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THE *ILLINOIS BRICK* DILEMMA: IS THERE A LEGISLATIVE SOLUTION?

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I. INTRODUCTION

In *Illinois Brick Co. v. Illinois*,[1] the United States Supreme Court held that in price-fixing actions brought under section 1 of the Sherman Act,[2] only first purchasers in the chain of vertical distribution are "injured," within the meaning of section 4 of the Clayton Act,[3] by the full amount of any overcharge. The Court's ruling bars plaintiffs who are "indirect purchasers" from offering proof that they have been injured by defendants' illegal overcharges which have been "passed on" to them by middlemen. The Court's holding reaffirmed the principles previously enunciated in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*,[4] which prevented defendants from escaping liability by proving that direct purchaser plaintiffs, who pass on to

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[1] 431 U.S. 720 (1977).

[2] Section 1 of the Sherman Act provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1 (1982).

[3] Section 4 of the Clayton Act provides in relevant part:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15 (1982).

[4] 392 U.S. 481 (1968).

their customers the alleged illegal overcharge initially imposed by defendants, are not injured within the meaning of section 4. Thus, both the *Hanover Shoe* and *Illinois Brick* decisions lodge the potential for full treble damage recovery in the hands of the first purchasers.

Illinois Brick was a pragmatic resolution of the very complicated passing-on issue; the Court attempted to harmonize the twin, but often competing, aims of treble damage actions — deterrence and compensation — in a manner that would maximize antitrust enforcement.[5] Although the Court recognized that its decision might deny compensation to certain indirect purchasers who have borne the brunt of an overcharge and in some cases permit antitrust violations to go unpunished, it nevertheless ruled that the goals of the antitrust laws are better served by holding that only direct purchasers are injured to the full extent of the overcharge paid by them. Attempts at apportioning the overcharge among all buyers down the distribution line who may have absorbed a part of the overcharge were rejected.[6] The ruling was grounded primarily on the Court's perception that tracing overcharges beyond first purchasers down the distribution line would enormously complicate antitrust litigation and thereby impair the effectiveness of the treble damages remedy.[7] Additionally, the Court feared that sanctioning the indirect purchasers' offensive use of passing-on (while at the same time denying defendants' use of passing-on as a defense) would expose defendants to multiple liability, enhance the likelihood of duplicative recoveries, and give rise to inconsistent judgments.[8]

Illinois Brick has been an unpopular decision in many quarters. It seems likely that the Court was aware of the controversy which its holding and rationale would generate because it specifically invited Congress to provide a legislative solution to the practical problems inherent in large antitrust litigation which deals with plaintiffs at different points in the distribution chain.[9] Congress responded almost immediately with a flurry of bills designed to override *Illinois Brick*, and extensive hearings were held on such bills in both the House and Senate during the 95th and 96th Congresses.[10] None of the bills was

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[5] Illinois Brick Co. v. Illinois, 431 U.S. 720, 728-29 (1977).

[6] *Id.* at 733-35.

[7] *Id.* at 738-44.

[8] *Id.* at 737.

[9] *Id.* at 746.

[10] While the formulations of the different bills varied widely, the primary thrust of the proposals was to repeal the *Illinois Brick* holding by making it clear that indirect purchasers whose business or property is injured by reason of an antitrust violation shall be entitled to sue for treble damages under § 4 of the Clayton Act. *E.g.*, S. 300, 96th Cong., 1st Sess. (1979); H.R.

ever debated on the floor of either chamber of Congress, however, and the measures failed. Following these initial legislative attempts to override the direct purchaser rule, the *Illinois Brick* controversy laid dormant until July, 1982 when it was infused with new life upon the introduction of yet another repealer bill in the Senate.[11] That bill, however, was not scheduled for hearings, and no action was taken on it.[12] Now, more than six years after the *Illinois Brick* decision, the debate has once again been rekindled in the 98th Congress. Both the House[13] and Senate[14] are considering measures to overrule,

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9132, 95th Cong., 1st Sess. (1977); H.R. 8517, 95th Cong., 1st Sess. (1977); H.R. 8516, 95th Cong., 1st Sess. (1977); H.R. 2204, 96th Cong., 1st Sess. (1977). *See infra* notes 109-11 and accompanying text.

[11] S. 2772, 97th Cong., 2d Sess. (1982).

[12] At the time S. 2772 was offered, the attention of the Senate Judiciary Committee was focused on S. 995, 97th Cong., 2d Sess. (1982), the contribution bill. Senator Gorton, the principal sponsor of S. 2772, was apparently amenable to having consideration of his bill deferred until the 98th Congress. *See* ANTITRUST & TRADE REG. REP. (BNA) No. 1081, at 444 (September 16, 1982).

[13] The House bill provides in relevant part:

INDIRECT ACTIONS

SEC. 4I.(a) A State, a political subdivision of a State, or the United States shall not be barred from bringing an action under section 4, 4A or 4C solely because the injury for which damages are sought did not arise from a sales transaction between the plaintiff (or natural persons on whose behalf the State brings the action) and the defendant.

(b) In any action under section 4, 4A, or 4C, the plaintiff shall not recover for any overcharge paid or underpayment received any amount that duplicates the recovery of another plaintiff in the action or any other action, based upon the same conduct of the defendant, for the overcharge or underpayment.

H.R. 2244, 98th Cong., 1st Sess. (1983).

[14] The Senate bill provides:

SECTION 1. (a) Section 4C(a) of the Clayton Act (15 U.S.C. 15c(a)) is amended — by adding new subsections (2) and (3) as follows:

(2) Whenever any State or political subdivision thereof is injured in its business or property by reason of anything forbidden by section 1 of this title the Attorney General of the State may sue on behalf of the State or any political subdivision thereof in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such State or political subdivision.

(3) Actions brought pursuant to section 4A of this Act or subsections (a)(1) or (a)(2) of this section may be maintained regardless of whether such natural person, State, political subdivision or the United States has purchased indirectly from the defendant.

(b) Section 4C(a)(2) of the Clayton Act (15 U.S.C. 15c(a)(2)) is redesignated as Section 4C(a)(4) of the Clayton Act (15 U.S.C. 15c(a)(4)) and is amended by inserting in the first sentence after "paragraph (1)" the following: "or paragraph(2)."

SEC 2. Section 4 of the Clayton Act (15 U.S.C. 15) is amended by adding at the end thereof a new section 4(I) to read as follows:

SEC 4(I) In any action under sections 4, 4A, or 4C of the Clayton Act, the defendant shall be entitled to prove as a partial or complete defense to a damage action, in order to avoid duplicative liability, that, some or all of what otherwise would constitute plaintiff's damages has been passed on to others, who are themselves entitled to maintain an action

this time in a very limited fashion, the Supreme Court holdings in *Illinois Brick* and *Hanover Shoe*.

The purposes of this Article are to (1) examine the legislative efforts to overturn *Illinois Brick* and *Hanover Shoe*; (2) determine whether the proposed congressional action effectively deals with the problems identified by the Supreme Court when the passing-on issue is introduced into treble damage litigation; and (3) examine whether the problems posed by indirect purchaser suits can be surmounted by resort to state law.

II. Background to the Proposed Legislative Action: The *Hanover Shoe* and *Illinois Brick* Decisions

A. Hanover Shoe

In *Hanover Shoe*, the plaintiff lessee claimed that the "lease only" policy of the defendant shoe machinery manufacturer violated section 2 of the Sherman Act.[15] The defendant urged that the plaintiff, by passing-on the allegedly incurred overcharges to its customers, was not "injured" in its business or property within the meaning of section 4 of the Clayton Act.[16] The Supreme Court rejected this "passing-on" defense, pointing out that such a defense presented problems of (1) tracing overcharges through the chain of distribution; (2) requiring additional hearings involving extensive evidence and complicated proof; and (3) limiting the effectiveness of the treble damage remedy.[17] The Court's holding stressed the difficulties involved in reconstructing a middleman's price-output decisions and proving that the first purchaser "could not" or "would not" have increased its prices, but for the overcharge.[18]

The Court concluded that the antitrust laws would be best enforced by elevating first purchasers to a preferred position as anti-

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or on whose behalf the Attorney General of the United States or of any State is entitled to maintain an action under Sections 4A or 4C of this Act. Such defense shall be set forth as an affirmative defense in any responsive pleading of the defendant. The defendant shall set forth in such pleading, with as much particularity as is reasonable, the identity of those to whom the defendant asserts the plaintiff has passed on some or all of plaintiff's damages. For the purposes of rule 19 of the Federal Rules of Civil Procedure, the Attorney General entitled to represent such person(s) pursuant to section 4A or 4C of this Act shall be deemed an indispensable party. S. 915 98th Cong., 1st Sess. (1983).

