases are frequently pursued separately rather than consolidated with other actions in a federal court proceeding. Litigation involving recoveries by direct and indirect purchasers for the same antitrust violation often has proceeded in at least two different courts, with direct purchasers filing under federal antitrust law in federal courts and indirect purchasers pursuing their state antitrust claims in state courts, resulting in wasteful, duplicative litigation.[24]

Some judges and parties have taken steps to reduce the duplication and wasted resources resulting from multiple federal and state proceedings concerning the same alleged antitrust violation. For example, on occasion, a federal judge presiding over a direct purchaser action has "contact[ed] the various state judges in an attempt to coordinate discovery, thus avoiding duplicative efforts; in most instances, those attempts were successful."[25] Some indirect purchasers have brought their state law damage claims in federal court under the federal court's supplemental jurisdiction.[26] In these cases, the indirect purchasers have asserted a federal antitrust claim seeking injunctive relief (which is not barred under *Illinois Brick*) and have requested that the federal court hear their state law claims for damages pursuant to the court's supplemental jurisdiction.[27] Although this procedure appears to have been used successfully with some frequency in recent years,[28] it can provide only a partial remedy to the problems of duplicative litigation. Plaintiffs may not use it when they cannot seek injunctive relief, for example, from a price-fixing cartel that has disbanded following criminal prosecution. In addition, defendants cannot use a federal court's supplemental jurisdiction to remove cases from state court to federal court, where they can be consolidated.

Under the new CAFA enacted by Congress in June 2005, however, defendants now can remove certain indirect purchaser class actions to federal court, where they may be consolidated with other actions, pursuant to the multidistrict litigation (MDL) process.[29] Under CAFA, "[f]ederal jurisdiction, with a few exceptions, now exists over class actions in which (1) minimal diversity exists (that is, where at least one plaintiff and one defendant are diverse), (2) the putative class contains at least 100 members, and (3) the amount in controversy is at least $5 million."[30] CAFA does create a number of exceptions to this broad grant; however, as discussed below, some predict that these will have limited application to state indirect purchaser class actions.[31] Even if removal is achieved, the Supreme Court's holding in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach* limits the purposes for which cases may be consolidated through the MDL process to pretrial proceedings.[32] This means that even when CAFA has allowed direct and indirect purchaser cases to be consolidated, those cases must be split up and returned to the originating federal courts for trial.

3. RECOMMENDATION AND FINDINGS

47. Direct and indirect purchaser litigation would be more efficient and more fair if it took place in one federal court for all purposes, including trial, and did not result in duplicative recoveries, denial of recoveries to persons who suffered injury, and windfall recoveries to persons who did not suffer injury. To facilitate this, Congress should enact a comprehensive statute with the following elements:*

- **Overrule *Illinois Brick* and *Hanover Shoe* to the extent necessary to allow both direct and indirect purchasers to sue to recover for actual damages from violations of federal antitrust law. Damages in such actions could not exceed the overcharges (trebled) incurred by direct purchasers. Damages should be apportioned among all purchaser plaintiffs—both direct and indirect—in full satisfaction of their claims in accordance with the evidence as to the extent of the actual damages they suffered.**

* Commissioners Cannon, Carlton, and Garza do not join this recommendation.

Commissioner Cannon does not join this recommendation because he believes that the problems due to the conflict between federal and state policy in this area are likely to be ameliorated to a large extent by CAFA, which makes it easier for state antitrust claims to be combined with federal antitrust claims and litigated in one federal court proceeding.

Commissioner Carlton does not join this recommendation because he believes standing should be limited to direct purchasers except where federal courts currently recognize an exception to the rule, including where the direct purchaser is alleged to be participating in the conspiracy. He would also consider allowing, after some period, a class of indirect purchasers to sue in cases where an insufficient number of direct purchasers come forward to sue. Additional study would be needed to refine this exception and to determine how to precisely define "insufficient."

Although Commissioner Garza would not recommend preemption of those state laws allowing indirect purchasers to sue under state antitrust law, she would not abandon federal policy, which she considers to be the optimal policy for reasons explained in this Report. She concurs in the view of Commissioner Cannon that CAFA may substantially ameliorate much of the burden arising out of conflicting state and federal policies and is concerned that the benefits of legislation proposed by the Commission would not outweigh the detriment of abandoning federal policy. In addition, while she does not join in this recommendation as a whole, she supports legislation that would allow consolidation of all direct and indirect purchaser actions in a single forum for both pretrial and trial proceedings, and also supports legislation allowing removal of indirect purchaser actions brought under state antitrust law to federal court to the full extent permitted under Article III.

- **Allow removal of indirect purchaser actions brought under state antitrust law to federal court to the full extent permitted under Article III.***
- **Allow consolidation of all direct and indirect purchaser actions in a single federal forum for both pre-trial and trial proceedings.**
- **Allow for certification of classes of direct purchasers, consistent with current practice, without regard to whether the injury alleged was passed on to customers of the direct purchasers.**

A. Reasons for the Commission's Recommendation

1. Duplicative federal direct purchaser and state indirect purchaser litigation imposes undue burdens on the judicial system and the parties, wastes resources, increases the risk of duplicative recoveries, skews the parties' incentives to settle, and hinders efficient global settlements

The conflict between federal and state policies on indirect purchaser damage actions has created a variety of problems. Absent the consolidation of federal and state cases involving direct and indirect purchasers, defendants must respond to complaints about the same conduct in multiple courts.[33] Burdensome and uncoordinated discovery increases costs to defendants and disadvantages plaintiffs as well, because they do not have access to materials produced in other actions. Even when pretrial consolidation of federal direct and state indirect purchaser actions is possible under federal MDL rules, *Lexecon* requires that actions be returned to their originating courts for trial,[34] causing duplicative and wasteful trials. With trials proceeding in at least two, and maybe more, different courts, a defendant may be liable for duplicative damages—the amount of the overcharge to the direct purchaser in the first instance, plus whatever overcharges the direct purchaser was able to pass on to indirect purchasers.[35] Correspondingly, direct purchasers may receive "windfall" awards exceeding their actual damages. Furthermore, when all parties are not before a single court, it can be difficult to negotiate and implement a global settlement.[36] Defendants also may confront costs due to the asymmetric application of collateral estoppel: a finding by one court that the defendant did violate the antitrust law may be used by plaintiffs to establish

* Commissioner Delrahim does not join this aspect of the recommendation. He would not expand the availability of removal of state court actions to federal court.

Although Commissioners Litvack, Shenefield, and Warden join this aspect of the recommendation, they would prefer to preempt state laws to require that any claim for damages by an indirect purchaser must be brought in federal court under federal antitrust law.

liability in other suits, but a finding in one suit that the defendant did not violate the antitrust laws may not be used by the defendant to seek dismissal of other suits.[37]

2. Current efforts to ameliorate these problems cannot alone provide sufficient remedies

The Commission commends the voluntary coordination among courts overseeing multiple proceedings and the parties involved to reduce the burdens on the parties and the courts. Such efforts alone are insufficient to address these problems, however, and the need for such coordination reveals the types of burdens on courts that duplicative direct and indirect purchaser actions create. Increased use of supplemental jurisdiction promotes consolidation and is therefore commendable, but it cannot adequately address the problem of duplicative litigation. Indirect purchasers of goods from a disbanded cartel cannot seek injunctive relief and therefore do not have a basis on which to request that a court invoke its supplemental jurisdiction. A federal court's supplemental jurisdiction is also not available to defendants as a basis for removal.

CAFA is likely to promote removal of state court indirect purchaser class actions, thereby permitting their consolidation in federal court. It may also lead more plaintiffs to file initially in federal court, likewise permitting consolidation. Indeed, if predictions of some are correct that CAFA will facilitate the removal of a large majority of state indirect purchaser actions to federal court—because CAFA's requirements will generally be met and its exceptions will seldom apply[38]—that could greatly reduce the waste of resources associated with multiple indirect purchaser actions in state courts, at least at the pretrial phase.[39] The Commission is loath to rely on such predictions, however. Because CAFA has several exceptions that may apply to indirect purchaser actions, plaintiffs may seek to use CAFA's exceptions to avoid removal, and a significant number of actions may remain in state court.[40] In addition, CAFA applies only to class actions—not to claims brought by large indirect purchasers, who can afford to bring lawsuits individually rather than through a class action. Moreover, indirect purchasers may opt out of a class action and assert their claims directly in state court; such actions would be outside CAFA's reach.[41] CAFA also does not apply to *parens patriae* actions by state attorneys general.[42]

Perhaps most importantly, CAFA does not overrule the Supreme Court's ruling in *Lexecon*, which permits consolidation of class actions in one federal district court only for pretrial matters, such as discovery, class certification, and summary judgment motions. For trial, the Supreme Court's ruling in *Lexecon* requires consolidated cases to be split up again and returned to their originating courts.[43] This rule frustrates the goal of resolving interrelated direct and indirect purchaser claims in one forum to avoid duplicative proceedings and recoveries. Finally, CAFA does not address substantive and procedural issues unique to indirect purchaser litigation.

3. Federalism and political pragmatism require deference to many states' clearly expressed preferences that indirect purchasers be allowed to sue for antitrust damages, and these values outweigh arguments in favor of limiting both federal and state recoveries to direct purchasers only

One way to simplify direct and indirect purchaser litigation would be for Congress explicitly to preempt state laws allowing indirect purchaser actions. A majority of the Commission concluded, however, that principles of federalism and practical political concerns counsel in favor of deference to the clear preference expressed by more than thirty-five states that allow indirect purchasers to pursue relief.

In evaluating possible recommendations on direct and indirect purchaser litigation, the Commission considered a wide variety of relevant policy considerations. The most fundamental criticism of the *Illinois Brick* rule is that it leaves many of those actually injured by antitrust violations without compensation.[44] Indirect purchaser actions can "provide[] an effective vehicle for compensating certain victims . . . including individual consumers";[45] on occasion, indirect purchaser actions yield significant distributions to injured indirect purchasers.[46] The evidence does not point only in one direction, however. Class actions sometimes yield very little compensation to injured indirect purchasers, even when those suits produce large settlements,[47] because the settlements take the form of vouchers, coupons, or product that few class members even bother to collect, or *cy pres*, typically benefiting worthy causes, but not injured purchasers.[48]

The record before the Commission was mixed on whether the deterrence of antitrust violations is best achieved by limiting recoveries to direct purchasers or permitting indirect purchasers to sue as well. Direct purchasers usually can better perceive the violation and prove overcharges and thus may be more likely to bring an antitrust suit.[49] Some witnesses argued that direct purchasers are more likely than indirect purchasers to bring antitrust lawsuits and thus to contribute more to the deterrence of antitrust violations.[50] A sample of indirect purchaser settlements provided by attorneys for indirect purchasers shows that, in virtually all cases, direct purchasers or other private enforcers also challenged the conduct at issue.[51] Nonetheless, indirect purchasers can bring actions in circumstances in which direct purchasers choose not to sue, for example, to avoid injuring business relationships with suppliers.[52] Moreover, data presented to the Commission show that indirect purchaser suits can provide additional deterrence by increasing the liability faced by violators.[53] Taken together, this evidence suggests that direct purchaser litigation is more likely to provide effective deterrence, but indirect purchaser litigation may supplement that deterrence.

If deterrence were the sole objective, one would prohibit indirect purchaser actions if allowing them would reduce the likelihood of direct purchaser actions. Under the existing regime, state indirect purchaser recoveries do not diminish recoveries under federal antitrust law by direct purchasers. However, several witnesses expressed concerns that, if direct purchasers suing under federal antitrust law were required to share the right to recover with indirect purchasers, private enforcement would be significantly diminished.[54] Others disagreed.[55]

Another policy consideration involves the potential for duplicative recoveries. Proponents of the *Illinois Brick* rule worry that indirect purchaser litigation exposes defendants to duplicative recoveries—that is, direct purchasers recover for treble the entire overcharge, then indirect purchasers recover for treble the amount of the overcharge that the direct purchaser passed on to them, and so on. The American Bar Association, Section of Antitrust Law, among others, has highlighted such concerns.[56] Although no one identified an instance of unfair or multiple recovery,[57] that may simply reflect the difficulty of determining whether actual damage awards and settlements exceed total damages.[58]

Testimony revealed that a number of states expressly instruct courts to avoid duplicative damages; no state expressly affords duplicative damages.[59] Such state policies are important to reduce concerns about duplicative recovery. Nevertheless, the potential for duplicative recoveries remains a serious concern as long as direct and indirect purchaser actions proceed without coordination in separate courts.

The burden on courts to manage the complexity of estimating the damages incurred by indirect purchasers was emphasized by the *Illinois Brick* Court[60] and has remained an important concern.[61] In particular, courts have found that estimating pass on for a potential class can be a significant barrier to class certification, "confirm[ing], in a new context, the magnitude of the problems of proof the Court sought to avoid in *Illinois Brick*."[62] Witnesses argued that recent advances in econometrics and other methodologies have made such assessments somewhat more manageable,[63] and at least some indirect purchaser claims may be "non-speculative."[64] Nonetheless, managing the complexity of damage calculation for direct and indirect purchasers remains a non-trivial problem.

