

The Multi-State Vitamins Indirect Purchaser Litigation, Settlement, and Implications

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I. Introduction

In October, 2000, twenty-one state attorneys general announced a historic, nationwide settlement of state antitrust lawsuits threatened against an international cartel of six vitamin manufacturers that allegedly inflated vitamins prices in violation of federal and state antitrust laws. States attorneys general, in partnership with private class action attorneys, represented classes consumer and commercial indirect purchasers of vitamins -- those who did not buy directly from the vitamin manufacturers but to whom the overcharge was passed on in the form artificially high prices for products containing vitamins. The actions were brought under state law and is separate and distinct from direct purchaser litigation resolved earlier in federal court.

The vitamins litigation indeed is historic in many respects. State indirect purchaser law has been little used in the past, and the never before has there been a multi-state indirect purchaser case of this size and kind.¹ The combined settlement awards, totaling \$225 million, represent the largest ever received under the various states' antitrust laws.² The vitamins litigation also is unprecedented in its use of one "state" court, the District of Columbia Superior Court, to coordinate and oversee the complicated settlement process from start to finish, as well as to administer the future distribution of settlement funds.³

The highlights of the vitamins litigation and settlement should be more than merely noted; rather, the litigation and its implications should be carefully considered. The stakes of multi-state indirect purchaser litigation can be quite significant: thousands of unrelated parties are represented at once in a forum other than their own home state, and the defendants face risk of significant multiple liability if they must pay both direct and indirect purchasers for the same overcharge in price. Yet, other than the basic prohibition against pursuing such actions under federal law, very little precedent exists to guide parties to an appropriate outcome. The

¹ The other major, multi-state indirect purchaser suits were on behalf of purchasers of baby formula and of citric acid, and neither proceeded as the vitamins case did, at the state level entirely.

² David Barboza, *Tearing Down the Facade of 'Vitamins, Inc.'*, N.Y. Times, October 10, 1999, at C1 [hereinafter *Tearing Down the Facade*].

³ The provisions of the Master Settlement Agreement are outlined in Section IV, *infra*.

vitamins litigation and settlement could well serve as the model for future multi-state indirect purchaser actions. This paper will lay out the story of the vitamins litigation and discuss the value of the precedent it sets.

II. The Vitamins Story

A. The Vitamins Market

Vitamins are a multi-billion dollar industry. Nearly 50 percent of Americans regularly consume dietary supplements, vitamins, minerals and herbs.⁴ American manufacturers and farmers also purchase hundreds of millions of dollars in vitamins every year, for example making vitamin premixes to be used as animal feed additives, vitamin pills for human consumption, or adding them to foods, such as milk, bread, and cereal, and even to cosmetics and hair products.⁵

Few American manufacturers involved in the production of vitamins; instead, the country's vitamin supply largely comes from sources abroad.⁶ The world's biggest vitamin producers are involved in this dispute: Switzerland's F. Hoffman-La Roche, Germany's BASF, and France's Aventis (previously known as Rhone-Poulenc). Three major Japanese companies were also involved: Takeda Chemical Industries Ltd., Esai Co. Ltd., and Daiichi Pharmaceutical Co. Ltd. These six settling companies control over 80 percent of the world's vitamin market.⁷

B. Antitrust Violations by the Cartel of "Vitamins, Inc."

They did it. There is little question that the above-named vitamins manufacturers violated federal and state antitrust laws by illegally conspiring to fix prices and allocate shares of the global market. "The scope of the conspiracy boggles the mind."⁸ Gary Spratling, then

⁴ *Tearing Down the Facade*, *supra* note 1.

⁵ For more, *see*, Exhibit 1, Vitamin Usage in Human and Animal Products, attached.

⁶ *Tearing Down the Facade*, *supra* note 1.

⁷ *Id.*

⁸ *Id.*

head of the Justice Department's criminal antitrust division stated, "Simply put, the vitamin cartel was as bad as they get. Nothing was left to chance, or more accurately to competition."⁹ According to Joel I. Klein, then head of the Justice Department's antitrust division, it was "the most pervasive and harmful criminal antitrust conspiracy ever uncovered."¹⁰

For at least ten years, top executives at some of world's largest drug companies met secretly in hotel suites and conferences, moving to the homes of high-level European executives when Federal Investigators were hot on their trail. Brazenly naming themselves "Vitamins Inc.," the coalition divided up world markets and carefully orchestrated price increases of vitamins A, C, E, niacin, and other B-complex vitamins -- a \$1 billion a year industry in raw vitamin ingredients.¹¹

In the process, they defrauded their customers -- small and big companies alike, including some of the world's major food companies, Kellogg, Coca-Cola and Nestle¹² -- and, eventually, those higher prices were passed down to individual consumers. Thus, as then Attorney General Janet Reno described, "on a daily basis for the past 10 years, every American consumer paid to eat and drink or use a product whose price was artificially inflated. Day by day, consumers took a hit in their wallet so that these conspirators could reap hundred of millions of dollars in additional revenue."¹³

The conspiracy is believed to have begun in 1989, when executives at Roche and BASF A.G. of Germany began conducting secret meetings about price-fixing, according to government investigators.¹⁴ At that time, Roche and BASF A.G. were apprehensive about the effects of pressure from rivals and falling prices. Their solution to those problems was to divide up the world vitamin market and invite other big vitamins makers to join the

⁹ Stephen Labaton & David Barboza, *Secret Vitamin Cartel Cheated Consumers, Price Fixers Hit with Record*, Times-Picayune, May 21, 1999, at E1 [hereinafter *Secret Vitamin Cartel*].

¹⁰ *Tearing Down the Facade*, *supra* note 1.

¹¹ *Id.*

¹² *Id.*

¹³ *Secret Vitamin Cartel*, *supra* note 8.

¹⁴ *Tearing Down the Facade*, *supra* note 1.

arrangement.¹⁵

According to Federal Investigators, Roche was the ringleader, and, with a series of high-ranking executives, was responsible for organizing meetings, coordinating the price-fixing, and ordering documents destroyed.¹⁶ The vitamins companies conducted regular meetings in Switzerland, Germany, and elsewhere, at which, according to the Government, they shared sales and market-share data, illegally coordinated price increases, and “decided region by region, who would get what share of the market, right down to the half percentage point, even the penny.”¹⁷ They even conducted regular “budget meetings” to make sure “everyone was on the same page.”¹⁸

The Government alleges in court documents that those three companies formed a giant price-fixing “phalanx,” gradually increasing the price of vitamins so as not to attract notice, as well as rigging the bidding process to drive prices higher.¹⁹ For example, in February, 1990, the average price of bulk vitamin A was \$11.59 a pound, and by November, 1998, the price had risen to \$19.84 a pound, according to a study conducted by lawyers of vitamins prices.²⁰ The scheme worked as planned, and the three companies dominated the market and earned billions of dollars. By the 1990’s, Roche, BASF, and Rhone Poulenc together controlled more than 60 percent of the world’s vitamin supply. Roche alone had revenues of \$3.3 billion in the United States. According to the Justice Department, an estimated \$5 billion to \$6 billion in United States commerce was affected in the early 1990’s by the price-fixing conspiracy.²¹

C. A Federal Investigation and Off to the Courthouse(s) – Chronology

- Information federal officers came across in an unrelated federal investigation in 1996

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

into price-fixing of feed additives by Archer Daniels Midland, a large chemical manufacturer, indicated that a similar, widespread price-fixing conspiracy existed in the vitamins industry.²² By November 1997, it was reported that the Justice Department was looking into possible antitrust violations in the vitamins industry, instigating a grand jury probe in Dallas, Texas, but naming no suspected companies individually.²³

- In October, 1998, before the federal investigation had received any significant breaks in the investigation, several attorneys, led by Davis Boies, Jr., of Microsoft fame, and his son, David Boies, III, filed two class actions in Washington, D.C.-- one on behalf of direct purchasers in federal district court,²⁴ and another on behalf of indirect purchasers in “state” court.²⁵
- The major turning point in the federal investigation came when Rhone-Poulenc came forward as part of an amnesty program in early 1999.²⁶ As a result, other companies followed, and Rhone-Poulenc avoided the fines assessed to the others.²⁷ Roche and BASF, as well as a large group of Japanese companies, next began to cooperate and begin settlement negotiations with the government. Word of an upcoming settlement between the government and the vitamin makers was out by mid-May of 1999.²⁸
- On May 17, 1999, David Boies, Jr., who then was working on the Microsoft case for the Justice Department, convened a group of plaintiff’s lawyers at the Mayflower hotel in Washington, D.C., “where he and colleagues mapped strategy from the several dozen firms scavenging for clients and readying their own suits.”²⁹ A key component of that strategy was to maneuver to have the cases heard before courts in Washington, D.C.³⁰
- In May 21, 1999, a settlement agreement with the federal government was announced. The vitamins makers involved in the conspiracy paid nearly \$1 billion to settle Federal antitrust charges, by far the largest criminal fines in American history. The Japanese companies agreed to pay \$137 million; BASF paid \$225 million, and Roche was slapped with the heaviest fine, \$500 million dollars, partly for being a repeat offender and partly for misleading government investigators during the Archer Midland investigation. Also, two Roche executives later would be sentenced by federal courts to prison terms of four to five months.³¹

²² In 1996, agreed to pay \$100 million to settle federal antitrust charges that the company had fixed the prices of feed additives. At the time, it was the biggest international cartel ever uncovered by Federal Prosecutors. *Id.*

²³ *Vitamin Industry Target of Federal Antitrust Probe*, Dallas Morning News, November 20, 1997, at D1.

