Protecting – and Advancing –Consumer Interests

When the Antitrust "Reform" Engine Kicks Into Gear

Remarks of Jay L. Himes

Chief, Antitrust Bureau

Office of the Attorney General

of the State of New York

November 5, 2003

Protecting – and Advancing –Consumer Interests

When the Antitrust "Reform" Engine Kicks Into Gear[1]

I would like to offer remarks tonight on the relationship between state attorneys general and the private plaintiffs bar, and the winds of change that offer not only opportunities to strengthen that relationship, but also risks of weakening it. Most of my comments will relate to *Illinois Brick*[2] and its impact on antitrust enforcement on behalf of consumers. If time permits, I will also briefly address the notion of detrebling civil damages for DOJ amnesty recipients.

Our Common Mission

A major part of a state attorney general's responsibility is to protect the people of the state. The attorney general's natural allies in that mission tend to be attorneys who represent plaintiffs – and typically individual consumers – in disputes with public policy implications, often brought as class actions. This alliance can develop in many substantive areas of the law. They range from antitrust to environmental protection, from employment discrimination to products liability, from securities transactions to consumer fraud and deception in general. Specifically in antitrust, from my observations over the past two-plus years, we have had, for the most part, a good working relationship with members of the private plaintiffs' bar, both at the New York Antitrust Bureau and among state enforcers nationwide.[3]

---

[1]The views expressed here are on my own, and do not represent those of the New York offices of Attorney General or the office's Antitrust Bureau.

[2]*Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

[3]For recent antitrust cases reflecting this strong working relationship, see *In re Compact Disc Minimum Advertised Price Antitrust Litigation*, 216 F.R.D. 197 (D. Me. 2003); *In re Cardizem CD Antitrust Litigation*, Master File No. 99-MD-1278, MDL No. 1278, 2003 WL 224076160 (E.D. Mich. October 10, 2003); *In re Buspirone Antitrust Litigation*, MDL No. 1413 (JGK) (S.D.N.Y.);

State attorneys general and private plaintiffs' counsel should be – as one of my colleagues likes to say – on the same side of the "v." That is, indeed, mostly – but not always – so. The basic challenge that we face is striving to increase that condition of "mostliness," while still enabling all of you to earn a better living than I do. Circumstances of the times make this challenge particularly noteworthy.

Emerging Antitrust Review

As you are probably aware, a year ago, Congress added to a Department of Justice appropriations law, provisions creating something called the "Antitrust Modernization Commission Act of 2002."[4] The law calls for a 12 member body, whose assignment is "to examine whether the need exists to modernize the antitrust laws and to identify and study related issues."[5] The Commission has three years within which to complete its work and to prepare a report to Congress.

This is not the first such effort – far from it.[6] For antitrust, "modernization" or "review" or "study" seems like a "rite of passage" that each succeeding generation is required to go through. Historically, the impact of these bodies tends to be relatively modest. But that does not mean the latest effort is one that we may safely ignore.

The business interests driving this effort are well-organized, well-financed and well-

---

Ohio v. Bristol-Myers Squibb Co., 1:02 CV 01080 (EGS) (D.D.C.); and *In re Disposable Contact Lens*, Docket No. 3:94, MDL-1030-J-20A (M.D. Fla.).

[4]Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, §§11051-060, 116 Stat. 1758.

[5]*Id.* §11053(1).

[6] For an overview of prior antitrust review efforts, see Albert A. Foer, Putting the Antitrust Modernization Commission into Perspective (July 11, 2003) (unpublished manuscript on file with author).

connected. And there is much potential for mischief here – for doing more harm than good to the consumer interest. It is, therefore, incumbent on state attorneys general and members of the plaintiffs' bar to remain vigilant, and to be prepared to respond to issues that the Modernization Commission may consider or undertake to address. At this point, the Congress has charged full speed ahead by creating the Commission, and some of its members have been selected. One thing that Congress has thus far neglected to do is to fill up the Commission's gas tank. So, as we sit here tonight, the Commission still lacks the appropriations it needs to function. But that condition may not continue much longer. In July, the House has passed a funding measure,[7] and it seems likely that the Senate will follow suit in the foreseeable future.

Just as there is a Congressional body poised to put antitrust under a microscope, so too the Antitrust Section of the American Bar Association is actively engaged. Scarcely two years ago, that Section called American antitrust enforcement "an uncoordinated hodgepodge of federal, state and multiple private enforcers with their own statutes to enforce and unique perspectives."[8] I find this criticism to be greatly over-stated. To be sure, we have, in this country, a system of multiple antitrust enforcers, consisting of the Department of Justice, the Federal Trade Commission, the State Attorneys General and members of the private bar. That is not especially unusual in our system of governance, however. In many statutory regimes – in such areas as civil rights, securities and commodities regulation, lending and credit reporting, and environmental protection – there is a mix of enforcement authority – between federal and state officials, or between public officials and

---

[7]H.R. No. 2799, Title V, 108th Cong., 1st Sess. (2003) (authorizing $1,499,000).

[8]American Bar Association Section of Antitrust Law, *2001 Report of the Task Force on the Federal Antitrust Agencies* 3 (January 2001).

members of the private bar on behalf of clients.[9] This diffusion of enforcement authority is, in every sense, part of the "American way" of governance. Indeed, several years ago, Lloyd Constantine wrote that our system of federalism "implies a system of vertical checks and balances as important to the vitality of our nation as the horizontal checks among the three branches of the federal government."[10] Diffusing enforcement helps ensure that no single enforcer is able to move the law rapidly in a sharply different direction, thereby buffering changes in enforcement philosophy. It also promotes development of a robust body case law by the courts.

Shared enforcement authority is a strength of our system of governance, not a weakness. Recent action in the European Union to transfer antitrust enforcement from the EC down to member states – and efforts in Canada to develop private antitrust enforcement – testify to the wisdom of the structure that we have developed in this nation.[11]

---

[9]*See generally* Jay L. Himes, *Exploring the Antitrust Operating System: State Enforcement of Federal Antitrust Law in the Remedies Phase of the* Microsoft *Case*, 11 Geo. Mason L. Rev. 37, 60-66 (2002).

[10]Lloyd Constantine, *The Mission and Agenda for State Antitrust Enforcement*, 36 Antitrust Bulletin 835, 838-39 (1991).

[11]*See, e.g.*, Spencer Weber Waller, *Private Law, Punishment, and Disgorgement: The Incoherence of Punishment in Antitrust*, 78 Chi.-Kent L. Rev. 207, 220 (2003); Calvin S. Goldman, Robert Kwintner, Jeff Galway & Chris Hersh, *Private Access to Antitrust Remedies: The Canadian Experience* (prepared for the ABA Section of Antitrust Law 2003 Spring Meeting April 2-4, 2003); Abbott B. Lipsky, Jr., *The Evolving Architecture of International Law: The Global Antitrust Explosion: Safeguarding Trade and Commerce or Runaway Regulation?*, 26 Fletcher F. World Aff. 59, 63 (Fall 2002); Kevin J. O'Connor, *Federalist Lessons for International Antitrust Convergence*, 70 Antitrust. L.J. 413, 432-33 (2002); European Council Regulation (EC) No. 1/2003 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty (December 16, 2002), at http://europa.eu.int/eur-lex/pri/en/oj/dat/ 2003/1_001/ 1_00120030104 en 00010025.pdf; *Modernization Package Goes to Member States for Approval*, European Report, July 26, 2003; European Commission Programme No. 99/027 White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty (April 28, 1999), at http://www.europa. eu.int/ comm/competition/antitrust/wp_modern_en.pdf.

