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The American
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COMMENTS OF THE AMERICAN ANTITRUST INSTITUTE

WORKING GROUP ON REMEDIES

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INTRODUCTION

These are the comments of a Working Group on Remedies established by the American Antitrust Institute for purposes of responding to the AMC's request for public comments. These comments reflect a consensus of the Working Group, but it should not be assumed that all agree with every statement or position herein. The Working Group is chaired by Michael Freed (Much Shelist Freed) and the other members are Joseph Bauer (University of Notre Dame), Patricia Connors (Florida OAG), Eugene Crew (Townsend Townsend & Crew, Jonathan Cuneo (Cuneo, Waldman, Gilbert & LaDuca), Albert Foer (AAI), Robert Lande (University of Baltimore), James Langenfeld (LECG), Daniel Mogin (Mogin Law), Kevin O'Connor (Lafollette Godfrey & Kahn), and Bernard Persky (Goodkind, Labaton, Rudoff & Sucharow LLP), with additional assistance from Jean Janes (Much Shelist Freed), Daniel Small (Cohen Milstein Hausfeld & Toll), and Robert Wozniak (Much Shelist Freed). We also thank Eleanor Fox (NYU) and Paul Sirkis (NYU) for preparing an annotated bibliography on antitrust remedies (prepared for the AAI conference on "Thinking Creatively about Antitrust Remedies" on June 21, 2005) which we attach.

A. TREBLE DAMAGES

1. *Are treble damage awards appropriate in civil antitrust cases?*

Yes. The antitrust remedies system must continue to promote the principal goals of antitrust: to deter anticompetitive conduct, adjusting for the fact that much illegal conduct is not detected, and to recover illegal gains from the violators and restore them to

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the victims.[1] Treble damage awards continue to serve these important goals, remain appropriate in civil antitrust cases, and should not be reduced.

Given the fact that cartels and other anticompetitive activities continue to occur, that recidivists are not uncommon, and that anticompetitive activities are becoming increasingly global in scope (perhaps in part to avoid penalties under U.S. law by facilitating conspiracies outside U.S. borders), it seems apparent that, in practice, the current treble-damages regime has actually resulted in sub-optimal deterrence. Indeed, some commentators argue persuasively that antitrust damage levels actually should be raised.[2]

The Working Group believes there should be no change in the availability of treble damages for civil antitrust cases. First, there is no evidence that overdeterrence is a problem. True treble damages awards are rare, even when all sources of damages and fine levels are combined.[3]

In reality, courts rarely, if ever, consider the numerous factors that should contribute to the damages calculation in order to achieve optimal deterrence for the damages from an antitrust violation. In addition to extracting the defendants' anticompetitive overcharge, the damages calculation also should include factors such as the "allocative inefficiency harms from market power," the "umbrella effects of market power" (where non-participants in the anticompetitive behavior nonetheless reap the benefits by being able to raise their prices right along with the violators), the reductive effects of the statute of limitations where illegal behavior is of long duration, uncompensated plaintiffs' attorneys' fees and costs, the uncompensated value of plaintiffs' time spent pursuing the case, the costs of the judicial system, and tax effects.[4] Damages also ought to reflect an adjustment for the time value of money (observing that the average cartel probably lasts 7-8 years, with an additional 4-plus-year lag before

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[1] Robert Pitofsky, *Antitrust at the Turn of the Twenty-First Century: The Matter of Remedies*, 91 GEO. L.J. 169, 170 (2002).

[2] *See* Robert H. Lande, *Why Antitrust Damage Levels Should Be Raised*, 16 LOY. CONSUMER L. REV. 329 (2004).

[3] *See id*. at 330-31 (stating that no one analyzing the decisions of neutral finders of fact has presented "a systematic pattern of evidence demonstrating that, overall, the current damage levels either constitute effective duplication or lead to overdeterrence.").

[4] *See id.* at 337-39 and n.37.

judgment),[5] and incorporate some multiple reflecting the probability of detection and proof.[6] As Judge Easterbrook wrote, "[M]ultiplication is essential to create optimal incentives for would-be violators when unlawful acts are not certain to be prosecuted successfully. Indeed, some multiplication is necessary even when most of the liability-creating acts are open and notorious. The defendants may be able to conceal facts that are essential to liability."[7] That damages awards typically omit these factors demonstrates that even supposed "treble damages" awards really are somewhat less.[8]

Second, a nominal "treble damages" award occurs only rarely, because most civil antitrust cases that survive summary judgment end in settlement. Settlement negotiations in such cases usually end up with plaintiffs asking for roughly single real damages and often settling for roughly nominal damages which are in reality one-third of true damages.[9] Thus, even with any criminal fines that might be added to the totals from private damages actions, defendants' total payouts rarely reach the true threefold level.[10] More typically, defendants might negotiate a settlement of nominal (as compared with actual) single damages with direct purchasers and negotiate a settlement of substantially less than actual nationwide damages with indirect purchasers. Add to this the fact that criminal fines often are negotiated down to 1 or 1 ½ times the supposed damages, and it is obvious that the damages awarded in antitrust cases neither duplicate remedies nor "overdeter" defendants, as critics of treble damages generally argue.[11]

The critics of treble damages awards in civil antitrust cases rely on a largely theoretical "piling on" argument that the availability of government fines, private direct purchaser litigation, and indirect purchaser litigation in states with Illinois Brick repealer statutes results in overdeterrence of potential antitrust violators. These critics view the treble damages regime from the wrong perspective, namely, that of the ex post liabilities

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[5] *See id*. at 337.

