

AN IMBALANCE OF REPRESENTATION:  
A CRITIQUE OF THE ANTITRUST MODERNIZATION COMMISSION RECOMMENDATIONS  
REGARDING CIVIL REMEDIES IN PRIVATE ANTITRUST CASES

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I. Introduction

The Antitrust Modernization Commission (“AMC”) recently released its lengthy Report and Recommendations.<sup>2</sup> To some extent, these recommendations were surprising, particularly in that they proposed retaining controversial rules necessary to promote private enforcement of the antitrust laws. From the outset, the composition of the AMC did not bode well for private antitrust plaintiffs, as not one member of the AMC had spent any significant portion of his or her career prosecuting private antitrust cases, particularly not class actions. Indeed, in an interview soon after the Report and Recommendations had become public, Deborah Garza, the Chairperson of the AMC, acknowledged the natural inference that the failure of the AMC to be representative might give rise to a bias:

Antitrust Source: One of the comments directed at the Commission is that the composition of the Commission, although bipartisan, was somewhat weighted towards the defense bar. What is your reaction to that criticism?

Garza: A number of Commissioners spent substantial parts of their careers as enforcers—for example, John Shenefield, Sandy Litvack, Makan Delrahim, Debra Valentine, Steve Cannon, and myself—and enforcers are plaintiffs. In addition, the record demonstrates that the Commissioners had before them, and considered,

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<sup>1</sup> Professor and Director, Center for Law and Ethics, U.S.F. School of Law. Some of the arguments in this Article—particularly regarding the possible repeal of *Illinois Brick*—are consistent with those submitted by the American Antitrust Institute (“AAI”) to the Antitrust Modernization Commission, comments which I co-authored as a Member of the AAI Advisory Board. The author is grateful for the extensive and insightful comments of Joe Saveri, Michele Jackson, Eric Cramer, Bert Foer and Professor Robert Lande. All remaining errors are my own. An earlier version of the arguments in this article appeared in *Competition*, the journal of the antitrust section of the State Bar of California.

<sup>2</sup> *Antitrust Modernization Commission: Report and Recommendations* (April 2007), available at [http://www.amc.gov/report\\_recommendation/amc\\_final\\_report.pdf](http://www.amc.gov/report_recommendation/amc_final_report.pdf) (last visited June 14, 2007) (“AMC Report”).

what you might call the plaintiff’s perspective. In fact, I don’t think the report is biased. Our focus was on optimal antitrust enforcement, not necessarily on the defendant’s view or the plaintiff’s view, but on issues of efficient enforcement, deterrence, transparency, and fairness. Those issues overrode any sort of plaintiff or defendant bias.<sup>3</sup>

Note that Commissioner Garza’s defense of the composition of the AMC was limited. In response to the interviewer’s question about the dominance of the defense bar on the AMC, Commissioner Garza stated that the AMC included “enforcers”—by which she appears to have sought to elide the difference between government prosecutors, who were well represented on the AMC, and plaintiffs’ attorneys, who were not. Further, her response acknowledged, if only implicitly, that the absence of a true private plaintiffs’ attorney created the risk of bias—a risk that she maintained did not come to fruition.<sup>4</sup>

And, indeed, there is good reason to conclude that the AMC proceeded in good faith in regard to private antitrust enforcement. That good faith is manifest in the AMC’s decision to retain rules essential to encouraging private enforcement of the antitrust laws. As the AMC stated: “The Commission recommends no change to the fundamental remedial scheme of the antitrust laws: the treble damages remedy and plaintiffs’ ability to recover attorneys’ fees.”<sup>5</sup>

The AMC was responsive to the testimony it received in deciding, in particular, not to eliminate treble damages. There was a surprising consensus that the antitrust laws today suffer from insufficient—not excessive—deterrence of illegal conduct. As David Boies put the matter in his testimony before the AMC:

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<sup>3</sup> *The Antitrust Source* 3 (April 2007).

<sup>4</sup> For an insightful discussion placing the AMC in historical context—and emphasizing the need for political balance and a wide representation of views—see Albert A. Foer, *Putting the Antitrust Modernization Commission into Perspective*, 51 *Buffalo L. Rev.* 1029, esp. 1031 (2003).

<sup>5</sup> AMC Report at vi.

I think one of the things that is remarkable is that the panelists, who come from very different backgrounds and very different experiences, all share two common views: one is that the antitrust laws as a whole, including mandatory treble damages, do not adequately deter illegal antitrust conduct; and, second, that it would be premature, based on the evidence available, to make any change in the deterrence that exists under current law.<sup>6</sup>

But, despite the AMC's good faith, and despite this consensus, there are ways in which the assumptions and priorities of the AMC led to proposals that could decrease deterrence resulting from private enforcement of the antitrust laws. These assumptions and priorities are perhaps most evident in the AMC's recommendations regarding civil remedies.

For example, despite withering criticism over two decades ago by Judge Frank Easterbrook of the failure to award prejudgment interest in antitrust cases,<sup>7</sup> the AMC did not recommend a change in this regard. Nor did the AMC provide a persuasive reason for failing to do so. Judge Easterbrook's analysis can hardly be dismissed as mindlessly tending to favor private enforcement of the antitrust laws. To the contrary, he is a committed and capable scholar with just the sort of Chicago School law-and-economics bent that the AMC generally embraced<sup>8</sup> (an approach that often works to the detriment of antitrust plaintiffs). As discussed below, the failure to award prejudgment interest can result in significant undercompensation to victims of antitrust violations and underdeterrence of potential violators of the antitrust laws. To their credit, several of the Commissioners dissented on this issue.<sup>9</sup> A plaintiffs' attorney Commissioner might have

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<sup>6</sup> AMC Public Hearing 20 (July 28, 2005) (testimony of David Boies), *available at* [http://www.amc.gov/commission\\_hearings/pdf/050728\\_Civil\\_Remedies\\_Transcript\\_reform.pdf](http://www.amc.gov/commission_hearings/pdf/050728_Civil_Remedies_Transcript_reform.pdf) (last visited June 7, 2007).

<sup>7</sup> See *Fishman v. Estate of Wirtz*, 807 F.2d 520, 584 (7<sup>th</sup> Cir. 1986) (Easterbrook, J., dissenting).

<sup>8</sup> See AMC Report at i.

<sup>9</sup> Commissioners Carlton, Delrahim, Garza, and Shenefield would have awarded prejudgment interest in all cases, and Commissioner Warden only in cases where damages are not trebled. AMC Report at 249.

pressed for greater attention to this matter and, ultimately, might have shifted the balance in favor of recommending a change.

In contrast to the AMC's caution regarding prejudgment interest, it made various other proposals for fundamental changes regarding civil remedies without sufficient justification, without adequate empirical investigation, and without proper clarity. These include: its recommendation to allow claim reduction and contribution to non-settling defendants based on the liability of settling defendants;<sup>10</sup> and its recommendation to modify the framework for direct and indirect purchaser litigation under federal law.<sup>11</sup> These proposals, if adopted, could make it much more difficult to prosecute antitrust cases in ways the AMC did not appear to appreciate. The result would be a decrease in the level of deterrence of antitrust violations, a decrease that the testimony before the AMC suggested would be undesirable. The proposals also contain omissions and ambiguities that would likely cause delay and consume the time of the courts and litigants. Plaintiffs suffer more than defendants from delay in litigation and are more sensitive to practical issues in prosecuting private antitrust cases. If a plaintiffs' attorney had been a Commissioner, the AMC might have recognized and addressed these flaws.

## II. Prejudgment Interest

One of the most difficult antitrust doctrines to defend is that those who violate the laws do not have to pay prejudgment interest. Instead, they can retain their ill-gotten gains for years as the equivalent of an interest-free loan. The incentives this rule creates are perverse—it encourages defendants to delay the resolution of litigation, a practice for

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<sup>10</sup> Two Commissioners, Carlton and Garza, dissented in regard to claims for contribution, although not in regard to claim reduction. AMC Report at 252.

<sup>11</sup> Commissioners Cannon, Carlton, and Garza did not join in all aspects of this complicated recommendation. AMC Report at 267.

which defendants already have significant motivation. Moreover, given the extended period of time it takes to detect and prosecute an antitrust violation, the loss to plaintiffs—and the benefit to defendants—can be considerable. Depending on the duration of litigation, and the prevailing rates of interest or other gauges of return on investments, denying prejudgment interest can easily reduce the real effect of compensation to a fraction of actual damages, even after trebling.