²⁴ *See, In Re: Vitamins Antitrust Litigation*, Misc. No. 99-197 (D.C. Dist. Ct. filed 1998).

²⁵ *See, Giral v. F. Hoffman-La Roche, Ltd.*, No. 98 CA 7467 (D.C. Sup. Ct. filed 1998).

²⁶ *Tearing Down the Facade*, *supra* note 1.

²⁷ *Id.*

²⁸ *Id.*

²⁹ David Segal, *A Vitamin Rich Diet for Hungry Firms*, Wash. Post, May 31, 1999, at F9.

³⁰ *Id.*

³¹ *Ex Roche Officer Sentenced to Jail*, N.Y. Times, August 20, 1999, C3.

- By June 1999, the direct purchaser class, which included over twenty corporate customers, were in negotiations with Roche, BASF, and Rhone Poulenc.³² The talks were being conducted in Washington, D.C., and the settlement figure was in the range of \$850 million,³³ with Roche paying up to \$500 million, BASF paying \$250 million, and Rhone-Poulenc paying about \$85 million.³⁴ In early January 2000, seven large vitamin makers agreed to pay \$1.1 billion to settle the consolidated class-action brought by purchasers of bulk vitamins. The settlement would recover about 20 percent of what major food companies overpaid for their vitamin purchases – the rest representing treble damages and legal fees. About \$122 million was to be for legal fees, split between 50 law firms.³⁵
- But in February of that year, several big plaintiffs, including Tyson Foods and Quaker Oats, withdrew from the settlement, reducing the actual award to \$400 million. When the award was finally approved on March 31, 2000, the amount had been reduced to \$242 million. Plaintiffs attorneys said they were still seeking \$122 million legal fees.³⁶
- On the indirect purchaser side, the class and negotiations were joined by states attorneys in May, 1999. All plaintiffs sought treble damages, plus attorneys fees, interest, and costs for the antitrust violations, and any other damages available under the consumer protection laws, as well as declaratory and injunctive relief.³⁷ The pretrial process and the negotiations were supervised by the District of Columbia Superior Court, and a settlement agreement was reached in October, 2000, which provided \$117 million *cy pres* award for consumers, \$107 million for commercial purchasers, and \$30 million for the states themselves to compensate for state purchases. The settlement agreement was given preliminary approval by the D.C. Superior court soon thereafter, and by the courts of each of the settling states between April 26, 2001 and August 22, 2001. The fairness hearing and subsequent final approval was scheduled to take place in late February, 2002, but was postponed. The state courts are scheduled to hold final approval hearings in Spring, 2002.

III. Federal and State Law on Indirect Purchasers

A. No Indirect Purchaser Actions at the Federal Level -- The Case of *Illinois Brick*

Federal antitrust law provides private persons an explicit right to sue for damages arising from federal antitrust violations:

³² *Financial Digest*, Wash. Post, June 10, 1999, E1.

³³ *Id.*

³⁴ David Barboza, *Three Companies Seen Moving to Resolve Vitamin Price-Fixing Lawsuit*, NY Times, June 10, 1999, at C1.

³⁵ *\$1.1 billion Settlement Reached in Vitamin Price-Fixing Action*, 6 Med. Devices Litig. Rep. 10 (2000).

³⁶ *Settlement in Vitamin Case is Approved*, N.Y. Times, March 31, 2000, at C1.

³⁷ Class Action Second Amended Complaint at 23.

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor... and shall recover threefold the damages...

Section 4 of the Clayton Act, 15 U.S.C. Section 15. Until 1977, the above-quoted provision could be interpreted to allow for damage actions by a wide, even unlimited, range of plaintiffs; nothing in the text and history of the Clayton Act, nor in subsequent federal antitrust law explicitly restricted the private right of action. Arguably then, private right of action was available to not only those who purchased goods or services *directly* from antitrust violators, but also to those who bought *indirectly* from antitrust violators -- that is, those who bought from dealers or retailers and harmed by overcharges passed on from antitrust violators.³⁸ In other words, an antitrust violator could be responsible to all purchasers in the chain of distribution of its product.

This changed in 1977 with the Supreme Court's ruling in *Illinois Brick Co. v. Illinois*.³⁹ In that decision, the Supreme Court interpreted the above provision of Section 4 of the Clayton Act as providing a private right of action to only those who purchased goods or services *directly from antitrust wrongdoers*. The Supreme Court thereby eliminated a private right of action for indirect purchasers. What that meant was that, under current federal antitrust law, only a direct purchaser who acts as a dealer is entitled to an antitrust damage action for the entire overcharge, even though the direct purchaser/dealer in turn will have passed much of the overcharge on to its own consumers.⁴⁰

The majority opinion in *Illinois Brick* was based on three policy goals: (1) to avoid the risk of multiple liability that could defendants could face from indirect purchaser actions; (2) to

³⁸ When a monopolist or cartel member exacts a higher- than- competitive price (an "overcharge") from a dealer or other intermediary in the distribution system, the dealer will ordinarily raise its price as well. In most cases part of the loss caused by the overcharge will be absorbed by the dealer and part will be "passed on" to the next person in the distribution chain, who will do the same thing in turn until the good reaches the final consumer.

³⁹ 431 U.S. 720 (1977) [hereinafter *Illinois Brick*].

⁴⁰ Herbert Hovenkamp, *Commentary: The Indirect Purchaser Rule and Cost-Plus Sales*, 103 Harv. L. Rev. 1717, 1717-18 (1990) [hereinafter *Cost-Plus Sales*].

save the federal courts from the onerous task of apportioning damages between direct and indirect purchasers (including determining the amount of overcharge passed on); and, (3) to give direct purchasers full recovery as incentive to bring actions that would deter future antitrust violations.⁴¹

The Court argued that duplicative recovery would occur because, under the Supreme Court's previous decision in *Hanover Shoe*, an antitrust violator does not have a valid defense that a dealer passed much of the overcharge on to its customers and therefore suffered no injury.⁴² The concern was that, by allowing indirect purchasers to recover for overcharges passed on to them, while still permitting direct purchasers to recover treble damages for the entire overcharge, unreduced by any pass on, total damages awarded would be greater than that authorized by Section 4 of the Clayton Act. The Court rejected adopting a rule that would require direct and indirect purchasers to be joined in the same proceeding and share the award in the same proportion as the overcharge was absorbed on the grounds that such a task would be too difficult for courts to administer.⁴³

The dissent focused on its concerns for "valued fairness and compensation to all victims," that is, indirect as well as direct purchasers. Justice Brennan argued that the majority's objection to unachievable precision in apportioning damages should not preclude fair compensation of all persons harmed by an antitrust violation, and that the "reasoned estimation" of damages would reduce satisfactorily the risk of double recovery.⁴⁴ Justice Brennan further reasoned that the broad language of the Sherman Act covered indirect purchaser actions and that the majority decision was contrary to the legislative intent behind the Hart-Scott-Rodino Antitrust Improvements Act to create an "effective mechanism to permit consumers to recover damages for conduct which is prohibited by the Sherman Act, by giving State attorney's general a cause of action [to sue as *parens patriae* on behalf of the States'

⁴¹ *Id.* at 1730-35.

⁴² *Id.* at 1718

⁴³ *Illinois Brick* at 757.

