St. John's University School of Law

St. John's Law Scholarship Repository

Faculty Publications

2004

Illinois Brick: A Look Back and a Look Ahead

Edward D. Cavanagh
St. John's University School of Law

Follow this and additional works at: https://scholarship.law.stjohns.edu/faculty_publications

Part of the Antitrust and Trade Regulation Commons, Consumer Protection Law Commons, and the Supreme Court of the United States Commons

This Article is brought to you for free and open access by St. John's Law Scholarship Repository. It has been accepted for inclusion in Faculty Publications by an authorized administrator of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

FEATURE ARTICLES

Illinois Brick: A Look Back and A Look Ahead

By Edward D. Cavanagh*

I. Introduction

In June 1977, the United States Supreme Court decided *Illinois Brick Co. v. Illinois*, ruling that only those dealing directly with price-fixers, and not others in the chain of distribution, are "injured" within the meaning of Section 4 of the Clayton Act in price-fixing cases.[1] The decision struck the death knell to claims by indirect purchasers that illegal overcharges incurred by first purchasers had been passed-on to them through the distribution chain.[2] The so-called direct purchaser rule of *Illinois Brick* was clear and unequivocal, the very essence of a bright-line rule. Yet, after over a quarter century, the decision remains controversial. Opponents of *Illinois Brick* have been both resourceful and persistent. While these opponents have failed in their efforts to see *Illinois Brick* repealed in Congress or directly overturned by the Supreme Court,[3] they have

---

* Professor of Law, St. John's University. A.B., University of Notre Dame; J.D., Cornell Law School; LL.M., J.S.D., Columbia Law School. The author gratefully acknowledges the very helpful comments of Professor Joseph Bauer and the faculty at Notre Dame Law School to whom an earlier version of this paper was presented as a work-in-progress.

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

[2] *In re* Microsoft Corp. Antitrust Litig., 127 F. Supp. 2d 702, 712 (D. Md. 2001) (stating that *Illinois Brick* assumes that direct purchasers were overcharged and "[t]his is the death knell to plaintiffs' claims since the very purpose of the *Illinois Brick* rule is to prevent indirect purchasers, such as plaintiffs, from receiving any portion of a passed-though overcharge.").

[3] *See* Kansas v. Utilicorp United, Inc., 497 U.S. 199, 217 (1990) (reaffirming *Illinois Brick*, explaining that "[h]aving stated the rule in *Hanover Shoe*, and adhered to it in *Illinois Brick*, we stand by our interpretation of § 4.").

effectively undermined *Illinois Brick* through statutory repealers under state law[4] and through the Supreme Court decision in *California v. ARC America Corp.*[5] *ARC America* held that *Illinois Brick* neither preempts states from enacting indirect purchaser statutes nor does it bar the federal courts from entertaining state law indirect purchaser claims.[6] As a direct result of *ARC America*, federal courts now regularly entertain, through removal or supplemental jurisdiction, issues involving passing-on under state law, which they are precluded from hearing under federal law by *Illinois Brick.*[7] *Illinois Brick* continues to inspire passionate arguments in the

---

[4] Some thirty states permit indirect purchaser suits. Twenty-five states and the District of Columbia have enacted *Illinois Brick* repealer statutes. *See* ALA. CODE § 6-5-60(a) (2004); ARIZ REV. STAT. § 44-1408(B) (2004); CAL. BUS. & PROF. CODE § 16750(a) (West 2004); COLO. REV. STAT. § 6-4-111(2) (2004) (authorizing the state attorney general to bring suit for indirect injury to any government or public entity); DEL. CODE ANN. tit. D(6), § 2108 (2004); D.C. CODE ANN. § 28-4509(a) (2004); HAW. REV. STAT. (Michie 2003) (allowing the state attorney general to file class action suit on behalf of indirect purchasers); IDAHO CODE § 48-108(2) (Michie 2004) (permitting the state attorney general as parens patriae to bring suit); 740 ILL. COMP. STAT. § 10/7(2) (2004); KAN. STAT. ANN. § 50-161(b) (20032); ME. REV. STAT. ANN. tit. 10, § 1104(1) (West 2004); MD. CODE ANN., COM. LAW I § 11-209(b)(ii) (2002) (allowing the state and its subdivisions to bring indirect purchaser suits); MICH. COMP. LAWS § 445.778(2) (2004); MINN. STAT. § 325D.57 (2003); MISS. CODE ANN. § 75-21-9 (2000); NEB. REV. STAT. § 59-821 (Supp. 2002); NEV. REV. STAT. 598A.210(2) (Supp. 2001); N.M. STAT. ANN. § 57-1-3(A) (Michie 2000); N.Y. GEN. BUS. LAW § 340(6) (McKinney Supp. 2003); N.D. CENT. CODE § 51-08.1-08(3) (2004); OR. REV. STAT. § 646.775(1)(a) (2001) (allowing attorney general to sue on behalf of indirect purchasers); R.I. GEN. LAWS § 6-36-12(g) (2001) (attorney general may sue on behalf of indirect purchasers); S.D. CODIFIED LAWS § 370-1-33 (Michie 2004); VT. STAT. ANN. tit. 9, § 2465(b) (Supp. 2002); WIS. STAT. § 133.18(1)(a) (2001).

Iowa, North Carolina, and Tennessee permit indirect purchaser suits by judicial decision. *See* Comes v. Microsoft Corp., 646 N.W.2d 440, 451 (Iowa 2002); Hyde v. Abbot Labs., Inc., 123 N.C. App. 572, 473 S.E.2d 680, 6848 (N.C. Ct. App. 1996); Blake v. Abbott Laboratories, Inc., No. 03A01-9509-CV-00307, 1996 Tenn. App. LEXIS 184, at *3-4, 1996-1 Trade Cas. (CCH) ¶ 71, 369 at 76,854 (Tenn. Ct. App. 1996).

Florida permits indirect purchaser suits under its consumer protection statute. *See* Mack v. Bristol- Meyers Squibb Co., 673 So. 2d 100 (Fla. 1st Dist. Ct. App. 1996). *See generally* 1 ABA SECTION OF ANTITRUST LAW, STATE ANTITRUST PRACTICE AND STATUTE 19 n.139 (3d ed. 2004).

[5] California v. ARC Am. Corp., 490 U.S. 93 (1989).

[6] *Id.* at 101-02.

[7] *See, e.g., In re* Vitamins Antitrust Litig., 320 F. Supp. 2d 1 (D.D.C. 2004).

antitrust community with debaters both *for* and *against* the *Illinois Brick* rule asserting their views with near religious fervor.[8] Unfortunately, that fervor has had the side-effect of clouding the underlying issues and promoting policy choices that may not be grounded in real-world experience. This article will: (1) review the *Illinois Brick* decision and its impact on the evolution of antitrust doctrine; (2) analyze the rule of *Illinois Brick* in light of a variety of policy considerations to determine the soundness of the rule; (3) review the judicial experience in indirect purchase suits in the post-*ARC America* era to ascertain whether any change in the direct purchaser rule is warranted; and (4) discuss the implications of *Illinois Brick* in answering the broader question of the proper role of state regulators and state law in the overall antitrust enforcement picture.

II. Background: The Direct Purchaser Rule

A. *Hanover Shoe*

It is impossible to grasp the philosophical underpinnings of the *Illinois Brick* decision without an in-depth understanding of the Supreme Court's earlier decision in *Hanover Shoe, Inc. v. United Shoe Machine Corp.*[9] *Hanover Shoe* was a treble damages action for

[8] The positions supporting and in opposition to *Illinois Brick* are so unyielding that panelists speaking at the ABA Antitrust Section's annual Antitrust Remedies Forum in spring 2003 in Washington, D.C. agreed not to discuss *Illinois Brick*, fearing that debate of indirect purchaser suits would *de facto* preempt debate on all other antitrust remedies issues. Over the years, however, the ABA Antitrust Section has debated the issue extensively. *See* ABA Section of Antitrust Law, *The State of Federal Enforcement Report of the Task Force on Federal Antitrust Agencies* 22, at 24 (Jan. 2001), *available at* http://www.abanet.org/antitrust/transition/transitionreport01.pdf (last visited Nov. 2, 2004); ABA Section of Antitrust Law, *Report of the Indirect Purchaser Task Force*, 63 ANTITRUST L.J. 993 (1995); ARC America Task Force, American Bar Association, *Report of the ABA Section of Antitrust Law Task Force to Review the Supreme Court's Decision in California v. ARC American Corp.*, 59 ANTITRUST L.J. 273 (1990); ABA Section of Antitrust Law, *Legislative Issues and Judicial Developments: Report of the American Bar Association Section of Antitrust Law Task Force to Review Proposed Legislation to Repeal or Modify Illinois Brick*, 52 ANTITRUST L.J. 841 (1984); *Illinois Brick* Task Force, ABA, *Report of the American Bar Association Antitrust Law Section Task Force on Legislative Alternatives Concerning* Illinois Brick Co. v. Illinois, 46 ANTITRUST L.J. 1137 (1978).

[9] Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968).

monopolistic overcharges against defendant shoe machinery manufacturer brought by plaintiff shoe-manufacturer, which had leased shoe machinery from defendant.[10] Plaintiff alleged that defendant's business practices, particularly its "lease only" policy with respect to shoe machinery that prohibited plaintiff from purchasing such machinery, violated Section 2 of the Sherman Act,[11] thereby causing the plaintiff to pay far more in rent under the lease agreement than it would have had to pay were it if permitted to purchase the equipment.[12] The Court rejected defendant's contention that plaintiff had suffered no legally cognizable damages because it has "passed-on" any overcharges by simply increasing the price of shoes sold to its customers and found for the plaintiff, holding that, except in very limited circumstances, a direct purchaser is injured by the full amount of any overcharge paid.[13]

On a visceral level, the *Hanover Shoe* holding is fairly easy to comprehend. Defendant, having been held liable for monopolization, argued that it should not have to pay treble damages to customers who actually *paid* the monopolistic overcharges because those customers did not ultimately bear the *burden* of those overcharges.[14] The defense position was counterintuitive. Given that the defendant had violated the antitrust laws and had caused its customers to pay overcharges, the antitrust violation was complete.[15] The business decisions that the first purchasers made after incurring the illegal overcharge are, from a legal perspective, irrelevant.[16] As the Court in *Hanover Shoe* noted, "[a]s long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows."[17] The rationale underlying the rejection of the "passing-on" defense was the Court's concern that recognizing this defense would impair the deterrent function of treble damages actions because the ultimate

---

[10] *Hanover Shoe*, 392 U.S. at 483. The *Hanover Shoe* treble damages action arose out of a government injunctive action entitled United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam* 347 U.S. 521 (1954), which resulted in judgment for the government.

[11] 15 U.S.C. § 2 (2004).

[12] *Hanover Shoe*, 392 U.S. at 483.

[13] *Id.* at 487-88.

[14] *Id.* at 488.

[15] *Id.* at 489.

[16] *Id.*

[17] *Hanover Shoe*, 392 U.S. at 489.

consumers, who, defendants say, bear the brunt of any overcharge, would have only a tiny stake in any litigation and thus no incentive to sue.[18] In addition, the Court was concerned about the practical pitfalls in analyzing business decisions in the "real economic world" rather than in an economist's hypothetical [econometric] model."[19] The Court stated:

> We are not impressed with the argument that sound laws of economics require recognizing this [passing-on] defense. A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether, had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price. Equally difficult to determine, in the real economic world rather than an economist's hypothetical model, is what effect a change in a company's price will have on its total sales. Finally, costs per unit for a different volume of total sales are hard to estimate. Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff *could not* or *would not* have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued. Since establishing the applicability of the passing-on defense would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable.[20]

---

[18] *Id.* at 494.

[19] *Id.* at 492.

[20] *Id.* at 492-93 (emphasis added). The Court thus identified several key factors which made measurement of "passed-on" overcharges highly speculative, if not impossible:

> 1. Bases for pricing decisions
>
> In making pricing decisions, a businessman looks at many parameters in addition to the cost of a single source of supply. *Id.* Hence, a shoe manufacturer would probably take into account a number of factors

The "could not" or "would not" analysis is key to

---

besides the rental cost of a shoe machine, including cost of building rental, labor costs, materials acquisition costs, transportation costs, availability and cost of credit, prices charged by competitors for comparable shoes, and expectations as to future demand, inflation and general employment levels. A change in any of these factors is likely to have an impact on pricing decisions by the shoe manufacturer (and in these inflationary times would no doubt result in an increase in the price of shoes). Thus, the notion inherent in the pass-on defense that any overcharge incurred by a customer can readily be traced and isolated in the price that such a customer charges his customers is fallacious.

2. Impact of price increases

In the real world, it is difficult to measure with any accuracy the effect on total sales of any price increase imposed by the overcharged purchaser to his buyers. *Id.* at 493. Economists measure a buyer's sensitivity to price changes by elasticity analysis. If a buyer is sensitive to price changes in a product, i.e., will reduce his volume of purchases when prices increase, his demand is said to be relatively elastic. Sophisticated econometric models can de devised to measure a buyer's demand elasticity and provide an estimate of how much of an increment an overcharged purchaser can pass-on to his buyer without affecting sales volume. Such a model could also theoretically measure the decline in sales the overcharged purchaser could expect to suffer were he to pass-on 100% of any overcharge.

Such econometric models, however, are expensive to devise, difficult to fully comprehend and at best only "guesstimators." Introduction of such econometric analysis into evidence would surely complicate and possibly unduly obfuscate antitrust proceedings. Moreover, such devices may be totally irrelevant in measuring change in sales volume. A buyer may choose to reduce volume of purchases from the overcharged purchaser for reasons that have nothing to do with increases in acquisition costs. For example, the buyer may have or perceive a change in taste; the buyer may be retrenching its sale efforts because of recession-induced economic conditions. There are any number of possible reasons for a decline in sales volume, none of which is easy to pinpoint.