Concern about the effect of failing to award prejudgment interest has not arisen exclusively among plaintiffs’ attorneys. Nor is it merely a recent phenomenon. Consider the comments Judge Easterbrook made in a dissenting opinion over twenty years ago:

Is [the failure to award prejudgment interest] small beer, to be made up by the trebling of damages? Hardly. Any erosion of the trebling on account of a denial of interest undermines the deterrent force of the antitrust law. Trebling makes up for the fact that antitrust violations are hard to detect and prove. The acts of the defendants [in the case before Judge Easterbrook] were easy to detect, but the court’s rule presumably applies in cartel cases as well. These may be detected only belatedly, and the denial of interest will make trebling much less useful in increasing the damages defendants expect to pay. The expected damages are the deterrent. . . . The denial of prejudgment interest systematically undercompensates victims and underdeters putative offenders. We should allow, indeed require, such awards.<sup>12</sup>

Judge Easterbrook calculated that with a long period of time between an antitrust violation and judgment, the lack of prejudgment interest can easily cause the actual compensation to a victim—again, even after trebling—to drop below 50% of the harm suffered.<sup>13</sup> The work of other analysts suggests similar conclusions, indicating that *on*

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<sup>12</sup> *Fishman*, 807 F.2d at 584.

<sup>13</sup> *Id.* (providing example of treble damages compensating for less than half of actual single damages if the cost of capital is 15%).

average the award of *treble* damages may in actuality translate, according to Professor Robert Lande, to a multiplier of only between 1.25 and 1.66 on single damages.<sup>14</sup>

Matters may be worse yet if one looks not to the goal of compensating victims of antitrust violations, but to the goal of deterring defendants from committing the violations in the first place. Many antitrust violators are large businesses that are able to invest capital at a very high rate of return. Consider Exxon's reported annual return on capital this past year: according to Exxon's summary annual report, in 2006 its return on average capital employed was 32%.<sup>15</sup> Reasoning along similar lines, at the time Judge Easterbrook suggested an annual interest rate of 15% might be appropriate to assess the impact of denying prejudgment interest.<sup>16</sup> Using 15%, Judge Easterbrook calculated that compensating for \$1 million in damages in 1972 would require a payment of \$7.08 million in 1986.<sup>17</sup> At Exxon's rate of return on capital in 2006, if it were to violate the antitrust laws, benefit by the amount of harm it caused, and enjoy a similar fourteen year delay in judgment, an award of more than \$48 million would be necessary to make violating the antitrust laws a losing venture for Exxon. More generally, the relevant issue from the perspective of deterrence is not the rate of return available to the public, but the return on investment for violators of the antitrust laws. Indeed, this point could support not only allowing an award of prejudgment interest—or, as Judge Easterbrook put it,

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<sup>14</sup> Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 Ohio St. L.J. 115, 134-36 (1993). A real world example arose in the vitamin cartel cases. Economists calculated that in that case, taking into account the lack of prejudgment interest alone, the nominal award of treble damages would translate into an actual multiplier of only 1.33. See Robert H. Lande, *Five Myths About Antitrust Damages*, 40 U.S.F. L. Rev. 651, 652 & n.6 (2006).

<sup>15</sup> *Exxon Mobile Corporation, 2006 Summary Annual Report* 4 (2007), available at [http://www.exxonmobil.com/corporate/files/corporate/XOM\\_2006\\_SAR.pdf](http://www.exxonmobil.com/corporate/files/corporate/XOM_2006_SAR.pdf) (last visited June 7, 2007).

<sup>16</sup> *Fishman*, 807 F.2d at 584.

<sup>17</sup> *Id.*

“requir[ing]” such an award<sup>18</sup>—but measuring the amount of that interest based on the value of the use of capital to the antitrust violator.<sup>19</sup>

Nevertheless, the AMC did not propose that the federal antitrust laws be revised to award prejudgment interest. Its discussion of the topic is quite brief, spanning only a page and a half.<sup>20</sup> It offered four reasons—with little substantiation—for retaining the current approach that is so difficult to justify.<sup>21</sup> First, the AMC noted that plaintiffs are entitled to treble damages, which, the AMC suggested without analysis or support, adequately compensate for the general unavailability of prejudgment interest.<sup>22</sup> One would have expected a more careful exploration of this assertion, particularly given that Judge Easterbrook considered and rejected this very position over twenty years ago.<sup>23</sup>

Indeed, the AMC and others have attempted to stretch treble damages to cover far too great a multitude of sins. As Professor Lande has pointed out, treble damages really amount at most to single damages when one takes into account various ways in which antitrust violators are not made to pay for the full harm they cause, including: prejudgment interest; allocative inefficiency;<sup>24</sup> umbrella effects;<sup>25</sup> and the statute of

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<sup>18</sup> *Id.*

<sup>19</sup> The right measure of prejudgment interest for purposes of deterrence is a tricky issue. One could argue that basing the award on the benefit to the antitrust violator—rather than the harm to the victim—might result in excessive deterrence. After all, deterrence theory usually supports an award based on the harm caused by a violation of the law. On the other hand, the difference between the benefit to the wrongdoer and the harm to the victim might not be as distinct as they at first appear—one way to formulate the relevant harm is as the amount of interest a victim of an antitrust violation would demand to be willing to provide a loan, and that amount could depend in significant part on the amount of interest the borrower is willing to pay.

<sup>20</sup> AMC Report at 249-50.

<sup>21</sup> *Id.* at 249-50.

<sup>22</sup> *Id.* at 249.

<sup>23</sup> *Fishman*, 807 F.2d at 584.

<sup>24</sup> According to Professor Lande, “Allocative inefficiency represents suboptimal use of societal resources as a result of market power.” Robert H. Lande, *Are Antitrust “Treble” Damages Really Single Damages?*, 54 Ohio St. L.J. 115, 120 & n.16 (1993) (citations omitted). Sales of a product that did not occur because it was priced above competitive levels gives rise to “allocative inefficiency.” Professor Lande suggest that courts generally do not award damages for allocative inefficiency, even though they reflect just the kind of harm theorists believe the antitrust laws are designed to prevent. See Robert H. Lande, *Five Myths About Antitrust Damages*, 40 U.S.F. L. Rev. 651, 653 & n.8 (2006).

limitations.<sup>26</sup> Indeed, Professor Lande has issued a challenge—which he repeated before the AMC—for anyone to identify a case in which a defendant paid more than single actual damages in an antitrust case, after taking into account the aforementioned factors.<sup>27</sup> As the AMC acknowledged, no one provided the AMC with even a single such example.<sup>28</sup>

Moreover, the conclusion that nominal treble damages in antitrust cases are really no more than single damages does not take into account the difficulties of detecting and proving an antitrust violation. The inherited wisdom is that those difficulties by themselves can justify treble damages.<sup>29</sup> The AMC provided no sound basis to question that wisdom. Further, there are procedural impediments to successful prosecution of antitrust actions that commentators have generally overlooked, that have nothing to do with the merits, and that may relieve antitrust violators from paying for some or all of the harm they cause—most notably in cases where a court denies class certification or certifies a class that includes only a subset of the victims of an antitrust violation.<sup>30</sup> These considerations strongly support the notion that treble damages cannot adequately compensate for the lack of prejudgment interest, as the AMC suggests.

None of the AMC's other justifications for failing to act is more persuasive. The second reason that the AMC offered for providing no prejudgment interest in antitrust

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<sup>25</sup> “Umbrella effects” occur when competitors of those who violate the antitrust laws take advantage of the lull in competition to raise their prices above competitive levels, causing damages that courts often refuse to award. See Robert H. Lande, *Are Antitrust “Treble” Damages Really Single Damages?*, 54 Ohio St. L.J. 115, 121 & nn.21-25 (1993) (citations omitted); Robert H. Lande, *Five Myths About Antitrust Damages*, 40 U.S.F. L. Rev. 651, 654-55 & nn.11-18 (2006).

<sup>26</sup> Robert H. Lande, *Five Myths About Antitrust Damages*, 40 U.S.F. L. Rev. 651, 652-56 & nn.19-20 (2006).

<sup>27</sup> See AMC Report at 247 & n.24; Robert H. Lande, *Five Myths About Antitrust Damages*, 40 U.S.F. L. Rev. 651, 659 (2006).