⁴⁴ *Id.* at 759-60.

citizens] against antitrust violators.”⁴⁵

B. State Law Provisions for Indirect Purchaser Recovery

Concerned with compensating all victims of antitrust violations, state legislatures and courts immediately responded to the Supreme Court’s decision in *Illinois Brick* by enacting or reading existing state laws (such as consumer protection laws) to provide protection and compensation to all “those injured by unlawful conduct,” including indirect purchasers. As of this writing, over two-thirds of the states allow some form of indirect purchaser recovery.⁴⁶

The validity of state indirect purchaser statutes was upheld by the Supreme Court in

⁴⁵ *Id.* at 756 (citing S.Rep. No. 94-803, p.6 (1976)).

⁴⁶ Kevin J. O’Conner, *Is the Illinois Brick Wall Crumbling?*, 15 Antitrust ABA 34, n.3-7 (2001) [hereinafter *Illinois Brick Wall*]. Since the *Illinois Brick* decision came down, 19 states, the District of Columbia, and Puerto Rico have statutes permitting damage actions by or on behalf of indirect purchasers, including, ultimate consumers. *See, e.g.*, CAL. BUS. & PROF. CODE § 16750(a) (enacted in 1978); D.C. CODE ANN. § 28-4509 (1980); HAW. REV. STAT. § § 480-3, 480-14 (enacted in 1987); IDAHO CODE § 48-108(2) (enacted in 2000); 740 ILL. COMP. STAT. ANN. 10/7(2) (1979); KAN. STAT. ANN. § 50-801(b) (enacted in 1985); MD. CODE ANN., COM. LAW § 11-209(b)(2)(ii) (enacted in 1982); ME. REV. STAT. ANN. 10, § 1104 (enacted in 1989); MICH. COMR LAWS § 445.778(2) (enacted in 1984); MINN. STAT. ANN. § 325D.57 (same); N.D. CENT. CODE § 51-08.1-08 (enacted in 1991); N.M. STAT. ANN. § 57-1-3 (1979); NEV. REV. STAT. § 598A. 210 (enacted in 1999); N.Y. GEN. Bus. § 340(6) (enacted in 1998); R.I. GEN. LAWS § 6-36-12(g) (1979); S.D. CODIFIED LAWS § 37-1-33 (enacted in 1980); VT. STAT. ANN. 9, § 2465(b) (1999) and WIS. STAT. ANN. § 113.18(1)(a) (enacted in 1979).

Antitrust statutes in Alabama and Mississippi expressly permitted indirect purchaser suits prior to *Illinois Brick*. ALA. CODE § 6-5-60; MISS. CODE ANN. § 75-21-9.

Another 17 states appear to permit recovery on behalf of consumers, either in the form of restitution or damages under either state consumer protection laws or state unfair trade practices statutes: Alaska, Arizona, Arkansas, Connecticut, Florida, Kentucky, Louisiana, Massachusetts, Missouri, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, Utah, Washington, West Virginia. All of these states, except Arizona and Massachusetts, were plaintiffs in *FTC v. Mylan Labs., Inc.*, 99 F. Supp. 2d 1 (D.D.C. 1999), reconsidering 62 F. Supp. 2d 25 (D.D.C. 1999). Case law discussing the particular grounding of the indirect purchaser right of action is discussed in these opinions. *See also* McLaughlin v. Abbott Labs., Inc., No. C95-0526 (Ariz. Super. Ct., Yavapai County, filed July 9, 1996).

Thus, thirty six states and the District of Columbia, comprising over 70 percent of the nation’s population, now provide for indirect purchaser recovery.

A number of remaining states now have pending legislation to permit indirect purchaser recovery. For example, as of February 2001, bills were pending in Iowa, Oregon, and Pennsylvania. H.S.B. 93, 79th Gen. Ass., IA. 1st Sess. (2001); H.B. 2217, 71st Leg., Or. Gen. Sess. (2001); S.B. 21, 185th Leg., Pa. Gen. Sess. (2001).

Also, four states permit the state governments to recover for indirect state purchases. These include Colorado, Delaware, Maryland, and Virginia.

California v. ARC America Corporation, holding that State antitrust statutes may constitutionally grant damages to indirect purchasers, so long as the statutes do not deny direct purchasers full treble damage remedy under federal law.⁴⁷ The Court found that, looking at the express language and legislative history of federal antitrust law, there was no congressional intent to “occupy the field” of antitrust regulation. The Court further found that their decision in *Illinois Brick* did not impose federal antitrust policy on the states, which were traditionally entitled to their own antitrust laws and policies. Moreover, the Court reasoned that federal courts would not be unduly burdened with indirect purchaser actions because such state statutes had no bearing on the damages available to direct purchasers under federal law, and federal courts were not obligated to exercise supplemental jurisdiction over indirect purchasers' claims.⁴⁸

C. The Resulting Legal Framework

Thus, *Illinois Brick* and the state level reaction to the decision resulted in a “trifurcated legal landscape for unlawful cartels: federal criminal or civil enforcement actions, federal [or state] direct purchaser actions, and state indirect purchaser actions” which, now with a case like the vitamins litigation, “are approaching national coverage.”⁴⁹ Reactions to this system mirrors the disagreement between the majority and dissent in *Illinois Brick*. Critics of this result argue, “When viewed together, the state and federal antitrust systems render the rationales of *Illinois Brick* practically meaningless,” because “duplicative recovery will exist and pass-on will have to established in litigation, albeit under state law.”⁵⁰ But defenders of state indirect purchaser laws maintain that they are necessary, because without such laws, the real victims of the antitrust violations -- the consumers who are ultimately stuck paying the overcharge -- would have no right to recovery.⁵¹

⁴⁷ 490 U.S. 93, 95 (1989).

⁴⁸ *Id.* at 103-04.

⁴⁹ *Illinois Brick Wall*, *supra* note 42, at 34.

⁵⁰ *Cost-Plus Sales*, *supra* note 36, at 1719.

⁵¹ Written comment from Vermont Assistant AG, Julie Brill, visiting Multi-state Litigation class at

IV. The Master Settlement Agreement

The section that follows is an outline of the key provisions of the Master Settlement Agreement (MSA) in the vitamins indirect purchaser litigation.

A. Approval of the Master Settlement Agreement

A master settlement agreement was given preliminary approval by the District of Columbia Superior Court in May, 2001. Thereafter, slightly modified versions of the settlement agreement were submitted to the court of each state involved, subject to preliminary and final approval of the state courts. Final approval requires fairness hearings be conducted, and most have been scheduled for early 2002.

B. Class Certification

- Two indirect purchaser classes were certified— one class consisted of consumer purchasers and another consisted of commercial purchasers.
- The consumer class was defined as:

All natural persons (excluding Released Parties) who purchased Indirect Vitamin Products for use of consumption by themselves and/or others and not for resale in any form, and who: (i) are residents of one or more Settling States; and (ii) purchased Indirect Vitamin Products from within one or more of the Settling States at any time during the Relevant Period.

The Consumer Settlement Class shall be divided into twenty-three (23) subclasses, one for each of the Settling States. A class member shall be

Columbia Law School (Nov. 27, 2001).

Each side's arguments are well illustrated in this case by examining the charts of the chains of vitamin distribution in various industries. *See* attached Exhibits A-C. Without state law, only the first purchaser in the chain of distribution would be able to recover; under *Illinois Brick*, all purchasers below the first level in the chain would be left without any compensation. On the other hand, the charts also demonstrate the inherent difficulty in properly apportioning damages between all purchasers.

included in only one subclass.⁵²

- The commercial class was defined as:

All persons or entities) excluding Government Entities and Released Parties) that made any Qualifying Purchases during the Relevant Period.

The Commercial Settlement Class shall be divided into twenty-two sub-classes, one for each of the Settling States, other than the State of Hawaii. Each Qualifying Purchase made by a class member shall qualify that class member for inclusion in only one sub-class.⁵³

C. Release of Claims

- In exchange for the relief described below, all classes released the defendants from all future claims with respect to the vitamins sold during the class period.⁵⁴

D. The Money

(1) The Consumer Settlement -- *Cy Pres* Remedy for the Indirect Consumer Class

- The MSA provides for \$117 million for consumers.
- Because of the difficulty of apportioning the damages among individual consumers, the money is to be distributed *cy pres* to organizations dealing with health and nutrition.⁵⁵
- As part of the settlement agreement, a State Economic Impact Fund was established and

⁵² MSA at Section I.A.1.

⁵³ *Id.* at Section I.A.2.

⁵⁴ *Id.* at Section V.A.