3. Ascertaining "but for" conduct

Were the alleged conspirator able to show that the first purchaser passes on 100% of any overcharge to its customers and such customers suffered no loss in total sales or profit margin (a showing, which, as demonstrated above, is at the very least unlikely), the defendant would find it nearly impossible to prove that but for the overcharge the first purchaser "could not" or "would not" have raised its prices or maintained supra-competitive prices had the alleged overcharges ceased. *Id.*

understanding *Hanover Shoe* and its offspring, *Illinois Brick.* Of course, any number of factors other than increased acquisition costs for a product caused by defendant's illegal overcharges could have prompted the first purchaser to increase the product's price.[21] For example, the first purchaser might raise its prices because of an increase in rent or a more expensive labor agreement or simply because it felt that the time was right to impose a price increase. The timing of the defendant's price rise may have been fortuitous. Moreover, the fact that the first purchaser's price rise follows the imposition of illegal overcharges does not establish that the first purchaser was not damaged by those overcharges.[22] It is quite possible that the higher price to the ultimate purchaser could have been charged long before its actual imposition. Hence, a mere showing that the first purchaser's price increase to its customer follows defendant's overcharge is not enough to prove injury. Defendant must prove that the first purchaser "could not" or "would not" maintain a given price absent any overcharge imposed by the antitrust violation; that burden cannot be sustained in the "real economic world."[23]

B. Post-*Hanover Shoe*, Pre-*Illinois Brick* Decisions Regarding Passing-on

Hanover Shoe held that a party may not defend a price-fixing charge by claiming that the plaintiff passed-on any overcharges to its customers, or, more simply, passing-on may not be used defensively.[24] *Hanover Shoe*, however, did not address the question

---

[21] *Id.* at 492 n.9.

[22] As the court in *Hanover Shoe* further noted:

> The mere fact that a price rise followed an unlawful cost increase does not show that the sufferer of the cost increase was undamaged. His customers may have been ripe for his price rise earlier; if a cost rise is merely the occasion for a price increase a businessman could have imposed absent the rise in his costs, the fact that he was earlier not enjoying the benefits of the higher price should not permit the supplier who charges an unlawful price to take those benefits from him without being liable for damages. This statement merely recognizes the usual principle that the possessor of a right can recover for its unlawful deprivation whether or not he was previously exercising it.

Id. at 493 n.9.

[23] *Id.*

[24] *Id.* at 491-92. This ruling is in line with prior Supreme Court holdings

of whether a plaintiff down the distribution line could claim that overcharges had been passed-on to the plaintiff, thereby causing antitrust injury; i.e., whether passing-on could be used offensively.[25] The majority of lower courts upheld the offensive use of passing-on,[26] although a few held, as the Supreme Court would eventually rule in *Illinois Brick*, that the logic of *Hanover Shoe* prohibited the offensive as well as defensive use of passing-on.[27] However, a great deal of confusion existed as to the legal basis for granting or denying offensive use of the passing-on doctrine. Courts and commentators[28]

---

wherein plaintiffs had indirect claims. *See, e.g.*, S. Pac. Co. v. Darnell-Taenzer Lumber Co., 245 U.S. 531, 533 (1918) ("The general tendency of the law, in regard to damages at least, is not to go beyond the first step.").

[25] There are several obvious distinctions between the *Hanover Shoe* doctrine and the offensive use of passing-on. *Hanover Shoe* was a pro-plaintiff decision; to permit the defensive use of passing-on would serve to frustrate antitrust enforcement. Allowing the offensive use of passing-on would arguably promote antitrust enforcement. Secondly, the result in *Hanover Shoe* was designed to prevent antitrust defendants from gaining a windfall. Permitting the offensive use of passing-on would arguably prevent first purchasers who passed-on overcharges from gaining a similar windfall. West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079, 1088 (2d Cir. 1971), *cert. denied sub nom.* Cotler Drugs, Inc. v. Chas. Pfizer & Co., 404 U.S. 871 (1971).

[26] Before *Illinois Brick*, six of the seven federal circuit courts ruling on the issue held that indirect purchasers could sue for damages caused by violations of the federal antitrust laws. *See* Illinois v. Ampress Brick Co., 536 F.2d 1163 (7th Cir. 1976), *rev'd sub nom.* Illinois Brick Co. v. Illinois, 431 U.S. 720, (1977); Yoder Bros., Inc. v. Cal.—Fla. Plant Corp., 537 F.2d 1347 (5th Cir. 1976); *In re* W. Liquid Asphalt Cases, 487 F.2d 191 (9th Cir. 1973); Illinois v. Bristol-Myers Co., 152 U.S. App. D.C. 367, 470 F.2d 1276 (D.C. Cir. 1972); West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079 (2d Cir. 1971); Mangano v. Am. Radiator & Standard Sanitary Corp., 438 F.2d 1187 (3d Cir. 1971) (upholding dismissal of indirect purchaser claim); S.C. Council of Milk Producers, Inc. v. Newton, 360 F.2d 414 (4th Cir. 1966).

[27] Donson Stores, Inc. v. Am. Bakeries Co., 58 F.R.D. 481 (S.D.N.Y. 1973); Philadelphia Hous. Auth. v. Am. Radiator & Standard Sanitary Corp., 50 F.R.D. 13 (E.D. Pa. 1970), *aff'd per curiam sub nom.* Mangano v. Am. Radiator & Standard Sanitary Corp., 483 F.2d 1187 (3d Cir. 1971); City and County of Denver v. Am. Oil Co., 53 F.R.D. 620 (D. Colo. 1971).

[28] Boshes v. Gen. Motors Corp., 59 F.R.D. 589 (N.D. Ill. 1973); *In re* Antibiotics Antitrust Actions, 333 F. Supp. 313 (S.D.N.Y. 1971); Wilson v. Ringsby Truck Lines, Inc., 320 F. Supp 699 (D. Colo. 1970); *see* Daniel Berger & Roger Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L.J. 809 (1977); Milton Handler & Michael Blechman, *Antitrust and Consumer Interest, The Fallacy of the Parens Patriae Approach*, 85 YALE L.J. 626, 638-48 (1976); Comment, *Standing to Sue in Antitrust Cases: The Offensive Use of Passing-On*, 123 U. PA. L. REV. 976, 977-79 (1975); Comment, *Mangano and*

discussed the issue in terms of "standing,"[29] "remoteness"[30] and "passing-on."[31] It was thus left to the Supreme Court to clear the air.

C. *Illinois Brick*

1. The *Illinois Brick* Rule

In *Illinois Brick*, the Supreme Court was asked to determine which group of purchasers at different levels in the same vertical chain of distribution—those purchasing directly from defendants ("direct purchasers") and the customers of such purchasers ("indirect purchasers")—had a claim for overcharges in a treble damages action arising out of an alleged price-fixing conspiracy by manufacturers of concrete blocks in violation of Section 1 of the Sherman Act.[32] Plaintiffs, various state and local government entities, admittedly did not deal directly with the defendants but rather purchased buildings into which the price-fixed concrete blocks had been incorporated.[33] Plaintiffs claimed that the overcharges imposed by the concrete block manufacturers had been passed-on to them by intervening parties in the chain of distribution and that they had therefore suffered "injury"

Ultimate Consumer Standing: The Misuse of the Hanover Doctrine, 72 COLUM. L. REV. 394 (1972).

[29] Illinois v. Ampress Brick Co., 67 F.R.D. 461, 467-68, (N.D. Ill. 1975), *rev'd*, 536 F.2d 1163, 1164-67 (7th Cir. 1976); *In re* W. Liquid Asphalt Cases, 487 F.2d 191 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974); *In re* Master Key Antitrust Litig., 1973 Trade Cas. (CCH) ¶ 74,680 (D. Conn. 1973).

[30] *See In re* Antibiotics Antitrust Actions, 333 F. Supp. 310, 312-13 (S.D.N.Y. 1971) (holding that purchasers of animal feed into which alleged priced fixed antibiotics had been incorporated were too remote to sue manufacturers of such antibiotics); *see also* Boshes v. Gen. Motors Corp., 59 F.R.D. 589 (N.D. Ill. 1973).

[31] *Hanover Shoe*, 392 U.S. at 489.

[32] *Illinois Brick*, 431 U.S. at 726-27. The rule of *Illinois Brick* applies only in treble damages actions and does not apply to actions for injunctions pursuant to § 16 of the Clayton Act, 15 U.S.C. § 26. *See* Campos v. Ticketmaster, 140 F.3d 1166, 1172 (8th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999) (upholding dismissal of indirect purchasers claim for monetary damages under § 4 of the Clayton Act); *In re* Chicken Antitrust Litig. Am. Poultry, 669 F.2d 228, 238 (5th Cir. 1982); Mid-West Paper Products Co. v. Cont'l Group, Inc., 596 F.2d 573, 589-94 (3d Cir. 1979).

[33] Blocks were purchased from defendants by masonry contractors and used to build masonry structures; those structures were incorporated into entire buildings by general contractors and then sold to, among others, governmental entities. *Illinois Brick*, 431 U.S. at 726.

under Section 4 of the Clayton Act.[34] Defendants moved for summary judgment on the authority of *Hanover Shoe*.[35]

The Court was thus confronted with the question of whether to reaffirm the principles of *Hanover Shoe* and hold that only the overcharged direct purchaser—as opposed to the indirect purchasers down the distribution line—should be deemed to have suffered the full injury from the alleged overcharge. Alternatively, the Court could modify *Hanover Shoe* and permit multiple claims to the same overcharge by plaintiffs at different points in the chain of distribution who can show passing-on.[36] The Court, by a 6-3 vote, again chose to concentrate the full amount of any overcharge in the hands of the first purchaser, stating "that the overcharged direct purchaser, and not others in the chain of manufacture and or distribution, is the party 'injured in his business or property' within the meaning of [Section 4 of the Clayton Act]."[37] The majority thus adopted a rule of symmetry regarding the offensive use of passing-on, thereby barring indirect purchasers from maintaining treble damages actions whenever the antitrust defendant would be precluded from asserting the passing-on defense against a direct purchaser.[38] The Court discussed at length the policy reasons underlying the rule of symmetry in *Illinois Brick*.[39]

---

[34] 15 U.S.C. § 15 (2004); *Illinois Brick*, 431 U.S. at 726.

[35] *Illinois Brick*, 431 U.S. at 726.

[36] *Illinois Brick*, 431 U.S. at 728-29.

[37] *Id.* at 729.

[38] *Id.*

[39] The pros and cons of the *Illinois Brick* ruling barring plaintiffs' use of the passing-on theory have been debated at length in the literature, *e.g.*, William Landes & Richard Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of Illinois Brick*, 46 U. CHI. L. REV. 602 (1979) (generally supporting the *Illinois Brick* holding); *cf.* Robert G. Harris & Lawrence A. Sullivan, *Passing On the Monopoly Overcharge: A Comprehensive Policy Analysis*, 128 U. PA. L. REV. 269 (1979) (criticizing the rule of *Illinois Brick*). *See* William Landes & Richard Posner, *The Economics of Passing On: A Reply to Harris and Sullivan*, 128 U. PA. L. REV. 1274 (1980); Robert G. Harris & Lawrence A. Sullivan, *Passing on the Monopoly Overcharge: A Response to Landes and Posner*, 128 U. PA. L. REV. 1280 (1980). That debate will not be rekindled here, except to note that even the most forceful opponents of the *Illinois Brick* holding fail to come to grips with a basic tenet of that ruling: proof of passing-on requires a number of assumptions which cannot be easily or accurately translated from the economist's hypothetical model to the real economic world. *See, e.g.*, Harris & Sullivan, *Passing on the Monopoly Overcharge*, *supra*, at 277-79.

a. Tracing Problems

The Court found that any attempt to trace complex economic adjustments to a change in the cost of a particular factor of production would greatly complicate already complex antitrust proceedings and bog the Court down with numerous side issues that did not go to the heart of the alleged misconduct.[40] The Court further reasoned that evidentiary complexities which were identified in *Hanover Shoe* (where passing-on was used as a defense) would be present where a plaintiff, several steps removed from the defendant price-fixer in the chain of distribution, sought to use passing-on offensively.[41]

b. Impairment of the Treble Damages Remedy

The Court feared that the introduction of complex tracing problems into antitrust litigation would reduce the effectiveness of treble damages actions as a tool for enforcing the antitrust laws.[42] Indirect purchasers, with a comparatively small monetary interest in the litigation, have far less incentive to sue than the direct purchasers, who are not only spared the burden of tracing overcharges but are also permitted to recover the full amount of any overcharge under *Hanover Shoe*.[43]

c. Risks of Multiple Liability and Inconsistent Judgments

The Court further noted that any departure from *Hanover Shoe* to permit the offensive use of passing-on would create "a

---

[40] *Illinois Brick*, 431 U.S. at 725, 736.

[41] *Id.* at 740 n.3.

[42] *Id.* at 731 n.12. Justice White wrote for the majority:

> The concern in *Hanover Shoe* for the complexity that would be introduced into treble-damages suits if pass-on theories were permitted was closely related to the Court's concern for the reduction in the effectiveness of those suits if brought by indirect purchasers with a smaller stake in the outcome than that of direct purchasers suing for the full amount of the overcharge . . . The combination of increasing the costs and diffusing the benefits of bringing a treble-damages action could seriously impair this important weapon of antitrust enforcement.

Id. at 745.

[43] *Id.* at 745-46.

serious risk of multiple liability and 'open the door' to duplicative recoveries."[44] Under *Hanover Shoe*, the direct purchaser would automatically recover the full amount of any overcharge it had passed-on; allowing offensive use of passing-on would enable indirect purchasers to sue for recovery of all or part of the same amount, and thereby expose defendants to multiple liability in an amount that could be far in excess of any ill-gotten gains obtained through price-fixing.[45] Moreover, permitting offensive but not defensive use of passing-on would inevitably give rise to inconsistent judgments.[46] Thus, one court might find for the defendants in a direct purchaser suit believing that the defendants committed no illegal acts. In a subsequent suit, however, another court might alternatively find for the plaintiffs in a case brought by indirect purchasers against the same defendants on parallel facts where the jurisdiction was not bound by the previous suit.[47]

2. Exceptions to the *Illinois Brick* Rule Barring Indirect Purchasers From Maintaining Treble Damages Claims

In *Illinois* Brick, the Supreme Court recognized that complex tracing problems and the possibility of duplicative recoveries did not always present insurmountable obstacles to recovery.[48] In two very narrowly defined circumstances, the Court found that a plaintiff who did not purchase directly from the alleged antitrust violator might be able to prove that overcharges were passed-on to it without the necessity of analyzing complex price-output decisions and relative elasticities in two situations: (1) where there is a pre-existing cost-plus contract between the first purchaser and its customer,[49] and (2)

---

[44] *Illinois Brick*, 431 U.S. at 730-31.

[45] *Id.* at 730-31.

[46] *Id.* at 737 n.18.

[47] The injustice of inconsistent verdicts would be further compounded by the fact that other indirect purchasers, not parties to either suit against the defendants, may then under the doctrine of collateral estoppel be able to avail themselves of favorable factual findings in the prior proceeding, effectively estopping defendants from re-litigating liability. *See, e.g.*, GAF Corp. v. Eastman Kodak Co., 519 F. Supp. 1203, 1209-18 (S.D.N.Y. 1981) (holding that the defendant was estopped from re-litigating the issue of liability when it had fairly litigated and lost the claim on the merits in a prior proceeding against a different plaintiff).