[15] Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 483 (1968).

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

[17] *Id.* at 492-93.

[18] *Id.*

trust plaintiffs, irrespective of whether they passed on any of the alleged overcharges down the distribution line.[19] Thus, *Hanover Shoe* stands as a pro-enforcement decision which prevents culpable defendants from escaping liability by pointing to pricing decisions made by middlemen who are neither parties to the suit nor accused of any wrongdoing.

B. Illinois Brick

Illinois Brick presented a factual situation mirroring *Hanover Shoe*. The plaintiffs, various state and local government entities, concededly did not deal directly with the defendants but rather purchased buildings into which price-fixed concrete blocks had been incorporated.[20] The plaintiffs claimed that the overcharges allegedly imposed by the concrete block manufacturers had been passed on to them by intervening parties in the distribution chain causing them to suffer "injury" under section 4 of the Clayton Act.[21] Whereas the defendants in *Hanover Shoe* had sought to use passing-on as a defensive weapon to bar recovery, the plaintiffs in *Illinois Brick* sought to use passing-on as an offensive weapon to prove they had been injured.[22]

In response to this argument by the "indirect purchaser" plaintiffs, the Court again chose to allow only the direct purchaser to recover the full amount of any overcharge. The Court argued "that the overcharged direct purchaser, and not others in the chain of distribution, is the party 'injured in his business or property' within the meaning of [section 4 of the Clayton Act]."[23] The majority thus adopted a rule of symmetry regarding the offensive use of passing-on, barring indirect purchasers from maintaining treble damage actions whenever the antitrust defendant would have been precluded from asserting the passing-on defense against a direct purchaser.

Echoing the *Hanover Shoe* holding, the Supreme Court found that permitting the offensive use of passing-on would create a host of practical problems which the courts were not equipped to handle. In particular, the Court noted such problems as (1) difficulties in tracing overcharges through the chain of distribution; (2) undue complexity

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[19] *Id.* at 494.
[20] Illinois Brick Co. v. Illinois, 431 U.S. 720, 726 (1977).
[21] *Id.* at 727.
[22] *Id.* at 726.
[23] *Id.* at 729.

in treble damage litigation which would impair the treble damage remedy; and (3) serious risks of double recoveries and inconsistent judgments.[24] The Court, however, did recognize that in certain very narrowly defined circumstances the practical problems identified above may not be extant, and in such cases indirect purchasers should be permitted to sue.[25] The Court specified only two such instances: (1) where the indirect purchaser is a party to a pre-existing, fixed quantity, cost-plus contract with its seller ("first purchaser") who, in turn, dealt directly with the price-fixer; and (2) where the first purchaser is owned or controlled by the indirect purchaser.[26] In both instances, the Court found the passing-on problem to be obviated and the indirect purchasers' damages "easy to prove."[27]

The essence of the *Illinois Brick* holding is that indirect purchasers, except in rare circumstances, are denied a right to treble damage recoveries, even though they, rather than direct purchasers, may have borne the brunt of the alleged overcharge. To justify such a potentially harsh result, the burdens imposed on the judiciary and litigants in resolving the passing-on issue must outweigh the benefits to be derived from compensating indirect purchasers for any overcharges passed on to them by middlemen. An analysis of these burdens and of the experiences of the courts in dealing with them demonstrates that the practical problems in litigating the passing-on issue are real and not mere hobgoblins conjured up by defense counsel.

1. Tracing Problems

To establish injury within the meaning of section 4 of the Clayton Act, an indirect purchaser must trace the alleged overcharge from the antitrust violator, through the intermediaries in the chain of distribution, to the point where it became a purchaser. Tracing involves two interrelated exercises: (a) flagging the alleged overcharge from transaction to transaction in the vertical distribution chain; and (b) establishing a causal nexus between such an overcharge and the defendants' purported illegal conduct. Such undertakings are largely speculative ventures. The task of tracing cannot be accomplished in the courtroom with any measure of certainty.[28]

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[24] *Id.* at 725, 730-31, 736, 737-40.
[25] *Id.* at 736 n.16.
[26] *Id.*
[27] *Id.* at 724 n.2.
[28] *Id.* at 741-42.

Normally, in price-fixing cases involving plaintiffs who are direct purchasers, the measure of damages is the difference between the price actually paid by the plaintiff and the price that would have been paid "but for" the claimed overcharge.[29] If indirect purchasers were permitted to prove passing-on, a determination of the "but for" price would be made even more complicated and less certain than a determination in direct purchaser cases, where no intermediaries are present.

Indirect purchasers' claims would be measured by the difference between what indirect purchasers actually paid for the particular goods and what the price charged by the middlemen would have been but for the manufacturer's illegal overcharge.[30] The key issue in indirect purchaser claims is whether intermediaries would have charged the same price even if their acquisition costs had not been inflated by illegal overcharges.[31] Resolution of this issue requires the court to recreate the price/output decisions of nonconspiring resellers. It must determine whether each reseller would have realized more on his resale had one element of cost been lower; whether such reseller would have kept his resale price the same had his costs been less; and whether such reseller would have lowered his price in the amount of the reduced acquisition costs. Thus, in a nationwide conspiracy case, the task of tracing involves the examination of individual relationships between intermediaries in a distribution chain consisting of perhaps hundreds of wholesalers, thousands of retailers and millions of consumers.[32]

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[29] 2 P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 344, at 229-30 (1976).

[30] Where there are multiple intermediaries, the tracing exercise must be repeated with respect to each and every such intermediary. Illinois Brick Co. v. Illinois, 431 U.S. 720, 732-33 (1977).

[31] *See* Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 492-93 (1968).

[32] As the Supreme Court noted in *Hanover Shoe* and *Illinois Brick*, there are many pitfalls in analyzing business decisions of large numbers of intermediaries in the "real economic world" rather than in an "economist's hypothetical model":

> 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

a. Bases for Pricing Decisions by Middlemen

A middleman takes many factors into account before ultimately setting a price for his goods. One element of price is quite obviously the acquisition cost of a given source of supply. Nevertheless, there are many other parameters which are factored into the pricing equation, including the cost of building rental, labor costs, materials acquisition costs, transportation costs, availability and cost of credit, prices charged by competitors for comparable products, and expectations as to future demand, inflation and general employment levels. A change in any one of these parameters may impact on the seller's pricing decisions. Thus, the fundamental premise of the passing-on concept, that any cost increments incurred by a middleman due to the manufacturer's alleged price-fixing can be readily traced and isolated in the price a middleman charges his customers, is hardly axiomatic.[33]

b. Impact of Price Increases on Total Sales

The impact of a middleman's price increases on his total sales to individual customers is difficult to measure. Price increases do not necessarily elicit a uniform response from buyers.[34] A small price increment, for example, may induce a drastic decline in sales, whereas a sizable increment in the middleman's price may result in no decline in sales.[35] To gauge accurately the effect of price increases on total

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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.

Id. at 492-93 (emphasis added).

[33] *See generally id.*; Illinois Brick Co. v. Illinois, 431 U.S. 720, 725 (1977).