<sup>28</sup> AMC Report at 247 & n.24.

<sup>29</sup> See *Fishman*, 807 F.2d at 584.

<sup>30</sup> An exception to the general tendency to overlook these sorts of procedural issues is Robert H. Lande, *Five Myths About Antitrust Damages*, 40 U.S.F. L. Rev. at 660 & n.39.



cases is that such damages are “not readily quantifiable” and that prejudgment interest is not awarded under such circumstances in tort cases.<sup>31</sup> In fact, courts have generally been highly critical of the failure to award prejudgment interest and, as a result, have found ways to do so, particularly for economic damages.<sup>32</sup> Moreover, the kind of wooden thinking exemplified by the common law reluctance to award prejudgment interest is just what the AMC was supposed to reconsider—it was a “modernization” commission, after all, charged with rethinking outdated and unjustified practices.<sup>33</sup>

The AMC’s third purported reason not to award prejudgment interest is, on closer inspection, actually a reason to do so. The AMC pointed out that some courts have “effectively compensated for the lack of prejudgment interest” by taking into account in awarding damages such considerations as “inflation and interest paid on borrowed capital.”<sup>34</sup> According to the AMC, allowing for an award of prejudgment interest would somehow detract from the development of these legal rules—although the AMC does not explain how.<sup>35</sup> The AMC had it backward. Its reasoning seems to suggest that because some courts have found a way to circumvent the general proscription on awarding prejudgment interest—and, apparently, were right to do so—there is no need to eliminate that proscription to achieve this desirable result in a forthright and systematic manner.

To the contrary, the more straightforward, and therefore better, approach would be explicitly to authorize courts to take into account the time value of money in measuring damages—whether by awarding prejudgment interest, considering inflation,

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<sup>31</sup> AMC Report at 249.

<sup>32</sup> See generally Dan B. Dobbs, *Law of Remedies* 248-50, 254-56, §3.6(2), §3.6(3) (Hornbook Series 2d ed. 1993).

<sup>33</sup> AMC Report at 2-3 (noting the Report takes a functional approach to antitrust law, that is, one designed to promote competition).

<sup>34</sup> *Id.* at 249 & n.51.

<sup>35</sup> *Id.* at 249.

compensating for interest on borrowed capital, requiring defendants to disgorge the return they received on their ill-gotten gains,<sup>36</sup> or by some other means. Doing so would not “deter courts from developing sounder rules regarding the treatment of opportunity and capital costs;”<sup>37</sup> it would, instead, encourage the development of those rules.

Finally, and perhaps most telling, the AMC chose not to act because of the “limited evidence and argument in support of greater availability of prejudgment interest in the Commission’s record.”<sup>38</sup> But the AMC itself was largely responsible for any lack of evidence or argument. Certainly, there was testimony regarding the effect of not awarding prejudgment interest—Professor Lande included it, for example, in his analysis concluding that the nominal award of treble damages in antitrust cases really approximates single damages.<sup>39</sup> The AMC could have sought additional testimony or evidence if it thought doing so would have been helpful. Indeed, Judge Easterbrook appeared before the AMC on the very day for testimony on prejudgment interest, but the AMC simply did not ask him to address that topic despite his well-known expertise in the area.<sup>40</sup> In the final analysis, the AMC did not make a recommendation regarding prejudgment interest at least in part because the Commissioners were simply not particularly interested in the issue. Participation by a plaintiffs’ attorney or two on the AMC might well have changed that.

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<sup>36</sup> In this way, damages in antitrust could serve much the same role as a constructive trust. See Dan B. Dobbs, *Law of Remedies* §4.3(2), 394-95 (Hornbook Series 2d ed. 1993).

<sup>37</sup> AMC Report at 249.

<sup>38</sup> *Id.* at 249-50.

<sup>39</sup> See Robert Lande, *The Four Myths About Antitrust Damages: Hearing on Civil Remedies: Damages Multiplier, Attorneys’ Fees, and Prejudgment Interest Before the Antitrust Modernization Comm’n 3 & nn.1-3* (2005) (prepared statement of Robert H. Lande, Venable Professor of Law, University of Baltimore School of Law, & Director, American Antitrust Institute), available at [http://www.amc.gov/commission\\_hearings/pdf/Lande.pdf](http://www.amc.gov/commission_hearings/pdf/Lande.pdf) (last visited June 6, 2007).

<sup>40</sup> See AMC Public Hearing (July 28, 2005) (testimony of Judge Frank Easterbrook), available at [http://www.amc.gov/commission\\_hearings/pdf/050728\\_Civil\\_Remedies\\_Transcript\\_reform.pdf](http://www.amc.gov/commission_hearings/pdf/050728_Civil_Remedies_Transcript_reform.pdf) (last visited June 7, 2007) (“Easterbrook AMC Testimony”).

### III. Joint and Several Liability, Contribution, and Claim Reduction

The AMC's proposal regarding joint and several liability, contribution, and claim reduction provides a stark contrast to its cautious approach to prejudgment interest. The AMC recommended that Congress enact a statute providing for claim reduction based on the greater of: the allocated share of liability of any settling defendant or the amount for which the defendant settled.<sup>41</sup> The AMC also recommended that Congress allow claims for contribution among non-settling defendants.<sup>42</sup>

The AMC took these steps even though before it there were strong arguments against changing the current approach to claim reduction or contribution in antitrust cases. One would have expected the AMC to address these arguments in some detail and to attempt to marshal evidence in support of any changes it proposed in the face of these concerns. That approach would seem to follow from the AMC offering as a reason *not* to recommend a change regarding prejudgment interest that it had heard insufficient arguments and received insufficient evidence to support doing so. But the AMC did not maintain a consistently circumspect attitude.

The AMC's proposed changes regarding claim reduction and contribution would depart significantly from current law. At present, all of the participants in an antitrust violation are jointly and severally liable for the aggregate harm a violation caused. A plaintiff may recover its full damages from any defendant.<sup>43</sup> If one defendant settles, the plaintiff's recovery against the others will be reduced only by the amount of the settlement, and not by the settling defendant's share of liability.<sup>44</sup> Moreover, non-settling

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<sup>41</sup> AMC Report at 252.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 252.

<sup>44</sup> *Id.*

defendants cannot seek contribution from other non-settling defendants.<sup>45</sup> As a result, under current law the parties and the court can safely ignore potentially thorny issues regarding the relative share of liability of settling defendants. The AMC’s proposal, in contrast, would require a court to allocate responsibility for an antitrust violation for each defendant, whether it settled or not, in order to address arguments for claim reduction or contribution.

Once again the analysis of Judge Easterbrook casts light on the AMC’s proposal. He adverted in his testimony to an article he wrote over a quarter of a century ago with Professor William Landes and Judge Richard Posner arguing against the AMC’s approach.<sup>46</sup> The first difficulty with the proposal is that it is quite expensive and time-consuming, as Judge Easterbrook put it, to determine “defendants’ market shares and the other estimators of their contribution to the cartel.”<sup>47</sup> As Judge Easterbrook further explained, an approach similar to the AMC’s proposal has been adopted in other areas of the law—notably, under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”)<sup>48</sup>—and has had adverse consequences that counsel in favor of caution. To quote Judge Easterbrook’s testimony again: “it ain’t pretty; it’s expensive; it’s highly imprecise. The contribution questions under CERCLA have become more expensive to litigate than the basic questions of liability.”<sup>49</sup>

The AMC’s response to this concern was brief and inadequate: market share should not be too difficult to assess and other straightforward measures for allocating

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<sup>45</sup> *Id.*

<sup>46</sup> Frank Easterbrook, William Landes, and Richard Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 J. L. & Econ. 331 (1980).

<sup>47</sup> Easterbrook AMC Testimony at 92.

<sup>48</sup> 42 U.S.C. §§9601 *et seq.* (1980).

<sup>49</sup> Easterbrook AMC Testimony at 92-93.

liability are possible.<sup>50</sup> The AMC did not provide any examples of how a similar approach has proven workable in any setting, much less evidence of its feasibility in any significant proportion of antitrust cases. Nor did the AMC address the cost of proving the relative share of liability of a settling defendant. In other words, the record was quite thin in support of the feasibility of this proposal, but that did not cause the AMC to refrain from recommending a change, as it did in regard to prejudgment interest.

