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THE AMC INDIRECT PURCHASER RECOMMENDATION: TWELVE YEARS LATER

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The AMC Indirect Purchaser Recommendation: Twelve Years Later

One of the issues addressed by the Antitrust Modernization Commission was what to do about the indirect purchaser litigation problem. Cases were being filed in multiple state and federal courts and consolidation was difficult. State attorneys general added another layer of complexity. Class certification was all over the map. Worse, while citizens of some states could recover as indirect purchasers, citizens of other states could not.

In the dozen years after the AMC report was submitted, there have been some minor improvements, largely as a result of the Class Action Fairness Act of 2005.[1] Specifically, most state law indirect purchaser class actions can now be filed in or removed to federal court.[2] Consequently, in most contexts arising out of a single antitrust offense, the cases can all be centralized in a single forum by the Judicial Panel on Multi-district Litigation.[3] In addition, class certification became a bit more coherent following the Supreme Court's decisions in *Dukes*[4] and *Comcast*.[5]

But, still, serious problems remain. Class actions seem invariably to involve multiple putative classes of direct and indirect purchasers. In the massive *Generics*[6] case, for example, there is a putative Wholesaler/Retailer Class; an Independent Pharmacies Class; an End-Payer Class; a Healthcare Facilities Class; numerous state AGs; and a growing number of opt-out plaintiffs. The complexity is staggering and the associated costs are immense.

So what do? Is the status quo acceptable? Should we support a simple overruling of *Illinois Brick*? What about the AMC proposed fix? Are there other solutions that have a chance of enactment? Let's tackle those questions now.

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1 28 U.S.C. §§ 1332(d), 1453, 1711-15.

2 *Id.* § 1332(d)(2).

3 *Id.* § 1407.

4 Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011).

5 Comcast Corp. v. Behrend, 569 U.S. 27 (2013).

6 *In re* Generic Pharmaceuticals Pricing Antitrust Litig., No. 2:16-md-02724-DMR (E.D. Pa.).

Some History

Much of the confused state of indirect purchaser recovery stems from the context in which the issue first arose. In *Hanover Shoe, Inc. v. United Shoes Machinery Corp.*,[7] decided during the height of the Warren Court era in 1968, the issue was not whether an indirect purchaser could recover damages; it was whether a defendant could escape liability by proving that the overcharge was passed through to the direct purchaser's customers. Unsurprisingly, the Warren Court was not buying that one.

But *Hanover Shoe* set the stage for *Illinois Brick*,[8] nine years later. And there, of course, the Supreme Court famously said "no" to indirect purchaser recovery. The reasoning was simple. If defendants cannot argue that any overcharge was passed on, allowing the direct purchasers to recover the entire overcharge and then owing additional damages to those to whom the overcharge was passed on to would mean a double recovery. The Court also expressly serious concerns about the complexity of assessing damages beyond the direct purchaser overcharge, and added that deterrence would be furthered by giving direct purchasers a stronger incentive to sue.

Responses to *Illinois Brick* came quickly. Although federal legislation was pursued, no consensus could be reached and nothing passed. The states, however, did respond with several "Illinois Brick Repealer" statutes. The Antitrust Section has summarized the state of play (as of 2016) as follows:

> Twenty-nine states, the District of Columbia, and Guam have enacted statutes allowing indirect purchaser actions to be maintained in whole or in part. Eight states' statutes permit such claims through state action, while the remaining states' statutes allow such claims through private actions. Two states reject indirect purchaser actions through antitrust laws, but permit such actions through their consumer protection laws. In the area of jurisprudence, seven states reject *Illinois Brick* and allow private causes of actions; while seven other states only allow parents patriae actions. Courts of three states follow *Illinois Brick* and deny standing to indirect purchasers to use for overcharges, while four states have yet to take any position.[9]

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[7] 392 U.S. 481 (1968).

[8] Illinois Brick v. Illinois, 431 U.S. 720 (1977).

[9] ABA ANTITRUST SECTION, INDIRECT PURCHASER LITIGATION HANDBOOK 23 (2d ed. 2016).

