

**Antitrust Modernization Commission  
Summary of Indirect Purchaser Hearings  
June 27, 2005**

The first round of hearings of the Antitrust Modernization Commission (AMC) took place on Monday, June 27, 2005. The two panels, *State Indirect Purchaser Actions in the U.S. Antitrust Enforcement System* and *State Indirect Purchaser Actions: Proposals for Reform*, presented the Commission with a wide spectrum of views on the issue of indirect purchaser actions. The two major points of discussion in the hearings were: 1) how much consideration to give the relatively new Class Action Fairness Act in relation to proposals for change to independent purchaser actions, and 2) whether the 2004 American Bar Association (ABA) Antitrust Section report and illustrative legislation on indirect purchaser actions reflected a position on which all panelists could agree. Each of these issues was touched on by almost all of the panelists and seemed to be of critical interest to the AMC.<sup>1</sup>

The session revealed some of the divisions between those practitioners who customarily represent plaintiffs and those who customarily represent defendants in antitrust class actions, as well as the positions taken by the States. Almost all of the speakers, except the plaintiff's bar representative, viewed the current situation as entailing needlessly heavy costs and burdens on the defendants. The questioning consisted largely of an effort to assess how much real data currently exists with respect to indirect purchaser actions and how useful further empirical research likely would be. There was little support among the panelists for preemption based on *Illinois Brick*, with the States vigorously opposing preemption under any circumstances. There was a solid core of proposals, including the Section's illustrative legislation, that would overrule *Illinois Brick* in an effort to facilitate consolidation of direct and indirect purchaser cases in federal court.

The following discussion attempts to summarize each panelist's written testimony and views expressed at the hearing. In addition to a summary of positions, this document will also highlight any significant questions raised by the AMC and the panelists' responses.

**I. Summary of Written Testimony From Panel No. 1.**

- A. David Tulchin. A defense attorney from Sullivan & Cromwell LLP that defended Microsoft in 150 class actions brought by private plaintiffs/indirect purchasers.

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<sup>1</sup> Commissioner Shenefield attempted to establish some consensus among the second set of panelists with respect to a proposal that the AMC could present to Congress. All of the panelists agreed to the Section's illustrative legislation with some non-harmful modifications related to their various viewpoints.

Mr. Tulchin's statement consisted of three key points. First, the two-tiered system consisting of direct purchaser (DP) actions in federal court and indirect purchaser (IP) actions in state courts is inefficient and a waste of resources for the government and private parties. Second, the current system of state indirect purchaser actions subjects defendants to collateral estoppel after losing in a single jurisdiction, yet does not reward a defendant who wins in a single jurisdiction. This system coerces defendants into settling for fear of collateral estoppel. Third, although he believes in retaining *Illinois Brick*, a uniform system that preempts state law claims in actions that involve interstate commerce and allows indirect purchaser actions in federal court would streamline antitrust litigation and eliminate unnecessary burdens.

B. Margaret Zwisler. A defense attorney with Latham & Watkins LLP

Ms. Zwisler spoke on behalf of upholding the ruling in *Illinois Brick*, and adopting legislation that preempts state indirect purchaser laws. Alternatively, Ms. Zwisler suggested that Congress should allow limited indirect purchaser actions in federal court for criminal or *per se* offenses under the Sherman Act. Ms. Zwisler raised concerns for the impact that CAFA would have on direct and indirect purchaser claims given the fact that the number of class action suits doubled between 2000 and 2003.

C. M. Laddie Montague. A plaintiff's attorney for direct and indirect purchasers

Mr. Montague is for the position that *Hanover Shoe* should be upheld and *Illinois Brick* should be overturned in order to promote consolidated discovery and litigation processes for direct and indirect purchasers in federal courts. Furthermore, preemption of state indirect purchaser laws is unnecessary if *Illinois Brick* were to be overturned, because most cases would then be brought and consolidated in federal courts and only those state claims that are truly local in nature and effect would remain within the jurisdiction of the states. Finally, there is no empirical evidence that dual recoveries, among DP and IP, have been a substantial problem.