Outweighing all of these considerations, however, are the values of federalism, compensating injured parties, and practical feasibility. Most states have implemented their preferences to allow indirect, as well as direct, purchasers to sue.[65] The authority of states to establish antitrust standards that differ from federal law is well established, including specifically with respect to indirect purchaser remedies.[66] Numerous state attorneys general (and many others) oppose "federal preemption of any state antitrust statutes, including indirect purchaser statutes."[67] In particular, they oppose any federal preemption of the right of state attorneys general to bring actions on behalf of their citizens pursuant to the *parens patriae* authority that Congress gave the states in 1976.[68] The congressional intent underlying the grant of *parens patriae* authority provides additional reason to defer to the rights of the states to allow indirect purchaser damage actions. Therefore, the Commission decided *not* to recommend that Congress pass legislation expressly to preempt state laws permitting indirect purchaser litigation.

B. Specific Explanation of the Commission's Recommendation for the Management of Direct and Indirect Purchaser Litigation

In light of the Commission's recommendation that Congress not preempt state indirect purchaser laws, the question becomes how best to reach a solution that will enable courts to manage direct and indirect purchaser actions to achieve efficiency and fairness. Direct and indirect purchaser litigation would be more efficient and fairer if it took place in one federal court for all purposes, including trial, and did not result in duplicative liability, denial of recoveries to persons who suffered injury, and windfall recoveries to persons who did not suffer injury. These goals can be best achieved if all direct and indirect purchasers are entitled to recover their actual damages (trebled) under federal law, and if all claims arising out of the same alleged antitrust violation are heard in one federal court, to the maximum extent possible. The Commission's recommendation contains four interrelated components, which are explained below, to achieve these goals.

1. *Overrule* Illinois Brick *and* Hanover Shoe *to the extent necessary to allow both direct and indirect purchasers to sue to recover for actual damages from violations of the federal antitrust laws. Damages in such actions could not exceed the overcharges (trebled) incurred by direct purchasers*

To the maximum extent possible, a single federal court should hear all proceedings relevant to actions by direct and indirect purchasers alleging the same antitrust violation. To accomplish this, federal law should permit direct and indirect purchasers to recover the actual damages they suffer as the result of antitrust violations. The first step toward these goals is to overrule *Illinois Brick* and *Hanover Shoe* legislatively to the extent necessary to allow both direct and indirect purchasers to sue under federal law to recover for actual damages they suffer from antitrust violations resulting in an overcharge. Overruling *Illinois Brick* would increase fairness by ensuring that all indirect purchasers, not just those in states permitting such actions, could recover treble their actual damages under federal law for injuries attributable to antitrust violations. Overruling *Hanover Shoe* would limit direct purchasers to recovering treble their actual damages, rather than the full overcharge regardless of pass on, and will thus promote fairness by preventing windfall damage recoveries.

Legislative overruling of *Illinois Brick* may encourage the resolution of direct and indirect purchaser litigation in a single forum, because indirect purchasers may choose to sue under federal antitrust laws rather than to bring state claims. In conjunction with the procedural components of the Commission's recommendation, this also should make resolution of all claims in a single forum easier. Federal recognition of indirect purchaser standing also will promote the development of a body of federal law governing the allocation of damages among direct and indirect purchasers.[69] (The allocation of damages, a second part of this component of the Commission's recommendation, is described below.)

2. Allow removal of actions brought under state antitrust law by direct and indirect purchasers to federal court to the full extent permitted under Article III

To ensure that direct and indirect purchaser litigation involving the same alleged antitrust violation will take place in a single court, Congress should include as an element of its comprehensive legislation a provision that allows removal of direct and indirect purchaser actions brought pursuant to state law to federal court to the full extent permitted under Article III. It is true that CAFA now permits consolidation of state indirect purchaser actions in one federal district court to a much greater extent than previously was possible. The potential susceptibility of CAFA's exceptions to plaintiff efforts to avoid removal, and other circumstances to which CAFA does not apply, however, generate concern that CAFA will not operate as well as would be desirable in consolidating direct and indirect purchaser actions. An antitrust-specific provision allowing removal of state indirect purchaser actions to federal court to the full extent permitted by Article III would afford a more comprehensive solution. In combination with other components of the Commission's recommendation, removal to the maximum extent permitted will also facilitate the transfer and consolidation of all direct and indirect purchaser actions in a single federal court.

3. Allow consolidation of all purchaser actions in a single federal forum for both pretrial and trial proceedings

In *Lexecon* the Supreme Court held that federal courts in which class actions are consolidated pursuant to the multidistrict litigation statute, 28 U.S.C. § 1407, may only conduct consolidated pretrial hearings on issues such as discovery, class certification, summary judgment, and other pretrial motions.[70] After that, the federal district court must remand the actions for trial in the courts in which they were originally brought.[71] Because *Lexecon* precludes consolidation for trial, the possibility of duplicative trial litigation and inconsistent results will remain.[72]

To avoid this result, Congress should legislatively overrule *Lexecon* for purposes of antitrust direct and indirect purchaser litigation only.[73] The benefits of consolidation, including reduced waste and enhanced coordination, will be far greater if the actions are consolidated for all purposes, including trial.[74] Moreover, such reform is especially necessary with respect to antitrust litigation involving claims by direct and indirect purchasers because, due to the problem of pass on, the amounts of injury suffered by different plaintiff groups are closely interrelated. Indeed, unless cases are consolidated for all purposes, it will be impractical to obtain a single determination of liability and damages and appropriately allocate damages awards among claimants, a critical element of the Commission's recommendation.

4. *Damages should be apportioned among all purchaser plaintiffs—both direct and indirect—in full satisfaction of their claims in accordance with the evidence as to the extent of the actual damages they suffered*

As explained above, one component of the Commission's recommendation calls for both direct and indirect purchasers to be able to recover their actual damages, trebled. Legislatively overruling *Illinois Brick* and *Hanover Shoe* will allow a limitation of the defendant's liability to treble the overcharges suffered by the direct purchasers as a result of the initial overcharge. These damages should be allocated among the different claimants, whether direct or indirect purchasers, according to the evidence regarding their actual damages.

To be sure, determinations of how to allocate damages among direct and indirect purchasers will often involve complex economic assessments of the extent to which each purchaser in the chain of distribution has suffered harm that can be traced to the overcharge. The federal courts have shown great ability to handle such complex economic issues, however, and they will develop rules and procedures to handle these issues. Consolidating all claims in a single proceeding will facilitate an appropriate allocation of relief among the claimants by the court. In addition, once all parties are before a single court, a global settlement becomes possible. Many of these disputes are likely to be settled; once liability and total damages are established, allocations of damages may often be determined by settlements among the claimants. Furthermore, limiting damages to the amount of the initial overcharge should streamline resolution of the litigation. Indeed, once the amount of overcharge has been determined, it may be possible to resolve the issues of how to allocate those damages among direct and indirect purchasers without the further involvement of the defendants.

Without a doubt, the management of a consolidated class action involving direct and indirect purchasers will be challenging. Such a proceeding will likely involve numerous claimants, the application of differing state laws, and difficult economic assessments of the extent to which overcharges flowed from direct to indirect purchasers and how best to apportion damages among claimants. Federal courts managing such proceedings should use their discretion to structure the proceedings as they see fit to achieve fairness and efficiency. Federal judges may wish to consider structuring the proceedings to make three distinct determinations: the liability of the defendants; the damages owed by the defendant (based on overcharges to the direct purchasers only); and the allocation of those damages among direct and indirect purchasers.* However, judges may choose from a variety of different mechanisms to best manage such cases. It is far preferable to have one federal judge oversee and manage the interrelationships among the claims and claimants than to have split proceedings in federal and state courts, as is now too frequently the case.

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* Commissioner Burchfield is skeptical about the proposed use of such structured (or "trifurcated") proceedings.

5. Allow for certification of classes of direct purchasers, consistent with current practice, without regard to whether the injury alleged was passed on to customers of the direct purchasers

The Commission does not intend its recommended reforms to make class certification more difficult for direct and indirect purchasers to obtain than under current practice. In particular, the Commission recognizes the concerns of some that certification of direct purchaser actions may be rendered more difficult by the legislative overruling of *Hanover Shoe*.[75] *Hanover Shoe* simplifies the proof of the fact and extent of injury suffered by direct purchasers—the overcharge depends only on the price they actually paid and the price they would have paid absent the violation. If *Hanover Shoe* is overruled legislatively, however, the extent to which the direct purchasers may have passed on the overcharge may become an issue at trial. Defendants thus may seek to argue as well that the extent of pass on is not susceptible of common proof, which potentially provides a basis to deny class certification. Because the extent of pass on affects both direct purchasers' claims and the indirect purchasers' claims, it has the potential to prevent *any* class from being certified.

In order to ensure that the proposed reform does not make class certification of purchaser classes more difficult, the legislation should specify that courts should certify direct purchaser classes without regard to whether the injury alleged was passed on by direct purchasers. Thus, the degree of pass on will be an issue only at trial, not at the class certification stage of the proceedings. Because the purpose of this proposed reform is to ensure all injured parties are able to obtain appropriate recoveries, increasing obstacles by creating greater burdens to certify class actions would frustrate the objectives of the proposal.

Notes

1 Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977); *see* 15 U.S.C. § 15(a).

2 *See generally* Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 110 n.5 (1986); Associated Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519, 532–46 (1983).

3 Hawaii v. Standard Oil Co., 405 U.S. 251, 263 n.14 (1972) (emphasis added).

4 Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968).

5 Illinois Brick Co. v. Illinois, 431 U.S. 720, 728–29 (1977).

6 Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended at 28 U.S.C. § 1711 note).

7 *Hanover Shoe*, 392 U.S. at 481.

8 *Id.* at 494.

9 *Illinois Brick*, 431 U.S. at 728–29.

10 *Id.* at 728–30.

11 *Id.* at 730–34.

[12] *Id.* at 749 (Brennan, J., dissenting).

[13] *Id.* at 756–58 (Brennan, J., dissenting).

[14] *Id.* at 758–60 (Brennan, J., dissenting).

[15] Andrew I. Gavil, *Federal Judicial Power and the Challenges of Multijurisdictional Direct and Indirect Purchaser Antitrust Litigation*, 69 Geo. Wash. L. Rev. 860, 867–69 (2001) [hereinafter Gavil, *Challenges of Multijurisdictional Direct and Indirect Purchaser Antitrust Litigation*]; Stephen Calkins, Illinois Brick *and Its Legislative Aftermath*, 47 Antitrust L.J. 967, 967–68 (1979) [hereinafter Calkins, Illinois Brick *and Its Legislative Aftermath*].

[16] For example, Senator Kennedy charged that "the *Illinois Brick* decision effectively frustrates the clear legislative intent of Congress." *Fair and Effective Enforcement of the Antitrust Laws, S. 1874: Hearings Before the Subcomm. on Antitrust and Monopoly of the S. Comm. on the Judiciary*, 95th Cong. 2 (1977) (statement of Senator Edward Kennedy).

[17] *See, e.g.*, S. 1874, 95th Cong. § 5 (1978); H.R. 11942, 95th Cong. § 3 (1978); *see also* Calkins, Illinois Brick *and Its Legislative Aftermath*, at 967.

[18] Edward D. Cavanagh, Illinois Brick*: A Look Back and a Look Ahead*, 17 Loy. Consumer L. Rev. 1, 19, 26 (2004) [hereinafter Cavanagh, Illinois Brick*: A Look Back and a Look Ahead*] (the bills to repeal *Illinois Brick* all died in committee; the most recent, introduced in 1983, would have allowed state attorneys general to sue on behalf of indirect purchasers); *see also* Edward D. Cavanagh, *The* Illinois Brick *Dilemma: Is There a Legislative Solution?*, 48 Alb. L. Rev. 273, 294–307 (1984).

[19] Ronald W. Davis, *Indirect Purchaser Litigation:* ARC America*'s Chickens Come Home to Roost on the* Illinois Brick *Wall*, 65 Antitrust L.J. 375, 391–93 (1997).

[20] Gavil, *Challenges of Multijurisdictional Direct and Indirect Purchaser Antitrust Litigation*, at 867–68.

[21] California v. ARC Am. Corp., 490 U.S. 93, 102–06 (1989).