Moreover, as Judge Easterbrook explained to the AMC, the current approach to claim reduction and contribution does not treat the participants in an antitrust violation unfairly *ex ante*.<sup>51</sup> Indeed, the law treats potential defendants equally when they are deciding whether to risk violating the law and, if they do, when they are choosing whether to settle litigation. Each defendant has an equal opportunity first to act lawfully or later to take responsibility for any unlawful actions and enter an appropriate settlement. In addition, experience supports the conclusion that attempting to achieve *ex post* fairness—in terms of the judgment at the end of a legal action—is simply too difficult, too expensive, and too time-consuming to be worthwhile.<sup>52</sup>

Another relevant consideration is the tendency of the AMC’s proposal to discourage settlement. The AMC acknowledged that its proposal would “likely reduce incentives for settlement, at least to some extent.”<sup>53</sup> But it was willing to tolerate that cost because it perceived some of those incentives as illegitimate. In particular, it worried that plaintiffs might engage in what it called “‘whipsaw’ settlement tactics”—the strategy of pressuring a defendant to settle early to avoid facing exposure for the full

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<sup>50</sup> AMC Report at 254-55.

<sup>51</sup> Easterbrook AMC Testimony at 92-94.

<sup>52</sup> *Id.* at 92-93.

<sup>53</sup> AMC Report at 253.

harm caused by an antitrust violation.<sup>54</sup> The AMC's view runs counter to prevailing wisdom. Others have thought that the incentive the law creates for one member of an illegal cartel to break ranks and turn in the other conspirators is desirable.<sup>55</sup> Indeed, the federal government has created an amnesty program to encourage just this sort of behavior.<sup>56</sup> The law should hardly be designed to encourage honor among thieves.

Moreover, there are other incentives to settle, the legitimacy of which the AMC did not question but which its proposal would undermine. One such incentive is to avoid the cost of litigation and trial. The AMC's proposal would make the share of responsibility of even *settling* defendants relevant. The parties would therefore have to admit evidence of that responsibility at trial, ensnaring the settling defendant in litigation it sought to avoid, increasing the settling defendant's costs after settlement, and decreasing its incentive to settle in the first place.

Further, the rules that currently govern the effect of settlement with one of several defendants in an antitrust case provide plaintiffs and defendants with certainty and treat them equally. Each defendant knows that the settlement amount is precisely the sum it will have to pay to end the litigation. And the plaintiff knows the settlement amount is exactly what it will receive in settlement from that defendant and exactly what it will forego in potential recovery from non-settling defendants. The AMC's proposal, however, would eliminate this certainty and symmetry. A plaintiff would no longer know how much it is giving up by allowing a defendant to settle. The plaintiff would lose at least the defendant's not yet established share of liability—a share that the *non-*

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<sup>54</sup> *Id.* at 252. Of course, even under current law this exposure would be reduced by the amount paid by any settling defendant. *Id.*

<sup>55</sup> I am grateful to Professor Lande for pointing this out in commenting on this paper.

<sup>56</sup> *See id.* at 296 & n.12.

*settling* defendants will have every reason and significant ability to exaggerate. Moreover, if it turns out that the plaintiff made a very good deal—that the settling defendant paid more in settlement than it would have owed after trial—the plaintiff would not get the benefit of that bargain. Its recovery against any *non-settling* defendants would be reduced by the actual amount of the settlement. But if it turns out that the plaintiff allowed the settling defendant to settle relatively cheaply, then the plaintiff would lose because the non-settling defendants would benefit from claim reduction for the full amount of the settling defendant’s share of liability. The AMC did not make any argument that placing this asymmetric risk on the plaintiff is just, but merely indicated that any resulting disincentive for the plaintiff to settle would be offset by other considerations.<sup>57</sup>

Finally, even as to the potential for “whipsaw” settlement tactics, the AMC’s reasoning may not comport with the facts. At present, there is reason to believe that defendants have incentives to resist settlement in antitrust cases until trial draws near and that plaintiffs have incentives to seek an early settlement. The potential for any “whipsaw” effect may simply be a healthy corrective for these undesirable tendencies.

For example, delay in litigation can redound to the benefit of defendants, particularly in cases where the potential damages are significantly larger than the litigation costs. As noted above, plaintiffs are not entitled to prejudgment interest, a rule which the AMC did not recommend modifying.<sup>58</sup> Until there is a judgment, then, plaintiffs are involuntary providers to defendants of an interest-free loan. Defendants have incentive to prolong that state of affairs.

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<sup>57</sup> *Id.* at 254.

<sup>58</sup> *Id.* at 249-50.

In contrast, plaintiffs have reason to try to settle early. First, without any right to prejudgment interest, settlement is the most expeditious way to extricate themselves from serving as unwilling creditors. Second, plaintiffs may be risk averse, particularly in the early stages of litigation. Plaintiffs face a significant risk of an early adverse decision by the court, the kind of ruling that is far more likely to occur to the detriment of plaintiffs than to the detriment of defendants—only plaintiffs face motions to dismiss, and very few motions for judgment on the pleadings or for summary judgment are entered in favor of plaintiffs in antitrust cases.<sup>59</sup>

In addition, there are the potential effects of agency costs. While I do not mean to impugn the ethics of any attorneys, the reality is that defense counsel are paid by the hour and tend to benefit from protracted litigation, whereas many plaintiffs’ attorneys are paid contingency fees and may benefit from a relatively early resolution of litigation.<sup>60</sup> Agency costs, then, can provide yet another counterweight to worries about a “whipsaw” settlement.

In light of these considerations, a careful economic analysis of the competing incentives and an amassing of evidence regarding settlement amounts and practices would seem to be a necessary predicate for any proposal to alter the current rules for claim reduction and contribution in antitrust cases. The AMC undertook neither of these efforts. In other words, it did not show nearly the same care and caution in regard to

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<sup>59</sup> Arguably, the Supreme Court in recent years has made it more difficult for plaintiffs in antitrust cases to survive motions to dismiss, motions for judgment on the pleadings and motions for summary judgment, at least in those actions involving “conscious parallelism.” See *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007) (discussing, among other cases, *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)).

<sup>60</sup> For a useful discussion of some of these incentives, see, e.g., A. Mitchell Polinsky and Daniel L. Rubinfeld, *Aligning the Interests of Lawyers and Clients*, 5 Am. L. & Econ. Rev. 165 (2003).



issues that could benefit defendants—contribution and, especially, claim reduction—as it did in regard to an issue that could benefit plaintiffs—prejudgment interest.

#### IV. Direct and Indirect Purchaser Litigation

##### A. The Proposal

The AMC may have had its greatest need for the influence of a plaintiffs’ attorney Commissioner in regard to its recommendations to restructure direct and indirect purchaser litigation.<sup>61</sup> The major features of its proposal are:

1. To allow both direct and indirect purchasers to recover their actual damages under federal antitrust law.
2. To cap the combination of direct and indirect purchaser damages at treble the overcharge incurred by direct purchasers.
3. To apportion the damages between direct and indirect purchasers to the extent of the actual damages they suffered.
4. To allow for certification of direct purchaser actions as if there were no “pass on” defense.
5. To allow removal of indirect purchaser actions to federal court.
6. To allow a single federal court to preside over all stages of all direct and indirect purchaser actions in a single case, including pre-trial and trial proceedings.<sup>62</sup>

##### B. Background

###### i. The *Illinois Brick-Hanover Shoe* Framework

Understanding the AMC’s complex proposal requires a substantial background in the current rules that govern federal and state private antitrust enforcement, their policy justifications, and the concerns to which they give rise. In particular, two Supreme Court

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<sup>61</sup> The American Antitrust Institute raised some of the key concerns expressed below—albeit in a significantly different form—in comments submitted to the AMC on July 10, 2006 and March 2, 2007, comments which I co-authored. Thus, the AMC should have been aware of the problems to which its proposal would give rise, but nevertheless failed to address them.

<sup>62</sup> AMC Report at 267.

decisions play a crucial role regarding who may sue for damages under federal antitrust laws and the damages they may recover. *Illinois Brick Co. v. Illinois*<sup>63</sup> held that only those who make purchases directly from an entity that violates the antitrust laws—so-called “direct purchasers”—may recover damages under federal law; those who make purchases from direct purchasers or other sellers further down the chain of distribution—so-called “indirect purchasers”—cannot recover damages under federal antitrust law.<sup>64</sup> *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*<sup>65</sup> held that a direct purchaser is entitled to recover the full overcharge it paid, that is, the difference between the price inflated by the antitrust violation and the price that would have been in place but for that violation.<sup>66</sup> *Hanover Shoe* precludes a defendant from arguing that a direct purchaser’s damages should be reduced to the extent it “passed on” some of the overcharge to indirect purchasers or otherwise benefited from the antitrust violation.

