

ABA Section of Antitrust Law REPORT ON REMEDIES

In 2003, the ABA Section of Antitrust Law convened a Task Force to study antitrust remedies and report to the Section's Council.¹ In the ensuing year, that Task Force analyzed presentations that previously had been made at a Chair's Showcase Program featured at the Section's 2002 Spring Meeting and a two-day Remedies Forum conducted at the Section's 2003 Spring Meeting. Members of the Task Force also held a remedies workshop at the Section's 2004 Mid-Winter Council Meeting and conducted extensive interviews with interested individuals, including judges, professors, enforcers and practitioners. The Task Force also had the benefit of reports issued by previous Section task forces, including a 1990 report (published at 59 Antitrust L.J. 273) and a 1995 report (published at 63 Antitrust L.J. 993), as well as a report issued by the Section's Task Force on the Federal Antitrust Agencies—2001 (available at <http://www.abanet.org/antitrust/antitrustenforcement.pdf>).

The law on antitrust remedies was examined in detail in the earlier Section reports and will simply be summarized here. In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), the Supreme Court barred the use of the pass-on defense except in the case of pre-existing cost-plus contracts. In *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the Court extended this bar to the offensive use of pass-on, thereby denying recovery to indirect purchasers. This was soon followed by the enactment of a series of state *Illinois Brick* repealer statutes (allowing certain indirect purchasers to sue under state antitrust statutes), which the Court held, in *California v. ARC America Corp.*, 490 U.S. 93 (1989), are not preempted by federal antitrust law. As a result, today (i) direct purchasers may recover under federal law even if they passed on the overcharge, (ii) indirect purchasers may not recover under federal law even if they incurred an overcharge, and (iii) indirect purchasers who incurred an overcharge may seek to recover under some state laws even if direct purchasers recover for the same overcharge under

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federal law in separate, parallel litigation. A similar situation exists in suits brought by direct and indirect sellers alleging that prices paid to them have been artificially depressed by buyer cartels or monopsonistic behavior.

There have been efforts to make progress in this area before without results. Today, however, there appears to be greater support for change than ever before, since more than half the states in America now permit indirect purchasers to recover under their antitrust laws—creating the prospect of multiple litigation and the possibility of duplicative exposure—while the remaining states continue to limit recovery to direct purchasers, leaving indirect purchasers there without a remedy.

The challenge facing the Task Force was to determine whether, in the present environment, there was any proposal that would improve the present situation while winning support from constituencies representative of the interests of both plaintiffs and defendants.

The conclusion, based on the input received, was that a legislative proposal could be drafted that would streamline the present process while providing a compromise between the interests and concerns expressed on behalf of both plaintiffs and defendants. Naturally, such a proposal would never attract universal support from either camp, since advocates for each side believe in the validity of their respective positions and some on each side believe that compromising their position, even in the interest of improving upon the current situation, would be a mistake. There are those who believe that indirect purchasers should not be permitted to recover under either federal or state law, while there are others who believe that direct and indirect purchasers both should be permitted to recover treble damages, plus prejudgment interest. Nevertheless, the Task Force proceeded to frame a compromise proposal without endorsing one side or the other. This proposal is not a recommendation but an illustration of how a compromise measure might be worded.

The Council considered the Task Force's conclusions at the 2004 ABA Annual Meeting and voted to forward the attached draft legislation (adopted from the Task Force report) to the Section's Task Force on Antitrust Modernization. Again, it should be emphasized that this draft legislation represents a compromise among contrasting positions held by various interested parties. Doubtless, it would not be considered

completely satisfactory by many of those parties, but the Council's purpose is to present an example of a compromise measure that would improve upon the present situation without favoring any one position. Accordingly, the draft legislation is intended to be considered only as a whole, and it would not be accurate to represent that the Section has prepared any particular part or parts of it without reference to the rest of it. Nor would it be accurate to represent that the Section has endorsed any particular policy toward antitrust remedies. Instead, this is simply an effort to illustrate how a compromise measure could be forged, so that the value of such a compromise can be considered in concrete, not abstract, terms. The draft legislation appears at the end of this Report. The key features and a brief explanation of each are as follows:

1. **Indirect purchasers and indirect sellers would not be barred from recovering under the Clayton Act.** The legislation would create a federal cause of action for indirect purchasers and sellers, overturning *Illinois Brick*. Such rights already exist for indirect purchasers in over half the states. This proposal would bring uniformity and would permit indirect purchasers and sellers in the remaining states to prove any damages and recover, but would not itself increase the total exposure for defendants.
2. **There would be no duplicative recovery under the new cause of action.** By consolidating direct and indirect claims in one forum, where both direct and indirect claimants would have an opportunity to prove their respective damages, the proposed statute would eliminate the possibility of duplicative recovery, consistent with provisions in several state indirect purchaser statutes—unless a state explicitly provided for duplicative recovery. Several of the state *Illinois Brick* repealer statutes in effect today explicitly provide that courts should avoid the award of duplicative damages.
3. **Plaintiffs would be entitled to recover pre-judgment interest.** This would entitle plaintiffs to greater recovery than is available today, offsetting other provisions in the proposal that would be expected to find more support among defendants. It has been argued that the lack of pre-judgment interest has prevented plaintiffs from being fully compensated under the present system.