[34] Sensitivity to changes in price is measured by an elasticity analysis. Where a buyer is price sensitive (*i.e.*, reduces its volume of purchases in response to a slight price increase or increases its volume of purchases in response to a slight price decrease), demand is relatively elastic. *See* L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 16, at 54 (1977). On the other hand, demand is said to be relatively inelastic where the buyer does not significantly alter its volume of purchases in response to price increases or decreases. *Id.* Elasticity can be measured by using sophisticated econometric models. Such models can provide an estimate of the amount of overcharge which can be passed on without affecting sales volume. Econometric models, aided by an array of simplifying assumptions, could also theoretically estimate the decline in sales volume which a middleman is likely to suffer by passing on the full amount of an overcharge. Nevertheless, introduction of such evidence would invariably serve to complicate unduly antitrust proceedings. Illinois Brick Co. v. Illinois, 431 U.S. 720, 741-42 (1977).

[35] The mere fact that a middleman is able to pass along 100% of an overcharge does not

sales, one would have to review hundreds of thousands of individual transactions between middlemen and ultimate purchasers. The judicial system is simply not equipped to evaluate such information without resort to outright guesswork.

Moreover, price change is not the sole factor upon which a buyer rests his purchasing decisions. A buyer may choose to reduce volume of purchases from an overcharged middleman for reasons that have nothing to do with upward adjustments in acquisition costs. For example, the retailer may perceive a change in consumer behavior or may be retrenching sales efforts because of declining sales performance. Attempts to measure such subjective factors at trial would add yet another layer of complexity to antitrust litigation.

c. Ascertaining "But For" Conduct

Were proof of passing-on permitted, the indirect purchaser would find it difficult to prove that but for the illegal overcharge, the middleman "could not" or "would not" have raised its prices.[36] The mere fact that a middleman's price rise follows the imposition of a manufacturer's illegal overcharge does not establish a causal nexus between that illegal overcharge and the price paid by the indirect purchaser. The timing of the middleman's price rise may have been fortuitous and might have occurred irrespective of the manufacturer's price increase.[37] A mere circumstantial showing that an intermediary's price rise follows that of a conspirator is therefore not enough; the illegal conduct must be causally linked to the intermediary's price increment.

An ample number of cases demonstrate that the Supreme Court's concerns regarding the complexities of tracing are real.[38] *Philadel-*

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establish that the middleman suffered no injury as a result of the overcharge. The middleman in such a case may suffer loss of sales volume. Even if volume remains constant when the entire overcharge is passed on, the middleman can still claim injury on the theory that sales volume would have been even greater but for the illegal overcharge. Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 489 (1968).

[36] *Id.* at 492-93. *See supra* note 32.

[37] 392 U.S. at 493 n.9.

[38] A number of massive antitrust actions presenting complicated tracing problems show that the concerns articulated by the majority in *Illinois Brick* are not unfounded. *See, e.g., In re* Beef Indus. Antitrust Litig., 542 F. Supp. 1122 (N.D. Tex. 1982), *aff'd*, 710 F.2d 216 (5th Cir. 1983); *In re* Coordinated Pretrial Proceedings in Petroleum Prod. Antitrust Litig., 523 F. Supp. 1116 (C.D. Cal. 1981), *aff'd*, 691 F.2d 1335 (9th Cir. 1982); Philadelphia Hous. Auth. v. American Radiator & Standard Sanitary Corp., 50 F.R.D. 13 (E.D. Pa. 1970), *aff'd sub nom.* Mangano v. American Radiator & Standard Corp., 438 F.2d 1187 (3d Cir. 1971).

phia Housing Authority v. American Radiator & Standard Sanitary Corp.[39] presents an ideal example of problems encountered in attempts to trace overcharges down the distribution line. The defendants in *Philadelphia Housing Authority* were manufacturers of plumbing fixtures who had allegedly fixed the prices of their products.[40] Plumbing fixtures were sold by the manufacturers to wholesalers and then to plumbing contractors, who installed such fixtures for general building contractors.[41] Building contractors then sold homes, incorporating the plumbing fixtures, to new home buyers, who, in turn, sold their homes to used home buyers.[42] The plaintiffs consisted of groups at four distinct, and increasingly remote, points in the distribution line: (1) plumbing contractors; (2) general building contractors; (3) new home buyers; and (4) used home buyers.[43] Each group of plaintiffs claimed that at least part of the illegal overcharge had been passed on to them. The alleged overcharge by the manufacturers amounted to roughly $10 to $20 per unit.[44] Plumbing fixtures were incorporated into homes which cost from $20,000 to $30,000.[45]

The court found untenable the plaintiffs' contention that a builder selling a $30,000 house would have priced the house at $29,990 but for a $10 overcharge imposed by the plumbing fixtures manufacturers.[46] The court further rejected the plaintiffs' implicit contention that the price of homes is affected by relatively miniscule changes in the prices of plumbing fixtures, rather than by the overall demand in the market for homes.[47] In essence, the court found that the connection between the initial overcharge and prices paid by remote purchasers in successive independent markets was so attenuated as to raise insuperable problems of proof.

The problems inherent in tracing passed-on overcharges are even more starkly illustrated in two recent cases: *In re Beef Industry Antitrust Litigation*[48] and *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation.*[49] While the courts in these

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[39] 50 F.R.D. 13 (E.D. Pa. 1970).

[40] *Id.* at 15.

[41] *Id.* at 19.

[42] *Id.* at 19-20.

[43] *Id.* at 26.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] 542 F. Supp. 1122 (N.D. Tex. 1982), *aff'd*, 710 F.2d 216 (5th Cir. 1983).

[49] 523 F. Supp. 1116 (C.D. Cal. 1981), *aff'd*, 691 F.2d 1335 (9th Cir. 1982), *cert. denied*, 52 U.S.L.W. 3527 (U.S. Jan. 17, 1984).

cases did not focus on the passing-on issue per se, the facts reveal tracing problems similar to those identified in *Philadelphia Housing Authority*. Significantly, the plaintiffs in both cases claimed to be within the recognized exceptions to *Illinois Brick* and thus maintained that the damages were "easy to prove";[50] in fact, the proof was quite complex.

The plaintiffs in *Beef Industry* sought to prove passing-on through an enormously complex chain of distribution,[51] claiming that the retailers purchased beef products in accordance with fixed formulae which constituted the "functional equivalent" of a pre-existing cost-plus contract.[52] The plaintiffs were cattle feeders who fattened cattle and sold them to meat packers who sold to retail grocery chains.[53] The plaintiffs thus did not deal directly with the retailer defendants; instead they sold their cattle to packers who would slaughter the cattle and convert them into beef and by-products.[54] The packers then sold the beef directly to food retailers, including defendants, or to others at the retail level (*e.g.*, hotels, fast food chains, restaurants, and the government); and to other middlemen, such as beef jobbers, fabricators and other packers, who would process the beef further and then sell it to retailers.[55] The packers did not sell by-products to the retailer defendants; a competitive market existed for the by-products.[56]

The court found that the defendants' pricing decisions were not made "in advance without regard to the interactions of supply and

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[50] The *Illinois Brick* Court stated: "The Court cited, as an example of when a pass-on defense might be permitted, the situation where 'an overcharged buyer has pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been damaged . . . .' " Illinois Brick Co. v. Illinois, 431 U.S. 720, 724 n.2 (1977) (citations omitted).

[51] The district court in the *Beef Industry* case used a chart to depict graphically the enormously complex chain of distribution in the beef industry. *In re* Beef Indus. Antitrust Litig., 542 F. Supp. 1122, 1127 (N.D. Tex. 1982), *aff'd*, 710 F.2d 216 (5th Cir. 1983).

[52] *Id.* at 1126.

[53] The gist of the plaintiff's claims was that defendants, beef retailers, conspired to keep down their acquisition costs for beef by agreeing among themselves to pay middlemen artificially low prices for beef. Middlemen, in order to protect their profit margins, began to offer lower prices to plaintiffs, cattle ranchers and feeders. Plaintiffs claimed that they had been forced to accept the lower prices because, unlike the retailers, they lacked storage facilities which would have enabled them to wait for better prices. Thus, plaintiffs asserted that the lower offering prices of defendants were "passed on" to them through middlemen. *Id.* at 1126-27. The *Beef Industry* cases involved a buyer's conspiracy and provided a mirror image of the sellers' conspiracy in *Illinois Brick*. However, the principles with respect to passing-on are the same in both cases.