To see how these rules work, consider, for example, a case in which a pharmaceutical manufacturer sells a drug—say, under the brand name Elixiria—to a wholesaler, and the wholesaler marks up the price of the drug and sells it to a retailer, and the retailer marks up the price of the drug and sells it to the ultimate consumer. Assume that the price of the drug sold under the brand name Elixiria is inflated because its manufacturer, Pharma Co., entered an illegal agreement with a generic drug manufacturer

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<sup>63</sup> 431 U.S. 720 (1977).

<sup>64</sup> *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977). There are narrow exceptions to this rule, but they arise sufficiently infrequently that they do not warrant discussion in the text. They occur: (1) when there are cost-plus fixed quantity contracts, *Kansas v. Utilicorp United Inc.*, 497 U.S. 199, 217 (1990), which no court has ever found; (2) when the direct purchaser is owned or controlled by (or, presumably, owns or controls) its customer, *Illinois Brick*, 431 U.S. at 736, n.16; or (3) when the direct purchaser is a co-conspirator in the activity that violates the antitrust laws. See, e.g., *Arizona v. Shamrock Foods Co.*, 729 F.3d 1208, 1211-14 (9<sup>th</sup> Cir. 1984); cf. *Paper Sys. Inc. v. Nippon Paper Indus. Co.*, 281 F.3d 629, 631-42 (7<sup>th</sup> Cir. 2002) (Easterbrook, J.) (arguing that no exception to *Illinois Brick* is necessary in this situation because the plaintiff bought directly from one of the co-conspirators, all of whom are jointly and severally liable).

<sup>65</sup> 392 U.S. 481 (1968).

<sup>66</sup> *Id.* at 494.

to delay entry of a generic equivalent of Elixiria into the market.<sup>67</sup> Further assume that as a result of this illegal agreement wholesalers paid \$4 per unit for the drug labeled as Elixiria rather than \$1 per unit for the drug in its generic form. In this hypothetical, under *Illinois Brick* only the wholesalers could seek damages under federal law because only the wholesalers bought Elixiria directly from Pharma Co. Further, under *Hanover Shoe* the wholesalers could recover the full overcharge on the units of Elixiria they bought. Their recovery would not be diminished even though they were able to mitigate the damages they suffered by passing on the higher prices to retailers. To put the same point somewhat more technically, *Hanover Shoe* eliminated the so-called “pass on” defense, that is, the defense that the overcharge overstates the damages that direct purchasers suffered.

ii. Some Policy Justifications for the *Illinois Brick-Hanover Shoe* Framework

Various policy reasons support this judicially created framework. One is that by concentrating damages in a single tier of purchasers, plaintiffs will be able to recover sufficient damages to have *incentive to sue*.<sup>68</sup> If the damages were allocated instead along the chain of distribution, no purchaser—or tier of purchasers—might be able to recover enough to be willing to face the costs and risks of bringing an antitrust action. In part for this reason, the Supreme Court concluded that the principle of antitrust deterrence would be better achieved by “holding direct purchasers to be injured to the full extent of

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<sup>67</sup> For a discussion of this kind of illegal agreement, see, e.g., Herbert Hovenkamp, Mark Janis, and Mark A. Lemley, *Anticompetitive Settlement of Intellectual Property Disputes*, 87 Minn. L. Rev. 1719 (2003); Joshua P. Davis and David F. Sorensen, *Chimerical Class Conflicts in Federal Antitrust Litigation: The Fox Guarding the Chicken House in Valley Drug*, 39 U.S.F. L. Rev. 141 (2004); Eric L. Cramer and Daniel Berger, *The Superiority of Direct Proof of Monopoly Power and Anticompetitive Effects in Antitrust Cases Involving Delayed Entry of Generic Drugs*, 38 U.S.F. L. Rev. 81 (2004).

<sup>68</sup> *Illinois Brick*, 431 U.S. at 735.

the overcharge paid by them than attempting to apportion the overcharge among all that may have absorbed part of it.”<sup>69</sup>

Second, the framework greatly *simplifies* federal antitrust actions for damages.<sup>70</sup> Calculating the extent of the damages suffered by each link in the chain of distribution—which may include assessing the extent to which each link passed on the overcharge to the next—can be quite complicated. The *Illinois Brick-Hanover Shoe* framework eliminates any need for that calculation. The Supreme Court was clear that one of its motivations was to avoid “the difficulty in ascertaining the amount [of the overcharge] absorbed by any particular indirect purchaser.”<sup>71</sup>

Third, direct purchasers tend to be relatively *sophisticated plaintiffs*, who are familiar with the structure of the industry and often are in an advantageous position to detect, assess, and prosecute antitrust violations.<sup>72</sup> Indirect purchasers—particularly consumers—in some cases may lack knowledge about the industry and the resources to determine whether the prices they pay are inflated through some complicated or secretive anticompetitive scheme or, if they do make that determination, to figure out the market and discover the underlying facts in the way necessary to file and pursue litigation.<sup>73</sup>

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<sup>69</sup> *Id.* at 746-47.

<sup>70</sup> The Court explained that the framework prevented any need to “attempt to trace the complex economic adjustments to a change in the cost of a particular factor of production.” *Id.* at 732. *See also Kansas v. Utilicorp United Inc.*, 497 U.S. 199, 208 (1990) (“The direct purchaser rule serves, in part, to eliminate the complications of apportioning overcharges between direct and indirect purchasers.”) (citations omitted).

<sup>71</sup> *Illinois Brick*, 431 U.S. at 732.

<sup>72</sup> *See, e.g.*, William M. Landes and Richard A. Posner, *Should Indirect Purchasers Have Standing To Sue Under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick*, 46 U. Chi. L. Rev. 602, 609-15 (1979); William M. Landes and Richard A. Posner, *The Economics of Passing On: A Reply to Harris and Sullivan*, 128 U. Pa. L. Rev. 1274, 1278-79 (1980).

<sup>73</sup> *See Utilicorp*, 497 U.S. at 215 (“Consumers may lack the expertise and experience necessary for detecting” an antitrust violation.) (citation omitted).

On the other hand, direct purchasers are not always willing to prosecute private litigation for at least one reason: they may be reluctant to sue their suppliers.<sup>74</sup> A partial solution to that problem is the class action, which raises a fourth policy in favor of the *Illinois Brick-Hanover Shoe* framework. The relative simplicity of assessing antitrust injury and calculating damages to direct purchasers makes their claims relatively *easy to certify for class treatment*, which allows a few brave direct purchasers to bring an action on behalf of a larger class.<sup>75</sup> Ease of class certification decreases the risk that wrongdoers will retain their ill-gotten gains simply for lack of an effective private enforcement mechanism.<sup>76</sup>

For various reasons, then, *Illinois Brick* and *Hanover Shoe* created an intricate framework for private antitrust enforcement, providing incentive to sue, simplifying the litigation, allowing for sophisticated private attorneys general, and promoting class certification. Given this intricacy, care should be taken in tinkering with the framework, even though it gives rise to some legitimate concerns.

### iii. Some Concerns About the *Illinois Brick-Hanover Shoe* Framework

The first concern often raised about the “direct purchaser rule” is that direct purchasers may recover more than their actual damages. The AMC expressed this concern—in a somewhat exaggerated manner—by stating that their proposal is designed to prevent “windfall recoveries to persons who did not suffer injury.”<sup>77</sup> To see the potential for a problem along these lines, imagine in the *Elixiria* case, for example, that a

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<sup>74</sup> *Illinois Brick*, 431 U.S. at 746.

<sup>75</sup> Joshua P. Davis and David F. Sorensen, *Chimerical Class Conflicts in Federal Antitrust Litigation: The Fox Guarding the Chicken House in Valley Drug*, 39 U.S.F. L. Rev. 141, 153-55 (2004).

<sup>76</sup> Of course, some potential plaintiffs could opt out of a class and choose not to litigate individually, decreasing the exposure of the wrongdoers. But it is far easier—and less likely to damage business relations—for direct purchasers to participate in litigation as absent class members than to bring their own lawsuits.