[48] *Illinois Brick*, 431 U.S. at 736 n.16.

[49] *Id.* The same exception was recognized by the Court in *Hanover Shoe* in the

where the first purchaser is owned or controlled by its customer.[50]

a. The "Pre-Existing Cost-Plus Contract" Exception

The problem of tracing does not arise in the situation where a "pre-existing cost-plus contract,"[51] which fixes the quantities to be purchased in advance, exists between the first purchaser and its customer, the indirect purchaser. As the Court pointed out:

> In such a situation, the [first] purchaser is insulated from any decrease in its sales as a result of attempting to pass-on the overcharge, because its customer [the indirect purchaser] is *committed to buying a fixed quantity regardless of price.* The effect of the overcharge is essentially determined in advance, without reference to the interaction of supply and demand that complicates the

---

context of the defensive use of passing-on. *Hanover Shoe*, 392 U.S. at 494.

[50] *Illinois Brick*, 431 U.S. at 736 n.16. While *Hanover Shoe* was silent on the application of this exception, it is clear that it pertains equally to defensive and offensive passing-on situations. *See generally* Royal Printing Co. v. Kimberly-Clark Corp., 621 F.2d 323, 325 (9th Cir. 1980); *In re* Sugar Indus. Antitrust Litig., 579 F.2d 13, 19 (3d Cir. 1978); *In re* Coordinated Pretrial Proceedings In Petroleum Prod. Antitrust Litig., 497 F. Supp. 218, 226 (C.D. Cal. 1980); Dart Drug Corp. v. Corning Glass Works, 480 F. Supp. 1091, 1100 (D. Md. 1979).

[51] The Court did not define precisely what was meant by "cost-plus contract." *Illinois Brick*, 431 U.S. at 736. There are essentially two basic methods used in cost-based pricing: mark-up pricing and cost-plus pricing. *See* Harris & Sullivan, *Passing on the Monopoly Overcharge, supra* note 39, at 303-04. Under mark-up pricing, widely practiced by wholesalers, the direct cost of a product is its invoice cost. *Id.* at 304. The resale price is determined by adding to the invoice cost a more or less fixed percentage mark-up over the invoice cost, designed to cover indirect costs and provide a profit. *Id.* A second type of mark-up pricing, frequently employed by retailers involves "manufacturer's suggested retail price." *Id.* at 305. The seller charges the manufacturer's suggested retail price and the mark-up is the difference between the suggested resale price and the acquisition cost. *Id.*

The cost-plus pricing system is most frequently used by manufacturers and contractors. *Id.* Unlike mark-up pricing, cost-plus pricing entails a deliberate cost-allocation process by which the manufacturers determine for each product the costs associated with the production of one unit of that product. *Id.* These are denominated direct costs. *Id.* Indirect costs are then determined by equal apportionment among all product lines or in the same ratio as direct costs occur. *Id.* The indirect costs may be set in dollar terms or in terms of a percentage of fixed costs. *Id.* at 306. In contrast, under a mark-up system, there is no effort to allocate fixed costs to each product line. *Id.* at 305.

> determination [of the amount of the overcharge] in the general case.[52]

Thus, the pre-existing cost-plus exception has three elements:

> (1) a provision providing for automatic passing-on the full extent of the overcharge to indirect purchasers;
>
> (2) the direct purchaser is insulated from any decrease in sales or profit; and
>
> (3) a contract exists which commits the indirect purchaser to buying a fixed quantity regardless of price.[53]

The key element here is the *pre-existing, fixed quantity* nature of the contract.[54] In such a situation, the indirect purchaser is locked-in to buying a set amount and the first purchaser suffers no injury from any overcharge because he has no loss of sales volume.[55] Many courts talk loosely in terms of the "cost-plus" exception,[56] but it is not

---

[52] *Illinois Brick*, 431 U.S. at 736 (emphasis in original).

[53] Lefrak v. Arabian Am. Oil Co., 487 F. Supp. 808, 819 (S.D.N.Y. 1980); *cf. In re* Beef Indus. Antitrust Litig., 542 F. Supp. 1122, 1128-29, 1982-2 Trade Cas. (CCH) ¶ 64,815 (N.D. Tex. 1982).

[54] A simple hypothetical will illustrate the operation of a fixed quantity, pre-existing cost-plus contract. Assume that the first purchaser (FP) and his customer, the indirect purchaser (IP), have entered into a pre-existing cost-plus contract which obligates IP to purchase specified quantities from FP. FP's source of supply (M) is engaged in a price-fixing conspiracy and pursuant thereto overcharges FP. The conspiratorial charge to FP by M (FP's acquisition cost) is $12.00 per unit, while the price that would have prevailed absent a conspiracy was $10.00 per unit. Under the FP-IP contract, IP must purchase one million units per year from FP at FP's acquisition cost plus ten percent. The total cost paid by IP during the conspiracy is $13.2 million; but for the conspiracy IP would have paid $11 million. In other words, IP pays $2.2 million more than he would have paid but for the conspiracy. FP on the other hand, is not out of pocket one penny, since 100% of the overcharge is passed-on. FP not only suffers no volume loss but retains his ten percent profit-margin over costs.

[55] This situation is equivalent to perfect inelasticity of demand; the same amount will be demanded, irrespective of price. *Lefrak*, 487 F. Supp. at 819.

[56] *See, e.g., In re* Beef Indus. Antitrust Litig., 600 F.2d 1148, 1163 (5th Cir. 1979), *cert. denied sub. nom.* Safeway Stores, Inc. v. Meat Price Investigators Assn., 449 U.S. 905 (1980); *In re* Mid-Atlantic Toyota Antitrust Litig., 516 F. Supp. 1287, 1292 (D. Md. 1981).

enough under *Illinois Brick* to have a cost-plus contract without having provisions for fixed quantities.[57]

b. The "Ownership or Control" Exception

In addition to the pre-existing "cost-plus" contract situation, the Court in *Illinois Brick* suggested a second possible exception to its general holding barring proof of passing-on, the "ownership or control" exception.[58] As is the case with the pre-existing "cost-plus" contract exception, market forces are superseded and complex tracing issues regarding price-output decisions do not arise because in situations where the price-fixer owns the first purchasers the "sale" by the price-fixer to its customer is not at arm's length.[59] A price-

---

[57] Where quantities are not contractually fixed in advance, IP may decide to decrease its volume of purchases in view of FP's price increase. Should IP reduce its volume, FP may claim injury based on lost sales. In such a situation, IP cannot claim to have suffered the full brunt of the overcharge and a detailed assessment of price/output functions would still be necessary. This, of course, would present precisely the situation which the Court in *Illinois Brick* sought to avoid. *Illinois Brick*, 431 U.S. at 736; *but see* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE, § 16.6 (2d ed. 1999) (suggesting that the pre-existing cost-plus contract exception may be crafted too narrowly).

[58] The Court noted that "[a]nother situation in which market forces have been superseded and the pass-on defense might be permitted is where the direct-purchaser is owned or controlled by its customer." *Illinois Brick*, 431 U.S. at 736 n.16; *cf.* Perkins v. Standard Oil Co., 395 U.S. 642, 648, (1969); *In re* W. Liquid Asphalt Cases, 487 F.2d 191, 197, 199 (1973), *cert. denied*, 415 U.S. 919 (1974).

[59] *Illinois Brick*, 431 U.S. at 736. *See also* Kansas v. Utilicorp United, Inc. 497 U.S. 199 (1990) (rejecting "regulatory exception" where first purchasers are public utilities). Subsequent lower court decisions have held that the "control" exception would apply not only where the direct purchaser is owned or controlled by its customer but also where it is owned or controlled by its supplier. *In re* Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 605 (7th Cir. 1997) (citing *Utilicorp*, "'where the direct purchaser is owned or controlled by its customer'. . . or, we suppose, vice versa"); *In re* Mid-Atlantic Toyota Antitrust Litig., 516 F. Supp. 1287, 1292 (D. Md. 1981); *In re* Beef Industry Antitrust Litig., 600 F.2d 1148, 1160-61 (5th Cir. 1979); Jewish Hospital Ass'n, v. Stewart Mech. Enter., Inc. 628 F.2d 971, 974-75 (6th Cir. 1980) *cert. denied*, 450 U.S. 966 (1981); Reiter v. Sonotone Corp., 486 F. Supp. 115, 121 n.6 (D. Minn. 1980); Dart Drug Corp. v. Corning Glass Works, 480 F. Supp. 1091, 1104 (D. Md. 1979); *see also* Note, *Scaling the Illinois Brick Wall: The Future of Indirect Purchasers in Antitrust Litigation*, 63 CORNELL L. REV. 309, 327 (1978). Scholars have criticized the *Utilicorp* holding as taking too narrow a view of the "cost plus" exception. *See, e.g.*, HOVENKAMP, *supra* note 57, § 16.6.

fixer would obviously not benefit from imposing overcharges on an entity that it owns. Accordingly, the only meaningful way to measure an overcharge is to look at the price charged by the first purchaser to its customers. That overcharge can be measured directly without tracing. Furthermore, the exception is rooted in common sense, for were it not recognized, the "direct purchaser" rule of *Illinois Brick* could be easily evaded by creating dummy entities as intermediate purchasers.[60]

In creating the "ownership or control" exception to the general rule of *Illinois Brick*, the Supreme Court did not elaborate on precisely what was meant by "ownership or control."[61] Nor have the lower courts developed a definitive test to determine "ownership or control" in the few cases which have addressed this issue.[62] The

---

[60] *See* Mid-West Paper Prods. Co. v. Cont'l Group, Inc., 596 F.2d 573, 589 (3d Cir. 1979) ("[T]o bar the purchaser from the subsidiary [of a price-fixer] from suing on the authority of *Illinois Brick* 'would invite evasion [of the antitrust laws] by the simple expedient of inserting a subsidiary between the violator and the first non-controlled purchaser.'" (quoting Stotter v. Amstar, 579 F.2d 13 (3d Cir. 1978))).

[61] Dart Drug Corp. v. Corning Glass Works, 480 F. Supp. 1091, 1103 (D. Md. 1979).

[62] The lower courts have construed exceptions to *Illinois Brick* narrowly. *See, e.g.*, Labrador Inc. v. Iams Co., 105 F.3d 665, 666 (9th Cir. 1997); *cf. In re* Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 605-06 (7th Cir. 1997) (rejecting control exception on the facts). Some clues as to exactly what the Supreme Court had in mind may be gleaned from the two cases cited in footnote sixteen. *See also* Perkins v. Standard Oil Co., 395 U.S. 642, 647-48 (1969) (involving an action under § 2 of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a) (2004), in which the defendant-supplier allegedly channeled illegal discounts to competitors of plaintiff through it's sixty percent owned subsidiary). The Court held that plaintiff's right to recover was not impeded by the additional formal transactions which occurred prior to reaching the level of its competitor. *Id.* at 649. The Ninth Circuit in *In re* W. Liquid Asphalt Cases held that suppliers' sales of price-fixed asphalt to indirect purchasers through contractors whom the asphalt suppliers controlled either by acquisition of stock, or indirectly through various financial arrangements, including credit, were not insulated from liability by the holding in *Hanover Shoe. In re* W. Liquid Asphalt Cases, 487 F.2d 191, 198-99 (9th Cir. 1978), *cert. denied*, 415 U.S. 919 (1974).

Thus, the Supreme Court contemplated that the "ownership or control" exception apply where (1) the parent subsidiary relationship exists between the seller and direct purchaser and (2) where the seller is able to exercise *de facto* dominion over the direct purchaser, absent ownership of a majority of stock in the direct purchaser. *See*, Note, *Scaling the Illinois Brick Wall: The Future of Indirect Purchasers In Antitrust Litigation*, 63 CORNELL L. REV. 309, 327 (1977); *see generally* William H. Page, *The Limits of State Indirect Purchaser Suits: Class*

Supreme Court has, however, resisted attempts to create additional exceptions to the *Illinois Brick* holding.[63]

D. *Illinois Brick* in Historical Context

The timing of the *Illinois Brick* decision is significant. In the late 1970's, the federal courts, led by the Supreme Court, were becoming much more defendant-friendly in antitrust cases. *Illinois Brick* was handed down only two weeks prior to the landmark decision in *Continental T.V., Inc. v. GTE Sylvania Inc.*,[64] which held that vertically imposed territorial restraints should not be condemned as *per se* unlawful but rather adjudged under a rule of reason standard.[65] In so holding, the Court overruled its earlier decision in *United States v. Arnold, Schwinn & Co.*,[66] which had condemned a manufacturer's vertically imposed territorial restraints as *per se* unlawful where the manufacturer had departed with "title, dominion and risk."[67] Thus, under *Schwinn*, legality turned on the *form* of the transaction. *GTE Sylvania* changed the focus of the inquiry to the *substance* of the transaction. Rejecting the *per se* approach, the Court found that whether or not a vertically imposed territorial restraint was lawful turned on an analysis of the pro-competitive benefits of that restraint and whether, on balance, the pro-competitive benefits outweighed anticompetitive effects.[68] Citing to the well-spring of economic literature on vertical non-price restraints that had emerged both before and in the wake of *Schwinn*, the Court concluded that it would be reasonable for a manufacturer to limit intra-brand competition among its dealers to promote stronger inter-brand competition and to avoid free-riding among Sylvania television dealers.[69]

Moreover, the *Illinois Brick* ruling was rendered only four

Certification in the Shadow of Illinois Brick, 67 ANTITRUST L.J. 1, 1-3 (1999) ("The Supreme Court has rebuffed efforts to create additional exceptions to the rule [of *Illinois Brick*].").

[63] *See* Kansas v. Utilicorp United Inc., 497 U.S. 199 (1990).

[64] Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1963).

[65] *Id.*

[66] United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

[67] *Id.* at 379.

[68] *Sylvania*, 433 U.S. at 51-58.

[69] *Id.*

months after *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*,[70] which held that a plaintiff in a private treble damages action must establish "antitrust injury," i.e., the kind of injury that the antitrust laws were designed to prevent and that "flows from that which makes the defendant's acts unlawful."[71] The impact of these three decisions was both striking and immediate. Following *Illinois Brick,* indirect purchaser suits virtually evaporated in the federal courts. Dealer termination suits disappeared in droves in the wake of *GTE Sylvania*; and, while these suits cannot fairly be described as extinct, a successful antitrust suit by a terminated dealer is a rarity today. Motions to dismiss for failure to establish antitrust injury under *Brunswick* became a cottage industry. Antitrust injury continues to be a point of contention in almost every antitrust action.