[54] *Id.* at 1126.

[55] *Id.* at 1126-27.

[56] *Id.* at 1126.

demand."[57] It further found that a number of factors had influenced the buyers' pricing decisions: individual needs, competition and negotiation for cattle, estimation of yield and grade of cattle, conditions in the cattle market and fluctuations in the by-product market.[58]

The *Petroleum Products* case involved a parens patriae action alleging price-fixing against the major oil companies, pursuant to section 4c of the Clayton Act.[59] Attorneys general for five states brought the suit on behalf of consumers.[60] Since most consumers purchased gasoline from retail dealers, rather than from the defendants, most claims seemed automatically barred by *Illinois Brick*. The plaintiffs, however, sought to circumvent summary dismissal by attempting to bring themselves within the "control exception" to *Illinois Brick*, claiming that control of retailers by defendants was so pervasive as to take away any discretion in pricing by the retailers.[61] In denying plaintiffs' class certification motion, the court held that the plaintiffs did not fit within the control exception and noted that it would be completely impracticable to prove defendants' alleged pervasive control over all of their dealers.[62]

The court further emphasized that adjudication of the passing-on claims would force the court to examine individual relationships between intermediaries and defendants, thereby "splintering the action into thousands of individual trials requiring years to litigate."[63] Such litigation would be quite unwieldy.

Thus, even in situations where plaintiffs claim that the commercial setting makes passing-on "easy to prove," the very fundamental problems of causation, tracing, absorption and determining the

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[57] *Id.* at 1131. (quoting *In re* Beef Indus. Antitrust Litig., 600 F.2d 1148 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980)).

[58] 542 F. Supp. at 1131-34.

[59] Section 4C of the Clayton Act provides in relevant part:

> (a)(1) Any attorney general of a State may bring a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of Sections 1 to 7 of this title.

15 U.S.C. § 15c(a)(1) (1982).

[60] *In re* Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 523 F. Supp. 1116 (C.D. Cal. 1981), *aff'd*, 691 F.2d 1335 (9th Cir. 1982), *cert. denied*, 52 U.S.L.W. 3527 (U.S. Jan. 17, 1984) (denying class certification to class of indirect purchasing retail consumers); *see In re* Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 497 F. Supp. 218 (C.D. Cal. 1980) (*Illinois Brick* bars claims by states in their proprietary capacities and parens patriae on behalf of consumers).

[61] 523 F. Supp. at 1118-19.

[62] *Id.*

[63] *Id.* at 1119 (quoting *In re* Hotel Tel. Charges, 500 F.2d 86, 90 (9th Cir. 1974)).

amount of damages create such complexity as to render the case unmanageable. It follows that in ordinary indirect purchaser cases, outside the *Illinois Brick* "easy to prove" exceptions, the lack of a claimed mechanical pricing formula would result in practical manageability problems of even greater proportions.

2. Antitrust Enforcement and the Impact of Passing-On

The Supreme Court in *Illinois Brick* was concerned that introduction of the passing-on issue would so complicate antitrust trials as to impair the effectiveness of the treble damage remedy.[64] The fact-finder in a case involving a nationwide price-fixing conspiracy would be subjected to endless volumes of conflicting testimonial and documentary proof regarding individual price/output decisions of hundreds of wholesalers and perhaps thousands of retailers on millions of transactions.[65] Such proof would be furnished largely by economic experts. Allowing the introduction of such evidence would raise at least two critical problems in the field of antitrust litigation: ultimate victims would have little incentive to sue; and trials would become unmanageable.

a. Incentives to Sue

Given the enormous amounts of additional proof which would inevitably be introduced on the passing-on issue, in the absence of *Illinois Brick*, pretrial and trial proceedings would become lengthier and more detailed, thereby forcing litigation expenses to skyrocket. An indirect purchaser with a comparatively tiny stake in the overall litigation might well conclude that the time, risks, and costs associated with bringing such an action would outweigh any benefits to be derived from prosecuting the suit.[66] In situations where incentive to sue is lacking, the goal of deterrence of antitrust violations is not well served. For this reason the Supreme Court chose to give first-purchasers, whose claims are not fragmented and whose discovery expenses are substantially less than the costs to indirect purchasers, a preferred place as antitrust plaintiffs.[67]

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[64] Illinois Brick Co. v. Illinois, 431 U.S. 720, 737 (1977).
[65] *See infra* notes 68-71.
[66] 431 U.S. at 745 (1977).
[67] *Id.* at 746.

b. Manageability

Perhaps more important than the incentive to sue problem is the serious question of whether competing claims by direct and indirect purchasers can be adjudicated within the courtroom without riding roughshod over the rights of the parties. Antitrust cases are, by their very nature, complex even without the presence of passing-on issues. Assuming that all claims could be procedurally consolidated for trial before the same court,[68] it is doubtful that such claims could be tried together in a manner consistent with the parties' due process rights.[69] One could not reasonably expect even a seasoned trial judge, let alone an unsophisticated jury,[70] to sort through the intricate network of conflicting and overlapping claims and reach a fair judgment or verdict based on the evidence.[71] Accordingly, the introduction of indirect purchaser claims may so complicate trials as to deny the parties due process of law, for where the evidence is incomprehensible

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[68] There currently exists no mechanism in the federal system which can force the consolidation of similar claims for litigation before the same judge. *See infra* note 74 and accompanying text.

[69] The practical problems of keeping track of evidence which applies to some claims but not others, the complexity of issues, the volume of testimony, and the sheer length of the trial itself virtually preclude the parties from receiving a fair trial on the merits. See *In re* Antibiotic Antitrust Actions, 1976-2 Trade Cas. (CCH) ¶ 61,058 (D. Minn. 1976), wherein Judge Miles Lord declared a mistrial in the midst of a trial which had spanned eighteen months with no end in sight. *Antibiotics Antitrust* involved a consolidated trial of six cases (including several class actions) with both direct and indirect purchaser claims. The lengthiness of the trial was a major ground upon which the court relied in granting the defendant's mistrial motion. The court found that after seven months of actual trial time spanning over one and one-half years, in which 136 volumes of trial testimony had accumulated, it would be impossible for the jury, which had grown "irritated, bored and confused," to reach a fair verdict based on the facts presented as evidence. *Id.*, at 69,779. Significantly, the court had not even reached the damages issues at the time the mistrial was declared. *Cf.* Boshes v. General Motors Corp., 59 F.R.D. 589, 600 (N.D. Ill. 1973) (offensive use of passing-on by consumers in action against major automobile manufacturer is permissible, but claims may not proceed as a class action since "the complexities of individual proof of damages in this case are overwhelming").

[70] It must be kept in mind that antitrust cases are frequently tried before juries; plaintiffs are not likely to waive their right to a jury trial merely because the particular facts of a case are complicated. The competency of lay jurors to decide complex antitrust claims has been questioned by a number of courts. *In re* Antibiotics Antitrust Actions, 1976-2 Trade Cas. (CCH) ¶ 61,058, at 69,779 (D. Minn. 1976); *see, e.g.*, Cotten v. Witco Chem. Corp., 651 F.2d 274 (5th Cir. 1981); *In re* Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069 (3d Cir. 1980); MCI Communications Corp. v. American Tel. & Tel. Co., 85 F.R.D. 28 (N.D. Ill. 1979); *In re* IBM Peripheral EDP Devices Antitrust Litig., 459 F. Supp. 626 (N.D. Cal. 1978); ILC Peripherals Leasing Corp. v. International Business Mach. Corp., 458 F. Supp. 423 (N.D. Cal. 1978).