It was against this backdrop that the Antitrust Section convened a task force in 2003, led by Richard Steuer. The ensuing report, called simply "Report on Remedies," did not advocate for any particular result, but did set forth a potential solution.[10] Specifically, the suggestion was to repeal *Illinois Brick* and *Hanover Shoe,* and to encourage all purchaser claims to be addressed in a single forum – while avoiding duplicative recovery.[11]

Following the task force's work, the Modernization Commission held an extensive hearing on indirect purchaser issues, received numerous comments, and analyzed the issues in depth. The AMC ultimately came to a consensus approach similar to what the ABA task force had suggested as a possibility.[12] The AMC proposal would:

- Overrule both *Illinois Brick* and *Hanover Shoe*;
- Limit the total damages to the full overcharge, without regard to pass-on, thus eliminating double recovery;
- Allow removal of state court cases to federal court to the full extent permitted by Article III;
- Encourage consolidation in a single action in a single forum; and
- Eliminate pass on as a class certification issue.

The expectation from the Commission was that, "in most cases, the proceedings that do not settle quickly would resemble an interpleader case: the aggregate overcharge would be determined first, with the allocation between direct and indirect purchasers to follow. That would allow the plaintiffs' groups to work together in the first phase of the case to maximize the total recovery. If they are successful . . ., then total damages recovered should be roughly the same as they are today. However, the ability of plaintiffs' lawyers to use the uncertainty in some states' laws to suggest that duplicative damages can be achieved will be eliminated."[13]

The AMC's recommendation has received zero attention in Congress. Although there is widespread criticism of the current regime, the interests of the relevant constituencies differ

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[10] https://www.americanbar.org/content/dam/aba/directories/antitrust/remediesreport council1.pdf (2004).

[11] *Id.*

[12] ANTITRUST MODERNIZATION COMM'N, REPORT & RECOMMENDATIONS 265-283 (2007) ("AMC Report"), *available at* https://govinfo.library.unt.edu/amc/report_recommendation/toc.htm.

[13] *Id.* at 422 (statement of Commissioner Jacobson).

substantially. The AMC's proposal was meant to bridge those divides, but that did not translate into action.

The issues, however, have not gone away. Although, as recounted above, CAFA has mitigated the forum shopping problem, several others remain:

- Consumers in many states cannot recover as indirect purchasers while consumers in other states can;
- Duplicative recoveries remain possible, as the California Supreme Court expressly allowed in *Clayworth v. Pfizer, Inc*.,[14] a problem exacerbated when indirect purchaser economic experts purport to find pass-through percentages exceeding 100%;[15]
- Determining who is and who is not barred by *Illinois Brick* has led to extensive litigation;[16]
- Cases (like *Generics*) often involve multiple indirect purchaser classes and, consequently, added complexity; and
- The uncertainty, coupled with the massive potential exposure, leads some defendants to settle cases they would otherwise defend.

Apple v. Pepper

Attention to the indirect purchaser problem was heightened recently when the Supreme Court agreed to hear *Apple v. Pepper.*[17] There, a divided Court ruled that purchasers from Apple's app store can sue Apple as direct purchasers, even though the prices set for apps are determined by app developers, not Apple; Apple simply charges a 30 percent commission on each sale. Because app store customers pay Apple directly, the majority concluded that *Illinois Brick* was no bar.[18]

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[14] 233 P.2d 1066 (Cal. 2010). The court indicated that apportionment would be allowed if both direct and indirect purchasers wee included in a single lawsuit.

[15] *See, e.g.*, *In re* Photochromic Lens Antitrust Litig., 2013 WL 12155832 (M.D. Fla., Mag. Judge, May 24, 2013).

[16] *See, e.g.*, Kansas v. Utilcorp United, Inc., 497 U.S. 199 (1990); *In re* Processed Egg Prods. Antitrust Litig., 861 F.3d 262 (3d Cir. 2018); *In re* Broiler Chicken Antitrust Litig., 290 F. Supp. 3d 772 (N.D. Ill. 2017).

[17] 139 S. Ct. 1514 (2019).

[18] The Eighth Circuit had reached the opposite result in Campos v. Ticketmaster Corp., 140 F.3d 1166 (8th Cir. 1998).

The *Apple v. Pepper* result was no shock, but it has refocused observers' attention to the basic indirect purchaser problem. Although the Solicitor General wound up supporting Apple's position, Makan Delrahim – AAG for antitrust and a former member of the Modernization Commission – would have preferred that the government instead support the AMC proposal. And at argument, Justices Kavanaugh and Gorsuch both floated the idea of overruling *Illinois Brick*. But that of course did not happen, and the *Pepper* decision ultimately left the fundamental problem open for another day.