<sup>77</sup> AMC Report at 270.

wholesaler may have been able to pass on to a retailer some, or all, of the overcharge the wholesaler paid to Pharma Co., but the wholesaler would still be able to recover for the full overcharge. This problem can easily be overstated. As discussed above, there are various ways in which antitrust damages fail to capture the full harm done by an antitrust violation, causing the wholesaler to be undercompensated. For example, the overcharge measure of damages could fail to compensate the wholesaler for lost profits on sales that did not occur because the inflated price for the drug sold under the brand name Elixiria decreased the total volume of sales.<sup>78</sup> Similarly, the lack of prejudgment interest for antitrust damages means that the wholesaler has provided in effect an interest-free loan to Pharma Co. But, particularly taking into account treble damages, the *Illinois Brick-Hanover Shoe* framework could in theory allow the wholesaler to recover more than its actual damages. Of course, the Supreme Court was fully aware of this concern when it decided *Illinois Brick* and *Hanover Shoe*—it simply felt that the policy benefits of the framework were more important than compensating injured parties for precisely the harms that they suffered.<sup>79</sup>

A second concern with the *Illinois Brick-Hanover Shoe* framework is that it does not allow indirect purchasers to recover damages under federal antitrust law at all. This concern is manifest in the AMC's comment that current antitrust law would be better if it

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<sup>78</sup> See, e.g., Herbert Hovenkamp, *The Indirect-Purchaser Rule and Cost-Plus Sales*, 103 Harv. L. Rev. 1717, 1722 & nn.31-32 (1990); Robert H. Lande, *Five Myths About Antitrust Damages*, 40 U.S.F. L. Rev. 651, 653 & n.8 (2006). The realities of the pharmaceutical industry greatly complicate these issues, including variations in the profits of wholesalers on the sale of brand name and generic drugs. Nevertheless, the points made in this oversimplified example remain valid.

<sup>79</sup> *Illinois Brick*, 431 U.S. at 746-47. See also William M. Landes and Richard A. Posner, *Should Indirect Purchasers Have Standing To Sue Under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick*, 46 U. Chi. L. Rev. 602, 605 (1979) (arguing goal of optimal deterrence is more important than goal of compensation in antitrust doctrine).

did not “den[y] recoveries to persons who suffer[] injury.”<sup>80</sup> This limitation can have two related effects: the framework can fail to compensate indirect purchasers and can underestimate the damages caused by an antitrust violation.

Often indirect purchasers will have suffered actual harm, particularly “end-payors” or consumers. In the hypothetical, they would have paid too much for Elixiria. Yet the *Illinois Brick-Hanover Shoe* framework does not allow indirect purchasers to recover these damages.

Moreover, given the various mark-ups that may occur along the chain of distribution, consumers may have suffered significantly greater damages than the direct purchasers. So, for example, with the antitrust violation in place, Pharma may have charged wholesalers \$4 per unit, wholesalers may have marked that up by 10% and charged retailers \$4.40 per unit, and retailers may have marked that up by 10% and charged consumers \$4.84 per unit. Assuming the same mark-ups by percentage, without the antitrust violations wholesalers might have paid \$1 per unit, retailers \$1.10 per unit, and consumers \$1.21 per unit. The overcharge to wholesalers, then, would be \$3 per unit (\$4 minus \$1) but the overcharge to consumers would be \$3.63 per unit (\$4.84 minus \$1.21). To be sure, in reality the economics are much more complicated.<sup>81</sup> But the central point is valid—the damages to indirect purchasers measured by the overcharge may be significantly greater than the damages to direct purchasers measured by the overcharge.

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<sup>80</sup> AMC Report at 47, 270.

<sup>81</sup> Note, however, that Richard Rozek and Ruth Berkowitz calculated, for example, that the increased cost of over \$1 billion from a two-year delay in permitting generic competition to the drug Taxol would be *magnified* by hundreds of millions of dollars as inflated prices were marked up along the chain of distribution. See Richard P. Rozek and Ruth Berkowitz, *The Costs to the U.S. Health Care System of Extending Marketing Exclusivity for Taxol*, 9 J. of Res. in Pharma. Econ. 21 (1999).

A partial solution to this problem is that states can pass their own laws to permit indirect purchasers to seek damages for antitrust violations.<sup>82</sup> Indeed, many states have done so.<sup>83</sup> These state laws—often called “repealer statutes” because they repeal the rule from *Illinois Brick* for state law purposes<sup>84</sup>—can help to compensate the victims of antitrust violations and to ensure that antitrust violators pay for the full harm they have caused. But they also give rise to another concern about the *Illinois Brick-Hanover Shoe* framework, that is, the potential for multiple liability.

The concern about multiple liability arises in part because of the combination of federal and state antitrust laws, as well as because federal law and some state laws award treble damages. The AMC characterized this concern as about “duplicative recoveries.”<sup>85</sup> To put the point in even more dramatic terms (which commentators sometimes do), those who violate the antitrust laws complain that they can be forced to pay sextuple damages in private litigation—six times single damages as a result of treble damages to direct purchasers under federal law and treble damages to indirect purchasers under state law.<sup>86</sup>

Perhaps no concern is as overstated as this one. As discussed above, Professor Lande has explained that when one takes into account the deficiencies in how courts measure antitrust damages, various procedural hurdles, and the like, it is improbable that those who violate the antitrust laws would ever pay in damages more than the actual

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<sup>82</sup> See *California v. ARC Am. Corp.*, 490 U.S. 93, 103 (1989).

<sup>83</sup> AMC Report at 266.

<sup>84</sup> See Robert H. Lande, *Are Antitrust “Treble” Damages Really Single Damages?*, 54 Ohio St. L.J. 115, 116 & n.5 (1993).

<sup>85</sup> AMC Report at 270.

<sup>86</sup> See Robert H. Lande, *Are Antitrust “Treble” Damages Really Single Damages?*, 54 Ohio St. L.J. 115, 116-17 (1993). Of course, most states either do not allow indirect purchaser antitrust claims or do not permit treble damages under state antitrust law.



harm they have caused.<sup>87</sup> Again, as noted above, this is so because antitrust violators generally do not pay for various harms they cause, including from: the loss of prejudgment interest; allocative inefficiency;<sup>88</sup> umbrella effects;<sup>89</sup> and the statute of limitations.<sup>90</sup> The likely reality, then, is that the *Illinois Brick-Hanover Shoe* framework may well result in multiple *liability* (liability to more than one set of plaintiffs and at an amount greater than single recovery as measured under the law) but not to multiple *actual damages*.

A somewhat related concern is that defendants in antitrust cases may face litigation in multiple fora—in state as well as federal court and in multiple federal courts. The AMC addressed this concern by recommending that direct and indirect purchaser litigation should occur in one federal court for all purposes, including trial.<sup>91</sup> Of course, the problem of separate actions being brought in federal and state court has been addressed already by the recent Class Action Fairness Act (“CAFA”),<sup>92</sup> which permits removal to federal court of the great majority of antitrust (and other) class actions filed in state court. Once removed, those state law actions, along with any federal law actions, can be transferred by the Judicial Panel on Multidistrict Litigation to a single federal court for coordinated or consolidated proceedings for pretrial purposes, although not for trial.<sup>93</sup> Only time will tell whether CAFA was wise legislation and whether it adequately

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<sup>87</sup> Robert H. Lande, *Five Myths About Antitrust Damages*, 40 U.S.F. L. Rev. 651, 652-56 & nn.19-20 (2006).

<sup>88</sup> See footnote 24 supra for an explanation of this term.

<sup>89</sup> See footnote 25 supra for an explanation of this term.

<sup>90</sup> 40 U.S.F. L. Rev. 651, 652-56 & nn.19-20 (2006). Indeed, as noted above, Professor Lande has issued a challenge for anyone to identify a case in which an antitrust violator actually paid more than single actual damages in a case—and the AMC has acknowledged that no one has done so. AMC Report at 247 & n.24.

<sup>91</sup> AMC Report at 271.

<sup>92</sup> Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended at 28 U.S.C. §1711).

<sup>93</sup> *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998).

addressed the concern about concurrent state and federal litigation arising from the same wrongdoing.

### C. Evaluating the AMC Proposal Regarding *Illinois Brick* and *Hanover Shoe*

With these concerns in mind, along with the background policy considerations, one can evaluate the AMC's proposal to modify the *Illinois Brick-Hanover Shoe* framework.