[71] The court in the *Antibiotics* case noted that at the time the mistrial was declared, the plaintiffs had not even gotten to the heart of their claims. *In re* Antibiotics Antitrust Actions, 1976-2 Trade Cas. (CCH) ¶ 61,058, at 69,779.

one can hardly be said to have had "an opportunity to be heard."[72]

3. Double Recovery and Inconsistent Judgments

Permitting passing-on to be used offensively may result in inconsistent judgments and may also subject defendants to multiple liability for the same illegal conduct. The fact that these risks are not mere fantasies was aptly illustrated in the *Petroleum Products* case. In that decision, the court denied certification of an indirect purchaser class of five state attorneys general suing parens patriae on behalf of consumers in their respective states. The court noted that substantially the same overcharges were being claimed by direct purchasers in another lawsuit and thereby recognized the potential of subjecting defendants to multiple liability.[73]

The risks of double recovery and inconsistent judgments might be somewhat lessened if all direct and indirect claims could be tried in a single action. But even this solution is not without its drawbacks. First, there is currently no mechanism by which consolidated trials may be mandated.[74] Assuming that a mandatory joint trial procedure is developed, there is a serious question as to whether a party, consistent with due process, can be forced to join a litigation or be forever precluded from pursuing a claim, however meritorious. Second, while the consolidated trial may lessen the twin problems of multiple liability and inconsistent judgments, it adds new dimensions of complexity

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[72] *See id.* at 69,776-79.

[73] The court in *In re* Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 523 F. Supp. 1116 (C.D. Cal. 1982) stated:

> The compelling nature of this conclusion [to deny class certification to *parens patriae* plaintiffs] is underlined by the current pendency of the antitrust litigation described in Bosgosian v. Gulf Oil Corp., 561 F.2d 434 (3d Cir. 1977). It is a class action against most of the major oil companies that are defendants here, and is brought on behalf of all of their retail gasoline dealers. It charges the defendants with a horizontal conspiracy to require their dealers to acquiesce in antitrust conduct as a condition to retaining their leases. Thus, the plaintiff class in *Bogosian* are seeking to recover, as direct purchasers, substantially the same dollars in damages that the present plaintiffs' proposed class are seeking, as indirect purchasers, from the same defendants. If the plaintiff class in *Bogosian* and the proposed plaintiff class here were both to succeed, the result would be the double recovery, trebled, that *Illinois Brick* envisaged and sought to forestall.

Id. at 1120-21.

[74] The lack of any procedure to effectuate consolidated trials has been a major argument against permitting indirect purchaser claims. *See, e.g., Fair And Effective Enforcement Of The Antitrust Laws: Hearings on S. 1874 Before The Subcomm. on Antitrust And Monopoly of The Senate Comm. on The Judiciary*, 95th Cong., 1st Sess. 185-87 (1977) (testimony of Samuel W. Murphy, Jr.) [hereinafter cited as *1977 Senate Hearings*].

and may create more problems than it solves.

4. Uncertainty Generated by the Passing-On Rule

While the *Illinois Brick* rule denying recovery to indirect purchasers may prove quite harsh in certain cases, it does have the virtue of certainty. In the years between the *Hanover Shoe* and *Illinois Brick* decisions, the status of the indirect purchaser as plaintiff was uncertain; cases on whether an indirect purchaser could prove passing-on yielded inconsistent results.[75] *Illinois Brick* put an end to this uncertainty by holding that only direct purchasers may sue. Repealing *Illinois Brick* would give new life to all questions regarding indirect purchaser claims that had been asked prior to that decision. However, such repeal would not guarantee that indirect purchasers may proceed with a suit. If allowed to sue, indirect purchasers must still show a causal nexus between the injury claimed and the defendants' alleged antitrust violation, and that their claims are not so remote from the defendants' misconduct as to preclude recovery.[76]

C. Illinois Brick *and the Hart-Scott-Rodino Act*

In 1976, prior to the Supreme Court's decision in *Illinois Brick*, Congress enacted the Hart-Scott-Rodino Antitrust Improvements Act.[77] The Act provides in part that the attorney general of a state may bring an action parens patriae on behalf of natural persons[78] for

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[75] Cases upholding the offensive use of passing-on include *In re* Western Liquid Asphalt Cases, 487 F.2d 191 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974); West Virginia v. Charles Pfizer & Co., 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971); *In re* Master Key Antitrust Litig., 1973 Trade Cas. (CCH) ¶ 74,680 (D. Conn. 1973); Boshes v. General Motors Corp., 59 F.R.D. 589 (N.D. Ill. 1973). Cases prohibiting the offensive use of passing-on include Donson Stores, Inc. v. American Bakeries Co., 58 F.R.D. 481 (S.D.N.Y. 1973); Philadelphia Hous. Auth. v. American Radiator & Standard Sanitary Corp., 50 F.R.D. 13 (E.D. Pa. 1970), *aff'd per curiam sub nom.* Mangano v. American Radiator & Standard Sanitary Corp., 438 F.2d 1187 (3d Cir. 1971); City & County of Denver v. American Oil Co., 53 F.R.D. 620 (D. Colo. 1971).

[76] A threshold requirement of a plaintiff's antitrust claim is proof of damage (*i.e.*, proof that the plaintiff's injury is causally related to the defendant's antitrust violation). Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931). Proposed *Illinois Brick* repealers should not alter this requirement. *See, e.g., 1977 Senate Hearings, supra* note 74 (testimony of John H. Shenefield).

[77] 15 U.S.C. §§ 15c-15h (1982).

[78] The Hart-Scott-Rodino bill was introduced in response to the court of appeals' decision in California v. Frito-Lay Inc., 474 F.2d 774, 777 (9th Cir.), *cert. denied*, 412 U.S. 908 (1973), which held that a state may not, under § 4 of the Clayton Act, 15 U.S.C. § 15, maintain a

Sherman Act violations.[79] A major purpose of the Act was to provide a mechanism whereby consumers could be compensated for antitrust overcharges.[80] While claims litigated in the *Illinois Brick* case did not arise under Hart-Scott-Rodino, the Supreme Court was nevertheless faced with the argument that legislative history demonstrated that Congress, in enacting the parens patriae bill, had interpreted section 4 of the Clayton Act to permit offensive use of passing-on.[81] Rejecting such arguments, the majority held that Hart-Scott-Rodino created no new substantive claim but rather added a new procedural device to enforce existing rights to treble damage recovery.[82]

The Supreme Court has not spoken further on the interplay between *Illinois Brick* and the Hart-Scott-Rodino Act.[83] The case law on this point is sparse but lower courts, which have faced the issue of the applicability of *Illinois Brick* to parens patriae cases, have followed the Supreme Court's restrictive approach. They have dismissed parens patriae claims on behalf of indirect purchasers, unless such plaintiffs fall within a recognized exception to *Illinois Brick* or allege that the defendants from whom they purchased were part of a vertical conspiracy.[84] Moreover, very few parens patriae cases have been

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parens patriae action for the benefit of its citizens. H.R. REP. No. 499, 94th Cong., 1st Sess. 8 (1975).

[79] Section 15c(a)(1) provides:

> Any attorney general of a State may bring a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of [the Sherman Act]. The court shall exclude from the amount of monetary relief awarded in such action any amount of monetary relief (A) which duplicates amounts which have been awarded for the same injury, or (B) which is properly allocable to (i) natural persons who have excluded their claims pursuant to subsection (b)(2) of this section, and (ii) any business entity.

[80] 15 U.S.C. § 15c(a)(1) (1982). H.R. REP. No. 499, 94th Cong., 1st Sess. 7-8 (1975); S. REP. No. 803, 94th Cong., 2d Sess. 39 (1976).

[81] Illinois Brick Co. v. Illinois, 431 U.S. 720, 756-58 (1977) (Brennan, J., dissenting).

[82] *Id.* at 733 n.14 (1977). *But see id.* at 756-58 (Brennan, J., dissenting) (Congress clearly intended that Hart-Scott-Rodino provide a remedy for consumers whether or not they purchased directly from the violator).

[83] The Court, however, has recently asked the Solicitor General's views on the applicability of the *Illinois Brick* rule to parens patriae cases in connection with the *certiorari* petition filed on behalf of the plaintiffs in *In re* Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig. ANTITRUST & TRADE REG. REP. (BNA) No. 1134, at 514 (October 6, 1983).