Antitrust Standing

Although the Supreme Court has never addressed it in those terms, the ability of indirect purchasers to recover is a question of antitrust standing – who can sue and for what? – focusing specifically on the remoteness problem.[19]

The Supreme Court did not address antitrust standing at all until *McCready* in 1982[20] and *Associated General Contractors* in 1983.[21] But the federal courts had encountered the issue for many decades prior. Thus, in 1910, in the *Loeb* case,[22] the Third Circuit concluded that shareholders of an injured company were too remote to sue. The company could sue for itself, but any additional recoveries by the stockholders would be duplicative. Later cases applied similar remoteness concerns to bar suits by suppliers, creditors, lessors, licensors, and employees of the injured entity.[23]

Associated General Contractors identified a number of factors to consider in determining whether a plaintiff's claim is too remote. As summarized by the Antitrust Section, the factors include:

> (1) the causal connection between the antitrust violation and the harm to the plaintiff, and whether the harm was intended; (2) the nature of the injury, including whether the plaintiff is a consumer or competitor in the relevant market; (3) the directness of the injury, and whether the damages are too

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[19] *See* Jonathan Jacobson, *Twenty-one Years of Antitrust Injury: Down the Alley with Brunswick v. Pueblo Bowl-O-Mat*, 66 ANTITRUST L.J. 273 (1998).

[20] Blue Shield of Va. v. McCready, 457 U.S. 465 (1982).

[21] Associated Gen. Contractors v. Carpenters, 459 U.S. 519 (1983).

[22] *Loeb v. Eastman Kodak Co.*, 183 F. 704 (3d Cir. 1910).

[23] ABA ANTITRUST SECTION , ANTITRUST LAW DEVELOPMENTS ("ALD8") 743-45 (8th ed. 2017); *see* Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183 (2d Cir. 1970).

> speculative; (4) the potential for duplicative recovery, and whether the apportionment of damages would be too complex; and (5) the existence of more direct victims.[24]

Applying these factors, a number of state courts have addressed the standing of particular types of indirect plaintiffs. For example, in a series of cases brought against Visa and MasterCard, most of the courts concluded that consumers using a credit card to purchase goods wee too remote to challenge the card associations' requirement that merchants accept both their credit cards their debit cards. The effect of the requirement on the fees merchants pay Visa and MasterCard itself was unclear; whether cardholders too were injured was thus unduly speculative.[25] Other fact patterns, however, have been more difficult. Thus, in cases involving price fixing of rubber, some courts concluded that tire purchasers could sue while others concluded they were too remote.[26]

And now?

There are many potential "solutions" to the current state of indirect purchaser recovery. The options include:

Do nothing. Sadly, this is highly likely to be the real world outcome. The number of interest groups with deeply conflicting interests makes a national consensus unlikely. Plaintiffs' lawyers like the complexity and specter of duplicative recoveries, as they tend to induce favorable settlements. Dependents despise all that for the same reasons. But with CAFA pulling state law cases into federal court, the prospect of companies having to mount a defense in numerous fora has receded significantly. The prospect of duplicative recovery, however, still remains.

There is some room for improvement even under this scenario. Specifically, greater reliance on the *AGC* factors to limit the universe of potential plaintiffs would be a plus. So, if an ingredient in a product is subject to price fixing, suits by buyers of the finished product generally should be

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[24] ALD8, at 743-44 (citing *Associated General Contractors*, 459 U.S. at 537-44).

[25] *See., e.g.*, Kanne v. Visa U.S.A., Inc., 723 N.W.2d 293 (Neb. 2006); Southward v. Visa USA, Inc., 734 N.W.2d 192, 199 (Iowa 2007); Knowles v. Visa U.S.A., Inc., No. CV-03-707, 2004 WL 2475284 (Me. Oct. 20, 2004); Stark v. Visa U.S.A., Inc., No. 03-055030-CZ, 2004 WL 1879003 (Mich. Cir. Ct. July 23, 2004); Beckler v. Visa USA, Inc., No. 09-04-C-00030, 2004 WL 2475100 (N.D. Dist. Ct. Sept. 21, 2004).

[26] *Compare, e.g.*, Crouch v. Crompton Corp., 2004 WL 2414027 at *3 (N.C. Super. Ct. 2004) (no standing; too remote) *with, e.g.*, Lorix v. Crompton Corp., 736 N.W.2d 619 (Minn. 2007) (standing); Szukalski v. Crompton Corp., 726 N.W.2d 304 (Wis. Ct. App. 2006) (same).

banned, at lease absent proof that the ingredient is a dominant portion of the finished product's value – as in the tires cases addressed above.