[6] *See* William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV. 652, 656-57 (1983).

[7] Frank Easterbrook, *Detrebling Antitrust Damages*, 28 J.L. ECON. 445, 455 (1985).

[8] *See* Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 OHIO ST. L.J. 115 (1993).

[9] *See* Lande, *supra* note 2, at 339.

[10] *See id*. at 340.

[11] *See id*. at 342-43.

faced by discovered cartel members. If deterrence remains an important goal of the antitrust laws, as it must, the proper perspective from which to evaluate treble damages in the context of the entire antitrust remedial scheme is from the perspective of a company contemplating forming or joining a price-fixing conspiracy, not from the perspective of those that have been caught after years of collecting the illegal benefits of their cartel activity.[12] From this perspective, a company weighing the probable additional profits it would obtain from cartel participation against the probable costs of being discovered and prosecuted might well decide the risk of penalties such as treble damages is not worth it.[13] Viewed *ex ante*, the current remedies scheme is more likely to have the desired deterrent effect.

Rather than compounding the penalties defendants face, the treble damages civil remedy serves a complementary role in relation to government remedies by encouraging private litigants to investigate and prosecute illegal cartel behavior. Victims of cartel conduct can supplement government enforcement of the antitrust laws in several ways, and in such high-profile cases as the *Brand Name Prescription Drugs* and *NASDAQ* litigation, have led the way to enforcement of the antitrust laws.[14] Private victims are likely to be among the first to learn of violations and may have better access to the evidence of those violations. Private lawsuits increase the volume of enforcement, and also shift the expense of enforcement away from government agencies, thus conserving precious public resources.[15] Further, as noted, the potential of having to pay treble damages to private litigants, plus attorneys' fees and costs, enhances the deterrent component of the antitrust laws.

Class actions that represent consumers are unlikely to occur with any frequency except on a contingent fee basis. This requires attorneys to calculate risks and potential

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[12] *See* John M. Connor, *Optimal Deterrence and Private International Cartels*, at 10 (draft, May 2, 2005).

[13] *Id*.

[14] *See* Arthur M. Kaplan, *Antitrust as a Public-Private Partnership: A Case Study of the NASDAQ Litigation*, 52 CASE W. RES. L. REV. 111, 130 (2001) ("[P]rivate and government cooperation produced the largest antitrust recovery in history, and revolutionized the organization and operation of the NASD and the Nasdaq National Market. It directly benefited more than one million investors who filed claims and shared in the $1.027 billion recovery, and indirectly benefited all investors by permanently reducing trading costs.")

rewards; to eliminate trebling or even to make trebling dependent on an after-the-fact decision by a judge (as Professor Hovenkamp proposed recently) would result in a dramatic reduction in the number of victims who would find representation.

2. *Should other procedural changes be considered to address issues relating to treble damage awards, such as providing courts with discretion in awarding treble (or higher) damages, limiting the availability of treble damages to certain types of offenses, or imposing a heightened burden of proof?*

No. These procedural changes are unnecessary and undesirable. Making treble damages discretionary would only inject additional uncertainty into the antitrust remedy regime, as courts struggle with the correct standard to apply to determine whether they should impose treble damages. There is no clear line between hard core and other horizontal arrangements. We've tried to articulate the line for decades, without success. Increasing the uncertainty of the value of a case will also reduce the number of cases brought on contingency fee and will make settlements more difficult.

Detrebling of non-criminal cases or non-hard-core cartels would be counterproductive because there would be virtually no deterrence left in the system. Such cases are not "easy" to find and in fact are usually more difficult to prove than hard-core violations. If damages are not multiplied, then a putative violator would calculate a course of action on the assumption that he would either get away with the violation unscathed or would, at most, have to pay back some of the gains and attorneys fees. Thus, even substituting prejudgment interest for trebling in these cases would lead to significant underdeterrence. This is especially true because the damages from the violation include allocative inefficiency harm, umbrella effects, and other factors not reflected in damage awards.