Recommendation 1: To allow both direct and indirect purchasers to recover their actual damages under federal antitrust law.

The AMC's first recommendation is to allow direct and indirect purchasers to recover their actual damages and only their actual damages in antitrust cases.<sup>94</sup> The first problem with this recommendation is increased complexity. Determining the actual damages of a direct purchaser is not always easy. If damages are measured by the overcharge paid by each purchaser, the AMC's proposal would seem to suggest that the court must determine how much of the overcharge remained with the direct purchaser and how much was passed down each link in the chain of distribution to each of the indirect purchasers. The Supreme Court was mindful of—indeed, focused on—this concern in creating the *Illinois Brick-Hanover Shoe* framework.<sup>95</sup> Yet the AMC provides no concrete analysis or guidance in explaining why the very task that worried the Supreme Court because of its complexity would in fact be feasible for the federal courts to undertake.

Moreover, awarding actual damages to the various purchasers would run the risk of underenforcement because direct purchasers might suffer damages too small to warrant litigation. If so, in many cases the most sophisticated potential plaintiffs would

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<sup>94</sup> AMC Report at 270.

<sup>95</sup> *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746-47 (1977).

have insufficient incentive to sue. Depending on the impact of an antitrust violation down the chain distribution, the same might well be true for all of the victims of an antitrust violation. Their damages—or, at least, the damages they are able to prove and recover<sup>96</sup>—may not be large enough for litigation to make sense. This can be so even if the aggregate harm from an antitrust violation is quite substantial. Yet the AMC Report says nary a word about these fundamental concerns.

At least as important as these glaring defects and omissions in the AMC's proposal are the ambiguities that the proposal would create. Perhaps most important, how are actual damages to be measured? One possibility is to measure damages by the overcharge paid by each direct and indirect purchaser. But that is not what the AMC's proposal states. And there are other possibilities. If, as the AMC suggests, direct purchasers should be entitled to recover their *actual* damages, rather than the full overcharge, a direct purchaser might sue, for example, for its lost profits. In the Elixiria example, for these damages to be *actual*, they should include profits a wholesaler lost because its sales volume decreased as a result of the inflated price of the drug, damages commentators have suggested courts will not generally award under current antitrust law.<sup>97</sup> The AMC's failure to explain whether these damages would be available creates an ambiguity that could cause serious difficulties for any court attempting to apply the rules the AMC has proposed. It also renders the AMC's other recommendations

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<sup>96</sup> Again, the Supreme Court's words from *Illinois Brick* are pertinent: "[W]e are unwilling to carry the compensation principle to its logical extreme by attempting to allocate damages among all 'those within defendant's chain of distribution,' [] especially because we question the extent to which such an attempt would make individual victims whole for actual injuries suffered rather than simply depleting the overall recovery in litigation over pass-on issues." *Illinois Brick*, 431 U.S. at 746-47.

<sup>97</sup> See, e.g., Herbert Hovenkamp, *The Indirect-Purchaser Rule and Cost-Plus Sales*, 103 Harv. L. Rev. 1717, 1722 & nn.31-32 (1990).

confusing. The potential for this problem becomes apparent in analyzing the next AMC recommendation—an artificial cap on aggregate antitrust damages.

Recommendation 2: To cap the combination of direct and indirect purchaser damages at treble the overcharge incurred by direct purchasers.

The AMC proposes to cap damages at treble the overcharge incurred by direct purchasers.<sup>98</sup> That recommendation suggests that the AMC assumed that the actual harm from an antitrust violation would never exceed the total overcharge paid by direct purchasers. But that is untrue. Correcting for this oversight reveals various ambiguities in the AMC's recommendation.

There are numerous cases in which purchasers suffer aggregate harm different from—and greater than—the total overcharge that the direct purchasers paid. As noted above, the direct purchasers themselves might have lost profits, including lost sales because an antitrust violation decreased output. Moreover, the overcharge to indirect purchasers might be significantly larger than the overcharge to direct purchasers. In the Elixiria example, the overcharge to the direct purchasers, the wholesalers, would be \$3 per unit (\$4 minus \$1) whereas the overcharge to the final indirect purchasers, the consumers, would be \$3.63 per unit (\$4.84 minus \$1.21). If the goal is to award actual damages, why cap the recovery of the indirect purchasers—much less the recovery of all injured parties—at treble the overcharge to the direct purchasers? That would create an artificial and arbitrary limit on damages.

Further, this cap also could create an unnecessary additional step in litigation. Without this cap, in some cases no purchaser may have any interest in pursuing—or calculating—the overcharge to direct purchasers. The *direct* purchasers might be

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<sup>98</sup> AMC Report at 270.

interested only in the losses they suffered from decreased output, perhaps because they were able to pass on all, or almost all, of the overcharge on the units they bought and resold. The *indirect* consumer purchasers might be interested in calculating only the difference between the price they paid for Elixiria and the price they would have paid for its generic equivalent, which they may be able to prove without tracing the “pass on” if, for example, the generic equivalent eventually came to market. And what happens if the direct purchasers do not file suit, or if they settle with the defendants, leaving the indirect purchasers to prosecute the litigation? For various reasons, then, there may be no reason for any party to calculate the amount of the overcharge to the direct purchasers, other than for purposes of applying the newly invented cap on damages that the AMC proposes. Thus, the cap would likely create an unnecessary additional issue in litigation, an issue that could easily cost hundreds of thousands of dollars in economist and attorney fees to resolve.

The AMC addressed none of these problems. It is hard to make sense of its silence on these crucial points. One explanation could be that the AMC assumed that the only possible measure of antitrust damages would be the overcharge that results from an antitrust violation and that the overcharge paid by indirect purchasers would necessarily be smaller than the overcharge paid by the direct purchasers. If that explanation is correct, these assumptions are difficult to defend. The AMC certainly made no effort to do so.

Recommendation 3: To apportion the damages between direct and indirect purchasers to the extent of the actual damages they suffered.

Similarly troubling is the AMC’s recommendation that the damages from an antitrust violation—capped at treble the overcharge paid by direct purchasers—should be apportioned between the direct and indirect purchasers “to the extent” of their actual damages.<sup>99</sup> A first concern about this proposal is procedural. The AMC appears not to appreciate what an extraordinary revision to the standard adversarial process the proposal would require. In ordinary litigation, some parties bring claims against other parties. The entire system of litigation—with its rules for pleading, discovery, motion practice, *etc.*—is premised on this basic structure. But the AMC seems to envision a process where, at some point in the litigation, various groups of plaintiffs would vie with one another for portions of the damages recovered from defendants. An analogy to an interpleader action comes to mind, although without the AMC making clear which, if any, of the special procedures for interpleader<sup>100</sup> would and could be adapted to litigation in this context. The AMC’s failure to grapple with the resulting complexities is reason enough not to act on this recommendation.

Other problems arise as well. Any effort to apportion damages by tracing the “pass on” of an overcharge would involve a highly complicated calculation of just the sort the federal courts have managed to avoid through the *Illinois Brick-Hanover Shoe* framework. Oddly, not only does the AMC fail to contend with this formidable difficulty, its analysis seems to imply the federal courts have undertaken the task successfully rather than acknowledging that the Supreme Court formulated doctrine precisely so they could avoid doing so.<sup>101</sup> The AMC wrote:

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<sup>99</sup> AMC Report at 270.

<sup>100</sup> See Fed. R. Civ. P 22 and 28 U.S.C. §§1335, 1397 & 2361.

<sup>101</sup> See *Illinois Brick*, 431 U.S. at 741-45; *Hanover Shoe*, 392 U.S. at 493.

To be sure, determinations of how to allocate damages among direct and indirect purchasers will often involve complex economic assessments of the extent to which each purchaser in the chain of distribution has suffered harm that can be traced to an overcharge. The federal courts have shown great ability to handle such complex economic issues, however, and they will develop rules and procedures to handle these issues.<sup>102</sup>

Moreover, another problem will occur whenever the damages permitted by the AMC's cap are smaller than the total actual damages suffered by the direct and indirect victims of an antitrust violation. The above quotation appears to confirm that the AMC mistakenly believed that the *actual* injury to direct purchasers necessarily would be best measured by the overcharge they paid and that the *actual* injury to indirect purchasers would necessarily be only a fraction of that amount. Once one corrects for these errors, it becomes apparent that the total damages to direct and indirect purchasers may be far larger than the overcharge to direct purchasers. How are the inadequate capped total damages to be allocated among the various purchasers? Who allocates the funds, the judge or jury? When does this occur—before trial, at trial, or after trial? The AMC did not recognize these problems, much less resolve them.