The mix of authority in any particular enforcement regime can, of course, vary, depending on such considerations as history, development, and conditions of human interaction defining the particular legal setting. There is, in short, no "one size fits all" solution.

The Antitrust Section's "hodge-podge" criticism is unjustified for another reason. When it comes to providing monetary recovery to consumers for antitrust violations, the relevant enforcers are, for the most part, you and me, and my counterparts throughout the states generally.[12] The DOJ's Antitrust Division has no statutory authority to secure monetary recoveries for anyone except the United States itself,[13] and it has never sought to establish any non-statutory *parens patriae* authority to obtain a damage recovery on behalf of consumers. The FTC has secured a monetary recovery for consumers in antitrust cases relatively infrequently.[14] The *Mylan*[15] litigation a couple of years ago marked the first time that a court upheld the FTC's authority to seek monetary relief – there, disgorgement – in an antitrust case. Whereas state and private enforcers have experience securing and distributing consumer recoveries, the DOJ and the FTC often enforce detailed conduct remedies. Thus, the Antitrust Section's comments unfairly gloss over the different emphases that characterize the enforcement efforts of those empowered to bring civil antitrust cases.

---

[12] 15 U.S.C. §§15, 15c.

[13] 15 U.S.C. §15a.

[14] *See generally* FTC, Policy Statement On Monetary Equitable Remedies In Competition Cases, at n.6 (July 25, 2003) ("FTC Policy Statement"), at http://www.ftc.gov/os/2003/07/disgorgementfrm.htm.

[15] *FTC v. Mylan Laboratories, Inc.*, 62 F. Supp. 2d 25 (D.D.C. 1999) (construing the FTC's equitable authority under Section 13(b) of the FTC Act, 15 U.S.C..§53(b)). *See also FTC v. Abbott Laboratories*, Civ. No. 92-1364, 1992 WL 335442 (D.D.C. October 13, 1992) (declining to dismiss FTC request for monetary relief as a matter of law), *dismissed*, 853 F. Supp. 526 (D.D.C. 1994).

In all events, however, the ABA Antitrust Section has now formed a major committee to study, specifically, remedies reform. This group, I think it fair to say, is commonly thought to be skewed to the defense side of the antitrust bar. The prospect that the Antitrust Section's remedies committee may fashion proposals that will be more favorable to defendants than to consumers is not fanciful.

We would, I believe, be ill-advised simply to dismiss these review efforts as quixotic. There are conditions in our antitrust enforcement system that do warrant scrutiny. Identifying at least some of those conditions is not that difficult. The hard part is coming up with a proposal for change that is likely to make matters better, rather than worse. By that I mean "better" in the sense of affording redress to persons in fact injured by antitrust violations. Merely reducing the volume of antitrust litigation, or channeling the litigation into federal – rather than state – court is not necessarily a step forward. Those of us committed to protecting the consumer interest ought to be prepared to engage the "dark side" of the antitrust world in a constructive dialog that advances the core goal of antitrust: to promote consumer welfare. That is, to protect the consumer's interest in lower prices, higher quality and wider choice, and to protect the competitive process that produces these results.

The Blight of *Illinois Brick*

In my judgment, the single consumer-related doctrinal principle that most cries out for reform is the direct purchaser rule established by the Supreme Court's *Illinois Brick* decision. The direct purchaser doctrine denies those persons who in fact suffered the economic loss arising from price fixing and other anticompetitive conduct the opportunity to recover under the federal antitrust laws. At the same time, it holds out to, primarily, business establishments the opportunity to recover three times the overcharge that the business establishment paid – even though the overcharge was passed

on to the next distribution level. Indeed, business establishments are allowed to recover under federal law even though, typically, the business not only passed on the overcharge, but probably took its own profit in the form of a mark-up against costs that include the artificially inflated price that it paid. The antitrust claim that *Illinois Brick* recognizes offers a windfall in every sense of the term.

In the antitrust world, there is nothing closer to the word of God than the late Professor Areeda's treatise.[16] I will therefore quote from it:

> The obvious difficulty with denying damages for consumers buying from an intermediary is that they are injured, often more than the intermediary, who may also be injured but for whom the entire overcharge is a windfall. The indirect purchaser rule awards greatly overcompensate intermediaries and greatly undercompensate consumers in the name of efficiency in the administration of the antitrust laws.[17]

Those of us concerned about the intellectual integrity of antitrust ought to be embarrassed that this state of affairs is permitted to exist – and has for a generation now. At the same time, however, those of us concerned with protecting consumers ought to be proud that some – albeit not all – state courts have declined to adopt *Illinois Brick* under individual state antitrust laws,[18] and that various state legislatures have enacted "*Illinois Brick* repealer" statutes.[19] These judicial and legislative

---

[16]II Phillip E. Areeda, Herbert Hovenkamp & Roger D. Blair, *Antitrust Law* (2nd ed. 2000).

[17]*Id.* ¶346k at 378

[18]*See, e.g.*, *Banker's Glass Co. v. Pilkington, PLC.*, 202 Ariz. 481, 47 P.3d 1119 (App. 2002), *appeal docketed*, No. CV-02-0140-PR (Ariz. Sup. Ct.); *Comes v. Microsoft Corp.*, 646 N.W. 2d 440 (Iowa Sup. Ct. 2002); *Hyde v. Abbott Lab, Inc.*, 123 N.C. App. 572, 473 S.E. 2d 680 (1996), *review denied*, 344 N.C. 734, 478 S.E.2d 5 (Sup. Ct.1996). Other state courts, however, have imported *Illinois Brick* into state law. *See, e.g., Free v. Abbott Lab*, 176 F.3rd 298, 301 n.7 (5th Cir. 1999) (construing Louisiana antitrust law; citing cases); *Comes*, 646 N.W. 2d at 448 (citing cases).

[19]*See, e.g.,* N.Y. Gen. Bus. L. § 340(6). *See generally California v. ARC America Corp.*, 490 U.S. 93 (1989) (upholding state repealer statutes); ABA, *2002 Annual Review of Antitrust Law Developments* 207-09 (2003) (summary of recent indirect purchaser cases and legislative developments); Kevin J. O'Connor, *Is the Illinois Brick Wall Crumbling*, 15 Antitrust 34 (Summer

developments are, of course, better than simply acquiescing in the inequity of *Illinois Brick*. But they are not, I suggest, sound long-term solutions for effective antitrust protection of consumers. I say that because an enforcement regime that permits indirect purchasers to sue under state – but not federal – law loads on significant transactional costs, fosters non-merits-related satellite litigation and risks pressuring other areas of law in ways that could eventually be detrimental to consumers.

Let me illustrate this using recent litigation relating to the international sorbates cartel.