Limiting treble damages to certain types of offenses also is unnecessary, particularly if the underlying rationale is to discourage non-meritorious actions. The courts already have the means to eliminate lawsuits that rest on marginal foundations through the Supreme Court's ruling in *Matsushita Electric Industrial Co. v. Zenith Radio*

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[15] *See* Joseph P. Bauer, *Reflections on the Manifold Means of Enforcing the Antitrust Laws: Too much, Too Little, or Just Right?*, 16 LOY. CONSUMER L. REV. 303, 310 (2004).

Corp.[16], which has resulted in increased willingness to grant summary judgment to defendants in antitrust cases.[17] With this mechanism, courts can dismiss non-meritorious lawsuits long before they even need to reach the question of treble damages. Given the difficulty in investigating and proving antitrust actions, any higher burden of proof will give defendants free rein to implement anticompetitive conduct.

B. PREJUDGMENT INTEREST

1. *Should successful antitrust plaintiffs be awarded pre-complaint interest, cost of capital, or opportunity cost damages?*

The Working Group believes that optimal deterrence should be the ultimate goal of any antitrust remedy scheme. The correct perspective, again, is ex ante: a company contemplating an antitrust violation should assume that damages will accrue from the time the conspiracy is formed, *i.e.*, from the moment an intent to injure is put into play. Accordingly, damages awards for successful antitrust plaintiffs should be adjusted for inflation as a matter of course in order to achieve true treble damages and optimal deterrence.[18] Successful plaintiffs should also be awarded prejudgment interest, cost of capital or opportunity cost damages.[19]

2. *Are the factors used to determine when prejudgment interest is available set forth in 15 U.S.C. § 15(a) (1-3) appropriate? If not, how should they be changed?*

Under Section 4A of the Clayton Act, prejudgment interest may be awarded to a successful private plaintiff only where a defendant is guilty of bad faith delay. In view of this and because courts are reluctant to add interest on top of treble damages, it is not surprising that there are no reported cases where courts have awarded prejudgment interest applying the factors set forth in 15 U.S.C. § 15(a)(1-3). On the other hand, two

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[16] 475 U.S. 574 (1986).

[17] *See* Joseph P. Bauer, *The Stealth Assault on Antitrust Enforcement: Raising the Barriers for Antitrust Injury and Standing*, 62 U. PITT. L. REV. 437 (2001).

[18] *See* Lande, *supra* note 8, at 130-34 for a more complete discussion of why damages should be adjusted for the time value of money; *see also*, John M. Connor, *Optimal Deterrence and Private International Cartels* (May 2, 2005 Draft Paper); Lande, *supra* note 2, at 337.

district courts have adjusted antitrust damage awards to account for inflation, without requiring evidence of intentional delay, in order to properly compensate victims and promote deterrence, [20] but these unfortunately do not represent the norm.

The Working Group urges that Section 4A of the Clayton Act should be amended to require prejudgment interest starting from the time of the offense in addition to the trebling of damages. A less desirable result, but still an improvement, would be to follow the cases adjusting for inflation. As the court noted in *Law v. NCAA*, "[L]osses due to the decreased purchasing power of the dollar represent real losses to plaintiffs" and in antitrust cases, which can take many years to litigate, "[t]o deny a CPI adjustment would be to allow the [defendant] to profit from a wrong."[21]

Prejudgment interest on compensatory damages should remain available as an additional discretionary sanction to be applied where district courts find that a defendant has engaged in intentional delay. Without the threat of prejudgment interest, delaying judgment would in effect provide an antitrust defendant with an interest free loan and provide a strong incentive for the defendant to prolong litigation.[22]

C. ATTORNEYS' FEES

1. *Should courts award attorneys' fees to successful antitrust plaintiffs?*

Yes. Like treble damages, attorneys' fees under 15 U.S.C. §15 are awarded for the salutary purpose which Congress envisioned back in 1890 when the Sherman Act was enacted with those remedies included, and is still valid today: our economy is one of the least government regulated based largely on the premise that a market economy governed by competition rather than government regulation is the best way to maximize innovation, output and efficiency for the benefit of consumers. But there must be some

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[19] The measures of damages we have been discussing are all similar, but there are differences that could be important in specific circumstances.

[20] *See* Law v. NCAA, 185 F.R.D. 324, 347 (D. Kan. 1999); Concord Boat Corp. v. Brunswick Corp., 21 F. Supp.2d 923, 936 (E.D. Ark. 1998), *rev'd on other grounds*, 207 F.3d 1039 (8th Cir. 2000).

[21] 185 F.R.D. at 347.

[22] *See* Michael S. Knoll, *A Primer on Prejudgment Interest*, 75 TEX. L. REV. 293, 297 (Dec. 1996).

regulation of competition for our market economy to thrive and the best regulation we have consists of our antitrust laws, principally the Sherman Act.

