

Antitrust Reform Around the Corner?
--US DOJ's Deborah Garza Addresses MSBA Antitrust Section
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Deborah A. Garza, Deputy Assistant Attorney General, addressed a lunch-time MSBA Antitrust Section CLE of over 45 attorneys and students on September 20, 2007 at the University of St. Thomas School of Law. Ms. Garza serves in the U.S. Department of Justice (DOJ) Antitrust Division, and is the former Chair of the Antitrust Modernization Commission (AMC). Ms. Garza shared her thoughts on whether Congress will enact crucial antitrust reforms recommended by the AMC in its final report issued in April 2007.

“These things take time to percolate,” said Garza. With support from the American Bar Association to keep the recommendations before Congress, however, she hopes for changes in due time. Since the twelve-person, bipartisan AMC included equal numbers of appointments by the President, Senate, and House of Representatives, the recommendations in the 540-page report should stay vital and relevant even after near-term elections.

In her [September 20 remarks](#), Garza focused on two of the eighty recommendations that are at the heart of antitrust reform. First, the report recommends changes in contribution and claims reduction law. Under current law, defendants are jointly and severally liable for antitrust damages without the right of contribution from other defendants. This results in some non-settling defendants being held liable for much more than their market share in the conspiracy, which the AMC considered unfair and resulting in over-deterrence.

The report recommends that non-settling defendants be able to reduce the plaintiff's claim against them by the amount of the settlement or the percent of market share of the settling defendant, whichever is greater, and allow defendants to make claims of contribution

against each other. Garza stated that, if adopted, this recommendation would create fairer allocation of liability and eliminate “whipsaw” settlement tactics, but still provide motivation to settle.

Another crucial recommendation that Garza explained deals with direct/indirect purchaser litigation. Federal law today allows only the direct purchaser to recover antitrust damages. The Supreme Court in *Illinois Brick Co. v. Illinois* held that even if the plaintiff had passed on some or all of the overcharge to indirect purchasers (such as distributors and consumers), the indirect purchasers could not recover damages for their injuries. This 1977 decision led many states to enact antitrust laws that do allow injured indirect purchasers to recover damages. Consequently, direct purchasers tend to file their claims in federal court while indirect purchasers file claims in state court on the same antitrust violation, resulting in “a messy situation.”

To avoid duplicative actions, judicial inefficiency, and windfall recoveries, the AMC recommends a new statute that would allow both direct and indirect purchaser litigation in one federal court for all purposes including pre-trial and trial proceedings, limiting damages to the overcharges trebled among the plaintiffs in proportion to the actual damages suffered.

Besides focus on the AMC, Garza addressed current DOJ interest in international antitrust law developments. Of greatest concern is Europe’s proclivity to go after firms with powerful market positions, even if the positions were not achieved by anticompetitive conduct. China and the rest of Asia tend to favor the European approach, which can be detrimental to American companies.

International relations in the criminal arena, however, are very strong. Numerous cooperative agreements with other countries have led to the arrest of several foreign nationals

in recent months including the arrest of Korean executives who received fourteen months in U.S. prisons—the longest sentence ever given to foreign nationals for price fixing.

The CLE concluded with a question and answer session, which brought lively discussion on the *Whole Foods* case, unilateral effects theory and other merger concepts. Garza again reminded attendees that AMC reforms are hopeful but probably not immediate. For a full copy of the report, go to <http://www.amc.gov>.

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