[22] Kevin J. O'Connor, *Is the* Illinois Brick *Wall Crumbling?*, 15 Antitrust, Summer 2001, at 34, 34–35 [hereinafter O'Connor, *Is the* Illinois Brick *Wall Crumbling?*] (reporting that "thirty-six states and the District of Columbia, representing over 70 percent of the nation's population, now provide for some sort of right of action on behalf of some or all indirect purchasers"); Cavanagh, Illinois Brick*: A Look Back and a Look Ahead*, at 19 ("[S]ome thirty states . . . permit[] antitrust suits by indirect purchasers under state law."); American Bar Association, Section of Antitrust Law, *Report on Remedies*, at 2 (2004) [hereinafter 2004 Task Force Report] ("more than half the states permit" indirect purchaser antitrust suits). There are a variety of remedies available to indirect purchasers under state law. *See* Mark J. Bennett & Ellen S. Cooper, Statement at AMC Indirect Purchaser Hearing, at 18–19 (June 27, 2005) [hereinafter Bennett & Cooper Statement] (describing state law remedies available to indirect purchasers, including consumer protection and Little FTC Acts); Indirect Purchaser Transcript at 103–04 (Cooper) (June 27, 2005); Dan E. Gustafson, Statement at AMC Indirect Purchaser Hearing, at 6–8 (June 27, 2005) [hereinafter Gustafson Statement]; Joel M. Cohen & Trisha Lawson, *Navigating Multistate Indirect Purchaser Lawsuits*, 15 Antitrust, Summer 2001, at 29, 30–31 [hereinafter Cohen & Lawson, *Navigating Multistate Indirect Purchaser Lawsuits*] (describing features of *Illinois Brick* repealers that vary by state).

[23] Indirect Purchaser Trans. at 41 (Zwisler); *id.* at 42–43 (Cuneo); William H. Page, *Class Certification in the* Microsoft *Indirect Purchaser Litigation*, 1 J. Competition L. & Econ., 303, 335–38 (2005) [hereinafter Page, *Class Certification in the* Microsoft *Indirect Purchaser Litigation*] (appendix listing class certification decisions in indirect purchaser actions, nearly all dating since the mid-1990s).

[24] *See, e.g.*, Cavanagh, Illinois Brick*: A Look Back and a Look Ahead*, at 30 (describing the "proliferation of litigation of indirect purchaser cases involving a common nucleus of operative fact"); Gavil, *Challenges of Multijurisdictional Direct and Indirect Purchaser Antitrust Litigation*, at 876–78.

[25] H. Laddie Montague, Jr., Statement at AMC Indirect Purchaser Hearing, at 2 (June 27, 2005) [hereinafter Montague Statement]; *see* Indirect Purchaser Trans. at 135–36 (Gustafson) (describing how "negotiated coordination" results in agreements to coordinate); *see also* O'Connor, *Is the* Illinois Brick *Wall Crumbling?*, at 34, 36–37 ("recent attempts at coordination initiated by state attorneys general, in con-

junction with private plaintiffs' and defendants' counsel," have reduced costs and facilitated settlement); Cohen & Lawson, *Navigating Multistate Indirect Purchaser Lawsuits*, at 31–32 ("indirect purchaser litigation has the potential to become unmanageable and extraordinarily expensive," but courts and plaintiffs' counsel are "frequently receptive to efforts to avoid unnecessary burden").

[26] Indirect Purchaser Trans. at 48–50 (Montague).

[27] *Id.*; Montague Statement, at 11–12.

[28] Pamela A. MacLean, *Federal Courts May Face Flood of Price-Fixing Allegations*, NAT'L L.J. (Sept. 21, 2005) (reporting that "[i]ndirect purchaser antitrust cases have flooded back to federal court using pendant state law antitrust claims"). At least eleven federal court pharmaceutical indirect purchaser actions may have been consolidated in this manner. *See* Patrick E. Cafferty et al., Public Comments Submitted to AMC (June 2, 2006) [hereinafter Cafferty Comments] (listing 11 indirect purchaser actions settled in federal court in recent years, some or all of which may have been brought relying on supplemental jurisdiction).

[29] *See* 28 U.S.C. § 1407 ("When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings.").

[30] Ian Simmons & Charles E. Borden, *The Class Action Fairness Act of 2005 and State Law Antitrust Actions*, 20 ANTITRUST, Fall 2005, at 19, 19 [hereinafter Simmons & Borden, *CAFA and State Law Antitrust Actions*].

[31] *Id.* at 20. The "Home State" exception is of the greatest potential relevance to the removal of state indirect purchaser class actions. It provides that a class action that otherwise meets CAFA's requirements is not subject to removal under CAFA if, *inter alia*, "(1) all of the primary defendants are citizens of the state in which the class action is being brought, and (2) at least two-thirds of the members of the putative class are also citizens of that state." *Id.* (citing 28 U.S.C. § 1332(d)(4)(B)). Moreover, under this provision, if between one-third and two-thirds of the members of the putative class are citizens of the same state as the defendant or defendants, then a federal court has discretion over whether it will exercise jurisdiction over the class action; it is not obligated to do so. *Id.* (citing 28 U.S.C. § 1332(d)(3)).

There is also a "Local Controversy" exception. *See* Bruce V. Spiva & Jonathan K. Tycko, *Indirect Purchaser Litigation on Behalf of Consumers After CAFA*, 20 ANTITRUST, Fall 2005, at 12, 14–15 [hereinafter Spiva & Tycko, *Indirect Purchaser Litigation*] (discussing both exceptions).

[32] Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 28 (1998).

[33] *See, e.g.*, Gavil, *Challenges of Multijurisdictional Direct and Indirect Purchaser Antitrust Litigation*, at 863 ("[T]he artificial division of cases that now flows from *Illinois Brick* imposes unnecessary litigation burdens on the parties and leads to unjustifiable systemic inefficiencies."); Cavanagh, Illinois Brick*: A Look Back and a Look Ahead*, at 30 (state indirect litigation outside the scope of federal consolidation poses a "logistical nightmare for the courts").

[34] *Lexecon* held that a federal district court conducting pretrial proceedings pursuant to the multidistrict litigation statute has no authority to invoke the change-of-venue provisions of 28 U.S.C. § 1404(a) to assign a transferred case to itself for trial, but rather must remand the transferred case "at or before the conclusion of such pretrial proceedings to the district from which it was transferred," as provided by 28 U.S.C. § 1407(a). *Lexecon*, 523 U.S. at 34–37.

[35] A series of ABA Reports had emphasized concerns for duplicative recoveries in identifying numerous problems raised by indirect purchaser suits. *See* American Bar Association, Section of Antitrust Law, *The State of Federal Antitrust Enforcement—2004*, at 50; 2004 Task Force Report, at 1–2; American Bar Association, Section of Antitrust Law, *Report of the Indirect Purchaser Task Force*, 63 ANTITRUST L.J. 993, 995–96 (1995); American Bar Association, Section of Antitrust Law, *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. 273, 283–87 (1990); American Bar Association, Section of Antitrust Law, *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, 841 (1983) [hereinafter 1983 Task Force Report]; *see also* Donald I. Baker, *Federalism and Futility: Hitting the Potholes on the* Illinois Brick

Road, 17 ANTITRUST, Fall 2002, at 14, 15 (stating that the current regime "has produced duplicative litigation and recoveries" on a scale the Court could "scarcely have imagined"); Business Roundtable, Public Comments Submitted to AMC, at 8 (Nov. 4, 2005).

[36] Michael L. Denger, Statement at AMC Indirect Purchaser Hearing, at 4 (June 27, 2005) [hereinafter Denger Statement]; Cavanagh, Illinois Brick*: A Look Back and a Look Ahead*, at 27 (without being subject to a federal court's pressure to settle, plaintiffs may "behave strategically to exact more favorable settlement terms").

[37] Indirect Purchaser Trans. at 9 (Tulchin) (stating that this "domino effect of collateral estoppel" makes it exceedingly difficult for defendants to go to trial); *id.* at 14, 90–91 (Zwisler) (emphasizing the "colossal damage exposure" from potential liability to indirect purchasers); Margaret M. Zwisler, Statement at AMC Indirect Purchaser Hearing, at 7–8 (June 27, 2005) [hereinafter Zwisler Statement].

[38] The three requirements of CAFA "will be satisfied in the overwhelming majority of indirect purchaser class actions," and "[m]ost of these exceptions [to CAFA's applicability] will rarely, if ever, apply in the context of indirect purchaser class actions." Simmons & Borden, *CAFA and State Law Antitrust Actions*, at 19–20.

[39] *Id.* at 19 (CAFA should "dramatically reduce the duplication in discovery and work product that defendants currently incur when facing multiple statewide indirect purchaser class actions"); Jonathan W. Cuneo, Statement at AMC Indirect Purchaser Hearing, at 8 (June 27, 2005) [hereinafter Cuneo Statement] (CAFA "will, without doubt, have the effect of moving the vast majority of state indirect purchaser class actions from state to federal court"); Montague Statement, at 3, 5 ("there is good reason to believe that [under CAFA] the federal courts can manage the direct and indirect purchaser cases in the same manner in which they managed them pre-*Illinois Brick*"—that is, "together in federal court"); Indirect Purchaser Trans. at 47–48 (Bennett) (predicting that state attorneys general would file in federal court if *Illinois Brick* were overruled and that few private cases would stay in state court).

[40] *See* Indirect Purchaser Trans. at 135–36 (Gustafson); *id.* at 53 (Tulchin); *id.* at 144 (Gavil); David B. Tulchin, Statement at AMC Indirect Purchaser Hearing, at 11–12 (June 27, 2005) [hereinafter Tulchin Statement].

[41] *See* Indirect Purchaser Trans. at 134–35 (Denger) (observing that many indirect purchasers and third-party payers are "substantial commercial entities" who could opt out of a class action and thereby avoid application of CAFA if their interests were better served in state court); *see also* Bennett & Cooper Statement, at 7–10 (reporting that some third party payers opted out of class actions and settled separately in the *Mylan*, *Buspirone*, and *Taxol* cases); Indirect Purchaser Trans. at 158 (Denger) ("[I]ncreasingly, in the last four or five years there have been a lot of opt out settlements.").

[42] Bennett & Cooper Statement, at 16; 46 State Attorneys General, Public Comments Submitted to AMC, at 8 (July 20, 2006) [hereinafter Comments of 46 State Attorneys General] (*parens patriae* actions are not subject to removal under CAFA).

[43] *See Lexecon*, 523 U.S. at 34–37.

[44] *See, e.g.*, Cavanagh, Illinois Brick*: A Look Back and a Look Ahead*, at 23–24 (*Illinois Brick* "failed to compensate the real victims of price-fixing"); Andrew I. Gavil, *Antitrust Remedy Wars Episode I:* Illinois Brick *from Inside the Supreme Court*, 79 ST. JOHN'S L. REV. 553, 565 (2005) (explaining that, under the *Illinois Brick* rule, there is "no compensation whatsoever for the indirect purchasers who were the true victims of the illegal overcharge").

[45] Thirty Antitrust Practitioners, Public Comments Submitted to AMC, at 15 (June 17, 2005) [hereinafter Thirty Antitrust Practitioners Comments].

[46] For example, Bennett and Cooper report that in several antitrust cases involving pharmaceuticals there were substantial sums paid to the injured class members. *See* Bennett & Cooper Statement, at 7–10; *see also* Indirect Purchaser Trans. at 24–25, 60–61, 94–95 (Bennett); *id.* at 178–79 (Cooper).

[47] Tulchin Statement, at 9–10; Zwisler Statement, at 8–9.

[48] *See* Tulchin Statement, at 9–10. For example, even using extraordinary efforts to contact potential claimants in the *United States Tobacco* litigation, plaintiffs still achieved only a 26 percent participation rate among class members. Zwisler Statement, at 8–9; *see also* John E. Lopatka & William H. Page, *Indirect Purchaser Suits and the Consumer Interest*, 48 Antitrust Bull. 531, 536 (2003). CAFA contains several provisions directed at reforming the use of coupons in settlements of class actions. *See, e.g.*, Charles B. Casper, *The Class Action Fairness Act's Impact on Settlements*, 20 Antitrust, Fall 2005, at 26, 27–28.

[49] William M. Landes & Richard A. Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of* Illinois Brick, 46 U. Chi. L. Rev. 602, 608–15 (1979) [hereinafter Landes & Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws?*]; Page, *Class Certification in the* Microsoft *Indirect Purchaser Litigation*, at 305 (the Supreme Court in *Illinois Brick* reasoned that concentrating the right to recovery in direct purchasers would ensure more effective deterrence).

[50] *See* Indirect Purchaser Trans. at 37 (Montague); Zwisler Statement, at 13; *see also* 1983 Task Force Report, at 856–57.

[51] *See* Cafferty Comments, at 1–25.

[52] *See* Professor Andrew I. Gavil, Statement at AMC Indirect Purchaser Hearing, at 17–18 (June 27, 2005); American Antitrust Institute, Public Comments Submitted to AMC Regarding Remedies, at 18–19 (June 17, 2005); Indirect Purchaser Trans. at 24 (Bennett); Cuneo Statement, at 5–6.