⁵⁵ The agreement provides:

Each Settling State, through its Attorney General ..., shall direct that portion of the Consumer Class Settlement Amount allocable to that particular Settling State be distributed to a political subdivision(s) thereof, not-for-profit corporation(s), and/or charitable organization(s) with the express purpose of ensuring that the funds be used for the improvement of the health and/or nutrition of the citizens of that State and/or the advancement of nutritional, dietary or agricultural science. Each Settling State shall direct that its share of the Consumer Class Settlement Amount shall be used only to fund activities that have not been funded and that, but for the receipt of funds from this Settlement, would not be fully funded. If a Settling State used its distribution to fund an activity that has previously been funded, it will direct that the distributed funds do not supplant existing funding and are used only to fund shortfalls in existing funding. The money may be distributed as a *cy pres* distribution to benefit injured consumers in the Settling State, as *cy pres* distribution to benefit injured commercial purchasers in the Settling State, or may be apportioned between the two. MSA at Section VI.E(4)(b).

is to be distributed by the respective Attorneys General of each Settling State in recognition of the differing economic impact or economic effect of the Alleged Conduct may have had on businesses and/or consumers in an individual Settling State. Accordingly, each state received differing percentages of the total award.⁵⁶

(2) The Commercial Settlement -- One Pot, One D.C.-Based Distribution Mechanism

- There is only one settlement agreement, and a single commercial settlement fund consisting of \$107,000,000.
- A novel mechanism was instituted for the distribution of the commercial settlement fund. The D.C. Superior Court -- and only that court -- is empowered to decide the matters of all commercial indirect purchasers throughout the nation. Specifically the court will:
 - decide whether the form and manner of notice is sufficient;⁵⁷
 - decide issues and disputes regarding possible reductions in the settlement fund;⁵⁸
 - appoint and oversee the settlement distributor;⁵⁹
 - approve the plan for distributing the fund to claimants throughout the nation;⁶⁰
 - approve the commercial distribution plan;⁶¹
 - approve late filed claims;⁶²
 - decide whether a decision by a defendant to terminate participation in the commercial settlement was in good faith;⁶³
 - resolve any disputes regarding the final accounting of the commercial settlement fund;⁶⁴
 - resolve all dispute concerning the commercial class settlement and retain jurisdiction over the implementation and enforcement of the settlement.⁶⁵
- Basically, it was intended that the D.C. Court will have almost exclusive power in supervising and administering the settlement.⁶⁶

⁵⁶ For specific percentages, *see*, MSA at VI.C

⁵⁷ MSA at Sections III.F.3, IV.I.4(b).

⁵⁸ *Id.*

⁵⁹ *Id.* at Section I.B.50.

⁶⁰ *Id.* at Section III.F.1.

⁶¹ *Id.* at Section VI.E.5.

⁶² *Id.* at Section III.G.2.

⁶³ *Id.* at Section VII.A.

⁶⁴ *Id.* at VI.E.3.

⁶⁵ *Id.* at Section IX.G.

⁶⁶ *See*, Class Opposition Brief at 10 (“[T]he MSA does require that commercial class settlement members submit to the ADR Court’s jurisdiction to ensure fairness and uniformity in the interpretation of and administration of the settlement.”); Class Opposition Brief at 12 (“[T]his Court will set in motion the settlement approval process in all the other settling states, including Minnesota.”); Corp. Counsel Opposition Brief at 5 (“The MSA assigns to this Court an on-going role in administering and overseeing the distribution of the commercial settlement fund through this multi-state claims process.”); Corp. Counsel Opposition Brief at 10 (“It is trusted that a decision by this Court conditionally certifying

(3) Separate Agreement Settling Claims of States as Indirect Purchasers:

- The plaintiffs and the general public also benefit from the separate settlement, the State Vitamin Purchaser Settlement Agreement (the “SVPSA”). The parties to the SVPSA are the State Attorneys General of the 43 states, Puerto Rico, and the District of Columbia and the Settling Defendants. SVPSA, which was negotiated contemporaneously with the MSA during the ADR proceedings, provides for payments totaling approximately \$30 million to resolve claims for direct and indirect government purchases of vitamin products, as well as claims for civil penalties. The SVPSA also provides injunctive relief prohibiting Settling Defendants from engaging in any horizontal conduct relating to vitamin products that constitutes a violation of Section 1 of the Sherman Act.⁶⁷

E. Opt-Out Process

- Those plaintiffs that opt out of the MSA must consent to being subject to discovery by the defendants.⁶⁸

V. Centralizing and Coordinating Litigation

Private class actions were filed in state courts, and soon thereafter, states attorneys general joined the litigation. The indirect purchaser class consisted of an incredibly numerous and diverse set of plaintiffs, from large food manufacturers, to animal feed manufacturers, to individual consumers, located all over the country. Actions were brought on behalf of indirect purchasers in each of the Class Jurisdictions, pursuant to the antitrust and consumer protection or unfair trade practice laws of the respective jurisdictions.⁶⁹

the District of Columbia classes and preliminary approving the MSA would increase the probability of the D.C. Superior Court, as opposed to a court in some other jurisdiction, assuming administrative responsibility for [the] multi-state [commercial] settlement fund...”).

⁶⁷ MSA at Section II.C.

⁶⁸ MSA at Section IV.C

⁶⁹ The private class first filed its claim pursuant to the District of Columbia Antitrust Act, D.C. Code Section 28-4501 *et seq.* and the Consumer Protecting Procedures Act, D.C. Code Section 28-3901 *et seq.* The District of Columbia Superior Court had jurisdiction over the case pursuant to D.C. Code Sections 11-921, 13-423, 28-3905(k)(1) (consumer protection), 28-4508 and 28-4509 (antitrust). Other states followed:

Arizona, A.R.S. Section 44-1402, *et seq.* (antitrust)

Florida, Florida Statutes Section 501.204, *et seq.* (consumer protection)

Kansas, Kan. Stat. Ann. Section 50-101, *et seq.* (antitrust)

Kan. Stat. Ann. Section 50-626(b) (consumer protection)

Maine, 10 M.S.R.A. Section 1101, *et seq.* (antitrust)

5 M.S.R.A. Section 207 (consumer protection)

A. Role of State Attorneys General in Coordination and Settlement

The alliance of the state-brought cases with private class actions during early proceedings and throughout ADR process was “instrumental” in resolving the dispute at the multi-state level.⁷⁰ The alliance was created and maintained by what each group brought to the litigation. Private counsel was “there first,” locating clients, building a case, and bringing considerable resources. But private counsel had special incentive to cooperate with the state attorneys general in this case. The states attorneys general allowed coordination and centralization of the all class actions that, otherwise, probably would not have been permitted. In particular, the assertion of state *parens patriae* claims helped to avoid potentially significant class certification problems.⁷¹

In some states, class certification is a straightforward matter, while in other states,

Michigan, M.C.L.A. Section 445.772, et seq. (antitrust)

M.C.L.A. Section 19.418(3) (consumer protection)

Minnesota, Minn. Stat. Ann. Sections 325D.57 and 325D.58 (antitrust)

Minn. Stat. Ann. Sections 325D.44 (consumer protection)

New Mexico, NM Stat. Ann. Section 57-1-3, et seq. (antitrust)

NM Stat. Ann. Sections 57-12-3 (consumer protection)

New York, N.Y. Gen. Bus. Section 340, et seq. (antitrust)

North Carolina, N.C. Gen.Stat. Section 75-1, et seq. (antitrust)

North Dakota, N.D. Cent. Code Section 51-08.1-08 (antitrust)

N.D. Cent. Code Section 51-15-02 (consumer protection)

South Dakota, S.D. Codified Law Ann. Sections 37-1-14.3, 37-1-33 (antitrust)

S.D. Codified Law Ann. Sections 37-26-6 (consumer protection)

Tennessee, Tenn. Code Ann. Sections 47-25-101, 47-25-105, 47-25-106 (antitrust)

Tenn. Code Ann. Section 47-18-104 (consumer protection)

West Virginia, W. Va. Code Section 47-18-1, et seq. (antitrust)

W. Va. Code Sections 46-A-6-104 and 47-11A-1, et seq. (consumer protection)

Wisconsin, Wis. Stat. Section 133.01, et seq. (antitrust)

Wis. Stat. Ann. Section 100.18(1)

⁷⁰ *Illinois Brick Wall*, *supra* note 42, at 37.