Despite the similarity in results in the three cases—each resulting in judgment for the defendant—they received markedly different reactions from the antitrust bar and the public. *GTE Sylvania* and *Brunswick* were generally embraced, perhaps reluctantly in some quarters, as intelligent decisions, even if they did limit the number of plaintiffs in the antitrust universe.[72] *Illinois Brick,* on the other hand, generated a firestorm of criticism from the day it was decided.[73] Opposition was by no means universal—*Illinois Brick* had many supporters not only in the defense bar but also among academics[74] and judges[75]—but opposition from the plaintiff's side

---

[70] Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

[71] *Id.* at 489.

[72] *See* HOVENKAMP, *supra* note 57, at §§ 11.3, 16.3; ROBERT H. BORK, THE ANTITRUST PARADOX, at 285-99 (1978).

[73] *See* Harris & Sullivan, *Passing On the Monopoly Overcharge*, *supra* note 39; Edmund H. Mantell, *Denial of Forum to Indirect Purchaser Victims of Price Fixing Conspiracies: A Legal and Economic Analysis of* Illinois Brick, 2 PACE L. REV. 153 (1982); William F. Watson, *Bad Economics in the Antitrust Courtroom:* Illinois Brick *and the Pass On Problem*, 9 ANTITRUST L. ECON. REV. 69 (1977).

[74] *See* Page, *supra* note 61. *See also* Landes & Posner, *An Economic Analysis of Illinois Brick*, *supra* note 39; Landes & Posner, *A Reply to Harris and Sullivan*, *supra* note 39.

[75] *See, e.g.*, *In re* Beef Indus. Antitrust Litig., 1982-2 Trade Cas. (CCH) ¶ 64, 815 (N.D. Tex. 1982) (Higginbotham, J., granting defendants' summary judgment motion dismissing indirect claims). Judge Higginbotham discussed the Supreme Court's attempt to reconcile competing interest in this way:

> The task of applying the legal doctrine that forbids both offensive and defensive use of pass-on is presented a second time in this litigation. The prohibition was born of a familiar tension between finite proof and

was vocal and intense. Almost overnight, legislation was introduced in Congress to supercede *Illinois Brick*.[76] That effort, as well as subsequent lobbying efforts, failed. So, too, did efforts to undo the direct purchaser rule in the courts.[77]

Undaunted, *Illinois Brick* opponents turned to state legislatures and state courts to challenge *Illinois Brick*. Here, they made inroads—some thirty states have statutes or court decisions permitting antitrust suits by indirect purchasers under state law.[78] Indirect purchasers suing in state courts under state law found a receptive atmosphere. In an effort to contain indirect purchaser suits brought in state courts, defendants, where possible, sought to (1) remove the case to federal court, and (2) move to dismiss on the authority of *Illinois Brick*.[79] Thus, the argument was that *Illinois Brick* had preempted state indirect purchasers claims from being heard in federal courts.[80] The defendants' proceeded using the following theory: if *Illinois Brick* held that an indirect purchaser was not "injured" within the meaning of Section 4 of the Clayton Act due to (1) the complexity of tracing overcharges through the chain of distribution, (2) the risk of multiple liability, and (3) impairment of the deterrent function of the treble damage remedy, then *Illinois Brick* must also bar claims asserted under state statutes virtually identical to the Sherman Act[81] for the same reasons that federal

---

> convenience and adjusted by the Supreme Court on the side of convenience. In this task, we are reminded that the relationship of antitrust law and economic theory continues to be a sometime thing suffering from both lack of commitment and an inability (or unwillingness) to communicate, each with the other.

Id. at 1126.

[76] H.R. 11942, 95th Cong., 2d Sess. (1978); S. 1874, 95th Cong., 2d Sess. (1978); H.R. 9132, 95th Cong., 1st Sess. (1977); H.R. 8516, 05th Cong., 1st Sess. (1977), H.R. 8359, 95th Cong., 1st Sess. (1977). Similar bills were introduced in the 96th Congress. H.R. 2004, 96th Cong., 1st Sess. (1979), H.R. 2060, 96th Cong., 1st Sess. (1979); S. 300, 96th Cong., 1st Sess. (1979).

For a detailed discussion of the merits of these bills *see* Edward D. Cavanagh, *The* Illinois Brick *Dilemma: Is there a Legislative Solution?* 48 ALBANY L. REV. 273, 294-307 (1984).

[77] *See* Kansas v. Utilicorp United Inc., 497 U.S. 199, 217 (1990).

[78] *See supra* text accompanying note 4.

[79] *See* California v. ARC Am. Corp., 490 U.S. 93, 97 (1989).

[80] *See id.* at 101-05.

[81] *See Illinois Brick*, 431 U.S. at 731, 746, 749.

claims are barred.[82] The Supreme Court, however, was not persuaded by this line of reasoning. In *ARC America*,[83] it held that under principles of federalism, the *Illinois Brick* decision does not bar *federal* courts from hearing indirect purchaser claims arising under *state* law, even though lower courts in these cases would be required to perform tasks which the Court had held the federal courts were not equipped to do under virtually identical federal law.[84]

Why did *Illinois Brick* generate such passionate opposition while *GTE Sylvania* and *Brunswick* gained quiet acceptance? There is no simple answer to this question. Opponents of the *Illinois Brick* decision criticized the decision and argued that the holding was anti-consumer because it barred from recovery those who bore the brunt of overcharges in price-fixing cases brought under the Sherman Act.[85] Some critics were concerned that *Illinois Brick* had thwarted the will of Congress as expressed in the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("Hart-Scott-Rodino") by effectively barring *parens patriae* suits.[86] In addition, other critics believed that *Illinois Brick* undermined the deterrent function of antitrust law by holding that direct purchasers experienced 100% of any overcharge as a matter of law.[87] In their view, direct purchasers would benefit from cartel behavior by being able to pass-on overcharges and therefore would have very little incentive to sue price-fixers.[88]

Neither *GTE Sylvania* nor *Brunswick* generated such negative visceral reactions. In part, this was due to the fact that *GTE Sylvania* and *Brunswick* were not viewed as overtly hostile to consumers. The effect of *GTE Sylvania* was to eliminate many dealer termination

---

[82] *See* California v. ARC Am. Corp., 490 U.S. at 99-100.

[83] *Id.* at 105-06.

[84] *Id.*

[85] S. Rep. No. 239, 96 Cong., 1st Sess. 6-10 (1979); Antitrust Enforcement Act of 1979; Hearings on S. 300 Before the Senate Comm. on the Judiciary, 96th Cong., 1st Sess. 69-77 (statements of Messrs. Browning, Scott, Smith, Clark, Hansen, and White) (hereafter *1979 Senate Hearings*).

[86] 15 U.S.C. § 15c(a)(1) (2004); *1979 Senate Hearings*, *supra* note 85, at 60-77 (statement of Chauncey H. Browning); *Restoring Effective Enforcement of the Anti-Trust Laws: Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 58 (1979) (statement of William J. Scott).

[87] S. Rep. 239, 96th Cong. 1st Sess. 22 (1979); *1979 Senate Hearings*, *supra* note 85, at 24, 37 (statements of Messrs. Shenefield and Bosworth).

[88] *Id.*

suits. A number of such suits were garden-variety contract disputes disguised as antitrust claims having questionable merit.[89] *GTE Sylvania* also took a more rational economic approach to vertically imposed non-price restraints than earlier cases, which had honored form over substance, by looking at the harm actually caused by such restraints and then weighing that harm against benefits to the consumer, instead of simply presuming that the conduct was unlawful.[90] Similarly, *Brunswick* was not viewed as anti-*consumer* because competitors—not consumers—are the parties most often forced out of court by the antitrust injury doctrine.[91] In addition, both *GTE Sylvania* and *Brunswick* embraced sound economic principles that had overwhelming support in the academic community.[92]

Illinois Brick appears more ambivalent in its approach to economic evidence. One could argue that *Illinois Brick*, far from embracing modern economic thought, was a throwback to earlier cases where the courts were reluctant to "ramble through the wilds of economic theory."[93] The Court expressed concern about turning a courtroom into an economics classroom.[94] Furthermore, the Court was concerned that trial courts would not be up to the complex task of tracing overcharges through the chain of distribution.[95]

Conversely, one could argue that *Illinois Brick* is firmly rooted in economic principles. Judge Frank Easterbrook described *Illinois Brick* as an example of a case in which the Supreme Court "emphasizes efficiency and consumer welfare," thus viewing the case as an application of cost-benefit analysis, perhaps the most fundamental exercise of economic principles.[96] This view is bolstered by the Supreme Court's recent opinion in *Verizon Communications. Inc. v. Law Offices of Curtis V. Trinko LLP*,[97] where Justice Antonin

---

[89] *See* HOVENKAMP, *supra* note 59, at § 11.6.

[90] *See* PHILLIP AREEDA AND & HERBERT HOVENKAMP, ANTITRUST LAW, ¶ 1643b (2d ed. 2003).

[91] *Id.* at ¶ 337.

[92] *See, e.g.*, Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 48 n.13 (1977).

[93] United States v. Topco Assocs., 405 U.S. 596, 609-10 n.10 (1972).

[94] *Illinois Brick*, 431 U.S. at 741-44.

[95] *Id.* at 742.

[96] Frank Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1698 n.7 (1986).

[97] Verizon Comm. Inc. v. Law Offices of Curtis V. Trinko LLP, 124 S. Ct.

Scalia counseled that the courts should defer to a monopolist's decision not to deal, lest the courts be forced to act as "central planners—a role for which they are ill-suited."[98] Justice Scalia further counseled "against an undue expansion of Section 2 liability [under the Sherman Act]," noting that the complexities of Section 2 and the practical limitations on the abilities of courts to fashion effective remedies are costs that outweigh any marginal benefits of judicial intervention in refusal to deal cases.[99] Moreover, one can argue that the Court did not reject economics analysis, as earlier courts had, but rather considered the proffered economic analysis and concluded that it would not be helpful on the facts of this case.[100]

Nevertheless, the position that *Illinois Brick* is nothing more than a straightforward application of cost/benefit analysis has its limits. Justice Byron White, the author of the majority opinion in *Illinois Brick*, can hardly be viewed as a proponent of "the new economic thought."[101] Indeed, Justice White's opinion in *Illinois Brick* is firmly rooted in the *Hanover Shoe* ruling nearly a decade earlier. Consistency with prior precedent, not the new economics, was arguably the bedrock of the opinion. Justice White was also concerned with the burdens on the courts posed by additional indirect purchaser suits.[102] He expressed skepticism that any increase in deterrence could be justified by the added costs of indirect purchaser suits, while noting potential disincentives of those with relatively small claims to sue.[103] These are issues that courts have struggled with for decades. Viewed in this context, *Illinois Brick* was evolutionary in nature, while *GTE Sylvania* and *Brunswick* were revolutionary.

The view that *Illinois Brick* is evolutionary as opposed to revolutionary is reinforced by recent scholarship delving into the work of the Supreme Court. Professor Andrew Gavil has undertaken an extensive examination of the Supreme Court papers of the late Justice Lewis F. Powell, which are lodged with Washington and Lee

---

872 (2004).

[98] *Verizon Comm. Inc.*, 124 S. Ct. at 879.

[99] *Id.* at 882.

[100] *Illinois Brick*, 431 U.S. at 742-43

[101] *See, e.g., GTE Sylvania*, 433 U.S. at 59 (White, J., concurring) (Justice White arguing that the Court should have distinguished *Schwinn* rather than overruling it).

[102] *Illinois Brick*, 431 U.S. at 746.

[103] *Id.*

University School of Law. Among other things, Justice Powell's papers reveal the concerns of several justices that barring indirect purchasers from suing under the antitrust laws may impair the compensatory function of antitrust.[104] As discussed above in Part II.C.1,[105] the Court by a vote of 6-3 rejected indirect purchasers as plaintiffs; but the initial vote in *Illinois Brick* was 6-3 to *permit* indirect purchaser suits.[106] It was Justice White, the author of *Hanover Shoe*, who eventually swayed the Court to a 6-3 ruling the other way by emphasizing the doctrine of *stare decisis*, concerns about complexity and the need to contain big litigation, as well as the need to minimize the possibility of multiple liability.[107] It is also clear that *Illinois Brick* was not a reactionary decision; the Court considered, and rejected as unhelpful, economic arguments.

III. *Illinois Brick* in Action

A. Efforts at Legislative Overruling

1. The Case for Overruling

Before the ink on the *Illinois Brick* opinion was dry, its opponents launched a massive lobbying campaign seeking to overrule the decision legislatively with a disarmingly simple argument: the holding was at odds with a fundamental principle of antitrust law—compensation of victims.[108] This argument assumed that consumers were the ultimate victims of price-fixing because some, if not all, of any illegal overcharge had been passed-on to them.[109] The decision not only failed to compensate the real victims of price-fixing, but it also gave a windfall to direct purchasers who had passed-on

---

[104] Andrew I. Gavil, *Antitrust and the Process of Change in the Supreme Court: Change in the Supreme Court: Assessing the Powell Papers, Third Annual Midwest Antitrust Colloquium* (April 11, 2003).

[105] *See supra* note 30 and accompanying text. *Illinois Brick*, 431 U.S. at 747. *See supra* Part II.C.1.

[106] *See* Gavil, *supra* note 104.

[107] *Illinois Brick*, 431 U.S. at 741-47; *see* Gavil, *supra* note 104.

[108] *See 1979 Senate Hearings*, *supra* note 85.

[109] *Id.*

overcharges through the distribution chain.[110] Accordingly, they argued that *Illinois Brick* was anti-consumer and failed to protect the very group that Congress had in mind in enacting the antitrust laws.[111]

Second, opponents of *Illinois Brick* argued that while the ruling in that case fosters deterrence by assuming that direct purchasers are in theory entitled to 100% of any overcharge, the reality is that direct purchasers, whose interests are closely aligned with their price-fixing sellers, will not sue antitrust violators but will simply pass-on any overcharges.[112] By excluding indirect purchasers, the Court eliminated the only victim of price-fixing with a strong motive to sue.[113]

Third, they argued that *Illinois Brick* was at odds with Hart-Scott-Rodino[114] and hence cannot stand.[115] Hart-Scott-Rodino specifically permitted state attorneys general to sue *parens patriae* on behalf of natural persons injured by price-fixing.[116] In enacting Hart-Scott-Rodino, Congress intended to include indirect purchasers as parties injured within the meaning of Section 4 of the Clayton Act.[117] Therefore, the holding in *Illinois Brick* effectively vitiates Hart-Scott-Rodino.