[84] *In re* Coordinated Pretrial Proceedings in Petroleum Prod. Antitrust Litig., 523 F. Supp. 1116 (C.D. Cal. 1981), *aff'd*, 691 F.2d 1335 (9th Cir. 1982); *cf. In re* Mid-Atlantic Toyota Antitrust Litig., 516 F. Supp. 1287 (D. Md. 1981) (recognizing the limitations imposed by *Illinois Brick* but holding that *Illinois Brick* was not a bar to a parens patriae suit where vertical conspiracy between dealer and manufacturer is alleged); *accord* Vermont v. Densmore Brick Co., 1980-2 Trade Cas. (CCH) ¶ 63,347 (D. Vt. 1980); *but see* Alaska v. Chevron Chem. Co., 669

filed since the date of the *Illinois Brick* decision.[85] Thus, *Illinois Brick*, by limiting treble damage recoveries to direct purchasers, has severely restricted the scope of the Hart-Scott-Rodino Act and its usefulness as a weapon of antitrust enforcement.

III. Prior Legislative Attempts to Overrule *Illinois Brick*

As noted above, *Illinois Brick* has been a controversial decision, sparking attack by a number of commentators[86] and in Congress,[87] where there have been repeated efforts to repeal *Illinois Brick* in the six years since the case was decided.[88] *Illinois Brick* is not a perfect solution to the problems of indirect purchaser suits. The decision attempted to strike a fair balance between the fundamental goals of antitrust litigation — compensation and deterrence — while at the same time assuring effective enforcement of the antitrust laws.[89] There has been, however, considerable good faith disagreement as to how these goals might best be accomplished in the real world.

F.2d 1299, 1301 n.4 (9th Cir. 1982) (suggesting that *Illinois Brick* does not preclude an action for injunctive relief by indirect purchasers).

[85] *Antitrust Enforcement Act of 1979: Hearings on S. 300 Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 60-77 (1979) (statement of Chauncey H. Browning) [hereinafter cited as *1979 Senate Hearings*]; *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) [hereinafter cited as *1979 House Hearings*].

[86] *See* Harris & Sullivan, *Passing On The Monopoly Overcharge: A Response To Landes and Posner*, 128 U. Pa. L. Rev. 1280 (1980); Harris & Sullivan, *Passing On the Monopoly Overcharge: A Comprehensive Policy Analysis*, 128 U. Pa. L. Rev. 269 (1979) (passing-on is the rule rather than the exception and the amounts passed on can be reasonably and reliably estimated); *see also* Comment, *Congressional Authorization Of Indirect Purchaser Treble Damage Claims: The* Illinois Brick *Wall Crumbles*, 47 Fordham L. Rev. 1025 (1979); Note, *Antitrust: Consumer Standing After* Reiter v. Sonotone Corp. *and* Illinois Brick Company v. Illinois, 26 Loy. U. Chi. L.J. 327 (1980) (*Illinois Brick* is an unduly harsh rule, and *Reiter* is only a pyrrhic victory because consumers, in order to recover, still must have been direct purchasers under the rule of *Illinois Brick*).

[87] H.R. Rep. No. 1397, 95th Cong., 2d Sess. 2-3 (1978); S. Rep. No. 934, 95th Cong., 2d Sess. 2-7 (1978); 123 Cong. Rec. S23335 (daily ed. July 15, 1977) (statement of Senator Kennedy).

[88] *See supra* note 10.

[89] Judge Patrick Higginbotham in deciding *In re* Beef Indus. Antitrust Litig., 542 F. Supp. 1122 (N.D. Tex. 1982) described the Supreme Court's accomodation of interests 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 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.

A. Summary of the Debate on Illinois Brick

1. Proponents

Proponents of the *Illinois Brick* decision, emphasizing the need to deter antitrust violations, urge that the decision does indeed strike a proper balance between compensation and deterrence.[90]

a. Deterrence

Direct purchasers, because they deal firsthand with the alleged wrongdoer, are in the best position to detect illegal conduct and hence are the most appropriate class to police antitrust violations.[91] Direct purchasers have a great incentive to sue because, under *Hanover Shoe*, they are entitled to recover the entire overcharge regardless of whether they passed on overcharges.[92] Thus, the recoveries by direct purchasers are not fragmented as would be the case if courts were asked to apportion overcharges to indirect purchasers down the distribution line.[93] If direct purchasers' recoveries could be dimin-

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[90] *1979 Senate Hearings, supra* note 85, at 5 (statement of Senator Thurmond).

[91] S. REP. No. 239, 96th Cong., 1st Sess. 107-08 (1979) (Minority Report); *Fair and Effective Enforcement of the Antitrust Laws: Hearings on S. 1874 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 51-52 (1978) (testimony of Richard A. Posner) [hereinafter cited as *1978 Senate Hearings*]. Judge, then Professor, Posner testified:

> The first purchaser is in the best position to detect an antitrust violation by his seller. It is therefore particularly important that the direct purchaser have adequate incentives to bring suit against the seller. He will — if he can sue for the entire overcharge. But if indirect purchasers can sue to the extent that they are injured, then, as a necessary corollary expressly recognized in S. 1874, the seller, in a suit by the first purchaser, will be able to defend by showing that the first purchaser passed on part of the overcharge to someone having standing to sue. Insofar as the defendant succeeds in this defense, the incentives of first purchasers to sue are weakened (and in the limit vanish). The likelihood that violators will be detected is therefore also diminished.
>
> Injured *indirect* purchasers will, to be sure, have an incentive to sue that is lacking under the rule of *Illinois Brick*. But they, as I have just argued, are normally less able to detect an antitrust violation of their remote seller than is the direct purchaser of his immediate seller. The benefits to deterrence from allowing direct purchasers to sue are therefore likely to be outweighed by the cost in reducing first purchasers' incentive to sue. There is, in short, a trade-off between direct and indirect purchaser suits. Anything that encourages the latter will discourage the former in a system where multiple liability is barred.

Id.

[92] S. REP. No. 239, 96th Cong., 1st Sess. 107-08 (1979) (Minority Report); *1978 Senate Hearings, supra* note 91, at 324 (testimony of Julian O. Von Kalinowski and John Clute).

[93] *See supra* note 92.

ished by indirect purchasers' claims, then first purchasers would have little incentive to sue. Moreover, because direct purchasers need not prove passing-on, establishing a claim is straightforward and less costly than it would be if indirect purchasers were permitted to trace overcharges through the distribution chain.[94]

b. Effective Antitrust Enforcement

The rule of *Illinois Brick* is desirable to assure the manageability of complex antitrust litigation, to avoid clogging the courts with speculative damage claims, and to make certain that defendants will not be exposed to multiple liability and inconsistent judgments.[95]

c. Compensation

While *Illinois Brick* may result in denying recovery to one who has clearly borne the burden of an overcharge, the benefits of the direct purchaser rule in terms of promoting overall antitrust enforcement outweigh any such occasional hardships in individual cases.[96] Consumers whose damages are but a fraction of the total overcharge have no incentive to sue and thus will remain uncompensated.[97] Moreover, indirect purchaser claims, which are usually part of massive antitrust suits, often result in compensating attorneys rather than antitrust victims.[98] Many antitrust suits end in settlement; attorneys' fees are usually paid as part of the settlement, and money that would otherwise compensate victims is syphoned off to cover legal expenses.[99] The *Illinois Brick* rule effectively stymies marginal claims made on

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[94] *Id.*

[95] *E.g., 1977 Senate Hearings, supra* note 74, at 69,182 (testimony of Samuel W. Murphy, Jr. and Michael Blechman); *1979 House Hearings, supra* note 85, at 113 (statement of Dorsey D. Ellis).

[96] *1979 House Hearings, supra* note 85, at 113 (statement of Dorsey D. Ellis).

[97] S. REP. No. 239, 96th Cong., 1st Sess. 107-08 (1979) (Minority Report); *1978 Senate Hearings, supra* note 91, at 51-52 (testimony of Richard A. Posner).

[98] *1977 Senate Hearings, supra* note 74, at 69 (testimony of Michael Blechman).