⁷¹ Seventeen states and the District of Columbia expressly allow *parens patriae* actions by the attorney general, and courts have interpreted statutes in fourteen states to allow *parens patriae* actions. Another five states have statutes authorizing the attorney general to maintain class actions or seek restitution on behalf of injured consumers. *Id.*

achieving certification can be quite difficult.⁷² The challenges of class certification are particularly compelling in the context of indirect purchaser actions, where, as in this case, potential plaintiffs may be great in number, quite diverse from one another, or impossible to identify.⁷³ The problem of class certification can be understood as one aspect of the apportionment issue raised in *Illinois Brick*:

Where plaintiffs assert a broad class, including multiple layers of distribution of a price-fixed product where each layer may have absorbed part of the unlawful overcharge, it can be challenging (but feasible) to satisfy courts that the manageability prerequisites of state law versions of Federal Rule of Civil Procedure 23 are met.⁷⁴

The special characteristics of *parens patriae* suits brought by states attorneys general, which confer a broad authority to sue in the public interest, helped to satisfy the manageability requirement for class certification. The availability of a *cy pres* remedy available in *parens patriae* actions would allow plaintiffs to avoid the task of apportionment, at least among consumer purchasers, as the damages recovered would not be distributed to individuals, but instead through some entity that works for the benefit of a state's citizenry in general.

The participation of the state attorneys general also played a significant role in overcoming objections from some plaintiffs that class representation was inadequate. Almost from the start, a group of Minnesota plaintiffs' attorneys, who represented a class ranging from individual consumers to commercial giant Tyson Foods, protested the negotiations process and the terms of the master settlement agreement. According to the Minnesota Plaintiffs, it was impossible to adequately represent each interest in such a highly diverse group of plaintiffs. They first sought to intervene in the case and, later, to have the D.C. Superior Court disapprove of the master settlement agreement.

In defending the adequacy of representation, the idea of the special legitimacy conferred

⁷² For example, Alabama courts have denied certification to every indirect purchaser class that has been proposed. *Indirect Purchaser Suits*, *supra* note 67, at n15.

⁷³ *Id.* at 35 (citing William H. Page, *The Limits of State Indirect Purchaser Suits: Class Certification in the Shadow of Illinois Brick*, 67 *Antitrust L.J.* 1, 22-23 (1999)).

⁷⁴ *Id.* at 35 (citing *Wood v. Abbott Labs., Inc.*, 1997-2 Trade Cas. (CCH) P72,014, 1997 WL 824019 (Mich. Cir. Ct. Mar. 30, 2001) (class certification granted)).

upon the settlement by the involvement of the state attorneys general proved crucial. Writing in opposition of the Minnesota Plaintiffs' motions, private counsel argued "as the chief law enforcement officers of their respective states, the State Attorneys General are expressly empowered to enforce their state antitrust and consumer protection laws, to seek injunctive relief against those violating their laws and, acting *parens patriae*, to obtain damages on behalf of businesses and/or consumers in their state."⁷⁵ Thus, they continued, "the fact that the Attorneys General are active participants in this settlement helps ensure that the settlement is fair and reasonable and benefits the entire plaintiff class."⁷⁶ The D.C. Superior Court agreed with this argument in orders denying the motions of the Minnesota Plaintiffs' motions, and thereby continued its support of the coordinated settlement process and master settlement agreement.

B. Reasons for Coordinated Settlement

A number of factors pressured the parties involved in the vitamins dispute to work to achieve a coordinated settlement. Variations on state law, such as on issues of class verification,⁷⁷ standing requirements,⁷⁸ recoverability of damages,⁷⁹ required proof of damages,⁸⁰

⁷⁵ Class Brief at 23 (citing D.C. Code Ann. Section 28-3901 et seq. and Section 28-4591, et seq.)

⁷⁶ *Id.* at 23-24 (citing, *Reebok*, 96 F.3d at 48 (noting that the motivating factor for states acting as *parens patriae* for their citizens is the enforcement of the antitrust laws); *In re Toys "R" Us Antitrust Litigation*, 191 F.R.D. 347, 351 (E.D.N.Y. 2000) ("Moreover, the participation of the State Attorneys General furnishes extra assurance that consumers' interests are protected."); *In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1386 (D. Md. 1983) ("Finally, the presence of public law enforcement officers in the settlement process is an appropriate element for the Court to consider in approving that settlement.")

⁷⁷ For example, in Illinois only the attorney general may maintain a class action on behalf of indirect purchasers. See, Joel Cohen & Trisha Lawson, *Navigating Multi-state Indirect Purchaser Lawsuits*, 15 Antitrust ABA 29, 31 n8 (2001) [hereinafter *Indirect Purchaser Lawsuits*] (citing, 740 ILL. COMP. STAT. ANN. 10/7(2)).

⁷⁸ Some statutes extend standing to any indirect purchaser that is injured as a result of an antitrust violation, while others are more limited. *Id.* at 31 n7 (*comparing* CAL. BUS. & PROF. CODE § 16750(a) (conferring standing upon "any person who is injured in his or her business or property . . . regardless of whether such injured person dealt directly or indirectly with the defendant") with MD. CODE. ANN., COM. LAW § 11-209(b)(2)(ii) (indirect purchaser standing conferred only on Maryland and U.S. governmental entities) and IDAHO CODE § 48-108(2) (authorizing only the attorney general to bring a civil action on behalf of indirect purchasers residing within the state)).

⁷⁹ In about half of the states with *Illinois Brick* repealer laws, plaintiffs can recover treble damages; in

and available defenses,⁸¹ would have made state-by-state litigation extremely unmanageable and time-consuming for both plaintiffs and defendants. Indirect purchaser litigation is complicated by the difficulty of assigning claims to a particular state as commerce typically crosses state lines. Such litigation has the potential to become extraordinarily expensive. For both plaintiffs and defendants, duplicative discovery would be an unnecessary burden and waste of resources. These reasons pushed both plaintiffs and defendants toward a comprehensive settlement.⁸²

C. Coordination in One “State” Court of the States’ Claims and Private Class Actions

In what seems to be an unprecedented maneuver, the parties were able to have all the state claims officially coordinated and supervised by one “state” court, the District of Columbia Superior Court.⁸³ For reasons particular to the vitamins case as well as for reasons relating to indirect purchaser law generally, the plaintiffs, both private class action attorneys and state attorneys general, did not have many options when it came to forum. First, in this particular case, the private plaintiffs who had first filed chose to proceed at the state level, filing different

other states, recovery may range from actual damages to actual damages plus \$500 for "each instance of [antitrust] injury or damage." *Id.* at 31, n9 (*citing*, e.g., ALA. CODE § 6-5-60).

⁸⁰ While many states seem (as there is little to no case law on indirect purchaser claims) to require individual proof of actual damages, a few states, most often in *parens patriae* actions, seem to accept aggregate proof of damages. *Id.* at 31, n10 (*comparing*, *Compare Execu-Tech Bus. Sys., Inc. v. Appleton Papers, Inc.*, No. 96-9639 (Dec. 18, 1997), *aff'd*, 743 So.2d 19 (Fla. App. Ct. 1999) (court may not presume individual injury in an indirect purchaser case) and *Wood v. Abbott Labs.*, 1997-2 Trade Cas. (CCH) & 72,014, 1997 WL 824019 (Mich. Cir. Ct. Sept. 11, 1997) (plaintiffs must prove actual damages) with D.C. CODE ANN. § 28-4508(c) (in private class actions, damages "may be proven on a class-wide basis") and D.C. CODE ANN. § 28-4507(d) (in *parens patriae* actions, "damages may be proved and assessed in the aggregate . . . without the necessity of separately proving the individual claim of, or amount of damage to, persons on whose behalf the suit was brought").

⁸¹ For example, several indirect purchaser statutes do not apply to conduct occurring prior to the date of their enactment. *Id.* at 31, n11 (*citing*, e.g., *In re Vitamins Antitrust Litig.*, 2000 WL 1511376 (D.D.C. Oct. 6, 2000) (holding that New York's indirect purchaser statute does not apply to conduct occurring before its enactment on Dec. 23, 1998); *Krotz v. Microsoft Corp.*, No. A416361 (Nev. Dist. Ct. June 22, 2000) (refusing to apply Nevada's indirect purchaser statute, enacted October 1, 1999, retroactively).

⁸² See, *Indirect Purchaser Suits*, *supra* note 67; *Illinois Brick Wall*, *supra* note 42.