[53] Thirty Antitrust Practitioners Comments, at 13–14, 19; Indirect Purchaser Trans. at 23–24 (Bennett). Some witnesses reported on large settlements recently obtained on behalf of indirect purchasers though class action suits by state attorneys general. Bennett & Cooper Statement, at 7–10 (*Mylan*—approximately $137 million total payouts to indirect purchasers; *Buspirone*—$240 million; *Taxol*—$70 million). According to one commenter, in 11 recent pharmaceutical cases (including *Mylan*, *Buspirone*, and *Taxol*) brought in federal court, indirect purchasers received over $900 million in recoveries. Cafferty Comments, at 1–4 (reporting settlement amounts). Three actions brought in state court—*Vitamins*, *Brand Name Prescription Drugs*, and *Infant Formula*—resulted in settlements totaling $424.9 million in cash and $160.5 million in product. *Id.* at 5–19. Recent actions brought on behalf of indirect purchasers in fifteen states against Microsoft resulted in the provision of vouchers worth up to $1.9 billion. *See id.* at 20–23; *see also* Community Catalyst, Public Comments Submitted to AMC, at 3–4 (July 22, 2005) (reporting recoveries for consumers and third party payers in pharmaceutical cases).

[54] *See, e.g.*, Indirect Purchaser Trans. at 18, 91 (Montague); *id.* at 130–31 (Gustafson).

[55] *Id.* at 129 (Cooper); *id.* at 129–30 (Denger) ("[T]here is no shortage of plaintiffs' lawyers willing to bring actions."); *id.* at 132–33 (Steuer) ("[E]ven though the incentive may be then divided up . . . there remains ample incentive collectively to pursue the suit.").

[56] *See, e.g.*, 2004 Task Force Report, at 1–2 (2004) (expressing concern for multiple litigation, duplicative exposure, and lack of recovery for indirect purchasers in states without repealers, and citing previous studies).

[57] Montague Statement, at 3–4 ("I am not aware of any instance in which an antitrust defendant has paid in settlements or in satisfaction of judgments as much or more than treble damages, or in most cases, more than single damages."); Indirect Purchaser Trans. at 23 (Bennett) ("The testimony from both panels, I think, is stark in that no one could actually point to any case, despite the large number of *Illinois Brick* repealers, in which any defendant had actually paid too much."); Gustafson Statement, at 15; Cuneo Statement, at 9.

[58] Indirect Purchaser Trans. at 38–39 (Tulchin) (identifying an instance of unfair multiple recovery is "very difficult" because you would need to know the actual damages suffered); *id.* at 41–42 (Zwisler); Denger Statement, at 6–8.

[59] Indirect Purchaser Trans. at 164–65 (Steuer). Other witnesses believe preemption of indirect purchaser rights under state law may be necessary to ensure that duplicative recoveries do not occur. *Id.* at 161–62 (Gavil).

60 *Illinois Brick*, 431 U.S. at 731–37.

61 1983 Task Force Report, at 852–55; Chris S. Coutroulis & D. Matthew Allen, *The Pass-on Problem in Indirect Purchaser Class Litigation*, 44 ANTITRUST BULL. 179 (1999) [hereinafter Coutroulis & Allen, *The Pass-on Problem*]; William H. Page, *The Limits of State Indirect Purchaser Suits: Class Certification in the Shadow of* Illinois Brick, 67 ANTITRUST L.J. 1, 12–19 (1999) [hereinafter Page, *The Limits of State Indirect Purchaser Suits*]; *see also In re* Brand Name Prescription Drugs Litig., 123 F.3d 599, 605 (7th Cir. 1997) (Posner, J.) ("Tracing a price hike through successive resales is an example of what is called 'incidence analysis,' and is famously difficult."); Landes & Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws?*, at 615–21. *But see* Robert G. Harris & Lawrence A. Sullivan, *Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis*, 128 U. PA. L. REV. 269, 354 (1979) (stating that "there is simply no credible argument that courts cannot handle passing-on issues").

62 Page, *The Limits of State Indirect Purchaser Suits*, at 5; *see* Coutroulis & Allen, *The Pass-on Problem*, at 184–88. Some Commission witnesses argued that evaluating injury to indirect purchasers would make proceedings very difficult or even "totally unworkable." Indirect Purchaser Trans. at 91 (Montague); *see also* Tulchin Statement, at 3–8.

63 Bennett & Cooper Statement, at 6–7 (while difficulties remain, advances in "data capture, storage and manipulation, as well as in econometric modeling has made such allocation less problematic"). Professor Hovenkamp has also argued that the difficulty of computing pass on can largely be avoided by applying standard methods for damage estimation to each level in the chain of distribution. *See* HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE 74–76 (2005).

64 Bennett & Cooper Statement, at 13–14.

65 O'Connor, *Is the* Illinois Brick *Wall Crumbling?*, at 34–35 (reporting that "thirty-six states and the District of Columbia, representing over 70 percent of the nation's population, now provide for some sort of right of action on behalf of some or all indirect purchasers"); *see also generally* Comments of 46 State Attorneys General, at 4–7 (arguing that state laws permitting indirect purchasers to assert antitrust claims should not be preempted); Bennett & Cooper Statement, at 16–19.

66 *See ARC America*, 490 U.S. 93.

67 Bennett & Cooper Statement, at 16; *id.* app. at 2–3; *see also* Comments of 46 State Attorneys General, at 1. Others share these views. *See* American Antitrust Institute, Public Comments Submitted to AMC Regarding Indirect Purchaser Litigation, at 8 (July 10, 2006) [hereinafter AAI Comments re Indirect Purchaser Litigation] (opposing strongly "any changes to federal law that would result in preemption of state indirect purchaser remedies").

68 *See* Indirect Purchaser Trans. at 101–02, 159 (Cooper); Bennett & Cooper Statement, at 19.

69 Furthermore, direct and indirect purchasers will be encouraged to develop and present appropriate methods for estimating damages.

70 *Lexecon*, 523 U.S. at 34–37; Spiva & Tycko, *Indirect Purchaser Litigation*, at 16.

71 *Lexecon*, 523 U.S. at 34–37; Spiva & Tycko, *Indirect Purchaser Litigation*, at 16.

72 Indirect Purchaser Trans. at 134–35 (Denger).

73 The Commission does not take a position as to whether overruling *Lexecon* would be desirable in other circumstances as well.

74 Consolidation for all purposes would also avoid one arguably unfair aspect of defending multiple actions. If defendants lose one action, it will face collateral estoppel in subsequent actions against it on the same claim. However, a win in one of those actions may not be used against a different plaintiff in a subsequent action.

75 *See* AAI Comments re Indirect Purchaser Litigation, at 4–6 (repeal of *Hanover Shoe* "would fuel arguments that proof of impact is an individualized question" not susceptible of common proof).

Chapter III.C
Government Civil Monetary Remedies

1. INTRODUCTION

Congress has given the antitrust agencies authority to obtain certain remedies for antitrust violations. For criminal antitrust violations, the Antitrust Division of the Department of Justice (DOJ) may seek significant monetary fines and prison terms.[1] For substantive, non-criminal violations, the agencies can seek broad injunctive relief to prevent future violations. For certain procedural violations, such as Hart-Scott-Rodino Act (HSR Act) violations, and for breaches of consent decrees, both the DOJ and the Federal Trade Commission (FTC) may seek civil fines.

Some have argued that the authority of the U.S. antitrust agencies to seek civil fines should be expanded beyond procedural violations, so that the antitrust agencies could seek civil fines for substantive, non-criminal antitrust violations, just as antitrust enforcers in the European Union and certain countries do. Advocates of expanded monetary remedies for the antitrust agencies also suggest the federal antitrust agencies should increase use of their equitable powers to obtain disgorgement and restitution remedies. Others point out that the U.S. system of antitrust remedies differs from that in many other countries, because the U.S. system gives private plaintiffs the ability to seek treble damages for antitrust violations. Such "private attorneys general" play an important role in antitrust enforcement. Concern exists that allowing the government also to extract monetary remedies for substantive non-criminal antitrust violations—a role currently occupied by private plaintiffs seeking treble damages—could result in defendants making duplicative, excessive payments.

In light of these arguments, the Commission looked at two questions: (1) whether Congress should give the federal antitrust agencies expanded civil fine authority; and (2) whether the agencies' current authority to seek monetary equitable relief, such as disgorgement and restitution, should be clarified, expanded, or limited. The Commission makes the following recommendations.

48. There is no need to give the antitrust agencies expanded authority to seek civil fines.

49. There is no need to clarify, expand, or limit the agencies' authority to seek monetary equitable relief. The Commission endorses the Federal Trade Commission's policy governing its use of monetary equitable remedies in competition cases.

2. BACKGROUND

A. Civil Fines

Congress has authorized the antitrust agencies to seek civil fines, but only for the breach of an antitrust consent decree with the DOJ or the FTC,[2] or for procedural violations, such as a failure to file a pre-merger notification as required under the HSR Act.[3] The agencies' pursuit of civil fines in these cases presents no threat of duplicative recovery, because no private remedies exist for such matters.[4]

The DOJ's and the FTC's lack of authority to seek civil fines for substantive, non-criminal antitrust violations differs from the authority of many antitrust regimes around the world to impose civil fines for such violations.[5] In the European Union, for example, antitrust enforcers have used their authority to impose millions of dollars in civil fines for substantive antitrust violations.[6] European Union antitrust enforcement, however, does not include robust private remedies. In fact, E.U. officials currently are studying ways in which to facilitate private damages actions as a means to "complement public enforcement."[7]

B. Equitable Relief

For substantive, non-criminal antitrust violations, Congress has authorized the DOJ and the FTC to seek equitable relief, including injunctions, temporary restraining orders, and "cease and desist" orders.[8] Courts generally have interpreted Congress's express authorization to seek broad equitable remedies, such as injunctions and restraining orders, as implied congressional authorization to seek *all* equitable remedies—including restitution and disgorgement. In *Porter v. Warner Holding Co.* the Supreme Court explained that "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied."[9]

To date, only the FTC has exercised its implied authority to seek monetary equitable remedies, although the DOJ believes it has similar authority.[10] Courts have upheld the FTC's authority to obtain disgorgement and restitution.[11] In consumer protection cases, where consumers often have only minimal federal private rights of action,[12] the FTC has regularly obtained restitution and disgorgement.[13]

In only eleven antitrust cases in the past twenty-six years, however, has the FTC sought equitable monetary remedies.[14] Unlike consumer protection, antitrust law does provide private remedies in the form of treble damages.[15] These treble damages generally provide injured parties with recoveries for their antitrust injuries. Nonetheless, in certain circumstances, obstacles, such as statutes of limitations, prohibitions against suits by indirect purchasers, or standing requirements, may hinder the filing of a treble damages suit.[16] In such circumstances, the FTC may seek monetary remedies "because other remedies are likely to fail to accomplish fully the purposes of the antitrust laws."[17]

At the urging of former FTC Commissioner Thomas B. Leary, the FTC developed a Policy Statement to articulate the circumstances in which it might pursue restitution or disgorgement in competition cases.[18] The *Policy Statement on Monetary Equitable Remedies in Competition Cases* ("the Policy Statement") was intended to provide the public with guidance as to when, in its prosecutorial discretion, the FTC will seek such relief.[19] The Policy Statement identified three factors that will govern the FTC's use of monetary equitable remedies:

(1) whether the violation was "clear" (*i.e.*, a reasonable party should expect its conduct to be found illegal);

(2) whether there is a reasonable basis for calculating the amount of disgorgement or remedy, based on the gains or injury from the violation; and

(3) whether use of the remedy would add value because other remedies will either likely fail or provide incomplete relief.[20]

The Policy Statement further explained that the FTC did "not view monetary disgorgement or restitution as routine remedies for antitrust cases," and that the agency would "continue to rely primarily on more familiar, prospective remedies, and seek disgorgement and restitution in exceptional cases."[21]

3. RECOMMENDATIONS AND FINDINGS

A. Civil Fines

48. There is no need to give the antitrust agencies expanded authority to seek civil fines.

Neither the DOJ nor the FTC has requested expanded civil fine authority.[22] In fact, the head of the Antitrust Division expressed "reservations" about increased government civil fine authority, stating that such a change might "blur[] the distinction between a civil violation and a criminal violation"—a distinction that is important to the DOJ.[23]

In the United States, treble damage recoveries by private plaintiffs play a significant role in antitrust enforcement. If the Commission had recommended reducing or eliminating treble damage recoveries, or significantly limiting their availability, it might have been appropriate to consider whether civil fine authority should take their place. The Commission has not recommended any change to treble damage recovery, however.[24]

Thus, a need for civil fine authority could be shown only if there were significant gaps in the current level of enforcement provided by private plaintiffs seeking damages. The Commission did not receive evidence of significant gaps, however. The Commission has identified one gap: cases in which civil fine authority might address egregious conduct for which treble damages are not available because no antitrust injuries resulted.[25] Such cases are rare and do not, by themselves, provide sufficient reason to expand the agencies' civil fine authority. In addition, as discussed below, the agencies' equitable authority may be used in certain circumstances to obtain disgorgement and restitution where specific circumstances impair the ability of injured parties to recover damages. Thus, to the extent that any gaps remain, they are better addressed through the use of the agencies' equitable powers than through providing additional civil fine authority to the agencies.