Overrule Illinois Brick. Some observers favor simply overruling *Illinois Brick*. Doing so would have the obvious benefits of a uniform rule across the country and, importantly, of helping what are often the real victims of the overcharge to recover. Remoteness concerns would be policed, as they are in other contexts, by the *AGC* factors.

But what about *Hanover Shoe*? Overruling *Illinois Brick* but not *Hanover Shoe* would all but ensure duplicative recovery. *Hanover Shoe* holds that defendants cannot argue for reduced damages on the basis of pass-on. But if direct purchasers can recover the entire overcharge without regard to pass-on, allowing indirect purchasers to recover as well *necessarily* means duplicating damages. So overruling *Illinois Brick* but not *Hanover Shoe* is highly unlikely and would be a pretty terrible outcome.

The prospects for overruling both cases are not hopeless. Both decisions were motivated in part by the perceived difficulty in estimating the degree of pass-on. But economic analysis and econometric techniques have progressed substantially in the more than 50 years since *Hanover Shoe* was decided.[27] Econometric analyses of pass-through are now common, and the combination of *Daubert* and evidence rule 702 helps ensure reliability.[28]

Another concern voiced by the *Illinois Brick* Court was preservation of the incentive to sue. The majority recognized that, if damages had to be apportioned, the recovery for direct purchasers would be necessarily be less. The Court believed that enforcement by direct purchasers was key, and that reducing their recoveries would diminish private antitrust enforcement.

But, again, lengthy experience has demonstrated that this concern too is ephemeral. Case after case has demonstrated that allowing indirect purchasers to sue has in no way reduced the incentives of direct purchasers to sue. Virtually every "cartel" case involves claims by direct and indirect purchasers. It would be difficult – likely impossible – to identify a single private case that has not been brought because indirect purchasers also sued.

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[27] *See generally* ABA ANTITRUST SECTION, PROVING ANTITRUST DAMAGES (3d ed. 2017).

[28] FED. R. EVID. 702; *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993); *see* INDIRECT PURCHASER HANDBOOK, *supra* note 9, at 156-59.

Pre-empt state laws and ban indirect purchaser suits entirely. This suggestion will almost certainly never happen. But it has many benefits. It would simplify private cartel class action litigation significantly. Instead of multiple classes, there would be just one. The litigation cost of estimating pass-on would be eliminated. Although concerns remain that at least some direct purchasers are too cozy to the perpetrators to sue, it will be a truly rare context where class action lawyers cannot find at least one direct purchaser to advance the claim.

Given my own concerns about the excessive costs of private litigation,[29] I would favor this solution if writing on a clean slate. (In fact, I said so in the AMC report.[30]) But, as a practical matter, I recognize (as did the other AMC commissioners) that such a suggestion would be DOA in Congress as state after state would oppose it. So this potential alternative is just not a credible option.

The AMC Solution. In my view, the best outcome is still the one the AMC proposed (and that the Antitrust Section put forward as their potential option). The proposal would achieve the following:

- Allow indirect purchasers to recover regardless of where they live, providing an opportunity for truly damaged persons to achieve compensation.
- Apportion damages to resemble more closely the actual damages incurred.
- Reduce litigation expense.
- Provide an orderly structure for apportionment.
- Mitigate complexity by forcing all claims into a single forum.
- Eliminate double recovery.
- Avoid preempting state laws.
- Maintain private enforcement incentives.

The primary opposition to the AMC proposal is from plaintiff lawyer groups. That opposition is unfortunate. It is true that the elimination of double recovery will tend to reduce total settlement value and, therefore, plaintiff lawyer income. But the effects should not be great and arguing in

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[29] *See* Jonathan Jacobson, *Tackling the Time and Cost of Antitrust of Litigation*, 32 ANTITRUST 3 (Fall 2017).

[30] AMC Report, *supra* note 12, at 200 n.*.

favor of duplicative recovery seems unprincipled. Still, passing legislation over plaintiff and state attorneys general opposition will be very, very difficult.

Ultimately, the AMC solution is likely to get the same congressional reaction it has received for the past dozen years: none. The problems persist, however. Unfortunately, that is likely to continue.