⁸³ *Giral v. F. Hoffman-La Roche, Ltd.*, No. 98 CA 7467 (D.C. Sup. Ct. filed 1998). "Unlike related federal cases, which can be consolidated for pre-trial purposes by the Judicial Panel on Multi-District Litigation, there is no formal procedure for coordinating or consolidating related state cases pending in multiple jurisdictions." *Indirect Purchaser Suits*, *supra* note 67 at 32.

class actions in state courts. Although the state attorneys general often prefer to file a single complaint in federal court with state claims added as supplemental claims, in this case the pendency of numerous state actions by the private classes more or less forced the use of the state route.⁸⁴

Second, judicial hostility to indirect purchaser claims, whether brought under federal or state law, made use of federal courts unwise. Citing *Illinois Brick*, the federal district court in Washington, D.C. presiding over the parallel, direct purchaser litigation dismissed the claims of plaintiffs it classified as really being indirect purchasers, finding that the plaintiffs had not purchased pre-mixed vitamins directly from any of the named defendant.⁸⁵ The court reasoned that the damages sought by those plaintiffs would overlap with those claimed by the blenders of the premixes (the direct purchasers of the vitamins) and thus implicate the complex apportionment issues rejected by *Illinois Brick*.⁸⁶

The same court also dismissed a claim by a putative class action plaintiff, an indirect purchaser, to sue the defendant vitamin companies under a state's antitrust laws.⁸⁷ The complaint was dismissed on the grounds that the state antitrust laws were preempted by federal antitrust law.⁸⁸ The court pointed to earlier decisions in the Mylan Laboratories litigation⁸⁹ that established a jurisprudential barrier to litigating indirect purchaser claims under the laws of

⁸⁴ Email from Kevin J. O'Conner, Wisconsin Assistant Attorney General, to author, Miranda Berge, (Jan. 28, 2002, 01:12 EST) (on file with author).

⁸⁵ *In Re: Vitamins Antitrust Litig.* (relating to *Blue Seal Feeds, et al. v. Akzo Nobel, Inc., et al.*; *Tyson Foods, Inc., et al. v. Akzo Nobel, Inc., et al.*), 2001 U.S. Dist. LEXIS 112114 (June, 2001).

⁸⁶ *Id.* at 33.

⁸⁷ *In Re: Vitamins Antitrust Litig.* (relating to *Greene v. F. Hoffman-LaRoche, Ltd., et al.*), 2001 U.S. Dist. LEXIS 9585 (April, 2001).

⁸⁸ *Id.*

⁸⁹ See, *FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25 (D.D.C. 1999) (hereinafter *Mylan I*); *FTC v. Mylan Labs., Inc.*, 99 F. Supp. 2d 1 (D.D.C.) (hereinafter *Mylan II*). In *Mylan II*, the court allowed attorneys general in some states to maintain restitution claims on behalf of indirect purchasers under state unfair trade statutes. These states include: Alaska, Arkansas, Connecticut, Kentucky, Louisiana, Ohio, Oklahoma, South Carolina, and Utah. See, *Indirect Purchaser Lawsuits*, *supra* note 67 at 31. In *Mylan II*, the court assumed, but did not hold, that the Federal Trade Commission has the authority to sue on behalf of indirect purchasers under the Federal Trade Commission Act -- and on that assumption, the court allowed attorneys general in states that have similar "unfair trade" statutes to sue on behalf of indirect purchasers. *Id.* (citing, 99 F. Supp. 2d at 4 n.2).

certain states (i.e. Tennessee) in federal court. In those decisions, the court dismissed the claims of indirect purchasers under state antitrust law because federal antitrust law preempted state law. The *Mylan* court reasoned that “when the challenged conduct occurs before the products arrive in [the particular state], the conduct is considered interstate in nature and the [state antitrust laws] should not apply.”⁹⁰

Dismissing a Tennessee indirect purchaser vitamins claim, the district court applied similar reasoning: although the companies’ alleged conduct could have a demonstrable effect within a state, that intrastate effect was incidental to the primary interstate character of the alleged “world-wide price-fixing.”⁹¹ The fact that the cause of action was not based exclusively on the law of one state (Tennessee), but “also on the law of fifteen other states plus the District of Columbia,” was also cited as a reason that the action should be understood as “predominantly interstate in character.”⁹²

It seems unclear whether indirect purchaser actions brought under the laws of other states would also be dismissed by a federal court. The test applied under Tennessee’s statute might not be applied where the state statute makes no mention of “predominately intrastate commerce.” Whether another state may sue depends on the federal court’s interpretation of the state’s indirect purchaser law -- and, as those laws are relatively undeveloped and the interpretation is being done at the national and not the state level, the chances of negative disposition seem significant. A multi-state indirect purchaser case in particular may find an unwelcome reception after *In re Vitamins Litigation*, given that court’s reliance on the suit’s multi-state nature to find federal preemption.

⁹⁰ *Mylan I*, 62 F. Supp 2d at 51.

⁹¹ *Id.* at 31. The court read Tennessee antitrust laws to apply to transactions which are “predominately” intrastate in character. *Id.* at 23.

⁹² *Id.* at 33. That is, that it is a *multi*-state case may be an important factor in keeping future indirect purchaser cases in state forums. Several important results follow. First, the D.C. Superior Court may become a repeat player in the multi-state indirect purchaser cases of the future, and that makes *an evaluation of the role the D.C. court more important*. Second, an indirect purchaser case will remain separate and distinct from a parallel direct purchaser case, making avoidable a direct resolution of the *Illinois Brick* issues of apportionment and risk of multiple recovery.

For those reasons, therefore, coordination by a state court was necessary.⁹³ It appears that most parties, although with some notable exceptions,⁹⁴ were in accord with having the various class actions centralized under the D.C. Superior Court supervision. Shortly after the initial complaint was filed in the District of Columbia Superior Court, the case was stayed pending the outcome of alternative dispute resolution mediation with all named defendants. A number of state attorneys general, representing classes of indirect purchasers from their states, joined the private class action several months later.⁹⁵ State attorneys general and private attorneys also agreed to stay the proceedings against the vitamin companies in their respective states.⁹⁶

Besides providing a state-level forum, the D.C. Superior Court has played a material role in coordinating pretrial and settlement proceedings. The court ruled on defendants' motions to dismiss for lack of jurisdiction and for failure to state a claim, and also presided over the Alternative Dispute Resolution proceedings that eventually led to settlement. In that capacity, the court was available to hear and resolve problems arising in the settlement process, force a deadline for settlement, and rule on motions by existing and potential new plaintiffs to intervene and in opposition of the proposed settlement agreement. The D.C. Superior Court's

⁹³ Jurisdiction of the D.C. Superior Court appears to be a carefully crafted statement to guarantee a state forum:

The total amount in controversy as to each Plaintiff and each individual member of the Class alleged herein does not exceed seventy-four thousand dollars, even if trebled, exclusive of interest and costs, and Plaintiffs do not seek any form of 'common recovery.' Further, Plaintiffs and the Class assert no federal questions of statute, and Plaintiffs state law causes of action are not federally pre-empted. Plaintiffs state, and intend to state, causes of action solely under the laws of the District of Columbia and the other Class Jurisdictions and specifically deny any attempt to state a cause of action under the laws of the United States of America.

Amended Complaint at 12.

⁹⁴ A group of plaintiffs from Minnesota objected to consolidation of all claims throughout the negotiations process, but did not prevail in interrupting the coordinated settlement process.

⁹⁵ A first amended complaint adding to the original complaint the claims brought by the states attorneys general, as well as additional defendants, was filed May 11, 1999.

⁹⁶ Stays were entered in Arizona, Florida, Kansas, Michigan, Minnesota, New York, North Carolina, North Dakota, Tennessee, West Virginia, and Wisconsin. New Mexico, South Dakota, Maine, and California did not have cases stayed, but for reasons unrelated to resistance by counsel to do so. E-mail from Kevin O' Conner, *supra* note 74. Corporation Counsel, part of the "state attorney general" office of the District of Columbia, intervened shortly before the settlement was announced.

approval of any proposed settlement agreement also was required before the agreement could be considered for approval in other state courts. Further, the terms of the MSA provided for a significant, on-going role for the D.C. Superior Court in overseeing the commercial settlement distribution.

According to Wisconsin State Assistant Attorney General, Kevin O’Conner, the coordination process worked reasonably well.⁹⁷ He emphasized, though, that an important reason that the settlement process worked as well as it did was that almost all parties favored settling over litigation in multiple state courts.⁹⁸ According to O’Conner, even though each side would occasionally suggest that litigation in particular state would give them an advantage, few believed that such a move would lead to a more favorable outcome.⁹⁹ In the absence of party agreement to coordinate settlement, it is not clear that individual state courts would be willing to stay their actions pending the outcome in another forum, as most courts were ready to do in this case.¹⁰⁰ Further, if some of plaintiffs, defendants, or state courts had not cooperated, it seems doubtful that the D.C. Superior Court could have “forced” cooperation.¹⁰¹

In future multi-state indirect purchaser cases, the fact that attorneys general and private plaintiffs may have overlapping authority to represent indirect purchasers may cause

⁹⁷ E-mail from Kevin O’Conner, *supra* note 74.