The antitrust laws would not be an effective method of regulating and thereby preserving competition in our market economy, however, unless they are vigorously enforced and they would not even be adequately enforced without the availability of strong private remedies, *i.e.*, the prospect of recovery of treble damages and attorneys' fees by the successful antitrust plaintiff. There is no way the antitrust laws can be enforced throughout one of the largest economies in the world by the Department of Justice and Federal Trade Commission alone. Combined, they are the antitrust lawyer workforce equivalent of just one law firm the size of Sullivan & Cromwell.(The states add something important to the balance, but it appears that the same forces seeking elimination or severe reduction of private actions are also seeking to cut back on state antitrust enforcement as well.) Moreover, the main relief those agencies seek and obtain is either criminal and/or injunctive in nature, in essence admonishing the antitrust violator to cease and desist – to "go and sin no more." The prospect of an injunction, without disgorgement of past illegal gains to the victim, does almost nothing to deter the violator from engaging in the lucrative violation at least until the Government finally discovers the violation and gets a court to stop it.

Private damage actions are thus critical to a successful enforcement regime. The fact that about 90% of antitrust litigation is prosecuted by private victims seeking monetary relief is surely not lost on the financially astute corporate executive contemplating a violation. Microsoft, through its antitrust economist (Professor Kevin Murphy of the University of Chicago), stressed under oath to the District Court and the Court of Appeals during the remedies phase of *United States v. Microsoft* that "we should also be concerned that the system of remedies provides appropriate deterrence" and that "monetary sanctions typically provide a better tool for deterring anticompetitive behavior and for denying an offender the fruits of such behavior" than do Government imposed "conduct or structural remedies."

This brings us to the reason the private remedy (treble damages and attorneys' fees) constitutes the best method we have of minimizing antitrust violations – a reason well understood by Congress when it enacted the private remedy over a century ago and

by the Chicago School economist of today who specializes in predicting rational economic responses to a set of incentives or disincentives: In short, "nothing concentrates the mind" of a potential antitrust miscreant like the prospect of a jury verdict that requires him to pay treble damages and a reasonable attorneys' fee to his victim and may additionally offer a term in prison.

But such a prospect will not serve to deter the "rational" antitrust violator unless the violator is convinced the prospect is real, *i.e.*, that his victim has (or can obtain through a contingent fee arrangement with antitrust counsel) the wherewithal needed to finance what may be a 5-10 year litigation war, or more, against a wealthy and powerful opponent (who may have already left the victim financially disabled by its violations). For the private remedy to deter the wrongdoer with the credible threat of a costly prosecution by his victim, it has to provide the victim with the necessary incentive and wherewithal to take defendant on. As far as we know, no one has suggested that private antitrust enforcement would be viable in the absence of contingent fees, or that statutory damages less certain than treble damages and attorneys fees for the victorious plaintiff would generate a reasonable likelihood that potential plaintiffs in putative antitrust cases would be able to obtain representation. Thus, any attack on attorneys fees or treble damages should be viewed as an attack on the fundamental idea of private enforcement of the antitrust laws.

2. *Are there circumstances in which a prevailing defendant should be awarded attorneys' fees?*

Yes, defendants fees should be potentially available in the limited case of a frivolous suit as a sanction. Some will suggest that a successful plaintiff's recovery of attorneys' fees (and treble damages) might constitute "over- deterrence" that inhibits a firm from engaging in aggressive but lawful competition because of the added cost of defending against plaintiff's charges. But plaintiff must win before defendant can be assessed plaintiffs' attorneys' fees and there is no evidence that a rational defendant would be deterred from engaging in lawful competition by the mere prospect that a jury might return a unanimous verdict (required by Fed. R. Civ. P. 48) that defendant engaged in unlawful competition. In any event, to the extent there could be "over deterrence" resulting from a defendant's fear of liability to a successful plaintiff for a reasonable

attorneys' fee, any such imbalance can be easily rectified by allowing defendant to recover its attorneys' fees if plaintiff's action is proven "frivolous" under Rule 11 of the Federal Rules of Civil Procedure.

3. *In areas of law other than antitrust, how effective is fee shifting as a tool to promote private enforcement?*

The Working Group did not address this question in detail, but state consumer fraud laws are certainly one area where fee shifting provisions are an effective tool in promoting private enforcement.

D. JOINT AND SEVERAL LIABILITY, CONTRIBUTION, AND CLAIM REDUCTIONS

1. *Should Congress and/ or the courts change the current antitrust rules regarding joint and several liability, contribution, and claim reduction?*

No. Current antitrust law provides for joint and several liability for co-conspirators, bars contribution among defendants and provides for actual dollar claim reduction or judgment credit. The current rules thus promote the goals of deterrence, victim compensation, settlement, finality and judicial economy. There have been few, if any, reported instances of miscarriages of justice created by these rules. Further, the Supreme Court has determined that these issues are exclusively for Congress, not the courts to resolve.