Fragmentation of the Sorbates Litigation

For the uninitiated, sorbates are a preservative used in a wide range of foods and beverages – bread, cheese, processed meat, fruit juices. You name it; the stuff is ubiquitous. You can count the number of major sorbates manufacturers worldwide on two hands, and still have several fingers left over. Those manufacturers formed a cartel that fixed sorbates prices worldwide. Several years ago, however, the DOJ's leniency program drove one cartel member to turn in the rest, thus exposing a 17 year international conspiracy.[20] The DOJ secured guilty pleas and, quite rightly, heavy fines,

---

2001) .

[20] *See, e.g., United States v. Eastman Chemical Co.*, No. CR 98-00302(SI) (N.D. Cal.); *United States v. Hoechst Aktiengesellschaft*, No. CR 99-0144(SI) (N.D. Cal.); *United States v. Nippon Gohsei*, No. CR 99-0261(SI) (N.D. Cal.); *United States v. Daicel Chemical Industries Ltd.*, No. CR 00-0392(SI) (N.D. Cal.); *United States v. Ueno Fine Chemicals Industry Limited*, No. CR-01-0018(SI) (N.D. Cal.). The cartel also resulted in criminal proceedings in Canada, and in recent civil fines by the European Commission. *See* European Commission, Press Release, *Commission Fines Four Companies in Sorbates Cartel a Total of 138.4 EUR Million* (October 2, 2003), at http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/03/1330|0|RAPID&lg=EN; *World Business Briefing Europe: Chemical Companies Fined*, New York Times, October 2, 2003, at W1, col. 3 (reporting fines of $161 million); Canadian Competition Bureau, *Penalties Imposed by the Courts,* at http://strategis.ic.gc.ca/epic/internet/incb-bc.nsf/vw Generated Inter-E/h_ct.1709e.html (reporting fines of Can.$ 7,390,000).

totaling $132,000,000.[21] Civil litigation, equally rightly, followed.

The direct purchasers – such as bulk wholesalers or food processors – did what direct purchasers are able to do: they sued in federal courts, and through the multidistrict transfer procedures,[22] the cases came to be consolidated in the Northern District of California before a single judge.[23] The direct purchaser litigation – covering a nationwide class – settled for $96,500,000, with some significant direct purchasers pursuing their own individual opt out litigation. But recall that we are dealing here with a ubiquitous substance, the overcharge on which probably was passed on, to one degree or another, to virtually the entire population. *Illinois Brick* denies all these victims the benefits of a single litigation to redress the diffuse – but nonetheless real, and, in the aggregate, large – economic injury that they suffered. In consequence, there has been a proliferation of state court cases on behalf of individual consumers.

Private class action antitrust litigation in three state courts – in California, Kansas and Tennessee – produced settlements for the benefit of consumers in those states of around $10,000.000 – 80% of which covered California indirect purchasers.[24] In addition, a class action

---

[21]U.S. Department of Justice, Antitrust Division, *Sherman Act Violations Yielding a Fine of $10 Million or More* (January 23, 2003), at http://www.usdoj.gov/atr/public/criminal/12557.htm.

[22]28 U.S.C. §1407.

[23]*In re Sorbates Direct Purchaser Antitrust Litigation*, Master File No. C98-4886 MMC (N.D. Cal.).

[24]*Sorbate Prices Cases*, J.C.C.P. No. 4073 (San. Fran. Co., Ca. Super Ct.); *William Foods, Inc. v. Eastman Chemical Co.*, No. 99C16680 (Johnson Co., Kan. Dist. Ct.); *Orlando's Bakery v. Nutrinova Specialties & Food Ingredients*, Case No. 99-560-II (Davidson Co., Tn. Ch. Ct.). The three settlements were:

California	$7,700,000
Kansas	1,025,000

was filed in Wisconsin state court, covering consumers in 11 states and the District of Columbia that had either what were considered "strong" *Illinois Brick* repealer statutes, or else case law permitting indirect purchaser suits.[25] That litigation was settled for $7,860,000.

To continue, another class case was filed in Tennessee state court, under Tennessee law, covering consumers in 35 states. These states lacked the sort of indirect purchaser law found in the 11 states covered in the earlier Wisconsin litigation.[26] New York is one of the states whose consumers were included in this last case – even though we have an indirect purchaser statute. I gather that the reason for this is that the state's law did not take effect until late 1998, and there seems to be reason to believe that, by then, the sorbates conspiracy had ended. Let me focus more specifically on this Tennessee case.

The Antitrust Bureau in New York, as well as those in a number of other states, began investigating the sorbates matter prior to the filing of this Tennessee state action. Once that case was filed, it came to our attention, and we opened a communications line with private plaintiff's counsel. We in New York expressed to them the view that, given the Antitrust Bureau's own interest in the matter, it would be undesirable for private counsel to seek to represent New York consumers. Despite that message, when plaintiff's counsel moved for class certification, they included New York as one of the states whose consumers the class representative proposed to represent.

This, in turn, led to our moving for permission to make an amicus filing in the Tennessee

---

Tennessee 1,450,000

[25] *Kelly Supply Co. v. Eastman Chemical Co.*, No. 99CV001528 (Dane Co., Wis. Cir. Ct.).

[26] *Freeman Industries LLC v. Eastman Chemical Co.*, Case No. C34355(L) (Sullivan Co., (Kingsport), Tn. Ct.) ("*Freeman*").

state case so that we could inform the Court that we intended imminently to file a New York state case. We further sought to convey, our desire that the Court not include New York consumers or other purchasers in any class that it might certify.[27] Other states made similar views known to the Tennessee court by letters. The sorbates manufacturers, of course, opposed class certification on lots of grounds, many of which revolved around the inescapable fact that the case had almost no connection to Tennessee, and that it was – they argued – inappropriate for a Tennessee court to take on the responsibility for adjudicating the claims of indirect purchasers in 35 other states. The Court accepted our amicus filing, and denied class certification altogether. That ruling is on appeal.[28]

Contemporaneous with arguing our amicus motion in Tennessee, we began a New York state court case against participants in the sorbates cartel.[29] After the Tennessee court denied class certification, the attorneys general in five other states – Idaho, Illinois, Nevada, Ohio, and Utah – also filed actions in their own state courts.[30]

Now, I do not much like doing something like what we did in the Tennessee sorbates case. However, I do not see what alternative we had. We might perhaps have moved to intervene in that

---

[27]*See* Proposed Memorandum of the New York Attorney General, as Amicus Curiae, in Opposition to So Much of Plaintiff's Motion For Class Certification as Seeks to Include New York Purchasers of Sorbates in the Class Sought to Be Certified (September 27, 2002), filed in *Freeman*.

[28]Order Regarding Plaintiff's Motion for Class Certification and Defendants' Motion for Summary Judgment (November 1, 2002), filed in *Freeman*, *appeal docketed*, Case No. E2003-00527-COA-R9-CV (Tenn. Ct. App.).

[29]*New York v. Daicel Chemical Industries, Ltd.*, Index No. 403878/02 (N.Y. Co. Sup. Ct.).