B. Equitable Monetary Remedies

49. There is no need to clarify, expand, or limit the agencies' authority to seek monetary equitable relief. The Commission endorses the Federal Trade Commission's policy governing its use of monetary equitable remedies in competition cases.*[*]

To the extent treble damage remedies may not be available, or are not sufficient to force disgorgement of defendant's unlawful gains or to redress injured parties' antitrust injuries, a federal antitrust agency may appropriately consider these facts (along with others) in deciding whether to seek equitable monetary remedies such as disgorgement and restitution. The FTC's limited use of this remedy in antitrust cases has been judicious and is commended.

The availability of disgorgement and restitution as government antitrust remedies, along with treble damages as private remedies, could cause defendants to make excessive and duplicative payments.[26] It is imperative to avoid duplicative recoveries. Nonetheless, the Commission's record is devoid of any example where government-sought disgorgement or restitution led to duplicative or excessive payments. Instead, the Commission heard testimony that in the thirty years since the FTC first exercised its equitable authority, there has never been a duplicative recovery.[27]

[*] Commissioners Valentine, Jacobson, Kempf, and Warden would further recommend that the DOJ adopt a policy similar to the FTC's Policy Statement to articulate the circumstances in which it would exercise its authority to seek equitable monetary remedies.

Notes

[1] 15 U.S.C. § 1 (authorizing criminal penalties up to $100 million for corporate offenders, and up to $1 million and/or up to 10 years in prison for individuals); 18 U.S.C. § 3571(d) (general statute authorizing criminal penalties up to twice the pecuniary gain, or twice the pecuniary loss caused by a violation).

[2] Courts can retain continuing jurisdiction over decrees filed by the DOJ pursuant to the Antitrust Procedures and Penalties Act (APPA or Tunney Act). A violation of those decrees "whether litigated or consent, is punishable as contempt of court for which severe penalties may be imposed." AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 708 (6th ed. 2007) (courts have imposed monetary penalties up to $750,000). The FTC may pursue similar fines pursuant to 15 U.S.C. § 45(*l*). *See, e.g.*, United States v. Boston Scientific Corp., 253 F. Supp. 2d 85, 86 (D. Mass. 2003) (suit initiated by the DOJ on behalf of the FTC resulted in a $7 million fine against Boston Scientific for violation of a 1995 FTC Consent Decree).

[3] *See, e.g.*, 15 U.S.C. § 18a(g)(1) ("Any person . . . who fails to comply with [Hart-Scott-Rodino Act (HSR Act) filing requirements] . . . shall be liable to the United States for a civil penalty of not more than $10,000 for each day during which such person is in violation of this section."). Although 15 U.S.C. § 18a(g)(1) specifically refers to the DOJ's ability to seek civil fines for non-substantive antitrust violations, the FTC can obtain civil fines for similar violations by asking the DOJ to initiate a proceeding on its behalf. *See, e.g.*, United States v. Hearst Trust, Complaint for Civil Penalties For Failure to Comply with Premerger Reporting Requirements of the Hart-Scott-Rodino Act, No. 1:01CV02119 (Oct. 11, 2001) (complaint filed at the request of the FTC, which resulted in a $4 million civil fine against Hearst for its failure to comply fully with HSR Act requirements).

[4] Stephen Calkins, Statement at AMC Government Civil Remedies Hearing, at 24 (Dec. 1, 2005) [hereinafter Calkins Statement] ("[V]iolation of the Hart-Scott-Rodino Act . . . does not create a private cause of action.").

[5] R. Hewitt Pate, Public Comments Submitted to AMC Proposing Issues for Commission Study, at 2 (Jan. 5, 2005) [hereinafter Pate Comments Proposing Issues] ("Civil fine authority is a part of enforcement in many foreign jurisdictions."); Calkins Statement, at 3 (stating that "in Europe, the civil fine is the tool of choice").

[6] Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, art. 83(2)(a); Calkins Statement, at 10 (noting that the European Union imposed both fines and conduct requirements on Microsoft for its violation of Europe's competition laws).

[7] Neelie Kroes, European Commissioner for Competition, The Green Paper in Antitrust Damages Actions: Empowering European Citizens to Enforce their Rights, Opening Speech at the European Parliament Workshop (June 6, 2006), at 6 (stating that there was "clear consensus" that the European Union needs to "complement public enforcement with stronger private actions"), *available at* http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/speech_06062006.pdf; *see also* European Commission Website, *available at* http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/index_en.html (stating that "[i]n Europe, competition law is mostly enforced by competition agencies" and that the European Union is studying ways in which to "facilitate private damages actions").

[8] 15 U.S.C. § 45(b) (authorizing the FTC to seek "cease and desist" orders against violators); 15 U.S.C. § 53(b) (authorizing the FTC to seek temporary restraining orders and injunctions from the district courts); 15 U.S.C. § 4 (granting the DOJ the authority to "prevent and restrain violations of [the Sherman Act]"); 15 U.S.C. § 25 (granting the DOJ the authority to "institute proceedings in equity to prevent and restrain . . . violations [of the Clayton Act]").

[9] Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946). If there is an elaborate enforcement scheme, however, the Court has taken a different view. *See* Meghrig v. KFC Western, Inc., 516 U.S. 479, 487–88 (1996) (when Congress creates an elaborate enforcement scheme, such as the Resource Conservation

and Recovery Act, it is inappropriate to assume that Congress also intended to confer the full scope of equitable power, including disgorgement and restitution).

10 *See* Reply Brief for the United States on Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, United States v. Philip Morris USA, Inc., No. 05-92, at 4 & n.3 (filed Sept. 2005) (arguing that RICO provides government with disgorgement remedy and refuting contention that antitrust laws preclude disgorgement) (citing Ford Motor Co. v. United States, 405 U.S. 562, 573 & n.8 (1972)); *see also* Thomas B. Leary, Statement at AMC Government Civil Remedies Hearing, at 7–8 (Dec. 1, 2005) (stating that he is not aware of any DOJ cases, but it is reasonable to assume that the Antitrust Division has authority similar to that of the FTC).

11 FTC v. Mylan Labs., Inc., 62 F. Supp. 2d 25, 37 (D.D.C. 1999) ("The comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command.") (quoting *Porter*, 328 U.S. at 398); *see also* FTC v. Munoz, 17 Fed. Appx. 624, 626 (9th Cir. 2001) (upholding the FTC's authority to seek equitable monetary relief); *accord* FTC v. Febre, 128 F.3d 530 (7th Cir. 1997); FTC v. Gem Merch. Corp., 87 F.3d 466 (11th Cir. 1996); FTC v. Security Rare Coin & Bullion Corp., 931 F.2d 1312 (8th Cir. 1991); FTC v. Southwest Sunsites, Inc., 665 F.2d 711 (5th Cir. 1982); FTC v. Ameridebt, Inc., 373 F. Supp. 2d 558 (D. Md. 2005).

12 Kevin Arquit, Statement at AMC Government Civil Remedies Hearing, at 13 (Dec. 1, 2005) [hereinafter Arquit Statement] (stating that consumer protection does not have a "wide body of law that allows private damages").

13 David Balto, *Returning to the Elman Vision of the Federal Trade Commission: Reassessing the Approach to FTC Remedies*, 72 Antitrust L.J. 1113, 1120 (2005) [hereinafter Balto, *Reassessing the Approach to FTC Remedies*] ("[S]eek[ing] monetary relief in unfair or deceptive practices cases since the early 1980s . . . has become the foundation of the FTC's consumer fraud program."); Arquit Statement, at 12 (describing the FTC's equitable monetary remedies as a "potent tool . . . against consumer fraud"); Calkins Statement, at 13 (stating that the "dominant use [of Section 13(b)] has been against fraud").

14 John Graubert, Statement at AMC Government Civil Remedies Hearing, at 2 nn.4–5 (Dec. 1, 2005).

15 Arquit Statement, at 12; American Antitrust Institute, Public Comments Submitted to AMC Regarding Civil Remedies, at 12 (June 17, 2005) ("[T]he FTC has endorsed the important complementary role that the private plaintiffs and state attorneys general serve in recovering damages. . . ."); David Boies, Statement at AMC Civil Remedies Hearing, at 12 (July 28, 2005) (stating that "[t]reble damages also play an important role in accomplishing the goal of disgorgement").

16 Government Civil Remedies Transcript at 12 (Graubert) (Dec. 1, 2005).

17 *Id.* at 11 (Graubert); *see also* FTC Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 Fed. Reg. 45,820, 45,822 (Aug. 4, 2003) [hereinafter FTC Policy Statement].

18 *See* Statement of Commissioner Thomas B. Leary, Dissenting in Part and Concurring in Part, FTC v. Mylan Pharms., Inc., FTC File No. X990015 (Nov. 29, 2000), *available at* http://www.ftc.gov/os/2000/11/mylanlearystatement.htm ("[I]t is essential that we somehow communicate our views on the appropriate parameters of the Section 13(b) remedy generally for antitrust cases. At the very least, we might indicate that the remedy will not be sought in cases where the violation is unclear and where private damage remedies are available and being pursued."); *see also* Government Civil Remedies Trans. at 9 (Graubert) (confirming that the FTC's 2003 policy resulted from Commissioner Leary's urging for clarification).

19 FTC Policy Statement, 68 Fed. Reg. at 45,820–21.

20 *Id.* at 45,821 n.8.

21 *Id.* at 45,821.

22 *See* Barnett/Majoras Transcript at 51–52 (Barnett) (March 21, 2006) (expressing reservations about extending civil fine authority to substantive antitrust violations); *id.* at 52 (Majoras) (stating that she "agree[s] with Assistant Attorney General Barnett's cautionary notes on civil fines," but also stating there may be circumstances where injunctive relief is not sufficient).

[23] *Id.* at 51–52 (Barnett) (describing the challenge the DOJ sometimes has to persuade courts that criminal prosecution of antitrust violations are is targeted at a narrow range of conduct, stating that "the sharper the distinction [between criminal and civil violations], the better off we are at the end of the day").

[24] *See* Chapter III.A of this Report regarding triple damages.

[25] Calkins Statement, at 8 (referring to time-limited injunctions as little more than a "slap on the wrist"); *see also* Pate Comments Proposing Issues, at 2 (noting that "injunctive relief alone may not be sufficient to deter or redress violations of the antitrust laws"); Government Civil Remedies Trans. at 14–17 (Calkins). For example, no antitrust injuries resulted in *United States v. American Airlines, Inc.*, when American Airlines's President, Robert Crandall, invited Braniff Airlines's President, Howard Putnam, to fix prices. United States v. American Airlines, Inc., 743 F.2d 1114, 1116 (5th Cir. 1984). Putnam refused and reported the conversation to the DOJ. If Putnam had accepted, the resulting conspiracy could have subjected both airline companies to millions of dollars in criminal fines and Crandall and Putnam to possible jail time. *American Airlines*, 743 F.2d at 1116; *see also* Calkins Statement, at 8 ("[T]he federal government remedy is likely to be limited to an injunction that can be described, often with some justification, as an order not to do it again. On the other hand, if the same conduct is successfully challenged criminally, it can be punished with prison time and massive individual and corporate fines. . . ."). In the absence of any agreement, however, the DOJ sought only injunctive relief—that is, a court order barring Crandall from engaging in similar conduct again. *American Airlines*, 743 F.2d at 1116.

[26] *See, e.g.*, Arquit Statement, at 1; Balto, *Reassessing the Approach to FTC Remedies*, at 1123 ("[T]here is no lack of private enforcement against the types of antitrust violations attacked by the FTC.").

[27] Government Civil Remedies Trans. at 11 (Graubert).

Chapter III.D
Criminal Remedies

1. INTRODUCTION

Criminal antitrust prosecution is a vital component of overall antitrust enforcement in the United States. Criminal penalties can include prison sentences for individuals and sizable monetary fines for individuals and corporations. Such criminal enforcement, and the associated sentences and fines, have generally been reserved for "hard-core" offenses. Those offenses typically are "naked" conspiracies between and among competitors to fix prices, rig bids, or allocate markets or customers. Such naked conspiracies lack any plausible relationship to enhancing output or providing other benefits to consumers; the participants usually conduct their activities in secret and know their activities are illegal. A consensus exists that such conspiracies almost invariably inflict harm on consumers and the economy.[1]

The Antitrust Division of the Department of Justice (DOJ) has made the detection, criminal prosecution, and deterrence of hard-core antitrust offenses its highest priority.[2] This priority, in combination with improved enforcement tools, cooperation from international antitrust enforcers, and a robust amnesty program, have led to the detection and prosecution of an ever-increasing number of cartels, often global in scope. These cartels can affect millions, if not billions, of dollars in commerce.[3] Congress has recognized the seriousness of these economic crimes, and has recently substantially increased maximum fines and jail sentences and authorized the DOJ to use wiretaps in the investigation of suspected criminal cartel conduct.[4]

Other enforcement authorities around the world have also increased their enforcement efforts against cartels.[5] Indeed, more than 100 jurisdictions around the world have enacted laws prohibiting cartels.[6] Moreover, at least fourteen nations make violations of their competition statutes criminal.[7] Although U.S. cartel enforcement against entities based in foreign countries has been controversial on some occasions in the past, today many nations have their own laws and policies against cartels, and they cooperate with the United States in cartel investigations, pursuant to various treaties and international agreements. Even in the past few years, the changes have been significant. In 2005 the British government commenced proceedings to extradite one of its citizens for prosecution in the United States for antitrust violations. By comparison, as recently as the late 1990s, requests by U.S. antitrust officials for international assistance routinely took a year to be processed, only to be denied ultimately in the majority of cases.[8]

Against this background of the increased role of criminal antitrust enforcement both in the United States and internationally, the Commission undertook to study three issues specific to U.S. criminal antitrust enforcement.

