

**ABA SECTION OF ANTITRUST LAW
RESPONSE TO ANTITRUST MODERNIZATION COMMISSION JUNE 12, 2006 REQUEST FOR
PUBLIC COMMENT ON CIVIL REMEDIES**

The Section of Antitrust Law of the American Bar Association (“ABA”) is pleased to submit these comments to the Antitrust Modernization Commission in response to its Request for Public Comment, dated June 12, 2006, regarding civil remedies. The views expressed herein are being presented on behalf of the Antitrust Section. They have not been approved by the House of Delegates or the Board of Governors of the ABA and, accordingly, should not be construed as representing the policy of the ABA.

EXECUTIVE SUMMARY

The Antitrust Section recommends that the Antitrust Modernization Commission consider a variety of questions prompted by the “proposal to reform indirect purchaser litigation” and the “proposal to change the current regime regarding private antitrust actions” outlined in its June 12, 2006 Request for Public Comment. These questions are presented in the Section’s comments below.

INTRODUCTION

In 2004, the ABA Section of Antitrust Law issued a Report on Remedies (available on the Section’s website) which served as the basis for comments that the Section submitted to the Antitrust Modernization Commission on June 14, 2005 on the subject of civil remedies. The essential conclusion of the Section’s Report and comments was that the present framework for litigating indirect purchaser claims is less efficient than it could be, and that legislation could be formulated that would streamline the process without prejudicing the interests of either plaintiffs or defendants. Subsequently, the Commission conducted hearings on this subject and issued a request for public comment on June 12, 2006. While the Section’s views continue to be embodied in the 2004 Report, the following comments address the first and fourth set of questions presented in the June 12 request. The questions presented in the Commission’s request are reproduced below, followed by the Section’s responses.

1. Civil Remedies. The Commission is evaluating a proposal to reform indirect purchaser litigation. The potential reform would consist of three principal components: (1) Legislative overruling of *Illinois brick Co. v. Illinois*, 431 U.S. 720 (1977), so that indirect purchaser claims could be brought under federal antitrust law, and *Hanover Shoe, Inc. v. United Shoe Machinery*, 392 U.S. 481 (1968), so as to allow assertion of the pass-on defense; (2) Statutory provisions either (a) to allow removal of all state indirect purchaser actions to federal court to the full extent permitted under Article III, or (b) to preempt state indirect purchaser laws; and (3) Statutory provisions to allow the consolidation of all related direct and indirect purchaser actions in a single federal district court for pre-trial proceedings.

Should the Commission recommend such reform to Congress? Should the proposal be modified in any respects? In responding, please also comment on the following:

a. Is a provision that would allow removal of state indirect purchaser actions necessary or desirable, in light of the generally applicable removal provisions contained in the Class Action Fairness Act?

In its 2004 Report, the Section presented an illustration of legislation under which (1) indirect purchasers and indirect sellers would not be barred from recovering under the federal Clayton Act; (2) there would be no duplicative recovery under this new federal cause of action; (3) plaintiffs would be entitled to prejudgment interest; (4) there would be the greatest possible relaxation of diversity jurisdiction and consolidation for all purposes in federal court; and (5) there would be no preemption of state law. Some of these changes were later included in the Class Action Fairness Act but that statute, as enacted with its limitations and exceptions, will not necessarily result in consolidation in federal court of as many antitrust cases as would be consolidated under legislation of the type described in the Section's Report. Consequently, one could argue that if legislation directed to antitrust and antitrust-type actions was warranted before the enactment of the CAFA, it still is warranted now.

As to the broader question of whether the Commission's proposal should be modified in any respect, the Section's illustration provided for consolidation for all purposes, including trial, and contained an explicit provision that there should be no duplicative recovery under the federal cause of action that would be created. The illustration also included a provision for prejudgment interest, although the Commission appears to be addressing that topic elsewhere in its deliberations, for all antitrust cases. The Section's illustration further provided that it would not preempt state law, while the proposal that the Commission is evaluating includes preemption as one of two alternatives.

