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Understanding the Antitrust Modernization Commission's Indirect Purchaser Recommendations

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Current Situation

- ▶ Indirect purchasers can recover in ~32 states, but not in ~18 others
- ▶ In some of the ~32 states where recovery appears to be permitted, treble damages are not available
- ▶ Some of the ~32 states permit recovery, not under antitrust provisions, but under strained interpretations of consumer fraud statutes
- ▶ In NY, and perhaps some other states, class certification is unavailable; in states where certification is theoretically possible, standards vary dramatically

Current Situation

- ▶ Massive procedural complexity, mitigated only partially by CAFA
 - *Suits brought in multiple state court courts must be removed - if they can be given CAFA loopholes - and only then referred to JPML before centralization in a single forum*
 - *Battles among plaintiffs' counsel for lead counsel roles also create incentives to separate directs and indirects, so as to make room for two sets of plaintiffs' counsel*
 - *Result is that indirect purchasers often proceed on a later or separate discovery track than directs, raising costs and impeding global settlements*
 - *Under Lexecon, if cases make it past pretrial they must be remanded back to districts of origin*

AMC Recommendation 47

- ▶ Direct and indirect purchaser litigation would be more efficient and more fair if it took place in one federal court for all purposes, including trial, and did not result in duplicative recoveries, denial of recoveries to persons who suffered injury, and windfall recoveries to persons who did not suffer injury.
- ▶ To facilitate this, Congress should enact a comprehensive statute with the following elements:

AMC Recommendation 47

- ▶ Overrule *Illinois Brick* and *Hanover Shoe* to the extent necessary to allow both direct and indirect purchasers to sue to recover for actual damages from violations of federal antitrust law.
- ▶ Damages in such actions could not exceed the overcharges (trebled) incurred by direct purchasers.
- ▶ Damages should be apportioned among all purchaser plaintiffs—both direct and indirect—in full satisfaction of their claims in accordance with the evidence as to the extent of the actual damages they suffered.

AMC Recommendation 47

- ▶ Allow removal of indirect purchaser actions brought under state antitrust law to federal court to the full extent permitted under Article III
- ▶ Allow consolidation of all direct and indirect purchaser actions in a single federal forum for both pre-trial and trial proceedings.

AMC Recommendation 47

- ▶ Allow for certification of classes of direct purchasers, consistent with current practice, without regard to whether the injury alleged was passed on to customers of the direct purchasers.

Likely process under AMC proposal

- ▶ Courts will manage cases in three parts: (1) class certification; (2) liability/total overcharge; (3) damage allocation among directs/indirects
 - *Indirects should combine with State AGs, who will have parens patriae authority, in the aggregate, over all 50 states, and who can proceed without class certification*
- ▶ Total damage recovery/settlements will be based on total overcharge; amounts paid by defendants will be the same
- ▶ Indirects will get more, directs less than today
- ▶ Legal fees will decline for both plaintiffs and defendants

Likely process under AMC proposal

- ▶ Direct purchasers will recover less, but no one can argue credibly that there will be fewer direct purchaser suits under the AMC regime
- ▶ Indirect purchaser classes are difficult to certify today; the AMC proposal effects no change for the worse
- ▶ The current legal regime encourages extorted settlements unrelated to the merits of a case, and this undermines enforcement by breeding disrespect and even contempt for the underlying law