As Judge Easterbrook wrote in *Paper Systems Inc. v. Nippon Paper Industries Co., Ltd.*,[23] "[j]oint and several liability is [a] vital instrument for maximizing deterrence." Further, Congress has neither expressly nor implicitly intended to create a right of contribution under the Sherman and Clayton Acts as neither those Acts nor their legislative history refers to contribution, and there is nothing to indicate any congressional concern with softening the blow on joint wrongdoers.[24] To the contrary, Congress has manifested its intent to punish past, and to deter future, unlawful conduct,

[23] 281 F.3d 629, 633 (7th Cir. 2002), (citing Lewis A. Kornhauser & Richard L. Revesz, *Sharing Damages Among Multiple Tortfeasors*, 98 YALE L.J. 831 (1989)).

[24] *See* Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981).

not to ameliorate the liability of joint wrongdoers.[25] Further, the federal courts are not empowered to create a federal common-law rule of contribution among antitrust wrongdoers, as it does not implicate the type of "uniquely federal interests" that necessitate formulation of federal common law. While Congress may have intended to allow federal courts to develop governing principles of law in the common-law tradition with regard to substantive violations of the Sherman Act, Congress did not intend to give courts similarly wide discretion in formulating remedies to enforce the Act or the kind of relief sought through contribution.[26] Likewise, the common-law did not allow contribution among joint tortfeasors. The common-law rule rested on the idea that when several tortfeasors have caused damage, the law should not lend its aid to have one tortfeasor compel others to share in the sanctions imposed by way of damages intended to compensate the victim.[27] On the other hand, the courts have enforced judgment sharing agreements entered between alleged joint wrongdoers.[28]

If courts had to allocate damages among the various defendants, the complexity of litigation would be expanded and the settlement process would be made more difficult because of the added element of uncertainty.

The current rules promote the policies of deterrence and finality and to a lesser extent recompense for injured parties. Further, the law favors settlement. Working together, the current antitrust rules regarding joint and several liability, contribution, and claim reduction provide incentives for early settlement at non-coercive levels.

2. *Is the evolution of rules regarding joint and several liability, contribution, and claim reduction in other areas of the law instructive in the context of antitrust law?*

No. Each area of substantive law is under girded by unique policy determinations. In antitrust, the rules regarding joint and several liability, contribution, and claim reduction are most often applied in the context of concerted anticompetitive actions. In the case of cartels, the success of the cartel is dependent on the interdependent actions of the members that will result in higher prices throughout the market; it makes sense to hold each member responsible for all the price rises in the market. This might or

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[25] *See id.*

[26] *See id.* at 640-46.

[27] *Id.*

[28] *See, e.g.*, In re Brand Name Prescription Drugs Antitrust Litig., Nos. 94 C 897, MDL 997, 1995-2 Trade Cas. (CCH) ¶71,091, 1995 WL 234521 (N.D. Ill. April 18, 1995).

might not be present for violations involving other areas of the law. The damages jurisprudence under Section 1 of the Sherman Act is carefully balanced to deter, punish and compensate those injured by concerted activity. It would undermine those policy goals to offer relief to such joint violators by ameliorating their liability for joint wrongdoing or complicating victim compensation.

E. REMEDIES AVAILABLE TO THE FEDERAL GOVERNMENT

1. *Should DOJ and/or the FTC have statutory authority to impose civil fines for substantive antitrust violations? If so, in what circumstances and what types of cases should such fines be available? If DOJ and/or the FTC are given such authority, how, if at all, should it affect the availability of damages awarded to private plaintiffs?*

No. The history and institutional structure of the DOJ and FTC, and the wide variety of anticompetitive behavior that they confront, both suggest that the addition of civil fines would be a complicated and unnecessary undertaking. The DOJ is mainly concerned with prosecuting civil and criminal antitrust violations in the courts. It would have to add an internal quasi-judicial function in order to determine violations and assess fines. The FTC arguably might be better suited than the DOJ to such a function, but the FTC's own statements about the limited circumstances in which it is institutionally suited to seek disgorgement, or other monetary remedies, suggests that the addition of administrative civil fines would not complement its primary purpose, which is to enjoin anticompetitive activity. Indeed, the FTC has endorsed the important complementary role that the private plaintiffs and state attorneys general serve in recovering damages, and has worked with them in many cases, including the recent Mylan litigation.[29]

Any discussion of change to available antitrust remedies must take into account the effect of that change on the other remedies available. Assuming that the DOJ and/or the FTC were given the authority to impose civil fines, any beneficial purposes of such

[29] *See* In re Lorazepam & Clorazepate Antitrust Litig., 202 F.R.D. 12, 17-21 (D.D.C. 2001) (holding that direct purchasers had standing to bring private treble damages action notwithstanding fact that FTC would recover overcharges on behalf of indirect purchasers).

civil fines would be vitiated by permitting the fine to offset damages awarded in other proceedings. The purpose of a fine is punitive, while the purpose of antitrust damages to private plaintiffs is primarily to compensate those injured by anticompetitive conduct.[30] The fine would have no punitive effect if it simply gave the violator a discount on its liability for civil damages.