Recommendation 4: To allow for certification of direct purchaser actions as if there were no “pass on” defense.

One substantial danger that the AMC did acknowledge involved class certification. In many cases, only a few purchasers are willing, able, and interested in pursuing antitrust litigation. In these cases, class certification is essential if antitrust violators are to be prevented from retaining their ill-gotten gains. Yet the potential complexities of determining the actual damages to direct and indirect purchasers—

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<sup>102</sup> AMC Report at 277.

particularly of tracing the overcharge as it wends its way down the chain of distribution, as the AMC envisions—could create difficulties for class certification.

The AMC’s proposal for contending with this formidable problem is extraordinary: federal courts should act as if the problem does not exist. In particular, in deciding whether to certify a class of direct purchasers, the AMC recommended that courts should be instructed to ignore the issue of whether the direct purchasers passed on some of the overcharge to indirect purchasers<sup>103</sup>—and, presumably, courts should also therefore ignore the issue of whether the amount of the “pass on” varied among the direct purchasers and gives rise to individual issues. At the trial itself, however, the AMC proposed that courts should take into account the issue of “pass on.”<sup>104</sup>

The problem with this proposal is that the rationale courts often provide when they refuse to certify indirect purchaser classes is that individual issues regarding “pass on” would make litigation on a class basis unworkable.<sup>105</sup> In other words, the issues of whether to certify a class and whether litigation on a class-wide basis is feasible are inextricably intertwined. For a court that believes the newly imposed “pass on” defense for direct purchasers would make class-wide litigation unmanageable, the requirement that the court must ignore “pass on” for purposes of class certification would be a bitter pill to swallow. If the court is right about the challenges of class litigation, it will be forced to manage the unmanageable.

Of course, there is another possibility, one which many plaintiffs’ lawyers might well find plausible. It may be that current law creates unnecessary impediments to class certification—that courts refuse to certify many indirect purchaser classes when doing so

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<sup>103</sup> AMC Report at 271.

<sup>104</sup> AMC Report at 278.

<sup>105</sup> *See, e.g., A & M Supply v. Microsoft*, 654 N.W.2d 572, 641-42 (Mich. Ct. App. 2002).



would be perfectly manageable and would best ensure meaningful private enforcement of the antitrust laws. If that is correct, it might be that federal courts could and would preside successfully over class-wide trials of direct purchaser claims, even if Illinois Brick were overruled by statute and defendants could invoke a “pass on” defense.

If so—if the AMC’s view is correct that these direct purchaser classes can and should be certified despite the “pass on” defense—the implications are profound. For, surely, a similar rule should apply to indirect purchaser litigation. After all, the same basic issue of “pass on” has been one of the main impediments to certification of those classes. Courts, then, have simply been wrong when they have refused to certify indirect purchaser classes—which is quite common.

For these reasons, the AMC’s implicit premise—that the “pass on” defense would not give rise to individual issues that would make class litigation inappropriate and unmanageable—is a surprising proposition. One would expect the AMC to have defended this premise at length. In fact, it did not.<sup>106</sup>

Recommendation 5: To allow removal of indirect purchaser actions to federal court.

The two remaining major proposals of the AMC are less troubling, although they seem unwise and premature. First, the AMC has proposed permitting removal of all antitrust claims to federal court, to the extent permitted under the Constitution.<sup>107</sup> This proposal is probably unnecessary. CAFA<sup>108</sup> already permits removal of the great majority of class actions arising under state antitrust law. There may be little need to extend CAFA further. Moreover, CAFA may prove to be unwise. In particular, federal

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<sup>106</sup> AMC Report at 278.

<sup>107</sup> *Id.* at 271.

<sup>108</sup> Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended at 28 U.S.C. §1711).

courts may be unwilling to respect the distinctive characteristics of state antitrust law. In a recent federal case, for example, the United States District Court for Northern District of California imposed a limitation on California state law indirect purchaser actions, reasoning by analogy to federal law, taking a step which it acknowledged no California state court had taken.<sup>109</sup> The risk that federal courts will rewrite state antitrust law to more closely resemble federal antitrust law may provide a good reason not to retain CAFA—or, at the least, not to extend federal jurisdiction over state claims further than CAFA does. Indeed, the AMC’s proposal might deprive state courts of the ability to develop state antitrust law because of the paucity of cases not subject to removal—giving rise to serious concerns about federalism. Congress attempted to strike a balance regarding these issues in CAFA. It is not appropriate to upset that balance without considering them carefully, which the AMC did not do. For example, the AMC did not adequately address federalism concerns in regard to removal of state law actions<sup>110</sup> (although it did in regard to eliminating indirect purchaser claims entirely<sup>111</sup>).

In any case, Congress passed CAFA only two years ago. Further reform should await experience with CAFA and the results of the expanded federal court jurisdiction over state antitrust law claims that CAFA created.

Recommendation 6: To allow a single federal court to preside over all stages of all direct and indirect purchaser actions in a single case, including both pre-trial and trial proceedings.

Finally, the AMC has proposed that a single court should preside over all proceedings in a single antitrust case, including all direct and indirect purchaser

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<sup>109</sup> *In re DRAM Antitrust Litig.*, 02-1486 (N.D. Cal. June 1, 2007), slip op. at 8-12.

<sup>110</sup> AMC Report at 272.

<sup>111</sup> *Id.* at 273.

actions.<sup>112</sup> Again, to a certain extent CAFA accomplished this result by allowing removal of state antitrust class actions to federal court. Direct and indirect purchaser actions will likely be tried together. On the other hand, as the AMC noted, while current law allows actions filed in different federal districts to be consolidated in a single court for pre-trial purposes, it does not allow the courts to require that those actions be *tried* in a single court.<sup>113</sup> Of course, the parties may be able to achieve this result voluntarily.

Perhaps requiring consolidation of all actions in one court for all purposes, including trial, would be more efficient. But perhaps not. Bigger is not necessarily better. At some point, a judge may become overwhelmed by having to address every single kind of purchaser and every single kind of antitrust claim, even if a common core of conduct is at issue.<sup>114</sup> And the difficulties juries generally have in complex litigation would only be compounded by the lengthy and complicated trial necessary to address all of these claims in one proceeding.

Again, given that CAFA has already greatly increased the likelihood that different claims in different actions by different plaintiffs will be tried in a single court, it probably would make most sense to allow time to pass and litigators and courts to gain practical experience before moving further in this direction.

## V. Conclusion

When it comes to civil remedies, then, the AMC left in place the provisions that are most important for effective private enforcement of the antitrust laws: treble damages and the award of attorneys' fees. For this decision it deserves praise. Given that no

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<sup>112</sup> *Id.* at 271.

<sup>113</sup> *Id.* at 269-270.

<sup>114</sup> Indeed, this may help to explain the court's decision to dismiss some of the indirect purchaser claims in *In re DRAM Antitrust Litigation*, 02-1486 (N.D. Cal. June 1, 2007).

Commissioner had any significant experience prosecuting private antitrust cases, this outcome is somewhat unexpected.

But why should this kind of skewed representation on the AMC be a given? As is implied by the interview with which this Article commenced, bipartisanship is not the same as balance. And the AMC was not balanced. That can help to explain why, despite the good faith of the Commissioners, the AMC failed to recommend changes that would have increased the level of deterrence for antitrust violations—an example is the failure to recommend awarding prejudgment interest (or some other measure of opportunity and capital costs). It can also help to explain why the AMC recommended alterations to antitrust doctrine that would decrease the level of deterrence for antitrust violations—examples include the proposals to allow claim reduction for non-settling defendants based on the liability of settling defendants and to alter the *Illinois Brick-Hanover Shoe* framework. These are the kinds of steps that a plaintiffs' attorney Commissioner likely would have challenged, particularly in light of consistent testimony that the laws *underdeter*—they do not *overdeter*—antitrust violations. In short, good faith efforts to overcome a lack of balance on the Commission proved to be an inadequate substitute for balance itself. Hopefully, Congress and the courts will attempt to compensate for this imbalance if they entertain any of the AMC's recommendations.