First, the Sherman Act nominally makes all violations of Section 1 and Section 2 subject to criminal prosecution. Some violations of those statutes, however, such as “naked” conspiracies to fix prices, rig bids, and allocate markets, are universally condemned as particularly harmful to consumer welfare and without procompetitive effects that might benefit consumers. By comparison, other violations, such as anticompetitive unilateral or joint conduct, can be more difficult to judge; unilateral or joint business conduct often requires more extensive factual inquiry to assess whether the conduct is likely to benefit or harm consumers. The DOJ has generally limited its criminal prosecutions to violations of the former type, and not the latter. The Commission examined whether the DOJ appropriately exercises its discretion by limiting criminal prosecutions to hard-core offenses.

Second, the Sherman Act establishes a maximum fine of $100 million for corporate violations, an amount that was increased from $10 million in 2004. This maximum may be increased through the application of a general criminal provision, 18 U.S.C. § 3571(d), the “alternative fines statute,” if certain proof burdens are met by the government. The Commission reviewed whether continued use of the alternative fines statute to increase fines was appropriate in antitrust cases in light of the complexity of adducing the necessary proof in antitrust cases and recent Supreme Court decisions requiring that juries determine whether the facts have been proven to a sufficient degree to warrant increased sentences.

Third, sentences for criminal offenses of the Sherman Act are determined through application of the United States Sentencing Commission’s Sentencing Guidelines (Sentencing Guidelines). For corporate antitrust violations, the Sentencing Guidelines set the sentence based on an estimate of the harm the violation caused. The estimate of harm is established through a “proxy,” which is set in all cases at 20 percent of the amount of commerce affected by the antitrust violation. This “20 percent harm proxy” assumes the harm caused by the violation bears a direct relationship to the amount of commerce affected by the conduct. The 20 percent harm proxy is adjusted on the basis of a variety of factors, and then is used to set the final sentence. Some have argued that use of the 20 percent harm proxy fails adequately to distinguish between conduct of different severity and that more should be done to take into account a variety of economic factors that can make similar conduct have significantly different costs to consumers. The Commission therefore studied whether the use of the 20 percent harm proxy in the Sentencing Guidelines for antitrust crimes adequately distinguishes cartel activity of differing severity.

The Commission makes the following recommendations regarding these issues.

50. While no change to existing law is recommended, the Antitrust Division of the Department of Justice should continue to limit its criminal enforcement activity to "naked" price-fixing, bid-rigging, and market or customer allocation agreements among competitors, which inevitably harm consumers.

51. No change should be made to the current maximum Sherman Act fine of $100 million or the applicability of 18 U.S.C. § 3571(d), the alternative fines statute, to Sherman Act offenses. Questions regarding application of Section 3571(d) to Sherman Act prosecutions should be resolved by the courts.[*]

52. Congress should encourage the Sentencing Commission to reevaluate and explain the rationale for using 20 percent of the volume of commerce affected as a proxy for actual harm, including both the assumption of an average overcharge of 10 percent of the amount of commerce affected and the difficulty of proving the actual gain or loss.[†]

53. The Sentencing Commission should amend the Sentencing Guidelines to make explicit that the 20 percent harm proxy (or any revised proxy)—used to calculate the pecuniary gain or loss resulting from a violation—may be rebutted by proof by a preponderance of the evidence that the actual amount of overcharge was higher or lower, where the difference would materially change the base fine.[**]

54. No change to the Sentencing Guidelines is needed to distinguish between different types of antitrust crimes because the Guidelines already apply only to "bid-rigging, price-fixing, or market allocation agreements among competitors," and the Antitrust Division of the Department of Justice limits criminal enforcement to such hard-core cartel activity as a matter of both historic and current enforcement policy.

[*] Commissioners Jacobson and Warden do not join this recommendation.

[†] Commissioner Carlton does not join this recommendation in full.

[**] Commissioners Burchfield, Carlton, and Garza do not join this recommendation.

2. FOCUS OF ENFORCEMENT ON HARD-CORE CONDUCT

A. Background

Violations of the Sherman Act have been criminal offenses since the Act was passed in 1890. Criminal penalties (which are often supplemented by follow-on civil private damage suits) in general are intended to deter unlawful conduct, protect the public, and punish offenders. They are set at levels designed both to reflect the seriousness of the crime and to provide an optimal level of deterrence, considering all relevant factors.

Although Sherman Act violations originally were misdemeanors punishable by up to one year in prison and a maximum of $5000 in fines, they subsequently became felonies punishable by much larger fines and longer prison sentences. A series of amendments to the Sherman Act—the most recent in 2004—have increased the maximum prison sentence to ten years and increased the maximum fines to $1 million for individuals and $100 million for corporations.[9] The criminal fines obtained by the DOJ have also increased substantially, particularly in the last decade. Between 1997 and 2004, the total amount of annual fines obtained by DOJ ranged from $204 million to over $1 billion, in any given year.[10] In 2005, the average jail sentence for antitrust crimes was twenty-four months.[11]

The DOJ has continued to seek improved methods for finding and punishing cartels. For example, it has enhanced its enforcement efforts through an invigorated amnesty program that encourages cartel participants to assist the DOJ in discovering and prosecuting cartel activity,[12] obtained the authority to use such methods as wire tapping,[13] and entered into agreements with foreign jurisdictions to investigate international cartels cooperatively.[14] The focus of this enforcement has broadened over time from prosecutions of regional and local price-fixing, territory allocation, and bid-rigging prior to the 1990s,[15] to international cartels involving large, multinational companies and significant amounts of affected commerce.[16]

B. Recommendation and Findings

50. While no change to existing law is recommended, the Antitrust Division of the Department of Justice should continue to limit its criminal enforcement activity to "naked" price-fixing, bid-rigging, and market or customer allocation agreements among competitors, which inevitably harm consumers.

Although the DOJ has statutory authority to prosecute all violations of Section 1 and 2 of the Sherman Act criminally, over time the DOJ has narrowed the scope of its criminal enforcement of the Sherman Act to "hard-core" offenses such as price-fixing.[17] The DOJ has in recent years forgone criminal prosecutions of unilateral conduct under Section 2 and joint conduct whose competitive effects are often ambiguous, and the DOJ has at various points in the last fifty years made policy statements narrowing the types of antitrust violations it will prosecute as criminal.[18] The last criminal prosecutions by the DOJ against conduct that did not involve price-fixing, bid-rigging, or market allocation were over twenty-five years ago.[19]

The DOJ has made quite clear that it does not currently prosecute anything other than hard-core cartel activity criminally, and it has no plans to change that policy in the future.[20] The DOJ's discretionary limitation of criminal prosecution to hard-core offenses allows it to focus its prosecutorial resources on that conduct about which there is general agreement that it harms consumers.[21] Indeed, the Supreme Court long ago made clear that any conspiracy formed for the purpose of "raising, depressing, fixing, pegging, or stabilizing . . . price . . . is illegal per se."[22] Similarly, it has long been recognized that agreements to allocate territories are unlawful without the need for an inquiry into their "business or economic justification, their impact in the marketplace, or their reasonableness."[23]

By comparison, other types of potentially anticompetitive conduct can have more ambiguous effects on consumers and consumer welfare, and the legal standards by which such conduct is determined to be anticompetitive are more complex and fact-intensive. Indeed, antitrust law evaluates a wide range of conduct under the "rule of reason," pursuant to which a court compares the anticompetitive harm from the activity with the procompetitive benefits that are likely to accrue to consumers. For example, companies often enter into a variety of joint ventures, whether for research and development, manufacturing, marketing, or distribution. Such joint ventures may "restrain" trade in some respect, but also offer efficiencies that are beneficial to both the companies and consumers.[24] Similarly, there is a wide range of unilateral conduct, such as pricing and distribution practices, that can be procompetitive in most instances, and anticompetitive only in very limited circumstances.[25] Criminal penalties, by contrast, are typically reserved for cases in which conduct is clearly unlawful. To impose them more broadly, on conduct that is potentially not anticompetitive, runs the risk of penalizing the very procompetitive, proconsumer conduct the antitrust laws are intended to encourage.

The DOJ has reasonably decided to focus its prosecutorial resources on the conduct most likely to harm consumers.[26] It likewise has reserved the most burdensome form of punishment—fines and incarceration—for such cases. The Commission therefore commends the DOJ's limitation of criminal prosecution to hard-core conduct and recommends its continuation.

3. THE ALTERNATIVE FINES STATUTE— 18 U.S.C. § 3571(d)

A. Background

Section 3571(d) of Title 18 of the United States Code is a generally applicable statute that permits prosecutors to seek higher fines than those provided for in the statute laying out the offense.[27] Section 3571(d), or the "alternative fines statute," provides that:

> If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.[28]

In antitrust cases, this statute permits the DOJ to seek fines in excess of the $100 million statutory maximum (or $1 million for individuals) if the Sentencing Guidelines (discussed below) would call for it.[29] When the DOJ seeks to invoke the alternative fines statute, fines are still calculated on the basis of the Sentencing Guidelines; the fine range is, however, no longer limited by the Sherman Act maximum.

B. Recommendation and Findings

51. No change should be made to the current maximum Sherman Act fine of $100 million or the applicability of 18 U.S.C. § 3571(d), the alternative fines statute, to Sherman Act offenses. Questions regarding application of Section 3571(d) to Sherman Act prosecutions should be resolved by the courts.*

Section 3571(d), the alternative fines statute, is generally applicable to all crimes for which there is a monetary penalty.[30] There is nothing unique about antitrust offenses that justifies their being carved out or otherwise exempted from this provision. On the contrary, the alternative fines statute provides a useful means to punish large cartels adequately without the need for Congress to pass frequent statutory increases to the maximum fine.[31] Indeed, the

* Commissioners Jacobson and Warden do not join this recommendation. They would make Section 3571(d) inapplicable to Sherman Act offenses and increase the maximum fine under the Sherman Act to $500 million. At a minimum, they would recommend that Congress revisit whether the alternative fines statute should be applicable to antitrust offenses. Because, in light of incentives to strike plea agreements with the DOJ, defendants have been unwilling to challenge the use of Section 3571(d), these Commissioners believe the issue is unlikely to be addressed and resolved by a court.

DOJ has obtained fines above $100 million in nine cases, and prior to the increase of the maximum fine in 2004, sought fines above the statutory maximum fifty-one times since 1997.[32] In the absence of the alternative fines statute, these high fines would have been barred. Congress increased the fines ten-fold in 2004; that increase, in conjunction with the use of the alternative fines statute, permits the DOJ to seek, and courts to impose, sufficiently high fines to continue to provide deterrence through criminal enforcement.

The Commission recommends that certain interpretive questions regarding the statute be left to courts to resolve in the context of actual cases. One such argument is that the term "gain or loss" in the statute refers to the gain or loss caused by the individual defendant, rather than the gain or loss caused by the entire conspiracy. A court is best suited to resolve any ambiguity in the statute and relevant legislative history.

A more substantial question that the Commission also recommends be addressed by courts is whether the alternative fines statute can continue to be used in light of *Apprendi v. New Jersey*, as well as subsequent Supreme Court decisions.[33] That case requires that any fact used to increase a sentence must be proved to a jury beyond a reasonable doubt.[34] The DOJ acknowledges that it must prove to a jury, beyond a reasonable doubt, the gain or loss used to establish a higher maximum fine under Section 3571(d).[35] Some observers argue that because proof of gain or loss is typically established through expert witnesses, opinion testimony, and econometric analysis in antitrust cases, it is inherently speculative and can never be sufficient for proof beyond a reasonable doubt.[36] Alternatively, they contend, because the litigation of gain or loss in any antitrust case is complicated and protracted, the alternative fines statute by its terms may not be applied.[37] Although antitrust sentences are typically imposed pursuant to a plea agreement,[38] the Commission believes these arguments are nonetheless best left to a court to consider in the first instance.