[30]*Idaho v. Daicel Chemical Industries, Ltd.*, Case No. CV-OC-0300114D (Ada Co., Id. 4th Jud. Dist. Ct.); *Illinois v. Daicel Chemical Industries, Ltd.*, No. 02 CH 19575 (Cook Co., Ill. Cir. Ct.); *Nevada v. Daicel Chemicals Industries, Ltd.*, No. 02-CV-6798 (Washoe Co., Nev. Dist. Ct.); *Ohio v. Daicel Chemical Industries, Ltd.*, No. 02CVH10-12064 (Franklin Co., Oh. Ct. C. P.); *Utah v. Daicel Chemical Industries, Ltd.*, No. 02091093 (Salt Lake Co., Ut. 3rd Jud. Dist. Ct.).

case to assert a claim on behalf of New York's indirect purchasers, which we – rather than private counsel – could prosecute in Tennessee. But I could not then – nor can I today – see good reason for us to ask a Tennessee state court to resolve antitrust and related claims pleaded under New York state law. Nor could I see the New York State Antitrust Bureau pleading a claim on behalf of New York consumers under Tennessee state law and pursuing it before a Tennessee state court. Furthermore, it is not entirely clear that the New York Attorney General could bring claims like this in another state's court. I will return briefly to this in a few minutes.

In any event, we were not able to persuade counsel in the Tennessee case of the soundness of our views. Thus, the alliance that we typically enjoy with plaintiffs' counsel broke down.

As noted, five other states, previously covered by the Tennessee case, similarly filed suit in their own state courts. The need for state attorneys general to file individual cases in six different states is not, I confess, the happiest prospect for me. State antitrust enforcers have thrived on marshaling their litigation resources and in working together in a single lawsuit.[31] They have – as I observed earlier – also litigated cooperatively with members of the private plaintiffs' bar in major antitrust cases. Where federal jurisdiction is available, this is our favored strategy to counter the often formidable forces of the defense bar representing cartel participants.

On the other hand, if state antitrust enforcers are denied a federal forum, the likelihood of any group of states commencing an antitrust lawsuit in the court of a single state is – as *Sorbates* illustrates – nil. The authority of a state court to hear such a case is itself problematic. The circumstances in which a state court may hear a case brought by the officials of another state could

---

[31] *See* Harry First, *Delivering Remedies: The Role of the States in Antitrust Enforcement*, 69 Geo. Wash. L. Rev. 1004, 1014 (2001) (noting that, to overcome resource limitations, state enforcement is characterized by cooperation with either other states or federal enforcers).

depend on whether particular claims are proprietary in nature, assert governmental interests, or may be said to seek enforcement of a state penal statute.[32] Moreover, the extent to which the developed body of case law applies where a state attorney general sues in a *parens patriae* or equivalent authority on behalf of consumers is debatable. I can assure you that I am not excited about using New York consumers as guinea pigs to test just how much jurisdiction the courts of another state have over state Donnelly Act claims,[33] or over the claims under the New York Executive Law or the General Business Law that we in the Antitrust Bureau often bring.[34] I strongly suspect that my counterparts in other states would reach the same conclusion.

As a result, for state attorneys general to pursue indirect purchaser cases like *Sorbates* will mean a bunch of cases brought in individual state courts. And, as *Sorbates* further suggests, the courts in which state attorneys general decide to sue will not necessarily be the same as those that you folks, as members of the private bar, choose for consumer class actions. Coordinating these individual cases in multiple jurisdictions is far more challenging than it is in a typical multistate federal litigation – if, indeed, it can be accomplished at all. Thus far, about all that we have

---

[32]*See, e.g., Pennhurst State School v. Estate of Goodhartz*, 42 N.J. 266, 200 A.2d 112 (1964); *State ex rel. Oklahoma Tax Commission v. Rodgers*, 238 Mo. App. 1115, 193 S.W.2d 919 (1946); *State ex rel. Duffy v. Arnett*, 314 Ky. 403, 234 S.W.2d 722 (Ct. App. 1950); *State v. Wilcox Construction Co.*, 100 N.Y.S.2d 508 (N.Y.C. Ct. 1950). *See generally Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 478, 481 N.Y.S.2d 597, 601 (1984) ("Typically, the courts refuse to adjudicate. . . claims in which the applicable law is penal in nature"); American Law Institute, *Restatement (Second) of Conflicts of Laws* §89 (1971) ("No action will be entertained on a foreign penal cause of action"); American Law Institute, *Restatement (First) of Conflicts of Laws* §610 (1934) ("No action can be maintained on a right created by the law of a foreign state as a method of furthering its own governmental interests").

[33]N.Y. Gen. Bus. L. §§340 *et seq*.

[34]*See* N.Y. Exec. L. §63(12); N.Y. Gen. Bus. L. §349.

coordinated in the six attorney general sorbates actions is the defendants' section of the case caption.

In all seriousness, however, this "balkanization" of related antitrust cases is not likely to benefit consumers. Look at what has happened in *Sorbates*. I don't think you have to go any further than to observe that – despite federal criminal convictions and various civil cases – consumers in more than 30 states are not currently the beneficiaries of any sorbates litigation. I do not believe that would be so if there were a federal forum available in which to prosecute indirect purchaser cases on a consolidated basis. Moreover, direct purchasers of sorbates settled for $96,500,000 in federal court. State indirect purchaser cases thus far settled have realized less than $20,000,000. I doubt that this ratio approximates the relative economic injury that the two groups suffered. Equally important, although the federal direct purchaser settlement was achieved long ago, the six state attorney general cases are still in litigation. The sorbates defendants have secured trial level dismissals in two of the six cases – Illinois, where the court ruled that the state attorney general lacks *parens* authority as a matter of Illinois state law,[35] and Utah, where the court found personal jurisdiction lacking.[36] In Nevada, the claims against the non-U.S. manufacturers were dismissed in a bench ruling, and the court has under advisement the remaining defendants' motion. Dismissal motions in other cases are pending. I find the lesson unmistakable: the more that *Illinois Brick* divides, the more that defendants will conquer.

Class Action Tensions

Now, you might suggest that perhaps there is a need for a greater commitment by both state

---

[35] *Illinois v. Daicel Chemical Industries, Ltd.*, 02 CH 19575, slip op. (Cook Co., Ill. Cir. Ct. September 23, 2003).

[36] *Utah v. Daicel Chemical Industries, Ltd.,* Case No. 020910931 MI, order (Salt Lake Co., Ut. 3rd Jud. Dist. Ct. July 28, 2003).

attorneys general and members of the private bar to pursue more state court cases on behalf of indirect purchasers, such as that represented by the *Sorbates* litigation. Certainly, more cases on behalf of indirect purchaser consumers is better than fewer cases. However, I have concerns about this as a long term strategy. I say that because of the substantial issues raised by the prospect of class actions in state courts covering nationwide – or even multistate – classes of indirect purchasers.