Fourth, the parade of horribles predicted by the Court, assuming indirect purchaser suits were allowed, is overstated. Concerns about possible multiple liability could be addressed through existing procedural mechanisms, namely, consolidation for pretrial purposes before the Judicial Panel for Multi-district Litigation. If all potential claimants are before the same court, the risk of multiple liability is minimized, if not eliminated. Moreover, the mere fact that the task of tracing overcharges through the chain of distribution is complicated is not sufficient reason to bar indirect purchaser suits. Antitrust cases regularly present a variety of complicated issues; yet the courts have not shied away from resolving these issues merely

---

[110] *See 1979 Senate Hearings*, *supra* note 85.

[111] *See 1979 Senate Hearings*, *supra* note 85.

[112] *See id.*

[113] *See id.*

[114] 15 U.S.C. § 15(c) (West 2004).

[115] *See 1979 Senate Hearings*, *supra* note 85.

[116] *Id.*

[117] *Id.*

because of their complexity. Finally, far from reducing deterrence, indirect purchaser suits will enhance deterrence by authorizing large numbers of antitrust victims to sue.

2. The Case Against Overruling

Proponents of *Illinois Brick* stand by Justice White's arguments for the majority. Foremost is the concern that overruling *Hanover Shoe* and coming to any conclusion other than that reached in *Illinois Brick* would impair deterrence by fragmenting potential plaintiffs' claims, thereby reducing incentives to sue.[118] Direct purchasers, who have the greatest incentive to sue and the least difficulty in proving claims, would have significantly reduced incentives to sue if *Hanover Shoe* were overturned because any recovery would be subject to reduction to the extent passing on down the distribution chain could be proved.[119] The extent of any reduction would be unknown *ex ante*, thus increasing both the uncertainty and risk of litigation, and minimizing the benefits of the treble damages remedy. Similarly, from a compensation-injury perspective, it is difficult to argue that direct purchasers, who have unquestionably paid overcharges to the defendants, have no claim for relief for those overcharges from the moment they were incurred because of pricing decisions they might *independently* arrive at in the future.

Moreover, the problems of complexity associated with indirect purchaser claims are real, not imaginary. The process of tracing overcharges through the distribution chain is inherently speculative. While it may be possible to reduce complexity through an array of simplifying assumptions, such as fixed percentage or fixed dollar mark-ups at each level in the distribution chain, in the end the answer we get is simply a product of those assumptions which may bear no relationship to real world business transactions. The real world rarely confronts the simplified model of seller, first purchaser, and ultimate consumer. Rather, there are several layers of intermediaries between the antitrust violator and the ultimate

---

[118] *See* William H. Page, *The Scope of Liability For Antitrust Violations*, 37 STAN. L. REV. 1445, 1487 (1985) (analyzing *Illinois Brick's* rejection of the offensive use of the passing-on theory).

[119] *Id.* at 1489. *See generally* Landes & Posner, *An Economic Analysis of* Illinois Brick, *supra* note 39 (determining that *Illinois Brick* and *Hanover Shoe* together concentrate damages in the hands of the initial purchasers, firms that deal directly with the manufacturers are apt to know the most about the industry's behavior and are in the best position to detect cartels, and allowing them to collect the full overcharge, trebled, creates powerful incentives to investigate and file suit).

purchaser. Equally important, it is impossible in the real world to prove that a first purchaser could not or would not have raised prices paid by its customers, even absent the overcharges imposed on it by the illegal conspiracy.

Finally, procedural devices currently provided by the Judicial Panel for Multi-district Litigation and the Federal Rules of Civil Procedure, in order to place all claimants and all defendants before the same trier of fact, are not a panacea.[120] Cases involving multi-district litigation may be transferred and consolidated for pre-trial for purposes only; they are then returned to their home districts for trial.[121] Moreover, federal statutes have no effect on cases proceeding in state court. Absent major legislation to mandate transfer of federal and state claims before one federal judge, there is simply no way to get all interested parties before a single court. Still, such legislation may not be enough, for there remains the nearly insurmountable problem of tracing overcharges through the distribution chain.

3. The Congressional Response

Despite the passion ignited by the *Illinois Brick* ruling, Congress declined to disturb the Supreme Court holding. A series of repealers introduced during the 1977-78 term died in committee.[122] More narrowly tailored legislation, which would allow state attorneys general to sue on behalf of indirect purchasers met a similar fate in 1983.[123] In the end, opponents of *Illinois Brick* failed to persuade legislators that the Supreme Court's ruling was, on balance, bad antitrust policy.

B. The Rise of State Law Indirect Purchaser Claims

Having been turned away by the federal courts and turned down by the Congress, indirect purchasers looked to state law and state courts where the reception to their claims was more hospitable. As discussed above,[124] a number of states responded to *Illinois Brick*

---

[120] *See* Cavanagh, *supra* note 76.

[121] Lexecon, Inc. v. Milberg, Weiss, Bershad, Hynes & Lerach, 523 U.S. 26, 28 (1998); 28 U.S.C. § 1407 (2004).

[122] *See supra* text accompanying note 76; *see also supra* text accompanying note 75.

[123] *Id.*

[124] *See supra* text accompanying note 3; *see also supra* text accompanying

by enacting statutes expressly authorizing indirect purchaser suits.[125] California, one of the first states to reject *Illinois Brick*, soon became a hotbed of indirect purchaser lawsuits under its consumer-friendly Cartwright Act.[126] Indirect purchasers quickly realized that state courts provided strategic advantages beyond more favorable law.[127] For example, because state indirect purchaser claims brought in state court would be separate from direct purchaser actions in federal court, it would be impossible for defendants to achieve peace merely by settling the federal claims. Gone is the "one-size fits all" settlement. Immune from the pressures of a federal judge to settle the federal actions, state court plaintiffs could behave strategically to exact more favorable settlement terms than would be possible if they were they part of a federal action. Indirect purchasers also perceived state court judges, who were generally less familiar with antitrust claims and likely less sophisticated in antitrust analysis than their federal counterparts, as generally pro-plaintiff, or at least for less willing than federal judges to grant motions to dismiss or for summary judgment. Far from eliminating indirect purchaser claims from the landscape, *Illinois Brick* simply galvanized state legislatures and shifted the action in indirect purchaser suits from federal to state court.[128]

Nor did *Illinois Brick* rid the federal system of indirect purchaser suits. Indirect purchaser cases brought under state law began to sneak into the federal system through the back door via

---

note 4.

[125] *See id.* (showing that the *Illinois Brick* repealer gave new status to state attorneys general charged with enforcing state antitrust policy. State enforcer did not hesitate to wield these newly granted powers. Moreover, as antitrust enforcement at the federal level waned under the minimalist policies adopted by the Reagan Administration,, and state attorneys general established an enforcement network intended to fill in the enforcement void at the federal level. Through the National Association of Attorneys General ("NAAG"), which allowed states to conducted joint antitrust investigations, and the prosecution of civil actions. Although federal antitrust enforcement has been re-energized in subsequent Administrations, state attorneys general continue to be a force in shaping and executing policy.).

[126] CAL. BUS. & PROF. CODE § 16750(a) (West 1997).

[127] *See* Joel M. Cohen & Trisha Lawson, *Navagating Indirect Purchaser Lawsuits*, 15 ANTITRUST 29, 30-31 (2001) (finding that following *Illinois Brick*, several states enacted so-called "*Illinois Brick* repealers," statutes conferring standing on indirect purchasers [or the state attorney general on their behalf] under state antitrust law).

[128] *See id.* (commenting on the use of state court indirect purchaser suits).

removal. Defendants were convinced that federal courts reviewing indirect purchaser claims arising under state laws virtually identical to the federal statutes would have no choice but to dismiss, given the strong policy grounds enunciated by the Supreme Court in *Illinois Brick* for avoiding complexity and uncertainty in the federal system in cases brought under federal law. Defendants argued that the doctrine of federal preemption barred state law indirect purchaser claims from being entertained in federal court.

That argument was decisively rejected by the Supreme Court in *ARC America*.[129] The Court concluded that federal law did not occupy the field and that, under principles of federalism, state law indirect purchaser claims would be upheld even through federal law did not recognize such claims.[130] In so holding, the Supreme Court did not even attempt to explain the apparent contradiction between its rulings in *ARC America* and *Illinois Brick*. In *Illinois Brick*, the Court stressed the fact that federal courts are ill-equipped to engage in the complicated task of tracing overcharges through the distribution chain and in any event, the end result of such a process is likely to be speculative.[131] If that were so, then federal courts would appear to be equally ill-suited to engage in an exercise involving tracing of overcharges in suits brought under state laws *identical* to the Clayton Act. Yet, the Supreme Court held that federal courts could hear state law indirect purchaser claims.[132] Rather than focusing on the impracticality and complexity of tracing overcharges as it did in *Illinois Brick*, the Court in *ARC America* hung its hat on preemption.[133] The Court concluded that Congress did not expressly preempt state laws allowing indirect purchaser claims.[134] Nor did state indirect purchaser statutes frustrate the aims of Congress; on the contrary such state laws are "consistent with the broad purposes of the antitrust laws."[135] In the end, *Illinois Brick* was simply irrelevant on the preemption issue.[136]

---

[129] *ARC Am. Corp.*, 490 U.S. at 93.

[130] *Id.* at 103-06.

[131] *Illinois Brick*, 431 U.S. at 741-44.

[132] *ARC Am. Corp.*, 490 U.S. at 93.

[133] *Id.* at 101.

[134] *Id.* at 102.

[135] *Id.*

[136] *Id.* at 105-06.

When viewed properly, *Illinois Brick* was a decision construing the federal antitrust laws, not a decision defining the interrelationship between the federal and state antitrust laws. The congressional purposes on which *Illinois Brick* was based provide no support for a finding that state indirect purchaser statutes are pre-empted by federal law. A more persuasive argument might have been mounted by defendants on the narrower grounds of abstention. Under the abstention approach, federal courts would recognize the power to hear state law indirect purchaser cases under the doctrine of supplemental jurisdiction but decline to exercise that power because of conflicts with strong federal policies enumerated in *Illinois Brick*.[137] The abstention argument still has appeal today; but given the fact that federal courts regularly entertain state law indirect purchaser claims in the wake of *ARC America* and the sky has not fallen, it would probably not prevail at the end of the day.

C. Indirect Purchaser Suits in the Courts

ARC America re-invigorated enforcement efforts on behalf of indirect purchasers under state law. Indeed, the *ARC America* decision and the Justice Department's aggressive prosecution of international cartels during the Clinton Administration[138] combined to make indirect purchaser suits the growth industry of the 1990's in antitrust.[139] Like the *Asbestos* suits of the 1980's, these cases were multi-party, multi-forum and multi-jurisdictional.[140] Plaintiffs, once eager for federal forums, now flock to state courts, at times shunning class actions in favor of consolidated suits.[141]

This new litigation paradigm is perhaps best exemplified by

---

[137] *But see ARC Am. Corp.*, 490 U.S. at 101-02 (in enacting the federal antitrust laws, Congress did not intend to occupy the field).

[138] *See In re* Vitamins Antitrust Litig., 320 F. Supp. 2d 1 (2004) (bringing an antitrust action against vitamin suppliers alleging broad antitrust conspiracy, and five suppliers that manufactured vitamin-B4 move for summary judgment on the issue of conspiracy).

[139] *Id.*

[140] *See id.* (considering a consolidated action before the Court, which involved fifty-five separate multiparty lawsuits from thirty-two different federal courts).

[141] *See id.* (involving well over 100 law firms in the preparation of over 10,000 separate filings).

the ongoing *Vitamins Antitrust Litigation.*[142] In the wake of a Justice Department investigation of price-fixing of vitamins and vitamin products by European manufacturers selling into the United States, including Hoffman-LaRoche, BASF and Rhone-Poulenc, and subsequent guilty pleas to felony counts, numerous follow-on treble damages actions have been commenced in both federal and state courts.[143] The federal actions were consolidated in the District of Columbia pursuant to the federal multi-district litigation consolidation statute.[144] To date, indirect purchaser actions have commenced in at least twenty-two states.[145]

This proliferation of litigation of indirect purchaser cases involving a common nucleus of operative fact with cases pending in federal court has created a logistical nightmare for the courts. State court cases are outside the scope of the federal consolidation statute and therefore cannot be part of any mandatory consolidation for pretrial purposes.[146] It follows that state court plaintiffs cannot avail themselves of consolidated discovery in the federal action. Nor is it possible for the courts of one state to regulate discovery in the courts of another state.

To a degree, the inefficiencies created by multi-forum litigation have been ameliorated by efforts of state attorneys general through the National Association of Attorneys' ("NAAG") to cooperate on discovery issues.[147] While the benefits of such cooperation should not be underestimated, voluntary cooperation does not solve the problem. Voluntary cooperation, though laudable, is not enforceable by court decree. Equally important, to the extent private parties as well as states are involved in the litigation, coordination problems abound.[148]

---

[142] *In re* Vitamins Antitrust Litig., 320 F. Supp. 2d 1 (2004).

[143] *Vitamins Antitrust Litig.*, 320 F. Supp. 2d at 6.

[144] *Id.* at 5; 28 U.S.C. § 1407 (2004).

[145] *Vitamins Antitrust Litig.*, 320 F. Supp. 2d at 6.

[146] *See* 28 U.S.C. § 1407 (2004) (stating that civil actions pending in different jurisdictions may be consolidated for pre-trial proceedings).

[147] *See id.* (showing that the *Illinois Brick* repealer gave new status to state attorneys general charged with enforcing state antitrust policy, and state attorneys general established an enforcement network intended to fill in the enforcement void at the federal level through the NAAG, which allowed states to conducted joint antitrust investigations and the prosecution of civil actions).

[148] *See* Andrew J. Gavil, *Federal Judicial Power and Challenges of Multijurisdictional Direct and Indirect Purchase Antitrust Litigation*, 69 GEO.

Moreover, it is impossible to convene a universal settlement conference aimed at resolution of all claims pending against the defendants because all parties are not before the same court. The inefficiency that results from permitting indirect purchasers suits to proceed on parallel tracks without any master plan for the conduct of discovery or for sharing the fruits of discovery is obvious. Defendants may be forced to waste time and money responding to duplicative discovery requests. Perhaps more importantly, state court plaintiffs have strong incentives to engage in strategic behavior during the course of any settlement discussions. This is especially likely after federal court claims have been settled.