4. THE SENTENCING GUIDELINES

A. Background

Although the Sherman Act specifies a maximum fine for violations, actual sentences for antitrust crimes are established with reference to the Sentencing Guidelines issued by the United States Sentencing Commission (Sentencing Guidelines).[39] Fines for both corporations and individuals are set by a series of calculations, described more fully below, that establish a range of possible fines. A court may impose a fine anywhere within the calculated range. A recent Supreme Court decision, *United States v. Booker*, made the fine range calculated by the Sentencing Guidelines advisory, leaving the court with discretion to impose a fine higher or lower than the calculated range.[40]

The Sentencing Guidelines contain a specific section for the calculation of fines for organizations convicted of criminal antitrust conduct. The Sentencing Guidelines call for the calculation of a "base fine" that is then adjusted for culpability. The base fine is in most cases determined by the pecuniary loss caused by the organization's violation.[41] Pecuniary loss is calculated as 20 percent of the volume of commerce affected by the defendant's anti-competitive conduct (referred to herein as the "20 percent harm proxy").[42] The base fine is then multiplied by a minimum and maximum culpability multiplier, and the sentencing judge may impose a fine anywhere within the range calculated.[43] The culpability multiplier may range from 0.75 to 4.0,[44] which depends on various factors relevant to the defendant's culpability, such as the size of the organization and whether the defendant cooperated with the investigation or accepted responsibility.[45]

The Sentencing Commission established the 20 percent harm proxy in 1991 so that courts could "avoid the time and expense that would be required . . . to determine the actual gain or loss."[46] The Sentencing Commission retained the 20 percent harm proxy in its most recent revisions to this part of the Guidelines in 2005. This decision was, in large part, because Congress expressly stated when it increased the maximum Sherman Act fines in 2004 that "Congress does not intend for the [Sentencing] Commission to revisit the current presumption that twenty percent of the volume of commerce is an appropriate proxy for the pecuniary loss caused by a criminal antitrust conspiracy."[47]

B. Recommendations and Findings

52. Congress should encourage the Sentencing Commission to reevaluate and explain the rationale for using 20 percent of the volume of commerce affected as a proxy for actual harm, including both the assumption of an average overcharge of 10 percent of the amount of commerce affected and the difficulty of proving the actual gain or loss.*

The Sentencing Commission adopted its 20 percent harm proxy for antitrust crimes in 1991, concluding that it is difficult to calculate loss or gain with precision in antitrust cases.[48] Because general deterrence of antitrust violations does not require an exact correlation of expected harm and penalty, the Sentencing Commission determined that reliance on a proxy amount would be appropriate.[49] The empirical data available at the time showed that price-fixing overcharges tended to be about 10 percent of the volume of affected commerce.[50] The Sentencing Commission doubled this amount to 20 percent to reflect the fact

* Commissioner Carlton joins this recommendation only to the extent it would lead to an increase in (or no change to) the proxy.

that the cost of antitrust violations to society exceeds the amount of overcharge.[51] The Sentencing Commission therefore concluded that a 20 percent harm proxy was appropriate for use in calculating the base fine.

Some studies suggest that the average overcharge in recent cartel cases has been 40 percent and that the median overcharge is 25 percent.[52] If these studies are accurate, and confirmed by further research, the presumed 10 percent overcharge reflected in the existing 20 percent harm proxy is inappropriately low. Conversely, some observers argue that the existing presumption results in fines that are too high.[53] Furthermore, development of economic learning and estimation techniques over the past fifteen years may have made proving gain or loss in an antitrust case less difficult than it was when the Sentencing Commission created the proxy.[54] The degree of difficulty of proving gain or loss, and the burdens it would impose on the sentencing process, are worthy of renewed consideration by the Sentencing Commission.

The DOJ believes that no change to the existing 20 percent harm proxy is appropriate, because more precise calculations are unnecessary.[55] The DOJ argues that criminal fines are not intended to be substitutes for damages, and do not necessitate precise calculation, because their primary purpose is to punish and deter, and they already provide rough justice.[56] Furthermore, the DOJ contends, more precise calculations would result in damages-like litigation that Congress hoped the sentencing courts could avoid through continued use of a proxy.[57]

On balance, however, the Commission recommends that the Sentencing Commission study these questions, and that Congress should encourage such study. The Sentencing Commission should determine whether the existing proxy is empirically sound and accurately reflects the best estimate of typical harm in antitrust cases. It should also determine the costs that individualized calculations of harm would impose on the sentencing process—in light of the current ability of lawyers and economists to estimate harm caused by antitrust crimes—and should determine whether establishing more individually tailored base fines could justify those additional costs. Such study would be consistent with the Sentencing Commission's more general efforts to increase the correlation between the penalty and the underlying facts of the crime.[58] The Commission does not take a position on how the Sentencing Commission should weigh these considerations, or whether the proxy should be higher or lower; it recommends only that the Sentencing Commission revisit its fifteen-year-old decision to determine whether change is warranted.

53. The Sentencing Commission should amend the Sentencing Guidelines to make explicit that the 20 percent harm proxy (or any revised proxy)—used to calculate the pecuniary gain or loss resulting from a violation—may be rebutted by proof by a preponderance of the evidence that the actual amount of overcharge was higher or lower, where the difference would materially change the base fine.*

The Sentencing Guidelines' use of a proxy for harm (whether the existing 20 percent harm proxy, or another revised proxy amount) does not carefully distinguish between defendants who have caused differing degrees of actual harm. That is, the inflexible presumption that antitrust crimes cause harm equal to 20 percent of the volume of commerce affected can be "inequitable," and potentially "disproportionate."[59] Just as there is some debate as to whether the existing harm proxy is too high or too low as a general matter, as explained above, it may also be too high or too low in individual cases. Indeed, the use of a proxy runs counter to the Guidelines' approach in other, non-antitrust cases, where the Sentencing Guidelines call for actual calculation of harm.[60] Furthermore, recent Supreme Court cases have imposed a requirement that any fact that would increase a sentence be proven to a jury beyond a reasonable doubt.[61] Although the holdings of those Supreme Court cases likely do not invalidate the proxy itself, they do highlight the concern of basing sentences on facts other than those proven at trial (or admitted by a defendant).

The Commission recommends that the Sentencing Guidelines be modified to allow the 20 percent harm proxy to be rebutted in certain circumstances, because sentencing calculations should more closely reflect the harm caused by the crime committed where doing so is feasible. Accordingly, the Commission recommends an approach that would permit a defendant to show that the overcharge was well below the presumed 10 percent of commerce affected or that the harm caused by its conduct was well less than double the overcharge. Conversely, the government could seek to prove that the overcharge was more than 10 percent, or that the overall harm caused was more than double the calculated overcharge.[62] This process would thus allow the fine to be either increased or decreased, depending on the circumstances. To maintain the efficiency of the sentencing process, the

* Commissioners Burchfield, Carlton, and Garza do not join this recommendation.

Commissioners Burchfield and Garza believe the Sentencing Guidelines provide sufficient alternative mechanisms to take into account individual circumstances. First, the Guidelines calculation results in a range of fines, leaving the sentencing judge free to impose a higher or lower fine as appropriate to the circumstances. Second, the Guidelines are now discretionary, as a result of the Supreme Court's decision in *United States v. Booker*, 530 U.S. 220 (2005), and therefore a judge has even greater latitude to impose a fine above or below the range calculated by the Guidelines.

Commissioner Carlton believes that additional proceedings designed to create more individually tailored base fines are a waste of judicial and prosecutorial resources.

Commission's recommendation calls for allowing such proof only if it would materially change the base fine. This would limit the increases in duration and costs of the sentencing process to instances where the sentence would be most disproportionate (whether too low or too high) to the harm actually caused.

The Commission's recommended rebuttal procedure is not intended to reduce the government's burden of proof when it seeks to impose a fine above the statutory maximum of the Sherman Act. As the government acknowledges, in those instances it must prove gain or loss beyond a reasonable doubt to establish a higher maximum fine. Accordingly, if the government sought to use this procedure to increase the base fine, with a resulting sentence that exceeds the applicable Sherman Act maximum, it would remain obliged to make the proof of gain or loss beyond a reasonable doubt, pursuant to Section 3571(d), for the court to impose that fine, and the burden of proof would not shift. If the government failed to meet this burden, any higher sentence resulting from an increased base fine would remain limited by maximum fine amounts provided for in the Sherman Act.

54. No change to the Sentencing Guidelines is needed to distinguish between different types of antitrust crimes because the Guidelines already apply only to "bid-rigging, price-fixing, or market allocation agreements among competitors," and the Antitrust Division of the Department of Justice limits criminal enforcement to such hard-core cartel activity as a matter of both historic and current enforcement policy.

The antitrust section of the Sentencing Guidelines specifies that its calculation of penalties is applicable only to bid-rigging, price-fixing and market allocation offenses—that is "hardcore" Section 1 offenses.[63] The Sentencing Guidelines do not, as some suggest,[64] purport to apply to other types of anticompetitive conduct, such as that which might violate Section 2 of the Sherman Act. Indeed, the Sentencing Commission decided to limit these provisions to those offenses because of the DOJ's historical practice not to prosecute other types of antitrust offenses.[65] As explained above, the Commission endorses continuation of this discretionary limitation. Should the DOJ's prosecutorial policy change in the future, it would be appropriate for the Sentencing Commission to revisit this aspect of the Sentencing Guidelines.

Notes

[1] Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) (describing price-fixing as having a "pernicious effect on competition and lack[ing] . . . any redeeming virtue"); Robert H. Bork, The Antitrust Paradox 268 (1978) [hereinafter Bork, Antitrust Paradox].

[2] Scott D. Hammond, Acting Deputy Ass't Att'y Gen. for Criminal Enforcement, Antitrust Div., Dep't of Justice, An Overview of Recent Developments in the Antitrust Division's Criminal Enforcement Program, Speech Before ABA Mid-winter Leadership Meeting, at 1 (Jan. 10, 2005) [hereinafter Hammond, Recent Developments in the Antitrust Division's Criminal Enforcement Program].

[3] Department of Justice, Antitrust Division, Antitrust Enforcement and the Consumer, *available at* http://www.usdoj.gov/atr/public/div_stats/211491.htm; *see also* William J. Kolasky, Deputy Ass't Att'y Gen., Antitrust Div., Dep't of Justice, A Culture of Competition for North America, Speech Before Economic Competition Day: Shared Experiences, Federal Competition Commission, at 3 (June 24, 2002) (stating that "the magnitude of harm from cartels is in the billions of dollars annually").

[4] *See* Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 215, 188 Stat. 661, 668 [hereinafter ACPERA] (codified as amended at 15 U.S.C. §§ 1–3) (increasing criminal maximum penalties from $10 million to $100 million in fines for corporate defendants; from $350,000 to $1 million in fines for individuals; and from 3 to 10 years in prison); U.S.A. Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 113(g)(3), 120 Stat. 192, 210 [hereinafter U.S.A. Patriot Improvement and Reauthorization Act] (codified as amended at 18 U.S.C. § 2516 (1)(r)) (allowing the Antitrust Division to seek wiretaps for criminal violations of Sections 1, 2, and 3 of the Sherman Act).

[5] Scott D. Hammond, Deputy Ass't Att'y Gen. for Criminal Enforcement, Antitrust Div., Dep't of Justice, Charting New Waters in International Cartel Prosecutions, Speech Before 20th Annual Nat'l Institute on White Collar Crime, ABA Criminal Justice Section, at 2 (Mar. 2, 2006) [hereinafter Hammond, International Cartel Prosecutions] ("Antitrust authorities around the world have become increasingly aggressive in investigating and sanctioning cartels that victimize their consumers.").

[6] *See* David E. Vann Jr. & Ethan E. Litwin, *Recent Developments in International Cartel Enforcement*, *in* Global Competition Review: Cartel Regulation 3 (2006).

[7] Global Competition Review: Cartel Regulation 198–207 (2006).

[8] Hammond, International Cartel Prosecutions, at 6.

[9] ACPERA. § 113(g)(3) (codified as amended at 15 U.S.C. §§ 1–3).

[10] Scott D. Hammond, Statement at AMC Criminal Remedies Hearing, at 2–3 (Nov. 3, 2005) [hereinafter Hammond Statement].

[11] Criminal Remedies Transcript at 53 (Hammond) (Nov. 3, 2005); Thomas O. Barnett, Statement at AMC Barnett/Majoras Hearing, at attachment 2 (Mar. 21, 2006) [hereinafter Barnett Statement].

[12] In 2004 Congress enacted statutory changes to the Antitrust Division's Leniency Program that would allow a successful amnesty applicant to be liable for only single damages in a civil follow-on action, if that amnesty applicant cooperated with the civil plaintiffs. ACPERA, § 213 (codified as amended at 15 U.S.C. § 1 note).

[13] U.S.A. Patriot Improvement and Reauthorization Act, § 113(g)(3) (codified as amended at 18 U.S.C. § 2516(1)(r)) (allowing the Antitrust Division to seek wiretaps for criminal violations of Sections 1, 2, and 3 of the Sherman Act).