D. John Cuneo. A former staff attorney at the FTC and, presently, a plaintiff's attorney

Mr. Cuneo took the position that the AMC should advise Congress to keep the present system intact. After *Illinois Brick*, many states enacted repealer laws that provided indirect purchasers with a right of action otherwise denied in federal court. Mr. Cuneo describes this situation as the ultimate form of federalism in that states now serve as laboratories for the creation of appropriate rights for indirect purchasers. The present system has the benefit of CAFA, which will serve

to eliminate any duplicative recovery and inefficiency through consolidation of DP and IP class actions in federal court. Congress should wait to see the full impact of CAFA on indirect purchaser actions before implementing further change.

E. Mark Bennett. Attorney General of Hawaii

Mr. Bennett spoke on behalf of the States, who continue to favor a legislative repeal of *Illinois Brick*, but disfavor any statute that would preempt state independent purchaser laws. In addition, *Hanover Shoe* should be legislatively amended to provide for fair allocation of damages among DP and IP. Although CAFA will make it easier to remove state class actions to federal court for discovery purposes, it is essential that Congress overturn *Lexecon* in order to allow for the federal court to retain a multidistrict litigation (MDL) for the full trial.

## II. Highlights from Panel No. 1 Questions and Answers

A. What would be the effect of overturning *Illinois Brick*?

- Bennett – If *Illinois Brick* were overturned, then the majority of cases would be brought in federal court, but this does not mean that the state's should not have the right to have their own systems under which individuals can bring suit.
- Montague – The benefit to overturning *Illinois Brick* is that individuals would be less likely to pursue separate actions and more likely to seek consolidated or class actions under federal law.
- Tulchin – If you reverse *Illinois Brick* and *Hanover Shoe*, then Congress must also reverse *Lexecon* in order to provide for the greatest efficiencies and enable one court to try the entire case.

B. Are there cases in which the damages judgment for a defendant has been duplicative, and is this empirical information that the AMC should obtain?

- This is empirical information that is necessary in order to determine the true burden on defendants.

C. Is there any objection to giving state attorneys general the sole authority to bring IP actions?

- Bennett and Montague – State attorneys general do not have the resources to bring all actions. Rather, private plaintiffs provide vigorous and necessary enforcement that compliments state attorneys general.

D. What is the likelihood that state claims will be brought in federal court under the new CAFA?

- Bennett – It appears that people are willing to bring most actions in federal court, and that only outlier claims will remain in state courts.
- Cuneo – Ultimately, plaintiff's counsel will still control whether an action is brought in state or federal court.
- Tulchin – Private plaintiff's lawyers have a greater interest in keeping cases in state court, and therefore, preemption is the only way to cure the current system's failings.

- E. In light of the argument that the current system puts pressure on defendant's to settle, are there actual examples of IP cases that have been litigated to final judgment?
- The Plywood case from Louisiana and Infant Formula case in Kansas were cited as examples.
- F. With respect to the number of IPs that actually come forward to take part in litigation and settlements, is it true that there are very few and that the actual amounts dispersed are de minimus?
- Bennett – The Mylan case distributed millions to IPs, third party payers, etc. In the Buspar litigation, the average consumer received \$700.
  - Tulchin – The actual claims rates of class members are below 5% of the total class population.
- G. Should the AMC take steps to modify the current system without waiting to see what the impact of CAFA is on indirect purchaser actions?
- Tulchin – In spite of CAFA, without overturning *Lexecon*, defendants will have to litigate claims in potentially 51 jurisdictions regardless of consolidation of discovery proceedings. CAFA also does not solve the problem of requiring the court to apply each individual jurisdiction's individual rules of procedure.
  - Bennett – First, *Illinois Brick* should be overturned, and then we can wait and see to determine the effect of CAFA.