Knowing that the defendants, having disposed of the federal claims, are looking to get out from under potential treble damage liability, the state court plaintiffs can hold out for a better deal. The added expense of state court indirect purchaser suits and additional burdens that these suits impose on the civil justice system purchaser suits are real and of such magnitude as to raise significant doubts as to whether the benefits achieved by such actions are cost-justified. Indirect purchasers have enjoyed some success under state antitrust laws; but, as has been the case with antitrust class actions generally, most recoveries have come through settlements rather than through litigated judgments. Still, successful actions can hardly be described as routine. Indirect purchaser suits face significant obstacles in both federal and state courts.

1. Federal Court

Even after *ARC America*, two principal hurdles face indirect purchaser suits in federal court: subject matter jurisdiction and class action certification.

a. Subject Matter Jurisdiction

State-based indirect purchaser claims may be heard in federal court where there is diversity jurisdiction.[149] Diversity jurisdiction requires not only that the citizenship of all plaintiffs be diverse from that of all defendants, but also that the amount in controversy exceed

---

WASH. L. REV. 860, 863 (2001) ("Multidistrict litigation, therefore, has become multijurisdictional, and the procedural means for capturing the efficiencies to be gained through coordination are far less certain. Achieving procedural efficiency is left to informal efforts by courts and counsel, not formal means of transfer, consolidation and coordination.").

[149] 28 U.S.C. § 1332 (2004).

$75,000.[150] Indirect purchaser claims in any given antitrust suit almost always exceed that amount in the aggregate, but rarely is any individual claim greater than $75,000. In *Zahn v. International Paper Co.*,[151] the Supreme Court held that in class actions where the basis of federal subject matter jurisdiction is diversity of citizenship, the claims of each member of the class must exceed $75,000, i.e., claims of individual class members cannot be aggregated to meet the jurisdictional threshold.

Zahn has always been something of a sore spot with proceduralists because it limits the availability of the federal class action remedy in suits involving a common nucleus of operative fact and thereby encourages a proliferation of litigation.[152] Scholars have questioned the continuing vitality of *Zahn*[153] in light of Congressional expansion of the pendent jurisdiction doctrine in 1990.[154] This statute modestly increased federal subject matter jurisdiction by codifying the common law doctrines of pendent and ancillary jurisdiction under the umbrella of supplemental jurisdiction.[155] The statute was intended to overrule the Supreme Court decision in *Finley v. United States* and permit the exercise of federal subject matter jurisdiction in cases where a given set of facts gives rise to federal claims against one or more defendants and state law claims against one or more other defendants.[156] At the same time, Congress made clear that it did not

---

[150] 28 U.S.C. § 1332 (2004).

[151] Zahn v. Int'l Paper Co., 414 U.S. 291, 294-95 (1973).

[152] *See, e.g.*, Stephen D. Kauffman, *"Federalizing" Class Actions: The Future of the Jurisdictional Requirements for Diversity–Based Class Actions*, 52 ALA. L. REV. 1029, 1043-44 (2001) (finding that lower federal courts are free to decide whether Congress intended for § 1367 to implicitly abrogate the Supreme Court's holding in Zahn); Thomas Merton Woods, *Wielding the Sledgehammer: Legislative Solutions for Class Action Jurisdictional Reform*, 75 N.Y.U.L. REV. 507, 541 (2000) (concluding that current practice elevates form over substance, encourages forum shopping, and prevents consolidation of competing classes).

[153] Gavil, *supra* note 144, at 872 (making the argument for why *Zahn* is overruled but noting that this argument is "contrary to the limited legislative history of the Statute").

[154] 28 U.S.C. § 1367 (2004).

[155] 28 U.S.C. § 1367 (2004); *see* CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS § 19, at 121-23. (6th ed. 2002) (discussing pendent and ancillary jurisdiction).

[156] Finley v. United States, 490 U.S. 545, 606 (1989) (holding that parties not otherwise subject to federal jurisdiction could not be sued in federal court when a co-defendant was being sued under federal law).

wish to disturb the holding in *Owen Equipment & Erection Co. v. Kroger* and limited the operation of supplemental jurisdiction where plaintiff's original claim is based on diversity jurisdiction and in those cases involving claims raised by impleader, joinder, and intervention.[157]

The statute, however, was silent regarding class action claims under Rule 23, leading some to argue that *Zahn* had been overruled.[158] The Circuits are divided on the issue;[159] and the Supreme Court failed to resolve the controversy, affirming by an equally divided Fifth Circuit decision holding that Congress had effectively overruled *Zahn*,[160] and thereby postponed the definitive resolution of the issue.

b. Class Certification

The class certification procedure is a second stumbling block to indirect purchaser suits in federal court. As a threshold matter, "federal appellate courts have viewed class actions governed by the laws of multiple states with serious skepticism."[161] Multi-

---

[157] Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365 (1978) (determining that a plaintiff may not assert a claim against a third party when there is no independent basis for federal jurisdiction over that claim).

[158] Rosmer v. Pfizer, Inc., 263 F.3d 110, 114-19 (4th Cir. 2001); Gibson v. Chrysler Corp., 261 F.3d 927, 933-40 (9th Cir. 2001); *In re* Brand Name Prescription Drug Antitrust Litig., 123 F.3d 599, 607 (7th Cir. 1997).

[159] The following cases upheld the *Zahn* ruling: Trimble v. Asarco, Inc., 232 F.3d 946, 959-62 (8th Cir. 2000); Meritcare Inc. v. St. Paul Mercury Ins. Co., 166 F.3d 214, 218-22 (3d Cir. 1999); Leonhardt v. W. Sugar Co., 160 F.3d 631, 637-41 (10th Cir. 1998).

Zahn was overruled in the following jurisdictions: Free v. Abbott Labs, Inc., 176 F.3d 298, 300-01 (5th Cir. 1999), *aff'd by an equally divided Supreme Court*, 120 S. Ct. 1578 (2000); Rosmer v. Pfizer Inc., 263 F.3d 110, 114-19 (4th Cir. 2001); Gibson v. Chrysler Corp., 261 F.3d 927, 933-40 (9th Cir. 2001); *In re* Brand Name Prescription Drug Antitrust Litig., 123 F.3d 599, 607 (7th Cir. 1997).

[160] Free v. Abbott Labs, Inc., 176 F.3d 298 (5th Cir. 1999), *aff'd*, 120 S. Ct. 1578 (2000).

[161] *In re* Relafen Antitrust Litig., 221 F.R.D. 260, 276 (D. Mass. 2004) (permitting class action certification for claims by indirect purchaser plaintiffs under the antitrust laws of Arizona, California, Massachusetts and Vermont; rejecting class action certification for indirect purchaser claims brought under the antitrust laws of Florida, Kansas, Maine, Michigan, Minnesota, New York, North Carolina and Tennessee); *In re* Bridgestone/Firestone, Inc., 288 F.3d 1012, 1015 (7th Cir. 2002) ("No class action is proper unless all litigants are governed by the

jurisdictional cases brought in Federal courts under state laws raise significant conflict of law issues.[162] Faced with a putative class action on behalf of plaintiffs from several states arising under state law indirect purchaser statutes, a federal judge must first determine which state law governs. Some courts have declined to certify nationwide classes where governing state laws vary.[163] A principal concern of these courts is the difficulty in instructing a jury on applying varying state laws to different plaintiffs.[164]

Other courts, rejecting this per se approach to certification of multi-state indirect purchaser actions, have afforded multi-state plaintiffs the opportunity to make their case for certification.[165] In these cases, courts have paid close attention to state law requirements of antitrust injury and whether such injury can be shown on a class-wide basis.[166] Courts have rejected attempts to short-circuit the conflict of law analysis by the simple expedient of invoking forum law.[167] Rather, the courts have focused on the situs of consumer purchases in determining the governing law.[168] States have a strong interest in protecting consumers purchasing within the state.[169] On the other hand, states have a weak interest in applying their laws to sales made to consumers in other states.[170]

The fact that the court concludes that the laws of several different states will govern the indirect purchaser claims is not itself fatal to certification.[171] The key question is whether the variations in state law are significant enough to negate claims that common

---

same legal rules."); *In re* Am. Med. Sys., Inc., 75 F.3d 1069, 1085 (6th Cir. 1996) (finding that it is "impossible" to instruct a jury where state laws differ); *but see* Mowbray v. Waste Mgmt. Holdings, Inc., 189 F.R.D. 194, 202 (D. Mass. 1999) (certifying class claims based on laws of different states).

[162] *Relafen Antitrust Litig.*, 221 F.R.D. at 276-279.

[163] *Bridgestone/Firestone,* 288 F.3d at 1015; *Am. Med. Sys.*, 75 F.3d at 1085.

[164] *Am. Med. Sys.,* 75 F.3d at 1085.

[165] *Relafen Antitrust Litig.*, 221 F.R.D. at 278.

[166] *Id.* at 280.

[167] *Id.* at 276-77.

[168] *Id.* at 277-78.

[169] *Id.* at 278.

[170] *Relafen Antitrust Litig.*, 221 F.R.D. at 278; *see also* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 571 (1996) ("[I]t is clear that no single state could . . . impose its own policy choice on neighboring states.").

[171] *Relafen Antitrust Litig.*, 221 F.R.D. at 278.

questions of law or fact predominate over individual questions.[172]

Some courts have dealt with the conflict of laws problem by simply assuming it away. For example, in *In re Terazosin Hydrochloride Antitrust Litigation*,[173] the court ruled that purported variations in state indirect purchaser statutes created a false conflict because plaintiffs "have cited case law under each state antitrust statute interpreting the acts co-extensively with the federal antitrust laws."[174] What the court failed to explain was how state reliance on federal precedent was relevant in indirect purchaser cases, given that under the rule of *Illinois Brick*, indirect purchasers are barred from recovery under federal law.[175] In addition, the court in *Terazosin* minimized any issue of class-wide impact on the indirect purchaser class, stating that "[c]ourts in the Eleventh Circuit have recognized a presumption of [class-wide] impact properly arises in [overcharge] cases where the defendants have market power and are alleged to have conspired with competing manufacturers."[176]

---

[172] *Id.*

[173] *In re* Terazosin Hydrochloride, 220 F.R.D. 672, 695 (S.D. Fla. 2004)

[174] *Id.* at 695.

[175] *Id.* at 695 n.38. The court recognized (recognizing that federal law did not allow indirect purchaser claims).

[176] *Id.* at 696-97. The court went on to say that even apart from the presumption of class-wide impact, plaintiffs could establish antitrust impact by showing:

> (1) Hytrin and its AB-rated generic bioequivalents are interchangeable versions of the same prescription drug product, with the exception that the generic costs significantly less than the branded Hytrin; (2) generic entry into the market results in consumers would switch to the lower-priced alternative; (3) after Geneva launched its generic terazosin capsule on August 13, 1999, the shares of sales accounted for by the generic terazosin markedly increased, while the price of terazosin decreased; (4) class members made payments for Hytrin at inflated rates during the period of generic foreclosure, from 1995 through August 12, 1999, which can be confirmed through generalized market data; (5) class members could have obtained terazosin hydrochloride at much lower prices absent the existence of the Abbot-Geneva and Abbot-Zenith accords, and in the absence of Abbott's sham prosecution of the add-on patents; and (6) Defendants used the same data and a substantially similar methodology as that used by Indirect Purchaser Plaintiffs here to forecast the economic effect of generic competition for Hytrin. Other courts have found such generalized evidence of impact to be sufficient for class certification purposes.

Terazosin Hydrochloride, 220 F.R.D. at 697.

Similarly, the court in *In re Cardizem CD Antitrust Litigation*[177] had no difficulty finding that the question of "cause in fact" could be proved on a class-wide basis.[178] The court proceeded to certify an indirect purchaser class consisting of end-users of the prescription drug Cardizem, which had been sold to plaintiffs in a form substantially unchanged from the form in which it was sold to first purchasers.[179] The court in *Cardizem* concluded that doubts should be resolved in favor of certification.[180]

Conflict of laws, however, is not the only hurdle for plaintiffs seeking class certification of state-based claims in federal court. The decision in *In re Methionine Antitrust Litigation*[181] is illustrative of additional pitfalls faced by indirect purchasers in the certification process in federal court, even in cases that involve the law of only one state. In *Methionine*, the putative class of indirect purchasers consisted of all natural persons and business entities in Wisconsin who were indirect purchasers of methionine manufactured by defendants.[182] The class purported to include both resellers and end-users of methionine.[183] Some putative class members purchased methionine from direct purchasers or other intermediaries in pure form.[184] Others purchased products into which methionine had been incorporated for use in feed for livestock and pets.[185]

The court noted that the plaintiffs needed to prove three elements in order to succeed on their antitrust claims: (1) a conspiracy to fix prices in violation of the Wisconsin antitrust laws; (2) class members were injured by the conspiracy; i.e., "fact of damage" or "impact"; and (3) the amount of damages.[186] The court held that the second element—fact of damage—could not be proven on a class-wide basis.[187] As a threshold matter, the court identified

---

[177] *In re* Cardizem CD Antitrust Litig., 200 F.R.D. 326 (E.D. Mich. 2001).

[178] *Cardizem CD Antitrust Litig.*, 200 F.R.D. at 339-40.

[179] *Id.* at 332.

[180] *Id.* at 334.

[181] *In re* Methionine Antitrust Litig., 204 F.R.D. 161 (N.D. Cal. 2001).

[182] *Id.* at 162.

[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] *Methionine Antitrust Litig.*, 204 F.R.D. at 163.

[187] *Id.* at 165.

the problems of proof of injury by those indirect purchasers who were also resellers, particularly those resellers who purchased pure methionine and sold it as part of a "value added product."[188] Resellers would also have to prove that they absorbed some portion of the overcharge; or, if they passed along 100% of the overcharge, that they suffered some other form of injury, e.g., lost sales volume.[189]

The court observed that indirect purchaser plaintiffs have the burden of proving whether and the extent to which alleged overcharges were passed through the distribution chain.[190] In this case, the Plaintiffs failed to prove their burden and therefore, certification under Rule 23(b)(3) was denied.[191] It concluded that the proof on this issue proffered by expert economist John M. Connor was woefully short of the mark:

> Connor's declaration does not come close to meeting this burden. His declaration contains a brief, generic description of how pass-through rates may be calculated for the indirect purchasers:
>
> > Pass-through rates can be calculated with historical data at the wholesale and retail levels. Because of the lengthy class period, there should be plenty of data to calculate [the pass-through rate] for the methionine industry. Under the normal assumption of fixed proportions in production (constant input/output ratios) [the pass-through rate] is simply the observed ratio of percentage change in purchase price of methionine some months after a price change in the wholesale price of methionine.[192]

The court found that the expert (1) failed to identify any record evidence suggesting that his formula for determining passing-on was appropriate for the methionine industry; (2) failed to provide any method to show that a reseller who did pass-on overcharges had been injured, nor did he show whether some or all any overcharges to resellers had been passed-on by those resellers; and (3) failed to show

---

188 *Id.* at 164.