⁹⁸ *Id.* However, one state, California, did perceive that its particularly strong antitrust laws would bring the California classes more benefits than could a unified settlement. Private plaintiffs in California chose not join the Master Settlement Agreement, and allied private plaintiffs rewrote the MSA to exclude any claim that could have been brought in California, thereby forcing a substantial number of claimants to look to California for satisfaction of their claims. Because many of these claims could be filed in more than one state (where the buyer is located, where the seller is located, and where the product was shipped), this put the California claimants in a potentially less favorable situation. For that reason, the California plaintiffs decided to rejoin the agreement just before it was finalized, but no agreement could be reached on how to revise the agreement to re-include them. *Id.*

⁹⁹ E-mail from Kevin O’Conner, *supra* note 74.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* See also, *Indirect Purchaser Suits*, *supra* note 67 at 32 (stating, “[t]o the extent that the other courts are willing to defer to the “lead” court on many common issues, without entertaining collateral attacks in their own courts, the process can approximate the MDL process in federal court. This is, however, a complex system, and the absence of a formal MDL-like procedure can result in breakdowns of coordination”).

dissension.¹⁰² Also complicating or preventing successful coordination in future cases may also be differences in the posture of the case for the defendants (e.g., “the number of cases at issue, the number and cohesiveness of defendants, the type of case and relative strength of each defendant's defenses, whether settlement is the ultimate goal”).¹⁰³ “Squabbles among plaintiffs' counsel, or among defendants' counsel, not to mention the more common squabbles between plaintiffs and defendants, can result in seemingly endless satellite litigation that can threaten the coordination of the cases.”¹⁰⁴ Defendants or plaintiffs may decide, before attempting coordination, to litigate aggressively in states where the opposition's claims are weakest to gain an advantage in negotiations.

Should coordination of the type in the vitamins case not be possible, some level of coordination still may be possible.¹⁰⁵ For example, case management and protective orders entered in federal direct purchaser litigation or an earlier state indirect purchaser case may serve as models for related actions.¹⁰⁶ A court may be responsive to such efforts to coordinate litigation, as avoiding repetitious disputes would reduce the burdens on the court itself and on the parties, as well as inconsistent requirements.¹⁰⁷

VI. Implications of the MSA and Coordinated Settlement Process

The vitamins case likely is one of the first of many multi-state indirect purchaser cases to come. The antitrust violations brought to light in the vitamin business are not unique -- in the last five years, Federal prosecutors have broken up three international food and agriculture cartels that lasted more than a decade. In 1999, the vitamins cartel was one of more than thirty

¹⁰² *Indirect Purchaser Suits*, *supra* note 67 at 31 (explaining that in some other repealer states, “it is not clear that the attorney general has authority to represent indirect purchasers as *parens patriae*,” and citing *In re Estate of Sharpe*, 217 N.W.2d 258, 262 (Wis. 1974) (attorney general lacks any common law or inherent *parens patriae* authority); *Wisconsin v. City of Oak Creek*, 605 N.W.2d 526 (Wis. 2000) (same)).

¹⁰³ *Id.*

¹⁰⁴ *Indirect Purchaser Suits*, *supra* note 67, at 32.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

investigations under way of international cartels in a variety of industries.¹⁰⁸ Private plaintiffs have increasingly sought indirect purchaser remedies.¹⁰⁹

State law in this area is little developed; few cases have been decided.¹¹⁰ Further, “most indirect purchaser statutes and parallel case law were adopted against a backdrop of procedural standards better suited to other types of litigation.”¹¹¹ The preceding section discussed why coordination and centralization occurred in this case; for those same reasons (and others to be discussed below), this model well might be followed in future multi-state indirect purchaser cases. Is this desirable?

A. State versus Multi-state Representation and Resolution

The advantages of a coordinated settlement are several; coordinated settlement reduced the resources necessary to litigate, joint retention of expensive experts and joint discovery, and added momentum in settlement discussions because states can offer a “global peace.” Are these benefits, however, worth the potential costs of coordination. Does a state give up more than it gains when it joins a centralized, multi-state litigation?

Coordination and centralization of claims brought by the state attorneys general and private plaintiffs allowed for a major, nationwide settlement of a highly complex dispute. The classes represented were arguably larger and more diverse than they otherwise ever could have been without the participation of the states attorney general, who, by asserting *parens patriae* actions on behalf of the entire state, were able to intervene in and have stayed and included in the settlement the pending, private class actions in their respective states. Some dissenting parties, such as the Minnesota plaintiffs, argued that the participation of the states attorney general was unwise and unfair. The negotiations process and MSA indeed do provide several possible sources of dissatisfaction: (a) plaintiffs were pulled unwillingly into a settlement¹¹²

¹⁰⁸ Stephen Labaton & David Barboza, *supra* note 7.

¹⁰⁹ *Illinois Brick Wall*, *supra* note 42, at 37.

¹¹⁰ *Id.* at 37.

¹¹¹ *Id.*

¹¹² According to the Minnesota Plaintiffs, it was not clear who was included in the settlement agreement

that gave them few options;¹¹³ (b) many plaintiffs were represented by a group of attorneys to whom they had no connection and who represented other clients (and/or the role of the attorney general of their state may have been limited or not in their best interest); (c) the possible advantages of the laws and courts of their own states were sacrificed; and (d) commercial plaintiffs will continue to be subject to the decisions of a court in another, distant state, as it distributes awards from one commercial fund. In part, the issues raised are those associated generally with class action suits, but several of those issues also can be understood as arising from the case's centralized pretrial/ negotiations process and resolution.

Class and state counsel, as well as the D.C. Superior Court, emphasize that no settlement agreement is final until each state court gives its approval, and that the concerns of particular classes or plaintiffs may be raised at the fairness hearings during the approval process of each state. However, plaintiffs like the Minnesota plaintiffs see it another way -- in their case, the role of the Minnesota state court is "strictly limited." The Minnesota State Court can only approve or disapprove the settlement as written. Any suggestions a state court may make to take into account the specific practicalities of the plaintiffs before it will delay settlement finalization and distribution in all jurisdictions.¹¹⁴

until the MSA was announced on December 12, 2000. Minnesota Plaintiffs Motion to Intervene at 9-10. The Minnesota Plaintiffs argued that the class counsel brought the case "on behalf of a class of Minnesota Plaintiffs," but "now seek to represent a broader class of Minnesota vitamins purchasers, including all of the Minnesota Plaintiffs, and seek the compromise and dismissal of all the Minnesota Plaintiffs." Minnesota Reply Memorandum at 5.

¹¹³ Other than intervention, plaintiffs objecting to or concerned about the terms of the settlement other than those negotiated have few options -- realistically, they may either opt out or shut up. Because dissatisfied plaintiffs must decide to opt out before the fairness hearings are conducted, the opportunity for those other than the key players at the negotiations table in Washington, D.C. is further reduced. And, in addition to the usual problems plaintiffs face in opting out (a costly alternative, particularly for plaintiffs with small claims, and which defeats many of the advantages for the class mechanism to be used in the first place), the plaintiff must decide whether to opt out before the fairness hearings in their own states are conducted. However, those who are not part of the negotiations, according to the Minnesota Plaintiffs, were never given any indication by lead plaintiffs' counsel as to whether the case against the defendants was strong or weak. *Id.* at 12. The Minnesota Plaintiffs were unable to conduct discovery during the time the settlement was being negotiated, a period of almost three years. Finally, as an additional restriction on plaintiffs' options, the MSA requires that class members opting out agree to open themselves to discovery by the defendants. MSA at IV.C.

¹¹⁴ *See*, Reply Memorandum in Support of Minnesota Plaintiffs' Motion to Intervene Pursuant to Rules

The lead plaintiffs argued, and the court agreed, that any class members' objections and reactions to the proposed settlement would be considered adequately at the fairness hearings conducted by the courts in each state. At the fairness hearings, the court presiding over the state class action would "have broad discretion to determine whether the proposed settlement is fair, adequate, and reasonable based on the law, facts, and circumstances of the case." But the Minnesota plaintiffs countered that, in reality, the state courts have no such broad discretion to safeguard the citizens of the state -- the Minnesota court's only real option is to disapprove the settlement, and the court has a limited time to do so and limited factual information.