[14] Hammond, Recent Developments in the Antitrust Division's Criminal Enforcement Program, at 5 (the Division has entered antitrust cooperation agreements with Brazil, Israel, Japan, Mexico, Australia, Canada, the European Union, and Germany).

[15] *See* Kenneth G. Starling, *Criminal Antitrust Enforcement*, 57 Antitrust L.J. 157, 159 (1988).

[16] Scott D. Hammond, Deputy Ass't Att'y Gen. for Criminal Enforcement, Antitrust Div., Dep't of Justice, A Summary Overview of the Antitrust Division's Criminal Enforcement Program, Speech Before New York State Bar Association Annual Meeting, at 4 (Jan. 20, 2003) ("In some matters currently under legislation, the volume of commerce affected by the suspected conspiracy is well over $1 billion per year and in more than two-thirds of our international investigations, the volume of commerce affected is over $100 million over the term of the conspiracy."); *see also* Barnett Statement, at attachment 1 (reflecting criminal fines imposed from 1996 to 2006 ranging from $10 million to $500 million, the most recent being $300 million imposed in 2006 for the DRAM conspiracy).

[17] American Bar Association, Section of Antitrust Law, Public Comments Submitted to AMC Regarding Sentencing Guidelines, at 4 (Nov. 14, 2005) [hereinafter ABA Comments re Sentencing Guidelines]; Anthony V. Nanni, Statement at AMC Criminal Remedies Hearing, at 6–7 (Nov. 3, 2005) [hereinafter Nanni Statement].

[18] *See* Report of the Attorney General's National Committee to Study the Antitrust Laws 350 (1955) (limiting prosecution to price-fixing and certain other types of violations); The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Crime and its Impact—An Assessment 110 (1967) (limiting prosecution to "willful" violations).

[19] *See* United States v. Empire Gas Co., 537 F.2d 296 (8th Cir. 1976) (unsuccessful prosecution under Section 2 for attempted monopolization through destruction of competitor's assets); United States v. Cuisinarts, Inc., Crim. No. J. 80-49 (D. Conn. 1981) (plea *nolo contendre* to Sherman Act indictment for resale price maintenance); *see also* Donald I. Baker, *The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging*, 69 Geo. Wash. L. Rev. 693, 695 n.14 (2001).

[20] R. Hewitt Pate, Ass't Att'y Gen., Antitrust Div., Dep't of Justice, Vigorous And Principled Antitrust Enforcement: Priorities And Goals, Address Before ABA Section of Antitrust Law Annual Meeting, at 6 (Aug. 12, 2003) (the DOJ brings criminal charges only against "hard-core cartel activity that each and every executive knows is wrongful. The cases we criminally prosecute at the Division are not ambiguous. They involve clandestine activity, concealment, and clear knowledge on the part of the perpetrators of the wrongful nature of their behavior."); Criminal Remedies Trans. at 83 (Hammond) (The DOJ will not prosecute cases in which "there is some innocent explanation here or some inadvertence, that they crossed the line without meaning to.").

[21] *Northern Pacific*, 356 U.S. at 5 (describing price-fixing as having a "pernicious effect on competition and lack[ing] . . . any redeeming virtue"); Bork, Antitrust Paradox 268.

[22] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940).

[23] United States v. Sealy, Inc., 388 U.S. 350, 358 (1951).

[24] *See, e.g.*, Broadcast Music, Inc. v. CBS, 441 U.S. 1, 23–24 (1978).

[25] *See, e.g.*, Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222 (1993) (explaining that price discounts, so long as they are above some measure of cost are always lawful in light of the high likelihood that consumers benefit from the lower prices they bring); State Oil Co. v. Kahn, 522 U.S. 3, 14 (1997) (holding that restrictions on maximum resale price imposed by distributor had the potential to "stimulate interbrand competition").

[26] ABA Comments re Sentencing Guidelines, at 4–5 (applauding the Division's "self-imposed discretion," but still advocating that this Commission make it clear that only hard-core antitrust violations be prosecuted criminally).

[27] *See, e.g.*, United States v. Wilder, 15 F.3d 1292 (5th Cir. 1994) (Section 3571(d) invoked to enhance penalty in case involving defrauding financial institutions and conspiring to defraud the federal government); United States v. Leonard, 37 F.3d 32 (2d Cir. 1994) (section 3571(d) implicated in tax evasion case); United States v. Foote, No. CR.A. 00-20091-01-KHV, 2003 WL 2466158, *1 (D. Kan. July 31, 2003) (Section 3571(d) used to enhance penalty for trafficking of counterfeit goods).

[28] 18 U.S.C. § 3571(d).

[29] Scott D. Hammond, Deputy Ass't Att'y Gen. for Criminal Enforcement, Antitrust Div., Dep't of Justice, Antitrust Sentencing in the Post-*Booker* Era: Risks Remain High for Non-Cooperating Defendants, Address Before ABA Section of Antitrust Law, Spring Meeting (Mar. 30, 2005).

[30] ABA Comments re Sentencing Guidelines, at 6 n.13.

[31] See Thomas O. Barnett, Public Comments Submitted to AMC, at 1 (July 24, 2006) (stating that without Section 3571(d), the DOJ and the sentencing courts would be forced to "treat companies that caused the greatest harm . . . the same as other violators"); American Antitrust Institute, Public Comments Submitted to AMC Regarding Alternative Fines Statute, at 2 (June 30, 2006) [hereinafter AAI Comments re Alternative Fines Statute] (statutory maximum not likely to be increased sufficiently to provide adequate fines for largest cartel cases); Philip C. Zane, Public Comments Submitted to AMC Regarding Alternative Fines Statute, at 1 (June 30, 2006) [hereinafter Zane Comments re Alternative Fines Statute].

[32] Hammond Statement, at 2.

[33] Apprendi v. New Jersey, 530 U.S. 466 (2000); *see also* Blakely v. Washington, 542 U.S. 296 (2004); United States v. Booker, 543 U.S. 220 (2005); Cunningham v. California, 127 S. Ct. 856 (2007).

[34] *Apprendi*, 530 U.S. at 490; *see also Booker*, 543 U.S. at 244 (confirming holding of *Apprendi*).

[35] Criminal Remedies Trans. at 43 (Hammond) (stating that DOJ will "have to prove [gain or loss] to a jury beyond a reasonable doubt").

[36] AAI Comments re Alternative Fines Statute, at 3 ("Proof of gain or loss in most antitrust cases involves complex econometric analysis about how markets would have performed in the absence of the unlawful conduct."); Zane Comments re Alternative Fines Statute, at 2.

[37] Tefft W. Smith, Statement at AMC Criminal Remedies Hearing, at 27 (Nov. 3, 2005) [hereinafter Smith Statement] (stating that Section 3571(d) "cannot even be applied where, as in an antitrust case, the Division would need to engage in a civil damage trial-like proceeding, because that would 'unduly complicate the sentencing process'"); *id.* at 25 ("Isn't 'twice the gain or loss' virtually unprovable under § 3571 as 'unduly complicating the sentencing proceedings'?").

[38] ABA Comments re Sentencing Guidelines, at 9 n.20; *see* Tara L. Reinhart et al., *The Business of Sentencing: Facing the Facts After* Blakely*,* Booker*, and* FanFan, ANTITRUST SOURCE, at 4 (Jan. 1, 2005) (stating that with respect to Section 3571(d) calculations, "the Division offers little more than a stipulation, which the Probation Office adopts"); Antitrust Division and Mitsubishi Corporation Plea Agreement, No. 00-033, at 4 (May 10, 2001) ("[T]he United States and Mitsubishi stipulate that the loss to the victims and/or the gain to Mitsubishi and others from the offense is sufficient to support a fine of $134 million [under Section 3571(d)]."), *available at* http://www.usdoj.gov/atr/cases/f8200/8204.htm.

[39] U.S. SENTENCING GUIDELINES MANUAL (2005) [hereinafter U.S.S.G.].

[40] *Booker*, 543 U.S 220.

[41] U.S.S.G. § 8C2.4(a)(3); *see* AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, SENTENCING GUIDELINES IN ANTITRUST: A PRACTITIONER'S HANDBOOK 43 (1999) (Robert E. Hauberg, Jr. et al. eds., 1999).

[42] U.S.S.G. § 2R1.1(d)(1). The use of the 20 percent harm proxy is not discretionary. *See id.* § 8C2.4(b) (a "special instruction for organizational fines . . . *shall* be applied") (emphasis added).

[43] A recent Supreme Court case has rendered the Sentencing Guidelines advisory only. *See Booker*, 543 U.S. at 245.

[44] *See* U.S.S.G. § 2R1.1(d)(2); *id.* at § 8C2.6.

[45] *Id.* at § 8C2.5.

[46] *Id.* at § 2R1.1 cmt. 3.

[47] Hammond Statement, at 8 (citing Supplemental Legislative History by Reps. Sensenbrenner and Conyers, 150 CONG. REC. H3658 (daily ed. June 2, 2004)).

[48] *Id.* at 7.

[49] *Id.* at 6–7.

[50] U.S.S.G. § 2R1.1 cmt. 3.

[51] *Id.* These costs derive from allocative inefficiency, which includes such inefficiencies that result from consumers who either do not purchase the product because of its artificially high price or who purchase an inferior substitute product. *See id.*

[52] John M. Connor & Robert H. Lande, *How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines*, 80 TUL. L. REV. 513, 540–41 (2005); *see* Comments of the American Bar Association, Section of Antitrust Law, on the Proposed Amendments to the Antitrust Recommendations of the United States Sentencing Guidelines, at 21 (Mar. 2005) [hereinafter ABA Comments to Sentencing Commission]. For instance, in *FTC v. Mylan*, the alleged overcharge was 1900 percent to 3200 percent. Had that case been prosecuted criminally, a fine based on a 10 percent overcharge and 10 percent deadweight loss would have been well below the estimated harm. *See FTC v. Mylan Labs., Inc.*, Amended Complaint, at ¶ 29, Civ. No. 1:98CV03114 (D.D.C. Feb. 8, 1999).

[53] Nanni Statement, at 9–10; Smith Statement, at 18–19, 21.

[54] ABA Comments re Sentencing Guidelines, at 9–10 & n.21 ("If subsequent events have shown that the determination of gain or loss in antitrust cases is not as complex as the Sentencing Commission assumed in 1991, there is no need to continue to base antitrust fines or jail sentences on volume of affected commerce as opposed to actual harm as is done in most other federal economic crimes.").

[55] Hammond Statement, at 6–7.

[56] *Id.*; Charles R. Tetzlaff, Statement at AMC Criminal Remedies Hearing, at 2 (Nov. 3, 2005) (identifying Guidelines goals as punishment, deterrence, incapacitation, and rehabilitation); *id.* at 4 (noting that Congress endorsed the Guidelines' 20 percent harm proxy, finding that it was sufficient to promote the interests of justice); Criminal Remedies Trans. at 26 (Nanni) (stating that a corporation's volume of commerce "roughly reflects its importance to the conspiracy . . . [and] that the Guidelines in terms of fines gets roughly to the right place").

[57] Criminal Remedies Trans. at 104 (Hammond) (it "creates a bigger headache"); *see* Hammond Statement, at 3–4 (stating "the increases in the Sherman Act statutory maximum fines are intended to permit courts to impose fines for antitrust violations at current Guidelines levels without the need to engage in damages litigation during the criminal sentencing process") (quoting 150 CONG. REC. H3658 (daily ed. June 2, 2004).

[58] Julie R. O'Sullivan, *Federal Criminal Code*, 96 J. CRIM. L. & CRIMINOLOGY 643, 646 (2006) (stating that the Sentencing Commission wanted to create a "'real offense' sentencing system—that is, a system where the sentence . . . was based on the 'real' circumstances of [the offender's] case").

[59] ABA Comments re Sentencing Guidelines, at 7.

[60] *See id.* at 12 n.30 (stating that the Sentencing Guidelines generally do not create proxies for harm for other white-collar crimes and that that calculation of the actual impact "is more consistent with how penalties are imposed in other white collar prosecutions"); *see also* ABA Comments to Sentencing Commission, at 21.

[61] ABA Comments to Sentencing Commission, at 20 (stating that it is possible that the Sentencing Commission "has not considered whether [*Booker*] requires amendment or removal of the current method of calculating the base fine for an organization that commits an antitrust violation").

[62] *See* Smith Statement, at 20; Nanni Statement, at 9–10.

[63] U.S.S.G. § 2R1.1 ("Bid-rigging, Price-Fixing or Market Allocation Agreements Among Competitors"); American Bar Association, Public Comments Submitted to the AMC Regarding Alternative Fines Statute, at 4 (June 30, 2006).

[64] ABA Comments to Sentencing Commission, at 5.

65 U.S.S.G. § 2R1.1 & Background (stating that "there is near universal agreement that . . . horizontal price-fixing (including bid-rigging) and horizontal market allocation . . . cause serious economic harm . . . [and] other types of antitrust offenses . . . are rarely prosecuted").