You are, no doubt, aware of recent congressional efforts to "federalize" class action litigation.[37] This past June, the House passed a bill called the "Class Action Fairness Act of 2003,"[38] which was designed to enable defendants to remove many state court class actions to federal court. The measure was defeated in the Senate two weeks ago.[39] That bill – which Attorney General Spitzer and other state attorneys general opposed[40] – had many problems, and deserved to be defeated. This effort to address class action litigation is not confined to antitrust cases, of course. However, at least some of the concerns driving the effort – while not limited to antitrust cases – are pertinent to evaluating whether state court indirect purchaser litigation is a viable long-term option for dealing with the limitations of *Illinois Brick.*

A core class action concern is the notion that state courts tend not to be an especially appropriate forum for adjudicating the claims of nationwide classes of victims – particularly where

---

[37]*Compare generally* John Conyers, Jr., *Class Action "Fairness" – A Bad Deal for States and Consumers*, 40 Harv. J. On Legis. 493 (2003), *with* John H. Beisner & Jessica Davidson Milke, *They're Making a Federal Case Out of It*, 25 Harv. J.L. & Pub. Pol'y 143 (2001).

[38]H.R. No. 1115, 108th Cong., 1st Sess. (passed June 12, 2003).

[39]*See, e.g., Class-Action Legislation Fails In Senate*, N.Y. Times, October 23, 2003, at http://www.nytimes.com/2003/10/23/politics/23CLAS.html.

[40]*See* Letter from Attorney General Eliot Spitzer and Attorney General W.A. Drew Edmondson to Hon. J. Dennis Hastert, Hon. Tom Delay and Hon. Nancy Pelosi (June 9, 2003).

the claim has no particular connection to the forum state in whose court suit is brought. Again, the *Sorbates* litigation is useful to illustrate the basic issue.

Why, after all, was a class action – covering consumers in 35 states other than Tennessee – filed in Tennessee state court, rather than in some other state court? There was only one connection: one of the defendants had its corporate headquarters in Tennessee, although even that defendant's manufacturing and shipping operations were located outside of Tennessee. The rest of the cartel members were non-U.S. entities and lacked any meaningful connection to Tennessee. The presence of one participant's corporate headquarters meant that employees of other cartel participants came to Tennessee from time to time, although whether those visits were in furtherance of the conspiracy is probably a subject of dispute. Thus, Tennessee had an arguable interest in the matter, although hardly a compelling one.

Recall, however, that there also was a sorbates class action in Wisconsin covering consumers in 11 states and the District of Columbia. So far as I know, the sorbates conspiracy had no particular connection at all to Wisconsin. At the same time, because all the sorbates conspirators, save one, were non-U.S. corporations – and because the impact of the conspiracy spread throughout the country – it is not especially easy to identify any individual state with an interest in the conspiracy that clearly prevails over that of many other states.

In these circumstances, it is a fair question to ask whether a state court should assume jurisdiction to adjudicate the antitrust claims not simply of that state's consumers, but also of consumers nationwide, or even in a multistate group. Moreover, if the conclusion is that the exercise of jurisdiction is appropriate, it is also fair to ask what substantive law that state court should apply,

and whether the same state law may properly be applied to consumers of many different states.[41] As a state enforcer, I will tell you that I was not keen about the idea of having Tennessee law determine the rights of New York consumers against the sorbates cartel participants.

In the antitrust context, these kinds of difficult class action issues are a direct by-product of *Illinois Brick*. Absent the indirect purchaser bar rule, I think most consumer antitrust cases – whether brought by you as private plaintiff's counsel or by state enforcers – would be filed in federal court under federal law, with pendent state antitrust claims. That is, after all, what happened in the years immediately before *Illinois Brick*. I also believe that consumers would be better served if their cases proceeded in federal court, where they could be managed on a consolidated basis and heard with direct purchaser cases.

Accomplishing this, however, means dealing with *Illinois Brick* – so as to permit filing the case in federal court to begin with – not fiddling around with class action procedures generally. For example, permitting an antitrust class action pleaded under state law in state court to be removed to federal court doesn't answer whether nationwide class treatment can be granted and, if so, whether consumers' rights may properly be determined under the law of a single state. Furthermore, if state court antitrust class actions by indirect purchasers were removable – and then able to be transferred

---

[41] *See generally BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) (punitive damage award in Alabama action could not properly be based on transactions in other states); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (Kansas could not properly apply its law to claims of class members that lacked a nexus to Kansas); *City of St. Paul v. FMC Corp.*, 1991-1 Trade Cas. (CCH) ¶69,305 (D. Minn. 1990) (declining to certify nationwide class of indirect purchasers, and limiting class to Minnesota residents); *OCE Printing Systems USA, Inc. v. Mailers Data Services, Inc.*, 760 So.2d 1037 (Fla. Ct. App. 2000) (declining to certify three nationwide classes under Florida antitrust law); James R. Safley & Bethany D. Krueger, Shutts *Meets the Baby Shermans: Considerations Affecting Choice of Federal or State Court for the Prosecution of Antitrust Class Actions*, 2 Sedona Conf. J. 97 (2001).

and managed on a consolidated basis with the direct purchaser cases – we still would be left with the question what to do with litigation once pretrial is completed. As you know under the multidistrict statute and the Supreme Court's *Lexecon* case, transfer is for pretrial purposes only.[42] The cases must be remanded to the transferor court for the trial itself. Therefore, unless Congress is prepared to amend the multidistrict transfer statute to overturn *Lexecon*, we would have the direct and indirect purchaser cases consolidated in federal court for pretrial, but not trial, purposes. To suggest that there is a certain lack of efficiency to such a situation is to belabor the obvious.

Satellite Litigation Over Substantive "Work-Arounds"

Illinois Brick also has given rise to satellite litigation over substantive claims. How many of you have ever responded, in an antitrust case, to an "end-around" argument made by defendants? Indirect purchasers cannot sue under the Sherman Act. And perhaps there is no state *Illinois Brick* repealer. So, those of us representing consumers, quite properly, plead claims under a state unfair trade practices statute, or we allege common law claims of unjust enrichment, restitution or disgorgement.[43] The defense response is "end- around." These non-antitrust claim, so the argument goes, are simply an "end around" *Illinois Brick's* indirect purchaser bar. Just as *Illinois Brick* bars the indirect purchaser's claim for antitrust purposes, so too the unfair trade practices or common law claims are said to be subject to dismissal.

---

[42]*See* 28 U.S.C. § 1407(a); *Lexecon, Inc. v. Milberg, Weiss, Bershad, Hynes & Lerach*, 523 U.S. 26 (1998). There is, however, an exception for state attorney general *parens* cases brought under 15 U.S.C. §15c. *See* 28 U.S.C. § 1407(h).

[43]*See generally Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) (a statutory grant of equitable jurisdiction "is not to be denied or limited in the absence of a clear and valid legislative command"); *FTC v. Mylan Laboratories, Inc.*, 62 F. Supp. 2d 25, 36-37, *modified*, 99 F. Supp. 2d 1, 4-5 (D.D.C. 1999).