A comparison of the Section's Report to the proposal under evaluation by the Commission raises the following issues in response to the Commission's inquiry as to whether the proposal should be modified in any respects:

1. Should there be an explicit provision against duplicative damages? Some state statutes have adopted such provisions, to prevent courts from awarding duplicative damages.
2. Would an explicit provision against duplicative damages eliminate the need to overrule *Hanover Shoe* or make other changes that might produce collateral consequences for antitrust enforcement? If there were a prohibition against duplicative damages under the federal statute, what would be added by overruling *Hanover Shoe* (other than allowing defendants to argue that if there was pass-on, and indirect purchasers fail to bring or prove a claim, there should be no recovery at all)?
3. Should the issue of prejudgment interest be integral to indirect purchaser legislation, to assure that such legislation would have a more neutral impact on recoveries? The Commission appears to be considering the topic of prejudgment interest, although not in this context alone.
4. Should *Lexecon* be overruled and consolidation be provided for all purposes, including trial? Again, the Commission appears to be examining this topic from a broader perspective.
5. Should there be preemption of state law? The Section's Report acknowledged that without preemption the prospect of duplicative damages would remain, since states might decide that both direct and indirect purchasers should be entitled to recover for the same overcharge. However, no state has yet adopted such a policy and the Section concluded that, as a practical matter, the issue of preemption would be so divisive as to make adoption of legislation politically unrealistic.

b. Is preemption of state indirect purchaser actions necessary or desirable if state indirect purchaser actions may be removed to federal court?

The Section assumed that as a political matter, preemption was a non-starter, and the Section has not taken a position as to whether or not preemption is “desirable” apart from political considerations. If state indirect purchaser actions may be removed to federal court, preemption might not change the outcomes unless any state decides affirmatively to authorize duplicative recovery. Today, the states having *Illinois Brick* repealer statutes either explicitly instruct courts to avoid duplicative recovery or are silent on the issue. As to whether preemption is “necessary,” this depends on what is expected to be accomplished by legislation. Presumably, preemption is not required for all purposes, since the Section was able to prepare an illustrative piece of legislation that would accomplish several changes without preemption.

c. Should the Commission also recommend to Congress that courts be required to use structured proceedings to resolve purchaser claims? Those proceedings would resolve liability in one phase, determine total damages in another, and allocate damages among direct and indirect claimants in a separate phase. Would structured proceedings work better if courts could combine certain of the proceedings, especially liability and total damages in appropriate cases in the exercise of their discretion?

The Section did not explicitly address this question in its previous submission, although the proposal for consolidation of state and federal claims in a single federal forum assumed that courts would address these three elements – liability, total damages and allocation – in an efficient manner, which might or might not include bifurcation or trifurcation. The Commission’s question raises the following issues:

1. Are courts already sufficiently well equipped and experienced to work out the best procedures themselves on a case-by-case basis, without any instructions from the legislature?
2. Would structured proceedings of this kind be mandatory? Are there situations in which structured proceedings would increase delay and expense for all parties?
3. If structured proceedings of this kind were mandatory, how detailed would the instructions for conducting such proceedings need to be?
4. Would a requirement for conducting trials in separate phases, but permitting discovery on all issues to proceed before commencement of trial, result in any material efficiencies? Would a

requirement that defers discovery on certain issues until trial on other issues has been completed raise issues under the Seventh Amendment with respect to issues triable to a jury?

5. How would structured proceedings apply to cases that include both federal claims and a variety of state claims?

d. To what extent would the legislative overruling of *Hanover Shoe* create new challenges in the process of certifying appropriate classes of claimants? Can any such challenges be resolved fully through the structured approach suggested in (c) above?

The answer to this question appears to depend upon whether it would be possible for plaintiffs to recover duplicative damages. If both direct and indirect purchasers were authorized to recover damages for the same overcharge, it would be incumbent upon the defendant to prove pass-on in order to avoid duplicative recoveries. However, if duplicative damages were precluded, plaintiffs presumably would have to agree upon or litigate the proper apportionment of damages between direct and indirect purchasers, but defendants would not be directly interested in this issue unless they could prove that no plaintiff should recover. Thus, the Commission's question raises these issues:

1. Should duplicative damages be precluded? If so, what is added by overruling *Hanover Shoe*?

2. Would the challenges of certifying classes of plaintiffs be different depending on whether *Hanover Shoe* were overruled or duplicative damages precluded?

3. What would be the effect with respect to any state that allows duplicative recovery? How should *Hanover Shoe* apply in such instances and what would be the effect of overruling it?

4. Under current law, could an affirmative defense such as passing-on be determined on a class-wide basis? If it could not, under what circumstances would structured proceedings be sufficient to address the problem? Is the feasibility of such a determination relevant to class certification under current law?

5. Does current law adequately enable courts to address class certification issues separately for liability and damages issues?