Another, related downside to negotiating a multi-state settlement is that the particular advantages of a state's laws may be lost in the interest of achieving a broader peace. Does a plaintiff lose damages where the differences in state protection (or strength of one's claim) are averaged out? At least in one area of the settlement the advantages gained by multi-state coordination outweigh those associated by proceeding at the individual state level -- the novel, one-pot, one-fund distribution process of the commercial settlement fund, supervised by the district of Columbia Superior Court. If the commercial settlement was separately allocated by each state, claimants, who likely have business affected in multiple states, do not have to guess which state fund would be the optimal one for their claim.¹¹⁵ Further, the one-pot mechanism also avoids the problem smaller jurisdictions may have in being depleted by a large claimant's decision to claim from that jurisdiction. Additionally, administration costs of the fund are minimized through coordination.

Looking at the overall picture, though, it is clearly difficult to determine whether or not a better result for the plaintiffs or defendants, in any objective, quantifiable sense, could have been procured by proceeding at the state versus multi-state level clearly -- especially, since at this point in the settlement process, there is no factual support or explanation available as to the adequacy of the settlement awards. The only factual information provided by the settling

23 and 24, at 2.

¹¹⁵ E-mail from Kevin O'Conner, *supra* note 74.

parties as to what the settlement figures represent is the following is the following:

The settlement amount in this case represents a recovery of approximately 10% of defendants' sales of vitamin products attributable to the Settling States during a ten-year class period, and all but the very highest tier of direct purchaser cases as well.

Indeed, many indirect and direct purchaser cases have settled for 1% or less of defendants' sales, often over a much shorter class period.¹¹⁶

No explanation of how the settlement amount is fair and adequate given the nature and extent of the *plaintiffs' harm* was given. Thus, the settlement amount may or may not seem reasonable given the amount of unlawful overcharges. As Minnesota Plaintiffs argued:

Remarkably, at a recent hearing in Minnesota, class counsel stated that they have no idea how much money a commercial class member submitting a claim under the settlement can expect to receive. They did not even provide a reasonable estimate or an educated guess.¹¹⁷

What *was* provided in support of approval of the settlement were the attorney's opinions that the awards are fair and adequate. In this regard, it should be noted that the settlement was judged to provide adequate recovery by the states attorneys general, who are supposed to be acting in the best interests of the citizens of their states. For example, despite the strenuous objections by the Minnesota Plaintiffs, the Minnesota Attorney General deemed the settlement to be in the best interest of the state. Also, attorneys from the state with the most developed law on indirect purchaser suits, California, attempted to be brought back into the master settlement after separating from the coordinated class. Of course, one question to consider in evaluating the vitamins agreement and the precedent it sets is how much deference to give a state attorney general's approval of a settlement agreement, or even the decision to enter the litigation at all.¹¹⁸

Looking at the issue of multi-state coordination from the defendant's perspective, the

¹¹⁶ Class Memorandum at 25.

¹¹⁷ Reply Memorandum to Intervene at 4, n7.

¹¹⁸ Surely the state attorney general's decisions are worth a certain amount of confidence, but several caveats should be raised. First, "in the public's general interest" is a broad, ambiguous term that does not coincide neatly with the class of plaintiffs that would have been represented in the lawsuit. Second, not all state attorneys general participate actively in the litigation. Third, states attorney general, as elected officials, may bring political influences to bear in decision-making and representation.

blurring of the distinctions of state laws can work the other way and “result in what defendants may view as unreasonable settlement demands for the group as a whole.”¹¹⁹ The following section discusses this issue in the context of apportionment and risk of multiple liability.

B. Addressing *Illinois Brick*?

For reasons of national policy, concerns with the risk of multiple recovery and apportionment,¹²⁰ the Supreme Court eliminated a federal right of action for indirect purchasers, but allowed a state right of action, with the understanding that such cases (and inherent problems) would remain localized. When a multi-state case includes almost half the states in the country, the issues involved arguably are closer to being questions of national, not local, policy. Thus, a coordinated and centralized, multi-state indirect purchaser case presents the opportunity, if not the responsibility, to address the issues raised in *Illinois Brick*.¹²¹ However, the briefs submitted and orders decreed thus far make no mention of *Illinois Brick*, or the problems of multiple liability and apportionment.

Kevin O’ Conner, Assistant Attorney General for the State of Wisconsin, asserts that the defendants in the vitamins case were not subject to multiple liability -- at least not beyond the treble damages allowable under federal and many states’ antitrust laws. He points out that in the Mylan litigation, the defendants paid a little less than single damages to the combined federal and state plaintiffs, and that in the Vitamins litigation, the “six settling defendants have paid approximately two-and-one-half times a reasonable estimate of the single damage overcharge when one combines the approximately \$875 million in criminal fines, the \$1.1

¹¹⁹ *Indirect Purchaser Suits*, *supra* note 67 at 33.

¹²⁰ The fear is that direct purchasers and each layer of indirect purchasers all the way down to consumers would in theory be able to collect treble damages, or at least single damages, with potentially no off-set for passed-on overcharges. *Illinois Brick Wall*, *supra* note 42, at 37.

¹²¹ *Id.* at 34 (proposing that the Vitamins case presents the opportunity, through multi-state, pre-trial coordination, to create “a manageable national indirect purchaser right of action”). *See also*, *Indirect Purchaser Suits*, *supra* note 67 at 33 (suggesting coordination presents defendants with an opportunity better than state-by-state litigation for avoiding multiple liability).

billion in direct damages, and approximately \$400 million in indirect damages.”¹²² O’Conner further contends that, given the severity of the conduct the defendants admitted to, the settlement amount seems “paltry,” “when one looks at the time value of money and other factors reflecting an accurate measure of the economic harm caused by illegal cartels.”¹²³ Thus, in this view, the process followed more closely Justice Brennan’s suggestion in dissent that apportionment and multiple liability could be addressed adequately through use of “reasoned estimation.”¹²⁴

At least several of the defendants’ representatives, however, do not agree with O’Conner.¹²⁵ They argue that parallel, but separate state indirect and federal direct purchaser settlements do result in multiple liability because of violations are double-counted and pass-on of the violating overcharge among plaintiffs are not taken in to account properly.¹²⁶ Indeed, they view the coordinated, multi-state cases of this sort as presenting a real risk of significant duplicative recovery for the future.¹²⁷

Again, based on the little factual information about the settlement amounts available at this point in the settlement process, it is difficult to see which side has the better argument, or to see how, if at all, the problems of multiple liability an apportionment were handled. It is possible that the problems of multiple liability were a factor in determining the negotiated settlement figure. Perhaps the unified, one-pot mechanism of the commercial settlement may provide an opportunity to sort out some of the pass-on problems. Clearly, though, no significant apportionment will take place, for, as supporters of the settlement argue, if carried to a high level of precision, apportionment among the multiple layers of indirect purchasers is not a worthwhile task.¹²⁸ Thus, it seems that the process was closer to the “reasoned

¹²² *Id.* at 37.

¹²³ *Id.* (citing, Robert H. Lande, *Are Antitrust Treble Damages Really Single Damages?*, 54 OHIO L.J. 115 (1993)).

¹²⁴ *Illinois Brick* at 759-60.

¹²⁵ *Indirect Purchaser Suits*, *supra* note 67.

¹²⁶ *Id.*

¹²⁷ *Id.* at 33.

¹²⁸ *Illinois Brick Wall*, *supra* note 42.

estimation” described by Brennan in his dissent in *Illinois Brick*.

Ultimately, the outcome of the vitamins litigation may not be so troubling, given its source -- multi-billion dollar companies committing blatant antitrust violations. However, where conduct is less obviously deserving correction and restitution, and where companies are less financially sound, the risk of multiple liability may be less justifiable and a multi-state case of this sort may be more harmful than beneficial, more unfair than fair.

VII. Conclusion

Multi-state indirect purchaser litigation is uncharted territory, and big stakes are involved for both plaintiffs and defendants. The vitamins case is one of the first such litigation, and its consequences likely will continue long after the last dollar has been distributed. The MSA is far-ranging, complicated, and the case as a whole establishes a new model for indirect purchaser litigation, and even multi-state actions generally. The partnership between states attorneys general and private attorneys provided the needed momentum to achieve such a resolution.

In the end, considering the nature of the harm and the advantages of coordinated settlement in comparison with what fragmented litigation might have achieved, the outcome of the vitamins litigation seems appropriate. Nonetheless, the balance between the advantages and disadvantages of this model may be otherwise in other indirect purchaser actions, or the use of “reasoned estimation” insufficient to prevent abuses. In what likely will be the advent of a new kind of indirect purchaser litigation, the states attorneys general have considerable power to determine the outcome as well as the freedom to choose how to proceed; hopefully, they will do so wisely.