In addition, the prospect that government intervention could affect the availability of damages awarded to private plaintiffs could significantly deter private actions, which are one of the primary means by which the antitrust laws are enforced. Congress clearly intended this important role for private litigants, providing treble damages and attorney fees so that aggrieved parties would serve as "private attorneys general" to protect the market from antitrust violations.[31] Federal agencies simply do not have the resources to litigate the large number of cases brought by the private bar.[32] It is highly unlikely that the FTC and DOJ would be allocated the additional resources necessary to take on the litigation that is handled by the private bar. Thus, any displacement of private remedies would reduce enforcement of the antitrust laws, and should be disfavored.

2. *Should Congress clarify, expand, or limit the FTC's authority to seek monetary relief under 15 U.S.C. § 53(b)?*

No. Important to the consideration of whether to clarify, expand, or limit the FTC's authority to seek monetary relief is the FTC's view that disgorgement is a tool it uses sparingly, and it does not have the resources or the institutional capability to seek redress in but a few cases. As the FTC has stated,

> The Commission continues to believe that disgorgement and restitution can play a useful role in some competition cases, complementing more familiar remedies such as divestiture, conduct remedies, private damages, and civil or criminal penalties. The competition enforcement regime in the United States is multifaceted, and it is important and beneficial that there

[30] The argument that the trebling of antitrust damages is punitive is refuted by evidence showing that plaintiffs on average do not recover more than their actual damages. *See* Lande, supra note 8, at 118.

[31] *See* Hawaii v Standard Oil, 405 U.S. 251, 262 (1972).

[32] *See* Stephen Calkins, *Corporate Compliance and the Antitrust Agencies' Bi-modal Penalties*, 60 LAW & CONTEMP. PROBS. 127, 156 (1997) (finding only ten civil Antitrust Division decisions published from 1980 to 1996, and only eight administrative competition complaints filed in the last seven years).

be a number of flexible tools, as well as a number of potential enforcers, available to address competitive problems in a particular case."[33]

As is clear from this statement, the FTC does not itself see an expanded authority to seek monetary relief as central to its mission. For example, it is unlikely to seek monetary relief where the calculation of defendant's profits is complex, or would result in a complicated claims process; these tasks are better undertaken by the private bar. On the other hand, the disgorgement remedy is a beneficial tool that the FTC has used well in cases where private plaintiffs were unlikely to bring suit, whether because of problems with class certification or damages, or fears of retaliation. In addition, the FTC Act is broader than the Sherman Act and the Clayton Act, and disgorgement actions can, at least in theory, assure some level of deterrence in a wider range of cases.

Case law on the disgorgement remedy available to the FTC under 15 U.S.C. § 53(b) shows that it is a remedy that the FTC has used sparingly, and the equitable nature of the remedy is such that it is one better defined through case law than by additional legislation. It really does not merit review until there has been greater experience.

F. PRIVATE INJUNCTIVE RELIEF

1. *Has the ability of states and private plaintiffs to seek injunctive relief under 15 U.S.C. 26 benefited consumers or caused harm to businesses or others? Please provide any specific examples, evidence, or analyses supporting this assessment. What would be the consequences if the availability of injunctive relief to states and private plaintiffs under 15 U.S.C. 26 were changed? Should standing to pursue injunctive relief under federal antitrust law be different for states than it is for private parties?*

Private enforcement of the antitrust laws serves a combination of purposes – it protects or compensates parties who have been injured by the antitrust violations of others; it serves to deter would-be violators, and thus importantly it serves the interests of consumers in maintaining vigorous competition and healthy markets; and it lessens the burdens and expenses that would otherwise be incurred by the federal enforcement agencies. The availability of preliminary and/or permanent injunctive relief under 15

[33] FTC, "Policy Statement on Monetary Equitable Remedies in Competition Cases," July 25, 2003, available at <http://www.ftc.gov/os/2003/07/disgorgementfrn.htm>.

U.S.C. § 26 is an important counterpart to the treble damages provision for the successful enforcement of the antitrust laws, Courts properly recognize that the proper application of injunctive relief will advance all of these objectives.

The availability of injunctive relief may well be essential for the firm whose competitive position, or indeed its very ability to stay in business, are threatened by unlawful, anticompetitive behavior. Limiting relief only to a later award of monetary relief does not adequately protect the public's interest in maintaining healthy competition. The interests of the business community and of consumers in safeguarding against the unduly expansive availability of injunctive relief are advanced by present-day standards for the grant of such relief. Because of the historically equitable history of injunctions, courts will grant preliminary injunctions only after balancing the harm to the defendant from the grant of the injunction against the harm that the plaintiff would suffer if the injunction were not granted, as well as the likelihood of the plaintiff's prevailing on the merits of the case and the public interest in the grant or denial of an injunction. Those business and consumer interests are further advanced by entrusting the grant of relief to the sound discretion of the district court, with appellate review for abuse of that discretion. Changes to the standards for the grant of injunctions, making them less freely available, would have a net adverse effect on consumer welfare.