[99] Courts are becoming more aware of the fact that the victims are not the sole beneficiaries of antitrust settlements; the victims' attorneys have a significant stake in any settlement. Fee applications are no longer being rubber-stamped but rather receive close scrutiny. *See, e.g., In re* Fine Paper Antitrust Litig., 98 F.R.D. 48 (E.D. Pa. 1983) (fee application by plaintiffs' attorneys in the amount of $21 million on a $50 million settlement reduced by some $15 million by the district court). *Cf. In re* Corrugated Container Antitrust Litig., ANTITRUST & TRADE REG. REP. (BNA) No. 1134, at 524-25 (Oct. 6, 1983) (attorneys for settling plaintiffs awarded $40.8 million in fees on settlement valued at $550 million).

behalf of remote victims which serve the interest of the plaintiffs' attorneys more than the interest of the claimants themselves.[100]

2. Opponents

Opponents of *Illinois Brick* see the decision as an impediment to antitrust enforcement.

a. Compensation

Illinois Brick denies compensation to the real victims of antitrust violations — the ultimate consumers.[101] Under the decision, direct purchasers who suffer no antitrust injury receive a windfall because they may simply pass along any overcharges to their customers and reap the added benefit of a treble damage judgment.[102] Thus, the consumer is saddled with a double penalty. He is forced to shoulder the brunt of the overcharge and at the same time is denied the recourse of a treble damage action.

b. Deterrence

Direct purchasers are not the most effective enforcers of antitrust laws; fearful of disrupting commercial relationships, direct purchasers are reluctant to sue their suppliers for antitrust violations.[103] Because of this reluctance to sue, the direct purchaser rule of *Illinois Brick* has no deterrent value, and many antitrust violations go unpunished for want of a willing plaintiff.[104] Allowing indirect purchaser suits would enable a number of ready, willing and able plaintiffs to prosecute their antitrust claims, thereby promoting deterrence.[105]

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[100] *1977 Senate Hearings, supra* note 74, at 69 (testimony of Michael Blechman).

[101] S. REP. No. 239, 96th Cong., 1st Sess. 6-10; *1979 Senate Hearings, supra* note 85, at 69-77 (statements of Messrs. Browning, Scott, Smith, Clark, Hansen and White).

[102] *See supra* note 101.

[103] S. REP. No. 239, 96th Cong., 1st Sess. 18 (1979); *1979 Senate Hearings, supra* note 85, at 65 (testimony of William Scott). With respect to the *Fine Paper* litigation, Mr. Scott stated: "There would have been over 1200 merchants in this Nation who would have been direct purchasers and to my knowledge, none of them have [sic] filed in that case." *Id.* at 63.

[104] S. REP. No. 239, 96th Cong., 1st Sess. 22 (1979); *1979 Senate Hearings, supra* note 85, at 24, 37 (statements of Messrs. Shenefield and Bosworth).

[105] *See supra* note 104.

c. Impact of Indirect Purchaser Suits on Antitrust Enforcement

The claimed practical problems associated with indirect purchaser suits, particularly inconsistent judgments and multiple recoveries, are greatly exaggerated and can be obviated by resort to various existing procedural devices, such as transfer, coordinated discovery and consolidated trial.[106] Furthermore, mere difficulty in measuring damages has never been grounds for denying an antitrust victim his day in court.[107] Indeed, where the fact of damage is established, cases have permitted plaintiffs to make reasonable estimates in proving the amount of damages.[108]

B. Chronology and Substance of Earlier Bills

Immediately after the *Illinois Brick* decision was announced, several bills were introduced to repeal its ban on the offensive use of passing-on.[109] Although extensive hearings were held on these measures, none was debated on the floor of either chamber of Congress and the bills eventually died. Similar efforts to repeal *Illinois Brick* failed in the 96th Congress.[110] After a three year hiatus, *Illinois Brick* legislation was again introduced in the Senate in July, 1982, but no

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[106] *See 1979 Senate Hearings, supra* note 85, at 26 (statement of John H. Shenefield); *1977 Senate Hearings, supra* note 74, at 57 (statement of Eleanor M. Fox). *But see id.* at 183 (statement of Samuel W. Murphy, Jr.). Mr. Murphy stated:

> Proponents of [S. 1874] seem to discount the complexity and judicial problems involved. Some have suggested that these problems, as well as risks of multiple recovery, are more imaginary than real. I disagree. These are not phantom problems. I submit that this subcommittee should not ignore them or proceed on the assumption that some innovative judges will later devise procedures to deal with them in an efficient and fair manner.
>
> I believe that the experience over the past 10 years in the tetracycline litigation can provide some empirical data upon which your legislative judgments on these matters can be based. We have been surprised that during the July hearings before this subcommittee references were made to that litigation as a case study of how problems of proof, allocation of damages and prevention of multiple recovery could be expeditiously and efficiently handled. In our view, the record of that litigation supports the opposite conclusion.

Id.

[107] *1979 Senate Hearings, supra* note 85, at 26 (statement of John H. Shenefield).

[108] *Id.* (citing Bigelow v. RKO Pictures, 327 U.S. 251 (1946)).

[109] 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, 95th Cong., 1st Sess. (1977); H.R. 8359, 95th Cong., 1st Sess. (1977).

[110] H.R. 2204, 96th Cong., 1st Sess. (1979); H.R. 2060, 96th Cong., 1st Sess. (1979); S. 300, 96th Cong., 1st Sess. (1979).

hearings were ever held.[111]

1. Ninety-fifth Congress

a. House

Several bills to repeal *Illinois Brick* were introduced in the House shortly after the case was decided.[112] Hearings were held in the fall of 1977 by the House Subcommittee on Monopolies and Commercial Law.[113] The Subcommittee recommended H.R. 11942 as a "clean bill" to the full Judiciary Committee.[114] On June 20, 1978, the Committee favorably reported the bill to the floor.[115] The salient features of H.R. 11942 were as follows:

> (i) indirect purchasers or indirect sellers would have been deemed injured under sections 4, 4A or 4C of the Clayton Act upon proof that they were overcharged or underpaid for goods or services;
> (ii) recovery of overcharges by indirect purchasers or indirect sellers would have been limited to the amount of the overcharge or underpayment actually passed on to them;
> (iii) *Hanover Shoe* would have been overruled by making a partial or complete defense in cases brought under sections 4 and 4A of the Clayton Act;
> (iv) proof of damages and passing-on on a class-wide basis rather than on an individual basis would have been allowed in class actions pursuant to section 4 of the Clayton Act and in parens patriae suits under section 4C. Individual damages would be measured by prorating actual purchases or sales of the price-fixed goods or services against the total purchases or sales of the entire class. However, damages would be assessed against defendants only on the basis of "valid damage claims" asserted; and
> (v) judgments in actions under Clayton Act sections 4, 4A, and 4C, insofar as they related to passing-on issues, would have been admissible in later actions as prima facie evidence against plaintiffs and con-

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[111] S. 2772, 97th Cong., 2d Sess. (1982).

[112] *See supra* note 109.

[113] *Effective Enforcement of the Antitrust Laws: Hearings on H.R. 8359 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. (1977) [hereinafter cited as *1977 House Hearings*].

[114] ANTITRUST & TRADE REG. REP. (BNA) No. 859, at A-21 (April 13, 1978). H.R. 11942 was introduced on April 6, 1978. 124 CONG. REC. H9144 (daily ed. April 6, 1978); *see 1979 House Hearings, supra* note 85, at 6 (statement of Rep. McClory).