More specifically, *Illinois Brick* is argued to be a policy decision grounded largely in the notion that affording damages to indirect purchasers would be unduly complicated and speculative. If one accepts those considerations as determinative, then, arguably, they apply regardless of what the pleaded claim is called. As one court put it in dismissing a non-antitrust indirect purchaser claim: "[t]his is the same claim with a different label."[44] Some courts have, therefore, accepted this defense position.[45]

I think this is a wrong result. It's not especially uncommon for a particular course of conduct to give rise to multiple theories of liability.[46] When that occurs, to resolve whether a particular claim is legally sufficient, courts typically analyze the theories presented individually – based on statutory language or legislative intent, or on the specific elements of the common law claim. This, I suggest, is the proper approach here.[47]

---

[44]*Blewett v. Abbott Laboratories*, 86 Wash. App. 2d 782, 938 P. 2d 842, 846 (Wash. Ct. App. 1997).

[45]*See, e.g.*, *Berghausen v. Microsoft Corp.*, 765 N.E. 2d 592, 596 (Ind. Ct. App. 2002); *Abbott Laboratories, Inc. v. Segura*, 907 S.W. 2d 503, 505-07 (Tex. Sup. Ct. 1995). *See also Vacco v. Microsoft Corp.*, 260 Conn. 59, 793 A.2d 1048, 1067 (Sup. Ct. 2002) (policy considerations underlying *Illinois Brick* support conclusion that indirect purchaser may not sue under Connecticut unfair trade practices act).

[46]See*, e.g.*, *United States v. Azzarelli Construction Co.*, 612 F.2d 292, 298 (7th Cir. 1979) (antitrust laws do not constitute the exclusive remedy for anti-competitive conduct, or preclude prosecution under the federal mail fraud statute). *Compare FTC v. Cement Institute*, 333 U.S. 683, 694-95 (1948) ("the Sherman Act and the Trade Commission Act provide the Government with cumulative remedies against activity detrimental to competition. Both the legislative history of the Trade Commission Act and its specific language indicate a congressional purpose, not to confine each of these proceedings within narrow, mutually exclusive limits, but rather to permit the simultaneous use of both types of proceedings"); *Blake v. Abbott Laboratories*, 1996 WL 134947 (Tenn. Ct. App. 1996).

[47]*See, e.g.*, *In re Cardizem CD Antitrust Litigation*, Master File No. 99-MD-1278, MDL No. 1278, Order No. 70, slip op. at 28 (May 23, 2003) ("this court is not convinced by Defendants'

Accordingly – as long as *Illinois Brick* is the law – you and I will continue to argue that the indirect purchaser bar rule should not be extended to non-antitrust claims. Protecting consumers in the face of this wooden doctrine makes it imperative that we continue to press alternative, non-antitrust claims.

Nonetheless, the need to pursue what I call "work-around" claims troubles me. First of all, the claims lack treble damages and to that extent, don't adequately replace the antitrust claim. Second, as an intellectual matter, I think we ought to analyze conduct having competitive consequences from an antitrust perspective, and not from perspectives developed in different contexts. Put another way, taking what is plainly an antitrust problem and analyzing it under the rubric of, say, unjust enrichment can result in strained application of the traditional elements of the common law claim, and can produce not only fuzzy thinking, but questionable results. Over time, that is not a good way for law to develop.

Thus, although able plaintiffs' attorneys have found creative substitutes to overcome *Illinois Brick*, this is not a state of affairs that I find all that satisfying long term. Errors tend to beget errors, and nowhere is that more apparent than in New York if we look at how indirect purchasers fare here.

New York-Unique Conditions

After the Supreme Court decided *Illinois Brick*, one New York trial level decision – *Levine*

---

argument that federal and state antitrust laws lay waste to common law claims of unjust enrichment"); *Ciardi v. F. Hoffman-LaRoche*, 762 N.E. 2d 303 (Mass. Sup. J. Ct. 2002) (indirect purchasers may sue under Massachusetts' little FTC Act, but not under the state's antitrust law); *Mack v. Bristol-Myers Squibb Co.*, 673 So.2d 100 (Fla. Dist. Ct. App. 1996) (indirect purchasers may sue under Florida's deceptive and unfair trade practices act).

v. Abbott Labs[48] – adopted the indirect purchaser bar rule as a matter of New York state antitrust law. *Levine* was appealed to the First Department, and the Antitrust Bureau under one of my predecessors filed an amicus brief in support of reversal.[49] The case settled before the Appellate Division ruled. *Levine*, however, provided the impetus for New York's *Illinois Brick* repealer statute, which became effective in December 1998.[50]

But the defense bar quickly found a way to gut the new repealer statute. New York, as many of you undoubtedly know, has a quirky class action provision – CPLR §901(b). Under that law, a claim providing for a "penalty" may not be maintained as a class action.[51] If you look at the legislative history of this provision, there simply is no doubt about what the New York legislature intended. The idea was to preclude class actions where a statute imposed an automatic monetary sanction once the statutory violation was proven, regardless of whether or not the victim could demonstrate any actual injury. The federal Truth In Lending Act[52] – which sets a fixed, per violation, amount – was held out, in the legislature, as a prototypical example of such a statute.[53] We know

---

[48]*Levine v. Abbott Labs*, Index No. 117320/95 (N.Y. Co. Sup. Ct. Nov. 25, 1996), *appeal withdrawn*, 257 A.D.2d 978, 685 N.Y.S.2d 384 (1st Dept. 1999) ("*Levine*").

[49]Brief of the State of New York as Amicus Curiae (November 20, 1997), filed in *Levine*.

[50]N.Y. L.1998, c. 653, §1, codified as Gen. Bus. L. §340(6).

[51]NY CPLR §901(b) provides that, "[u]nless a statute creating or imposing penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action."

[52]15 U.S.C. §1640(e).

[53]*See* Notice of Motion, Affidavit and Exhibits of the Attorney General of the State of New York in Support of Motion to Participate as Amicus Curiae (May 31, 2002), at 36-39, filed in *Cox v. Microsoft Corp.* (N.Y. Ct. App.) ("*Cox Amicus*").

for sure that the Legislature was not trying to block antitrust treble damage awards in class actions brought under the state Donnelly Act. We know that because, at the time that this class action "penalty" limitation was enacted, New York did not even have a treble damage antitrust provision.[54]

Nevertheless, in two decisions issued in January 2002 – *Asher* and *Cox*[55] – the defense bar persuaded two First Department panels that §901(b) precludes bringing a treble damage Donnelly Act action as a class action. Both the Appellate Division and the New York Court of Appeals denied permission to appeal. We supported the plaintiffs with amicus briefs in both the First Department and the Court of Appeals, but our efforts were unavailing.

Asher and *Cox* pretty much denude New York's *Illinois Brick* repealer of practical impact. It will be a rare indirect purchaser case that will be pursued as an individual action. Frankly, I believe that, for this state's legislature to enact an indirect purchaser statute, and for the state's courts then to bar class actions under the law – makes New York law look silly to the antitrust bar. This state of affairs should not exist in the nation's premier commercial center. Consequently, I take comfort that the New York Assembly has passed a bill to permit state antitrust class actions.[56] I hope that the State Senate similarly adopts the measure so that it may become law.

---

[54]*See* N.Y. L.1975, ch. 333, §1 (effective July 1, 1975); *Cox Amicus* at 35, 40-44.