189 *Id.*

190 *Id.*

191 *Methionine Antitrust Litig.*, 204 F.R.D. at 164.

192 *Id.* at 164-65.

that any injury to indirect purchasers had occurred.[193] Accordingly, injury in fact could not be proven on a class-wide basis and common questions did not predominate.[194]

In addition, the court distinguished cases cited by the plaintiffs where class certification had been granted. It noted that those cases are inapposite because they involved plaintiffs who were end-users and not resellers and the price-fixed product was sold in substantially the same pure form and not incorporated into other products.[195]

Although the court did not specifically address the sufficiency of the proffered expert testimony in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[196] and its progeny, it might have reached the same conclusion on the grounds that the expert testimony failed to meet the standards prescribed in Rule 702 of the Federal Rules of Evidence.[197] The generic evidence of passing-on articulated by the expert was at odds with the main facts and thus arguably lacked the requisite "fit" needed to satisfy Rule 702.[198] Although the factual circumstances vary from case to case, it is likely that indirect purchaser claims will face greater scrutiny at the outset under *Daubert.*[199]

---

[193] *Methionine Antitrust Litig.*, 204 F.R.D. at 165.

[194] *Id.*

[195] *Id.* at 165.

[196] Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

[197] FED. R. EVID. 702.

[198] *Id.*

[199] *Id.* Some courts have expressed reservations about making a "full *Daubert*" hearing at the class certification stage. *See* Nichols v. SmithKline Beecham Corp., 2003-1 Trade Cas. (CCH) ¶ 73, 974 (E.D. Pa. 2003) ("The issue presently before the Court, however, is not whether each of the millions of sales of Paxil to indirect purchasers during the proposed class period resulted in damage to each individual indirect purchaser, but whether [the expert] has a sufficient basis for opining that the class members suffered a common impact from Defendant's alleged attempts to infinitely prolong its monopoly power in the market for paraxetine hydro-chloride."); *In re* Cardizem CD Antitrust Litig., 200 F.R.D. 297, 307 (E.D. Mich. 2001) ("In order to show impact is susceptible to class-wide proof, Plaintiffs are not required to show that the fact of injury actually exists for each class member."); Midwestern Mach. v. Northwest Airlines, Inc., 211 F.R.D. 562, 565-66 (D. Minn. 2001) ("The application of the *Daubert* test is somewhat limited at the stage of class certification.").

Other courts have held that a *Daubert* inquiry is not inappropriate at the class certification stage but that the bar is high. *See In re* Visa Check/MasterMoney

Still, judicial attitudes toward class action litigation vary widely. The rules governing class actions in federal courts are sufficiently fluid to give judges significant leeway in making class certification decisions. In the end, a judge's attitude toward class actions is likely to have a direct effect on the certification decision.[200] A court focusing on issues of commonality, typicality, and predominance may be reluctant to certify class treatment for indirect purchaser claims.[201] On the other hand, a court focusing on efficiency concerns may be inclined to certify the very same claims.[202]

4. State Courts

As in the federal courts, class certification looms as a hurdle to indirect purchaser suits in state courts. Decisions in the state courts on the class certification issue, like those in the federal courts, have been mixed.[203] Professor Page suggests that the "most important determinant of class certification of indirect purchaser suits appears to be where the suit is filed."[204] Differing results on certification

---

Antitrust Litig., 192 F.R.D. 68, 76 (E.D.N.Y. 2000) ("To preclude [expert] evidence at the class certification stage, it must be shown the opinion is the kind of "junk science that a *Daubert* inquiry at this stage ought to screen."), *aff'd*, 280 F.3d 124 (2d Cir. 2001), *cert. denied*, 122 S. Ct. 2382 (2002). *Accord, In re* Linerboard Antitrust Litig., 203 F.R.D. 197 (E.D. Pa. 2001).

[200] *See* Jerrold S. Solovy, *Class Action Controversies*, 367 PLI/LIT. 473, 481 (Dec. 1, 1988) ("Variation in individual courts' attitudes toward class actions have a direct impact on the outcome of the certification decision."); Natalie C. Scott, *Don't Forget Me! The Client in a Class Action Lawsuit*, 15 GEO. J. LEGAL ETHICS 561, 588 (2002) ("Judicial attitudes often govern the treatment of class action litigation and settlements."); *In re* Cardizem CD Antitrust Litig., 200 F.R.D. 326, 334 (E.D. Mich. 2001) (citing Little Caesar Enter., Inc. v. Smith, 172 F.R.D. 236, 241 (E. D. Mich. 1997)) (finding that courts should err on the side of certification).

[201] *See, e.g., Relafen Antitrust Litig.*, 221 F.R.D. at 276 (determining that focusing on common economic harm may not be sufficient because some members may not have this in common).

[202] *See, e.g., Bridgestone/Firestone*, 288 F.3d at 1015 (determining that it may be more efficient to break down the plaintiff into different areas).

[203] *Compare* Bellinder v. Microsoft Corp., 2001 WL 1397995 (Kan. Sept. 7, 2001) (granting certification), *with* A&M Supply Co. v. Microsoft Corp., 654 N.W.2d 572 (Mich. App. 2002) (denying certification of an indirect purchaser class on virtually identical proof as submitted in *Bellinder*, including the same opposing experts).

[204] Page, *supra* note 62, at 21.

rulings tend to reflect differences in state substantive law.[205] For example, a District of Columbia court granted certification of an indirect purchaser class after concluding that the D.C. statute explicitly allows class-wide proof of injury.[206] Other states have denied certification where the state law in question, unlike D.C. law, requires proof of injury to each class member.[207] Somewhat surprising, at least at first blush, is the number of state court cases where class certification has been denied to state law indirect purchaser claims.[208] This is surprising in that indirect purchaser suits specifically authorized by state statutes are thwarted by failure to meet the requirements of a state-based class action. One might expect the federal courts to look for ways to unload state indirect purchaser claims, given the policies enunciated in *Illinois Brick.* Upon reflection, the fact that indirect purchasers are encountering the same procedural obstacles in state court as in federal court should not be surprising at all. State and federal courts, applying similar legal standards to similar facts, *ought* to come to similar results and it would truly be surprising if they *did not* reach similar conclusions. The fact that a significant number of state courts in states where legislatures have authorized indirect purchaser suits have denied class action treatment may, in the end, simply point out the wisdom of

---

[205] Page, *supra* note 62, at 27.

[206] Goda v. Abbott Labs., No. 01445-96, 1997 WL 156541 (D.C. Super. Ct. 1997).

[207] *See, e.g.,* Execu-Tech Bus. Sys., Inc. v. Appleton Papers, Inc., 743 So.2d 19 (Fla. Dist. Ct. App. 1999) (denying certification where plaintiffs had failed to demonstrate a methodology using generalized proof to show that unlawful price-fixing affected each class member individually); Melnick v. Microsoft Corp., 2001 WL 1012261 (Me. Super. Ct. 2001) (denying certification where plaintiff's proffer of "general, untried economic theory" instead of "real world facts" regarding injury to Maine consumers failed to establish that overcharges were passed-on to end-users); *A&M Supply,* 252 Mich. App. at 616-32, 635 (denying certification where plaintiffs failed to meet the "rigorous analysis" of adverse impact on individuals); Gordon v. Microsoft Corp., 2001 WL 366432 (Minn. Dist. Ct. 2001) (granting certification where plaintiffs proffered a viable method for proving class-wide injury and amount of damages).

[208] *See, e.g.,* J.P. Morgan & Co. v. Superior Ct., 6 Cal. Rptr. 3d 214 (Ct. App. 2003) (denying certification of a nationwide class of indirect purchasers); OCE Printing Sys. USA, Inc. v. Mailers Data Services, Inc., 760 So. 2d 1037 (Fla. Ct. App. 2000) (denying class certification). For a comprehensive listing of state court indirect purchaser cases where class certification has been denied, *see* Page, *supra* note 62; Ronald W. Davis, *Indirect Purchaser Litigation: ARC America's Chicken Come Home to Roost on the Illinois Brick Wall,* 65 ANTITRUST L.J. 375, 381 n.5 (1997).

Illinois Brick.

Compliance with rules governing class actions is only the tip of the iceberg when one catalogues the potential problems with state court indirect purchaser claims. Many of these actions seek certification of *nationwide* classes in state court. Such cases raise profound issues that go to the very heart of the power of state courts to adjudicate matters in our federal system.[209] As a threshold matter, there is a serious question as to whether the requirement that common questions of law or fact predominate over individual issues can ever be met where plaintiffs are from many states with differing legal standards for liability.[210] More fundamentally, these cases raise serious constitutional issues regarding the jurisdictional reach of state courts, including whether the court has the power to speak the law with respect to absentee class members having no connection with the forum state and whether it is fair to proceed against defendants whose conduct occurred principally outside the forum.[211] Equally problematic is the issue of conflict of laws, specifically whether the forum state has sufficient interest in the subject matter of the action so that it is constitutional to apply forum law.[212] Lastly, state court certification of nationwide classes creates the enormous practical problems of "dueling jurisdictions" and possible multiple liability.

While state courts have not rejected arguments for certification of nationwide classes out of hand, they have made clear that these actions "should be certified only if it will provide substantial benefit both to the courts and the litigants."[213] It is also clear that the bar setting the standard of proof is set high.[214]

---

[209] *See* John C. Anderson, *Good "Brick" Walls Make Good Neighbors: Should A State Court Certify a Multistate or Nationwide Class of Indirect Purchasers*, 70 FORDHAM L. REV. 2019, 2031-32 (2002) (finding that a concern for constitutional due process rights requires that before subjecting a defendant to the substantive law of a given jurisdiction, that defendant must have some contact with a state so as to avoid unfair surprise in the application of unfavorable substantive law, and the nature of our federal system and the demands of the Full Faith and Credit Clause inform us of a sovereign state's right to further the policies behind its laws through application of those laws to disputes with which it has a significant connection).

[210] *Bridgestone/Firestone*, 288 F.3d at 1015.

[211] *Relafen Antitrust Litig.*, 221 F.R.D. at 278.

[212] *Id.*

[213] J.P. Morgan & Co., Inc. v. Superior Ct., 113 Cal. App. 4th 195, 216 (2003)

[214] *Id.* at 219 ("This showing by Plaintiff falls short of a clear demonstration that the hundreds of thousands of proposed class members from states other than

IV. Prescriptions

The theoretical debate over the relative merits of *Illinois Brick* and *Illinois Brick* repealers continues; but, clearly, indirect purchaser suits are not going away. The question is how best to deal with the differing state and federal standards. Set forth below is a discussion of possible ways to address this problem.

A. Substantive Approaches

1. Maintain the Status Quo

This is the most doctrinally pure position and perhaps the most prudent. Yet, to ignore indirect purchaser suits and their potential deleterious effects on the state and federal courts is to deny a potentially devastating problem for the civil justice system. Maintaining the status quo would mean that state indirect purchaser suits would continue to percolate through the federal and state courts, much as they do now. If nothing were done, these suits could become millstones around the neck of the civil justice system, much in the way *Asbestos* suits did in the 1980's and 1990's. Further inaction may only fuel the problem.

2. Overrule *Illinois Brick* and *Hanover Shoe*

For reasons stated in *Illinois Brick*, this approach would have a disastrous effect on the private antitrust remedy.[215] At first blush, this option might seem appealing. Turning the clock back would serve to recognize compensation principles that had been bartered away in favor of deterrence by *Illinois Brick* and *Hanover Shoe*. The "benefit" of recognizing compensation principles, however, is illusory because its price—overruling *Hanover Shoe* and thereby

---

California, who conducted their business in other states, nevertheless have brought themselves within the protection of the California Cartwright Act.").

[215] This solution is not politically feasible. *See* Gavil, *supra* note 148, at 880. ("After more than a quarter of century of acquiescence in *Illinois Brick*, however, today it is hard to envision any political scenario that would lead to significant expansion of the private right of action through alteration of the rule of *Illinois Brick*. Quite to the contrary, there is probably more widespread acceptance of the federal ban on indirect purchasers today than ever, and there is little reason to believe that Congress might act to reauthorize indirect purchasers to sue in federal court."). Similarly, any effort by Congress to preempt' state indirect purchaser suits as suggested by *ARC America* is likely to be without support. *Id.*

reactivating the passing-on defense—is unacceptably high. Were *Hanover Shoe* overruled, plaintiffs, especially first purchasers in the distribution chain, would have little incentive to sue because, after spending time, effort and money to uncover and investigate wrongdoing and thereafter prove liability, they could not fully reap the fruits of the treble damage remedy, if some or all of the overcharges incurred may have been passed-on to customers. Whether or not passing-on, in fact, occurred in a given case, the issue would likely be raised in all cases, imposing significant costs on direct purchasers and adding a new dimension of risk to an already risky enterprise. These factors combine to create enormous disincentives for indirect purchasers to sue. If direct purchasers bow out, there is little hope of identifying an effective plaintiff because, as we work our way down the distribution chain, the monetary incentives to sue decrease while the difficulties in proof increase exponentially. The cost of overruling *Hanover Shoe* in terms of reduced incentives to sue and diminution in deterrence is simply not worth the benefit of having end-users compensated for passed-on overcharges.

3. Overrule *Illinois Brick* but not *Hanover Shoe*

This approach was specifically rejected by the Supreme Court in *Illinois Brick*, which insisted on symmetrical treatment of the passing-on issue. The Supreme Court was concerned that under this approach, defendants may be subjected to multiple liability, since *Hanover Shoe* holds unequivocally that first purchasers are entitled to recover 100% of any overcharge, irrespective of whether the first purchasers actually passed-on some or all of the illegal overcharges imposed on them by the conspirators.