4. **There would be relaxation of diversity jurisdiction and consolidation in federal court.** Consolidation is a critical feature of this proposal, and would eliminate duplicative litigation over the same subject matter in different forums. Relaxation of the requirements for diversity jurisdiction would allow consolidation to be effected in the greatest number of cases.
5. **There would be no preemption of state law.** There have been differences of opinion expressed as to whether state laws should be preempted in this context. However, as a practical matter, preemption would create a broad and divisive political issue and defeat the purpose of proposing a realistically achievable compromise measure. It is true that without preemption the prospect of duplicative damages would remain for indirect purchasers in any states that might decide to provide that both indirect and direct purchasers may recover for the same overcharge—and this would be so even if cases were consolidated in federal court. However, preserving such a prospect would be preferable, in the judgment of the Council, to the present situation in which there is neither preemption nor consolidation.

Conclusion

The debate over antitrust remedies in general, and indirect purchaser suits in particular, has continued now for decades. This report is intended to demonstrate that it is possible to draft a compromise measure. Hopefully, this report and draft legislation that accompanies it will bring the debate into sharp focus and allow a sound judgment to be made as to whether the modernization of antitrust law should include some manner of remedies reform.

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DRAFT AMENDMENTS

1. Section 1. INDIRECT PURCHASERS AND SELLERS.

Section 4 of the Clayton Act, 15 U.S.C. § 15, is amended in subsection (a) by adding at the end the first sentence, the following:

“In actions under this section, a person injured by reason of a violation of the antitrust laws shall recover threefold the actual damages by him sustained, as provided in this section, regardless of whether or not he dealt directly with the defendant. There will be no duplication of recovery of damages under this section.”

and by adding at the end of the subsection the following:

“Notwithstanding any other provisions of this subsection, and in lieu of any interest provided therein, persons recovering damages under this section as compensation for overcharges or underpayments caused by horizontal price fixing shall be entitled to recover simple interest on their actual damages from the date on which damages were incurred at a rate equal to the weekly average one-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System.”

2. Section 2. REMOVAL AND CONSOLIDATION.

Section 4 of the Clayton Act, 15 U.S.C. § 15, is amended by adding at the end the following:

“(d) Upon timely application, any person entitled to maintain an action pursuant to this section alleging injury from indirect purchases or indirect sales may intervene in any action under this section alleging injury from direct purchases or direct sales based on the same or substantially the same alleged conduct.

“(e) Upon timely application, any person entitled to maintain an action under this section may intervene in any action under this section which alleges injury from indirect purchases or indirect sales based on the same or substantially the same alleged conduct.

“(f) Upon a request made by any party, the court shall order the consolidation for all purposes of any actions, including removed actions, pending before it pursuant to this section alleging injury from indirect purchases or indirect sales and any other action alleging injury from direct or indirect purchases or sales under this section or the comparable provisions of state law

based on the same or substantially similar alleged conduct. The district courts shall have removal jurisdiction over actions alleging injury from direct or indirect purchases or sales under provisions of state law comparable to the federal antitrust laws, where any plaintiff is a citizen of a State different from that of any defendant, or any plaintiff is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State, or any plaintiff is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state. For purposes of this section an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized. In any such action removed from the courts of any state, the court after removal shall promptly remand such action to the state court from which it was removed whenever it shall appear that the conduct alleged in such action was neither in nor affecting the interstate or foreign commerce of the United States. All other proceedings in such cases shall be automatically stayed pending the further order of court wherein such actions are consolidated. Whenever any action removed or consolidated pursuant to the provisions of this subsection contains any claims which are not related to the same or substantially similar conduct alleged in the claims giving rise to such removal or consolidation, the court, in its discretion, may remand any such claims at any time in order to facilitate the administration of justice and the prompt and equitable resolution of such claims. Cases within the scope of this subsection (f) that are transferred to any district for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. Section 1407 shall be consolidated for all purposes, including trial, by the transferee court except where the court concludes that consolidation for trial would be contrary to the interests of justice and the prompt and equitable resolution of claims.