2. *Are there currently sufficient safeguards (e.g., judicial discretion and the Cargill requirement that private plaintiffs establish antitrust injury) to limit injunctions to appropriate circumstances?*

The Commission should consider some relaxation in the antitrust injury and standing requirements for injunctive relief. While the Supreme Court suggested in *Hawaii v. Standard Oil* that somewhat more relaxed standards might be appropriate for injunctive relief, in *Cargill* the Court then limited any such differences. Standing rules in general have been animated in part by concerns for finding the "best plaintiff" or for protecting defendants against duplicative awards. But, as evidenced by the inapplicability of the Illinois Brick rule to indirect purchasers seeking only injunctive relief, these concerns are lessened, or even completely absent, in actions seeking injunctions.

G. INDIRECT PURCHASER LITIGATION

1. *What are the costs and benefits of antitrust actions by indirect purchasers, including their role and significance in the U.S. antitrust enforcement system? Please be as specific as possible.*

2. *What burdens, if any, are imposed on courts and litigants by the difficulty of consolidating state court actions brought on behalf of indirect purchasers with actions brought on behalf of direct purchasers, and how have courts and litigants responded to them? What impact, if any, will the Class Action Fairness Act of 2005 have in this regard?*

3. *Does Illinois Brick's refusal to provide indirect purchasers with a right of recovery under federal antitrust law serve or disserve federal antitrust policies, such as promoting optimal enforcement, providing redress to victims of antitrust violations, preventing multiple awards against a defendant, and avoiding undue complexity in damage calculations?*

4. *What actions, if any, should Congress take to address the inconsistencies between state and federal rules on antitrust actions by indirect purchasers? For example, should Congress establish Illinois Brick as the uniform national rule by preempting Illinois Brick repealer statutes, or should it overrule Illinois Brick? If Congress were to overrule Illinois Brick, should it also overrule Hanover Shoe, so that recoveries by direct purchasers can be reduced to reflect recoveries by indirect purchasers (or vice versa)? Assuming both direct and indirect purchaser suits continue to exist, what procedural mechanisms should Congress and the courts adopt to facilitate consolidation of antitrust actions by indirect and direct purchasers?*

[The AAI has respectfully elected to provide a single response]

Since 1977, the only damages remedies available to indirect purchasers harmed by antitrust violations have been those provided by state law. State legislatures, not Congress, should decide whether and to what extent consumers and other indirect purchasers residing in their states should have a state law damages remedy. Congress should not prohibit states from exercising this authority, especially since state laws regulating competition actually preceded the Sherman Act.[34]

The Sherman Act was intended to supplement, not displace, state antitrust enforcement. Senator Sherman himself stated that the "single object" of the Act was "to arm the Federal Courts … that they may cooperate with the State courts in checking, curbing and controlling the most dangerous combinations …." [35]. The federal policy of

[34] *See* James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust La*w, 1880-1918, 135 U. PA. L. REV. 495 (1987).

[35] 21 CONG. REC. 2457 (1890) (statement of Sen. Sherman) (emphasis added).

working side-by-side with the states to promote competition has continued unabated for the 115 year life of the Sherman Act. Respect for state sovereignty, as well as the proven effectiveness of this dual antitrust enforcement, counsel strongly against any effort by Congress to eliminate an important area of state antitrust enforcement. Thus, the National Association of Attorneys General adopted a resolution this year in which, among other things, it expressed its opposition to federal preemption of any state antitrust laws, including indirect purchaser laws, because such preemption would "impair enforcement of the antitrust laws, harm consumers, and harm free competition." [36]

In fact, there exists a general division of labor somewhat similar to what the European Union nations are now attempting to develop, namely that matters of primarily local concern should be handled at the local level, whereas matters of a more regional or national concern should be handled at the federal level. Many antitrust violations are clearly local in nature and the central government should not generally have an interest in prosecuting such violations. This does not imply that the division of labor can be clear-cut. Very little occurs in the modern American economy that does not leak out beyond the boundaries of a single state, and a political system that assigns great value to decentralized government must provide state governments some flexibility in attempting to protect their own citizens from antitrust violations that have a significant impact within the state. All of this works in practice, most of the time. The federalism wheel is not broken.[37]

Preemption of state indirect purchaser remedies would also end doctrinal competition between federal and state governments, to the detriment of antitrust jurisprudence. Antitrust federalism:

> encourages diversity of thought, experimentation, and innovation in approaches. Such diversity and experimentation are especially important in the field of antitrust, where debate continues on how best to approach certain key issues and the laws' proper goals.[38]

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[36] NAAG Resolution, "Principles of State Antitrust Enforcement," adopted at Spring Meeting, March 14-16, 2005.