Notwithstanding Justice White's forceful and persuasive argument that the passing-on issue in *Hanover Shoe* and *Illinois Brick* must be treated symmetrically, the argument for an asymmetrical approach may have legs. The antitrust enforcement experience in the nearly three decades since the *Illinois Brick* ruling suggests that the concerns about multiple liability cited by the *Illinois Brick* majority might be overblown. The federal courts today seem less concerned about multiple liability and appear to have no problem in exacting large criminal fines on top of civil treble damage awards, which is arguably the functional equivalent of "paying twice." For example, in the *Vitamins Case*, Hoffman-LaRoche paid a record criminal fine of $500 million and thereafter made, and continues to make, payments in large amount to plaintiffs in settlement of private treble damages

actions.[216] In theory, forcing defendants to compensate indirect purchasers, after first purchasers have been awarded 100% of any overcharges under *Hanover Shoe*, is no different from imposing criminal fines in addition to treble damage judgments. What some would call multiple liability, others would call maximization of deterrence and compensation. At the same time, concerns about multiple liability are not frivolous. If this asymmetrical approach were adopted, concerns about multiple liability could be ameliorated by limiting indirect purchasers to *actual* damages.

4. Permit State Attorneys General to Sue on Behalf of Indirect Purchasers

A variation of the foregoing alternative would be to permit suits on behalf of indirect purchaser by state attorneys general but not by private parties. This would ensure that indirect purchaser suits are brought in the public interest, and not in the private interest of plaintiffs' class action lawyers. More importantly, this approach would be in line with what was intended by Hart-Scott-Rodino but undone by *Illinois Brick*. As previously noted, Hart-Scott-Rodino authorized state attorneys general to sue *parens patriae* on behalf of natural persons victimized by price-fixing.[217] While this approach would limit the number of indirect purchaser suits and minimize the potential for multiple liability, it does not address the more fundamental problem of tracing overcharges through the distribution chain.

B. Procedural Approach

Rather than amend substantive antitrust law, Congress may choose to address the problems created by *Illinois Brick* through procedural reforms which would authorize federal jurisdiction over multi-jurisdictional indirect purchaser suits brought in state court. From an efficiency perspective, what is needed is a mechanism to get all antitrust actions—state and federal—arising from a common nucleus of operative fact, including both direct purchaser and indirect purchaser suits, before a single federal judge. This path would eliminate multi-jurisdictional suits, as well as the extra cost and delay associated with such suits, facilitate universal settlements and provide

---

[216] *See Vitamins Antitrust Litig.*, 305 F.Supp.2d at 100 (approving settlements with Biotin and Niacin defendants).

[217] 15 U.S.C. § 15c (2000); *see supra* text accompanying note 85.

disincentives for strategic behavior by erstwhile state court indirect purchaser plaintiffs. It would also assure consistency in judgments and minimize potential multiple liability, while at the same time assuring that no antitrust claimant would be unfairly prejudiced. The goal here is to make sure that multi-jurisdictional indirect purchase suits do not inundate the civil justice system the way asbestos cases did in the 1980's and 1990's.

The Class Action Fairness Act of 2003,[218] currently before the Senate and passed by the House during the first session of the 108th Congress, is designed to address the potentially adverse impact of multi-jurisdictional lawsuits on the civil justice system. The Act lists a series of legislative findings detailing the abuses which have crept into interstate class actions such as: the use of artful pleading by plaintiffs attorneys to avoid litigating class actions in state court; how the respective abuses undermine the federal judicial system, the free flow of goods in interstate commerce and the intent of the drafters of the Constitution in creating diversity jurisdiction; and how abusive interstate class actions in state courts have harmed society as a whole because unjustified awards are made to some class members at the expense of others.[219] Such examples of societal harm include:

> (1)The use of artful pleading by plaintiffs' attorneys to avoid litigating class actions in a federal forum, thereby making business entities defend interstate class actions in state court, wherein (a) lawyers, not plaintiffs, are the principal beneficiaries of the lawsuits; (b) less scrutiny is given to cases that would be given in federal court; and (c) defendants, facing potentially enormous liability, have no choice but enter into settlement agreements, irrespective of the merits of the claim.[220]
>
> (2)These abuses undermine the federal judicial system, the free flow of goods in interstate commerce and intent of the drafters of the Constitution in creating diversity jurisdiction

---

[218] Three bills carry the title of Class Action Fairness Act of 2003. H.R. 1115 was passed by the House in the first session of the 108th Congress. S. 274 was introduced in the first session of the 108th Congress and not passed. S. 1751 was also introduced in the first session of the 108th Congress and is currently to be debated by the Senate. The bills are substantially similar in content. The discussion here references S. 1751, 108th Cong. (2003).

[219] S. 1751, 108th Cong. (2003).

[220] S. 1751, 108th Cong. § 2(2) (2003).

in that state courts are (a) hearing interstate class actions affecting parties from numerous states; (b) sometimes acting with bias against out of state defendants; and (c) entering judgments which bind out of state residents and impose their particular view of the law on other states.[221]

(3)Abusive interstate class actions in state courts have harmed society as a whole because unjustified awards are made to some class members at the expense of other class members.[222]

The legislation would address these abuses by expanding federal subject matter jurisdiction to include class action suits where the amount in controversy exceeds $5 million and minimal diversity exists.[223] Thus, minimal diversity would exist where (1) any member of the plaintiffs' class is a citizen of a state different from the defendant; (2) any member of the plaintiffs' class is a foreign state or a citizen of a foreign state and defendant is a citizen of a state; or (3) any member of the plaintiffs' class is a citizen of a state and any defendant is a foreign state or a citizen of a foreign state.[224] In determining whether the $5 million amount in controversy has been met, the plaintiffs' claims may be aggregated,[225] thereby eliminating the *Zahn* problem discussed above.[226]

The legislation would, however, exclude federal subject matter jurisdiction where (1) at least two-thirds of the plaintiffs are citizens of the state in which the action is filed; (2) at least one defendant from whom significant relief is sought and whose conduct forms a significant basis for class claims is a citizen of the state in which the claim is filed; and (3) the principal injuries caused by defendants' conduct were incurred in the state where the action was initially filed.[227]

In addition, federal courts under this legislation may "in the

---

[221] S. 1751, 108th Cong. § 2(4) (2003). *See* S. Rep. No. 108-23 at 14-23 (2003) (providing a detailed discussion of abuses arising from multijurisdictional class actions).

[222] S. 1751, 108th Cong. § 2(c) (2003).

[223] S. 1751, 108th Cong. § 4(a)(2) (2003).

[224] *Id.*

[225] *Id.*

[226] *See infra* Part III.A.3.

[227] S. 1751, 108th Cong. § 4(a)(4) (2003).

interests of justice and looking at the totality of the circumstances" decline jurisdiction where between one-third and two-thirds of the plaintiffs' class and the primary defendants are citizens of the state in which the action is filed initially.[228] In making that decision, Courts are directed to consider the following factors:

> (a) whether the claims asserted involve matters of national or interstate interest;
>
> (b) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;
>
> (c) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;
>
> (d) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;
>
> (e) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and
>
> (f) whether, during the three-year period preceding the filing of that class action, one or more other class actions asserting the same or similar claims on behalf of the same or other person have been filed.[229]

While a step in the right direction, this legislation is not sufficiently comprehensive to resolve the problems created by indirect purchaser suits under state antitrust law. The expansion of diversity jurisdiction to permit federal jurisdiction over class actions by indirect purchasers is both appropriate and necessary but may be largely undone through artful pleading because of a huge loophole

---

[228] S. 1751, 108th Cong. § 4(a)(3) (2003).

[229] *Id.*

that in some cases requires, and in other cases permits, federal courts to decline adjudicatory authority.[230] One might try to minimize this argument by pointing out that problematic indirect purchaser claims typically arise out of cases involving national or international antitrust conspiracies, and accordingly the exceptions are unlikely to arise in the antitrust context. Still, the legislation as currently drafted gives calculating plaintiffs' counsel sufficient wiggle room to frustrate Congress and the courts. Moreover, the legislation does not address the problem of disparate treatment of class action certification by the federal courts. Nor does the legislation, as it should, empower the Judicial Panel for Multi-district Litigation to consolidate all cases—state and federal—before one court for *both* trial and pretrial purposes.[231] Finally, it is not clear whether the $5 million threshold for jurisdiction takes into account trebling; if not, then the threshold should be lower.

V. Lessons Learned

A. Indirect Purchaser Suits

In the quarter century since the *Illinois Brick* decision, the antitrust community has learned some very important lessons. Foremost among them is that the Supreme Court was on target in ruling that allowing indirect purchasers to sue would complicate and delay antitrust proceedings. Today, notwithstanding technological developments that have given birth to sophisticated econometric models predicting economic behavior, there is still no satisfactory way to trace overcharges through the distribution chain without resorting to assumptions and outright speculation. Adding indirect purchasers to the mix makes both the settlement process and trial—if the matter ever reaches trial—infinitely more complex. Nor are existing procedural mechanisms designed to get parties before a single fact-finder effective. Moreover, contrary to what critics of *Illinois Brick* have maintained, direct purchasers do sue price-fixers.[232] Robust enforcement activities by direct purchasers in the

---

[230] *See* S. 1751, 108th Cong. § 4(a)(4) (2003).

[231] *See* Lexecon, Inc. v. Milberg, Weiss, Bershad, Hynes & Lerach, 523 U.S. 26 (1998) (holding that 28 U.S.C. § 1407 does not authorize a transferee court to retain the case for trial purposes).

[232] *See Report of the American Bar Association Antitrust Section Task Force to Review Proposed Legislation to Repeal or Modify* Illinois Brick, 52 ANTITRUST

past decade belie any contention that *Illinois Brick* has had a negative impact on deterrence.[233] Finally, it remains unclear whether indirect purchaser suits are truly in the interest of the client and not the attorney.

At the same time, the post *Illinois Brick* experience has debunked certain myths about indirect purchaser suits. Indirect purchaser suits have not bankrupted any Fortune 500 companies; it is clear that firms which have violated the antitrust laws can survive, and perhaps even thrive, after compensating indirect purchasers. Indirect purchaser suits have led to a modest up-tick in deterrence. It also appears that consumers, at least in actions brought by state governments, are getting some compensation from antitrust violators.[234] While the indirect purchaser suits have not proven to be the scourge that some had predicted, they have been problematic and disruptive in both federal and state courts; and clearly the case has not been made for overruling or even modifying the *Illinois Brick* rule. Finally, the ultimate irony is that the best hope for resolving the procedural nightmare created by multi-jurisdictional indirect purchaser suits is to remove those cases to federal court—the very place the Supreme Court said should not be hearing such claims in the first place.

B. Implications of *Illinois Brick* for the Broader Question of the Proper Role of States in Antitrust Enforcement

Illinois Brick and *ARC America* were defining moments for state antitrust enforcement. *Illinois Brick* galvanized state legislatures into action to find a way around the direct purchaser rule. *ARC America* helped to jump start enforcement of state-created indirect purchaser statutes in both state and federal courts, and in the wake of that decision, states have carved out an enforcement niche in indirect purchaser suits arising under state law.

These decisions, however, did more than simply fill an enforcement void; they emboldened state regulators to pursue ambitious enforcement agendas that parallel those of the federal agencies, including price-fixing, bid rigging, resale price maintenance, and mergers. Indeed, the proper role of state regulators and state courts in the overall antitrust enforcement picture has

L.J. 841 (1984).

[233] *See Vitamins Antitrust Litig.*, 305 F. Supp. 2d at 100.

[234] *See* Boyle v. Giral, 820 A.2d 561 (D.C. 2003) (awarding antitrust action for indirect purchasers).

become a topic of heated debate. Judge Richard Posner, over a decade after *ARC America* was handed down, proposed virtual elimination of state antitrust enforcement and of state antitrust laws.[235] Defenders of state antitrust enforcement, notably Professor Harry First, argue that although "[f]itting somewhat uncomfortably into this dual system" of public and private enforcement of federal antitrust law, state antitrust enforcement remains vital to the protection of consumer interests.[236] Professor First notes that in obtaining recoveries *parens patriae* on behalf of injured citizens, "the states in no way conflict with federal enforcement."[237] Professor First further argues that states can bring meaningful value added to antitrust enforcement in those local cases where "a state enforcement agency can more easily understand the market" and thus more likely to benefit consumers.[238]

How should the balance between state and federal antitrust enforcement be struck? Here, *Illinois Brick* can teach some valuable lessons. First, it is far too late in the game to turn back the clock and largely eliminate state antitrust enforcement as Judge Posner proposes. Second, state enforcement works best where its supplements, rather than duplicates, federal enforcement efforts. Professor First is correct that state enforcement can complement federal enforcement, notably in *parens patriae* cases on behalf of consumers. States might also take the lead in resale price maintenance cases, which appear to be low on the list of federal enforcement priorities. Federal regulators might consider handing over bid rigging cases to state authorities so that federal personnel can be devoted to resource-intensive national and international cartel cases. States should go forward with price-fixing cases which, either because of their size or peculiar local characteristics, have flown under the federal radar.

Even under Professor First's "value added" approach, however, it is hard to make a case for having states play a lead role in merger enforcement for two reasons. First, time is of the essence in most mergers. The time value of money and market expectations

---

[235] Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 940-42 (2001).

[236] Harry First, *Delivering Remedies: The Role of the States in Antitrust Enforcement*, 69 GEO. WASH. L. REV. 1004 (2001).

[237] *Id.* at 1039.

[238] *Id.* at 1036 (finding that this value added approach "does not make for a neat division of responsibility between state and federal enforcers").

make it critical that the merger, if lawful, proceed expeditiously. The Hart-Scott-Rodino process gives federal authorities ample time to scrutinize the merger. Forcing the merging parties to jump through additional hoops with the states can further delay the transaction. Generally, these costs would appear to outweigh the marginal benefits from state involvement. Absent a compelling state interest, state authorities should defer to the federal government on merger issues.

Second, requiring mergers to pass muster with federal and state regulators may create confusion and uncertainty for foreign firms engaged in international transactions. The need for United States antitrust enforcers to speak with one voice grows more compelling as the economy becomes more globalized. The prospect of having to obtain the approval of not only the federal government, but also one, some, or all of the fifty states, would prove overwhelming and also quite costly to foreign firms attempting to consummate a cross-border merger. While cooperation between federal and state antitrust enforcers has improved markedly in the merger area, turf battles continue to be fought. The federal government continues to be the senior partner in cooperative enforcement ventures, and that is how things should be.

VI. Conclusion

In *Illinois Brick*, the Supreme Court held that the policy of containing antitrust litigation trumped an indirect purchaser's right to prove injury from price-fixing on the merits. In the wake of the migration of indirect purchaser suits to state court, the debate has shifted away from substantive law to procedural remedies. It is now up to Congress to fashion procedures that will provide for the just, speedy, and efficient resolution of multi-jurisdictional indirect purchaser suits. Failure to address this issue will have dire consequences for the civil justice system in the United States.

***