[55]*Asher v. Abbott Labs*, 290 A.D. 208, 737 N.Y.S.2d 4 (1st Dep't), *appeal dismissed*, 98 N.Y. 2d 728 (2002); *Cox v. Microsoft Corp.*, 290 A.D. 2d 206, 737 N.Y.S.2d 1 (1st Dep't), *appeal dismissed*, 98 N.Y.2d 728 (2002). Trial level decisions in the New York state courts are to the same effect. *See Lennon v. Philip Morris Companies, Inc.*, 189 Misc.2d 577, 734 N.Y.S.2d 374 (N.Y. Co. Sup. Ct. 2001); *Rubin v. Nine West Group*, 1999-2 Trade Cas. (CCH) ¶ 72,714 (Westchester Co. Sup. Ct. 1999); *Russo & Dubin v. Allied Maintenance Corp.*, 95 Misc. 2d 344, 407 N.Y.S.2d 617 (N.Y. Co. Sup. Ct. 1978); *Blumenthal v. American Society of Travel Agents, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,530 (N.Y. Co. Sup. Ct. July 5, 1977).

[56]N.Y. Bill No. A.05158 (2003-04 Reg. Sess.) (amending Gen. Bus. Law §340 to create subpart (7), authorizing class actions).

Meanwhile, as a New York specific work-around for the antitrust class action barrier, plaintiff's counsel have sustained under the State's "little FTC Act" – Gen. Bus. L. §349[57] – claims that cannot be pleaded as antitrust class actions.[58] Thus, the *Cox* case is continuing as a class action under §349. All the news is not good, however, because the Second Circuit recently certified to the New York Court of Appeals the question whether §349 reaches indirect injury.[59]

The Antitrust Bureau takes the position that *Asher* and *Cox* apply only to private Donnelly Act cases, which require class certification under Article 9 of the CPLR. We will, therefore, continue to represent consumers under authority available specifically to the Attorney General, independent of the CPLR's class action provisions.[60] It is, however, no secret that the State

---

[57]Section 349(a) provides, in pertinent part, that "[d]eceptive acts or practices in the conduct of any business, trade or commerce, or in the furnishing of any service in this state are hereby declared unlawful."

[58]*Cox v. Microsoft Corp.*, Index No. 105193/00, slip op. at 7 (N.Y. Co. Sup. Ct. July 21, 2003).

[59]*Blue Cross and Blue Shield of New Jersey, Inc. v. Philip Morris USA, Inc.*, 344 F.3d 211 (2nd Cir. 2003).

[60]In state antitrust matters, the New York Attorney General has *parens patriae* or equivalent authority both under common law and by statute. As common law authority, *see, e.g., Alfred L. Snapp & Sons, Inc. v. Puerto Rico*, 458 U.S. 592 (1982); *Late Corporation of the Church of Jesus Christ of Latter Day Saints v. United States*, 136 U.S. 1, 57 (1890); *Finger Lakes Health Systems Agency v. St. Joseph's Hospital*, 81 A.D.2d 403, 407 (3rd Dept. 1981); *New York v. New York City Conciliation and Appeals Board*, 123 Misc.2d 47, 49 (N.Y. Co. Sup. Ct. 1984). For statutory authority, *see*: (a) N.Y. Exec. L. §63(1) (empowering the Attorney General to "[p]rosecute and defend all actions and proceedings in which the state is interested") and §63(12) (providing that the Attorney General may seek, "in the name of the people of the state of New York . . . restitution and damages" from persons engaged in repeated or persistent "fraudulent or illegal" acts); and (b) N.Y. Gen. Bus. L. §§340, 342 and 349. The courts have recognized these statutes as providing the "functional equivalent" of *parens patriae* authority. *In re Cardizem CD Antitrust Litigation*, Master File No. 99-MD-1278, MDL No. 1278, 2003 WL 22407160 at *13 (E.D. Mich. October 10, 2003) (citing §§63(1), 340, 342 and 349); *In re Lorazepam & Clorazapate Antitrust Litigation*, 205 F.R.D. 369, 386 (D.D.C. 2002) (citing §63(12)). For federal antitrust claims, *see* 15 U.S.C. §15c; *Georgia*

Antitrust Bureau lacks the resources to investigate and prosecute all the competitive matters that raise colorable antitrust claims. The loss of private attorneys general that *Asher* and *Cox* have brought about is, therefore, of concern. We will try, where we can, to help the private plaintiffs' bar to overcome these cases.

Detrebling

I wish to discuss one other unrelated damages issue that has quickly emerged as a subject of discussion. At the August ABA antitrust meetings, the DOJ floated the notion that perhaps those granted amnesty under its leniency program should be exposed only to single, not treble, damages.[61] Last week, Senators DeWine and Kohl introduced a detrebling proposal as part of a bill known as the "Antitrust Criminal Penalty Enhancements and Reform Act of 2003" – S.1797.[62] The AAI recently commented on a virtually identical unintroduced *proposed* bill, and that letter is up on the AAI website.[63] I will highlight several issues raised by S.1797. I refer those interested in the subject to the AAI letter for more.

Now, I believe that the DOJ's leniency program is a good thing for antitrust – and for

---

v. Pennsylvania R.R., 324 U.S. 439 (1945).

[61]*See* R. Hewitt Pate, Vigorous and Principled Antitrust Enforcement: Priorities and Goals, Speech before the Antitrust Section of the American Bar Ass'n (August 12, 2003), at http://www.usdoj.gov/atr/public/speeches/201241.htm.

[62]Antitrust Criminal Penalty Enhancements and Reform Act of 2003, Sen. No. 1797, 108th Cong., 1st Sess. (introduced October 29, 2003) ("S.1797").

[63]Letter from Robert H. Lande and Albert Foer to Hon. Mike DeWine, Hon. Herbert H. Kohl, Hon. F. James Sensenbrenner, Jr., and Hon. John Conyers, Jr. (October 20, 2003), at http://www.antitrustinstitute.org/recent2/277.pdf.

consumers.[64] A decade of experience under the program does suggest that the opportunity for amnesty destabilizes cartels, and, equally important, drives participants to turn in their co-conspirators rather than risk having another cartel participant avail itself of that opportunity. The DOJ thus has a better opportunity to detect cartels, and to prosecute and convict their participants. Increased detection, prosecution and conviction translates into an increased ability for victims to recover for overcharges suffered. Thus, amnesty from criminal liability has proven to be an appropriate means to promote antitrust enforcement, both criminally and civilly.

But, of course, the cartel participant who turns "state's evidence" is still subject to civil damage exposure. The issue now raised is whether reducing civil damage exposure might make the leniency program even more effective. I take the underlying assumption to be that, there is some body of cartel participants out there who decline to seek amnesty. They make that choice because they would rather take the chance that the cartel will go undetected, than run the exposure to a civil treble damage award that is likely to accompany turning in their cohorts. It's pretty hard to imagine what empirical evidence might be offered on the point. Therefore, I would like to hear what DOJ criminal antitrust officials – and perhaps members of the defense bar – can say publicly to support this proposition, recognizing that the information available may be only anecdotal.