### III. Summary of Written Testimony from Panel No. 2

#### A. Ellen Cooper. Assistant Attorney General for Maryland's Antitrust Division.

Ms. Cooper spoke on behalf of the States and articulated the position that States oppose federal preemption of state IP statutes. Ms. Cooper also addressed the issue of allocation of damages and emphasized that damages should

be allocated only among purchasers on a single level and that when there are damages suffered by purchasers on multiple levels, each level of claimants should receive appropriate damages. Ms. Cooper pointed out that state attorneys general often coordinate to file suit in order to reduce the burden and increase efficiency.

B. Michael Denger. Attorney for Gibson, Dunn & Crutcher LLP

Mr. Denger proposed the following changes to the current IP system: 1) overrule *Illinois Brick* in order to allow IP suits in federal court; 2) overrule *Lexecon* in order to allow all plaintiffs to litigate fully in a single MDL proceeding; 3) allow for broad removal jurisdiction greater than currently allowed through CAFA; 4) require opt outs to stay and participate in litigation; 5) structure consolidated proceedings in a trifurcated trial (liability, determination of overall overcharge, allocation of damages among claimants). According to Mr. Denger, this system would create the most efficiency while allowing for a fair resolution of both DP and IP claims.

C. Daniel Gustafson. Attorney primarily for direct and indirect purchasers

Mr. Gustafson recommends that the AMC do nothing at the moment with the present system, but rather it should gather empirical evidence and determine the impact of CAFA on removal of state cases to federal court.

D. Andrew Gavil. Professor of Antitrust at Howard University Law School

Mr. Gavil proposes that *Hanover Shoe* be upheld and *Illinois Brick* overturned. He also believes that CAFA will not fix all of the problems presented by the present system because some private actions will remain in state courts and unless *Illinois Brick* is overturned, these actions cannot be removed to federal court. Mr. Gavil also proposes that the AMC undertake some empirical studies as to the number of cases that result in duplicative damages, the number of cases that are litigated in full, and the number of private cases that are add-ons to government enforcement actions.

E. Richard Steuer. Secretary and Communications Officer of the Antitrust Section of the ABA

The comments of the ABA Antitrust Section with respect to IP suits are set forth in the 2004 Council Report that followed from a report prepared by the Section's Remedies Task Force, which considered various positions expressed at the Section's Remedies Forum and thereafter. An illustration of compromise legislation that accompanies the Report includes the following elements: 1) overturn *Illinois Brick* and allow for a federal cause of action; 2) eliminate duplicative recovery; 3)

repeal *Lexecon* in order to consolidate actions into one court for both discovery and trial; 4) allow plaintiffs to recover prejudgment interest; 5) do not preempt state repealer laws. Mr. Steuer pointed out that the preemption issue had been the subject of substantial difference of opinion, and that although no position was taken on the issue, the decision not to include preemption reflected the assessment that in any event, inclusion of a preemption provision would make it highly unlikely that any compromise measure would stand a realistic chance of being enacted.

#### **IV. Highlights from Panel No. 2 Questions and Answers**

A. What is CAFA's likely effect on plaintiff's removal of state claims to federal court?

- Denger – Absent repeal of *Lexecon*, cases will be returned to their original jurisdictions after the discovery phase, negating any efficiency that would otherwise be achieved. Also, the chances of forming a nationwide class of plaintiffs is difficult given the different rules in each individual state.
- Gustafson – CAFA is not going to be the panacea that some anticipate.

B. What is objectionable in the ABA illustration to each witness?

- Cooper – The attorneys general agree with most of the ABA illustration as long as it provides relief for a claimant IP or DP that has suffered actual damages, and there is no preemption of state law.
- Gustafson – The prejudgment interest element is particularly attractive. One reservation is with respect to consumers that do not have a record or evidence of pass-on. Mr. Gustafson would like there to be a presumption of pass-on for consumers.
- Gavil – The lack of preemption in the ABA illustration conflicts with Mr. Gavil's proposal, but he understood the political reality of passing such legislation and the need to concede on that point.
- Denger – Mr. Denger approved the ABA illustration, but would add the trifurcated proceeding element to it.

C. What changes to CAFA need to be addressed in order to make it effective in the IP and antitrust realm?

- Denger – There are substantial problems with opt-outs being allowed to return to state courts to litigate claims.