4. Should the Commission recommend the following proposal to Congress and, if so, should any components of the proposal be modified?

a. In all matters where the government institutes criminal proceedings and obtains a guilty verdict by plea or trial, all unlawful gains made by the defendants and precomplaint and prejudgment interest thereon shall be disgorged in that proceeding, together with such fines as may be provided by law and a civil penalty of 200% of the amount disgorged.

i. The disgorged unlawful gains shall be apportioned among those from whom they were taken directly or indirectly by the criminal court in a summary proceeding to be concluded within 90 days of the entry of a final criminal judgment as to all defendants. Classes of direct and indirect claimants may participate through counsel in that proceeding. Claims of less than \$100 shall be disregarded and the amounts attributable to such claims paid to the Treasury.

The Section did not address a consolidation proposal of this kind. The proposal is consistent with the assumption that indirect purchaser claims can be consolidated with direct purchaser claims in one proceeding. However, this proposal raises a number of additional questions:

1. What would be the impact on civil cases filed prior to the institution of a criminal proceeding (e.g., cases filed upon publication of reports that an investigation has been opened)?

2. Would the summary proceeding be conducted by the court sitting without a jury? If so, are there circumstances in which the summary proceeding could raise Seventh Amendment issues?

3. Would the total amount of unlawful gains to be disgorged be determined in the proposed summary proceeding, in addition to allocation of such disgorged amounts among the victims?

4. Would disgorgement limit civil recovery to the amount of defendants' unlawful gains even in cases where the amount of plaintiffs' losses exceed those gains?

5. Who would be responsible for proving "all unlawful gains"?

6. Who would be responsible for administering the determination of individual claims and the distribution of disgorged amounts among claimants?

7. Is it likely that discovery and expert analysis of the amount of unlawful gains and appropriate allocation of disgorged amounts will be necessary before such a summary proceeding occurs? If so, when would this happen?

8. Is the 90-day period sufficient, particularly if discovery and expert analysis is to occur after judgment in the criminal case? Should the period be longer in plea cases than litigated cases? Should there be a time limit applicable to amnesty candidates?

9. If discovery and expert analysis were to occur before trial, how would that impact the defendant's right to a speedy trial?

10. Would putative victims be able to participate through counsel in the proceedings? If so, at what stage of the proceedings? At the determination of the amount of "all unlawful gains"? Would they be permitted to intervene as parties? Would there be a procedure for classes of putative victims to participate? What criteria would govern requests to participate?

11. Would the criminal court determine issues of class certification by potentially injured parties? If not, would the potential for participation by classes of claimants be adequate in cases where related civil actions have not proceeded past the class certification stage before the time for commencement of the summary disgorgement proceeding in the criminal case?

12. Would potential plaintiffs not joining in the proceeding be able to pursue claims arising from the same facts in other forums?

13. Could defendants force potential plaintiffs into the proceeding?

14. In class actions, class members are permitted to opt out and some (particularly those with individually substantial claims) may commence their own own damage suits individually.

Should such an option be available with respect to the summary disgorgement proceeding. If so, how would that be accomplished?

15. Is the \$100 *de minimis* threshold too high? If a threshold is to be established, is data on the cost of distributing recoveries relevant in determining an appropriate consideration?

16. What would be the effect on mandatory arbitration clauses?

17. How would it be determined that there has been a “final criminal judgment as to all defendants”? What if later discovered evidence triggers a previously unanticipated indictment, for example?

ii. Fines and civil penalties shall accrue solely to the Treasury, but the court may award compensation from those amounts to any private party found to have been a material factor in the instigation or successful conduct of the government’s investigation and prosecution or its counsel.

1. Is this a whistleblower provision?

2. Would compensation be available to private parties who may contribute only to the determination of amounts to be disgorged and allocation of disgorged amounts among claimants?

3. How is “material factor” to be defined?

4. How would the amount of compensation be determined, and by what criteria?

b. In the case of defendants acquitted of criminal charges, private claims may be asserted as otherwise provided by law, but only the actual amount of unlawful gain may be recovered.

1. Does this rewrite the applicable law?

2. Does the Clayton Act’s provision for treble damages serve purposes other than punishment and, if so, what would be the impact on these purposes?

3. Does the “actual amount of unlawful gain” include interest?
4. What about attorneys fees and costs?
5. Would this change deter plea bargains?
6. How would this impact state law?

July 17, 2006