At the same time, I think it fair to ask whether there is a significant downside to a detrebling approach so long as one retains the rule of law making all cartel members, other than the amnesty recipient, jointly and severally liable for all the damages resulting from the conspiracy? If we accept that as an enduring principle, then those cartel members who do not receive amnesty remain liable

---

[64] *See* Corporate Leniency Policy at http://www.usdoj.gov/atr/public/guidelines/0091.htm; Leniency Policy for Individuals, http://www.usdoj.gov/atr/public/guidelines/0092.htm.

for three times the damages caused by the conspiracy, and what the plaintiff has lost is the opportunity also to subject the company granted amnesty to the treble damage multiplier.

This idea strikes me as worth thinking about, although like much of life, the devil's in the details. So, let's take a quick look at S.1797.

First, the bill does more than just detreble damages. Section 103(a) provides that damages recoverable from an amnesty recipient "shall not exceed that portion of the actual damages sustained by such claimant which is attributable to the commerce done by the [amnesty recipient] in the goods or services affected by the violation."[65] As I read that provision, it would not only detreble, but also relieve the amnesty recipient of responsibility for any damages attributable to the sales or other acts of co-conspirators. In other words, the provision impairs the principle of joint and several liability. Accordingly, if the antitrust violation is such that there are no damages attributable to sales by the amnesty recipient, then there will be no civil damages at all. That scenario sounds unlikely, but it could happen in some market allocation arrangements.

Second, the provision would apply not only to Sections 1 and 3 of the Sherman Act, but also to violations of "any similar State law . . . ."[66] So, the proposed bill raises preemption considerations.

Third – and this one's on the good side – in order for the amnesty recipient to achieve this damage relief, the court in which the civil action is pending will have to determine that the amnesty recipient "has provided satisfactory cooperation to the claimant . . . ."[67] The proposal specifies the

---

[65]S.1797 §103(a).

[66]*Id.*

[67]*Id*. §103(b).

sort of cooperation that will be required, which includes: (1) providing "a full account" of all potentially relevant facts; (2) furnishing documents, "wherever they are located"; (2) submitting to interviews, depositions, and testimony; and (3) "responding completely and truthfully, without making any attempt either falsely to protect or falsely to implicate any person or entity, and without intentionally withholding any potentially relevant information . . . ."[68] Plainly, this sort of cooperation obligation would be a good thing for civil enforcement. The opportunity to get the motivated cooperation of a cartel participant is not something to be lightly dismissed.

I am, nonetheless, troubled by the fact that the cooperation language in the S.1797 differs in various respects from that which the DOJ has released publicly in its model cooperation provision.[69] I doubt that any different level of cooperation is intended. However, insofar as there are language differences between the kind of cooperation that the amnesty recipient owes to the civil plaintiff, compared to that owed to the DOJ, seeds of confusion and uncertainty are planted. Thus, it would be desirable to have as near identical language as possible, and probably also an express provision declaring that the degree of cooperation owed to the civil litigant will not be less than that owed to the DOJ.

Finally, I am concerned about what happens if a company that receives amnesty turns out to be the only cartel member with the financial wherewithal to discharge a treble damage award based

---

[68] *Id.*.

[69] *See* Gary R Spratling, *Making Companies An Offer They Shouldn't Refuse* (February 16, 1999), at 16, presented at The Bar Association of the District of Columbia's 35th Annual Symposium on Associations and Antitrust, at http:// www.usdoj.gov:80 /atr/ public /speeches/ 2247.htm; Gary R. Spratling, *The Corporate Leniency Policy: Answers to Recurring Questions* (April 1, 1998), presented at the ABA Antitrust Section 1998 Spring Meeting, at http://www.usdoj.gov/atr/public/speeches/1626.htm.

on all the overcharges resulting from the conspiracy. Antitrust cases often take substantial time to resolve, and the financial condition of industry participants can change, particularly if cartel members plead guilty, or are convicted, and subject to substantial penalties. It does seem to me problematic to give the amnesty recipient damage relief if it means exposing cartel victims to the risk that the remaining cartel members will be unable to discharge the conspiracy's damage liability.

S.1797 does not address this situation at all. My preliminary thoughts are that the amnesty recipient should remain subject to full treble damages, and to joint and several liability, if remaining cartel members cannot discharge the damages assessed against them. In other words, an amnesty recipient should have the opportunity to reduce its damage exposure, but no assurance going in of realizing that result. A company that is considering whether to provide full cooperation to the DOJ to begin with could well find it tolerable to offer that same cooperation to civil plaintiffs in exchange for the opportunity – but not the certainty – of significant civil damage relief. This would, after all, be more than the amnesty recipient has today.

I have highlighted only a handful of issues that S.1797 presents. Recognizing how long I have already taken, I propose to conclude.

Conclusion

The message that I want to take away is that it would be a mistake generally to tune out antitrust "reform" efforts – such as those represented by the Modernization Commission and the Antitrust Section's remedies committee. Tuning them out liberates those who would weaken antitrust protections for consumers and who would, instead, move the law in directions that favor business interests.

Concerning *Illinois Brick* specifically, I believe that repealer statutes and judicial rulings

upholding indirect purchaser claims – either under state antitrust laws, or under other state consumer protection acts or the common law – have created an environment that business interests themselves regard as undesirable. The perceived complexity that *Illinois Brick* sought to avoid has come to exist anyway. Further, the existence of direct and indirect purchaser claims in different jurisdictions suggests a damage exposure that at least equals, and may even exceed, that presented if *Illinois Brick* were not law.[70] And, our current system of both federal and state litigation generates transactional costs that also probably exceed those that would arise absent *Illinois Brick.*

For these basic reasons, I believe we are at a juncture where it may be possible to banish *Illinois Brick* from our antitrust landscape. The risk, however, is that something even worse will emerge. That's the result that we need to avoid, and the way to maximize our ability to accomplish that goal is to engage those who seek antitrust reform, and to make sure that the voices of consumers are heard.

Similar considerations apply to detrebling. It's not so clear that the DOJ leniency program needs this additional incentive. On the other hand, there would be an undeniable benefit if civil enforcers were able to get ready access to the same facts that the amnesty recipient provides the DOJ. Accordingly, I believe there is the kernel of an idea here that ought to be vetted. We should strive to focus discussion on devising means to facilitate making the amnesty recipient's information available for the benefit of consumers without jeopardizing damage recoveries. What we certainly want to avoid is letting detrebling turn into a platform for those who would eliminate treble damages altogether, or for those who would eliminate joint and level liability for each conspirator. These are

---

[70] *See In re Lorazepam & Clorazepate Antitrust Litigation*, 289 F.3d 98 (D.C. Cir. 2002), (denying petition to review certification of a direct purchaser class after federal, state and private enforcers secured settlement on behalf of indirect purchasers).

pillars for protecting consumers. We should resist any effort to topple them.[71]

[71]Indeed, Professor Robert Lande has argued that, bearing in mind a variety of discount factors that could be applied, a treble damage award accomplishes a sort of "rough justice" that enables an antitrust victim to recover what are much closer to the single, actual damages suffered. Robert H. Lande, *Are Antitrust Treble Damages Really Single Damages*?, 54 Ohio St. L.J. 115 (1993). *See generally* FTC Policy Statement, *supra* n. 14 at n.13 (noting the lack of empirical evidence establishing the adequacy of damage awards in antitrust cases, and citing authorities debating the matter).