[37] E. Gellhorn, W. Kovacic, and S. Calkins, ANTITRUST LAW AND ECONOMICS IN A NUTSHELL 541 (5th ed. 2004) ("In fact, Microsoft is the aberrational state case. The vast majority of state antitrust cases reflect the states' consensus comparative advantages of familiarity with local markets, familiarity with local institutions, and possession of tools and expertise for compensating individuals.").

[38] J. W. Burns, *Symposium, Antitrust at the Millennium (Part I); Embracing Both Faces of Antitrust Federalism: Parker and ARC America*, 68 ANTITRUST L.J. 29 (2000).

This diversity and innovation, therefore, should not be terminated.

While someday a consensus may emerge on indirect purchaser issues, that day certainly has not arrived. Indeed, the American Bar Association Antitrust Task Force has observed the marked contrast between federal and state approaches, as well as the legitimacy of both:

> While it is difficult to draw any definitive conclusions about such a diverse body of law, it seems fair to say that federal antitrust policy, as embodied in Hanover Shoe and Illinois Brick, and state antitrust policy, as embodied in various indirect purchaser statutes, represent two legitimate but competing schemes of antitrust enforcement.[39]

Even within the realm of state antitrust law, diversity abounds. For example, more than half the states have some form of Illinois Brick repealer legislation, and half do not.[40]

Most Illinois Brick issues arise in the form of class actions on behalf of consumers. Congress has just passed major legislation, the Class Action Fairness Act, reforming the handling of class actions. Nearly all antitrust class actions (whether grounded in state or federal law) will be coordinated or consolidated in a single federal court. That should take care of many of the concerns relating to Illinois Brick, proliferation of duplicative state and federal suits and inconsistent adjudications. In view of this brand new and revolutionary change, which has not yet been given a chance to work itself out, it would be unwise to recommend additional reformation of the relationship between state and federal law for indirect purchasers at this time. Rather, Congress would benefit from a fuller opportunity to witness the actual (as opposed to theoretical) benefits and drawbacks of state indirect purchaser remedies and how in reality they interplay with federal remedies, under the new scheme.

Retaining state ability to provide for indirect purchaser claims is important. There are numerous instances, for example, where enforcement by purchasers occupying one or the other end of the distribution system is non-existent or de minimus, leaving only the

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[39] *ARC America Task Force Report: Report of the American Bar Association Section of Antitrust Law Task Force to Review the Supreme Court's Decision in California v. ARC America Corp.*, 59 ANTITRUST L.J. 217 (March 23, 1990).

[40] *See* D. R. Karon, *"Your Honor, Tear Down That Illinois Brick Wall!" The National Movement Toward Indirect Purchaser Antitrust Standing and Consumer Justice*, 30 WM. MITCHELL L. REV. 1351, 1361-62 (2004).

other end to provide adequate antitrust enforcement. In the Microsoft class action litigation, no significant direct purchaser class was ever certified, leaving the vast majority of direct purchases uncompensated.[41] Were it not for the recoveries by indirect purchasers under state law, Microsoft would have retained virtually all of the overcharge. Similarly, in *In re New Motor Vehicles Canadian Export Antitrust Litigation*,[42] currently pending in federal district court in Maine, no direct purchaser of motor vehicles has sued in the two years since the case was filed by indirect purchasers.[43] In all likelihood, the indirect purchasers, proceeding under state law, will be the sole antitrust enforcers in this litigation.

In sum, for many years the states have made a highly valuable contribution to the origination, development and enforcement of antitrust law in this country. They should be permitted to continue to protect their own consumers through indirect purchaser statutes, and to contribute to the ongoing development of indirect purchaser law. Congress, for its part, should continue to learn how indirect purchaser laws work in practice, including under the newly-enacted Class Action Fairness Act, and permit further study of whether or not in reality they lead to over-deterrence.

Additional Submissions:

Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 OHIO ST. L.J. 115 (1993).

Paul Sirkis, Selected Bibliography, Antitrust Remedies.

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[41] Only $10.5 million out of billions of dollars in estimated damages were recovered by direct purchasers.

[42] MDL No. 1532.

[43] These cases reflect one of the fundamental failings of the Supreme Court's *Illinois Brick* opinion, namely its assumption that direct purchasers will have the strongest incentive to sue antitrust violators. This ignores practical realities of business life in which direct purchasers most often pass on overcharges and in which direct purchasers have a strategic motivation not to antagonize their major suppliers. The current system helps ensure that at least one class of plaintiff will have both the incentive and the capability to sue the violator. This is a desirable state of affairs that would be called into question only if there were strong evidence of systematic overdeterrence – which evidence we have never seen.