[115] ANTITRUST & TRADE REG. REP. (BNA) No. 859, at A-21 (April 13, 1978). *See 1979 House Hearings, supra* note 85, at 6 (statement of Rep. McClory).

clusive evidence against defendants.[116]

b. Senate

S. 1874 was introduced on July 15, 1977.[117] The Subcommittee on Antitrust and Monopoly held hearings in July and September, 1977,[118] and full Committee hearings were convened in April, 1978.[119] On May 25, 1978, S. 1874 was reported favorably to the Senate.[120] The pertinent portions of the bill provided:

(i) plaintiffs would not have been barred from pursuing claims under sections 4, 4A and 4C of the Clayton Act by the mere fact that they did not deal directly with the defendants; and
(ii) *Hanover Shoe* would have been repealed, but only in actions brought under sections 4 or 4A of the Clayton Act.[121]

2. Ninety-sixth Congress

a. House

Two *Illinois Brick* bills were again introduced in 1979.[122] Hearings were held on both H.R. 2060 and H.R. 2204 by the Subcommittee on Monopolies and Commercial Law.[123] On September 18, 1979, the Subcommittee voted to approve a compromise bill,[124] but no action was taken on that bill by the full Committee. The compromise bill was similar to H.R. 11942 but differed in several key respects:

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[116] For the exact provisions of the bill see H.R. 11942, 95th Cong., 2d Sess. (1978); *see also* H.R. REP. 1397, 95th Cong., 2d Sess. 1-2 (1978).

[117] S. REP. 934, 95th Cong., 2d Sess. 30 (1978).

[118] *Id.*; *1977 Senate Hearings, supra* note 74.

[119] *Fair and Effective Enforcement of the Antitrust Laws: Hearings on S. 1874 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. (1977).

[120] ANTITRUST & TRADE REG. REP. (BNA) No. 866, at A-3 (June 1, 1978); 124 CONG. REC. S. 17570 (daily ed. June 14, 1978).

[121] For exact provisions of the bill, see S. 1874, 95th Cong., 2d Sess. (1978); *see also* S. REP. No. 934, 95th Cong., 2d Sess. 35-36 (1978).

[122] H.R. 2204, 96th Cong., 1st Sess. (1979); H.R. 2060, 96th Cong., 1st Sess. (1979). H.R. 2060 was identical to S. 300 introduced in the Senate. H.R. 2204 was identical to H.R. 11942. *1979 House Hearings, supra* note 85, at 6 (statement of Rep. McClory).

[123] ANTITRUST & TRADE REG. REP. (BNA) No. 909, at A-20 to 21 (Apr. 12, 1979).

[124] 125 CONG. REC. H697-98 (daily ed. Sept. 18, 1979); ANTITRUST & TRADE REG. REP. (BNA) No. 931, at A-18 (Sept. 20, 1979). The compromise bill was proposed by Representatives Rodino, McClory and Seiberling. ANTITRUST & TRADE REG. REP. (BNA) No. 930, at A-32 to 33, E-1 (Sept. 13, 1979).

(i) the judge would have decided the extent to which passing-on would be permitted after proof of both violation and fact of injury. Discovery on the passing-on issue might have been delayed by the court until there was proof of violation and damages;
(ii) provisions for class-wide proof of damages would have been modified to permit the court in class actions under sections 4 or 4C of the Clayton Act to find that individual damages would have been based on the ratio of an individual's purchases to the purchases of the entire class, if doing so would reduce complexity and facilitate management of the case; and
(iii) while prior damage awards would have been admissible against plaintiffs in subsequent damage actions, the compromise bill, unlike H.R. 11942, would not give prima facie effect to such prior determinations.[125]

b. Senate

On January 31, 1979, S. 300 was introduced.[126] The Judiciary Committee held hearings in February and March, 1979.[127] In May, 1979, the Committee recommended the bill to the full Senate.[128] The new bill differed from its predecessor, S. 1874, in two significant respects:

(i) the *Hanover Shoe* repealer in S. 300 would have been broadened to cover actions brought under sections 4A and 4C of the Clayton Act in addition to those brought under section 4; and
(ii) S. 300 would have limited the use of the passing-on defense "in order to avoid duplicative liability to it."[129]

3. Ninety-seventh Congress

The *Illinois Brick* debate was resumed with the July, 1982 introduction of S. 2772 in the Senate.[130] No hearings were held on the bill, which provided for:

(i) a repeal of *Hanover Shoe* in actions brought under section 4 of the Clayton Act;
(ii) an overruling of *Illinois Brick* in actions under sections 4 and 4A

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[125] *See* ANTITRUST & TRADE REG. REP. (BNA) No. 930, at E-1 to 2 (Sept. 13, 1979).
[126] 125 CONG. REC. S1459-64 (daily ed. January 31, 1979).
[127] *See 1979 Senate Hearings, supra* note 85.
[128] ANTITRUST & TRADE REG. REP. (BNA) No. 913, at A-7 (May 10, 1979).
[129] For exact provisions of the bill, see S. 300, 96th Cong., 1st Sess. (1979); *see also* ANTITRUST & TRADE REG. REP. (BNA) No. 922, at 23 (July 19, 1979).
[130] 128 CONG. REC. S9121 (daily ed. July 26, 1982).

of the Clayton Act; and
(iii) a repeal of *Illinois Brick* in parens patriae cases under section 4C involving price-fixing actions brought on behalf of natural persons.[131]

IV. The 1983 Proposed Legislation

A. *The Pending Legislation in a Nutshell*

In March 1983, two bills, S. 915[132] and H.R. 2244,[133] were introduced into the Senate and House respectively. The Senate bill deals solely with indirect purchaser claims. H.R. 2244 is a far more comprehensive piece of legislation, dealing with contribution and amending the Tunney Act,[134] as well as with *Illinois Brick/Hanover Shoe* concerns.[135] Significantly, both bills provide for only a limited repeal of *Illinois Brick* and *Hanover Shoe*, unlike predecessor proposals which would have broadly overturned these prior holdings. The basic purpose of the legislation is to restore the vitality of parens patriae suits which many feel had been vitiated by *Illinois Brick*. Furthermore, in those instances where the federal or state governments purchased indirectly from antitrust violators (and thus had no recourse under *Illinois Brick*), the bills attempt to assure that the taxpayers will not be called upon to absorb any illegal overcharges.[136]

1. H.R. 2244

The House bill would partially overrule *Illinois Brick* by providing that in actions brought by the state or a political subdivision thereof pursuant to section 4 of the Clayton Act, by the federal government under section 4A, and by a state attorney general as parens patriae of natural persons pursuant to section 4C, the fact that the plaintiffs

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[131] *See* Antitrust & Trade Reg. Rep. (BNA) No. 1076, at 293 (Aug. 5, 1982).

[132] 129 Cong. Rec. S3876-77 (daily ed. Mar. 23, 1983).

[133] 129 Cong. Rec. H1560 (daily ed. Mar. 22, 1983).

[134] 15 U.S.C. §§ 1-3, 16, 28-29; 47 U.S.C. § 401; 49 U.S.C. §§ 43-45 (1976). The Antitrust Procedures and Penalties Act, popularly known as the Tunney Act, requires the Department of Justice, prior to entering into a consent decree, to file for public consideration a copy of the proposed decree and a statement analyzing the likely effects of the decree. L. Sullivan, Handbook of the Law of Antitrust § 244, at 758-59 (1977). The Act is designed to prevent political interference or favoritism by the government in settling antitrust matters. *Id.*

[135] The portions of H.R. 2244 which do not deal with *Illinois Brick/Hanover Shoe* issues are beyond the scope of this article and will not be discussed herein.

[136] 129 Cong. Rec. H1549 (daily ed. Mar. 22, 1983) (statement of Rep. Rodino).

did not deal directly with the defendants shall not bar suit.[137] The bill would also overrule *Hanover Shoe* in part by providing that a plaintiff, in actions under sections 4, 4A, or 4C of the Clayton Act, may not recover "any amount that duplicates the recovery of another plaintiff in the action or any other action."[138] It should be noted that H.R. 2244 would not repeal either *Illinois Brick* or *Hanover Shoe* where the ultimate purchaser is someone other than the United States, a state or local governmental entity, or a consumer represented by a state attorney general parens patriae. Thus, *Illinois Brick* and *Hanover Shoe* would still apply where the ultimate purchaser is a corporation or other business entity.

2. S. 915

The Senate proposal, like the House bill, would repeal *Illinois Brick* only in damage actions brought by the state or a political subdivision thereof, whether on its own behalf or on behalf of consumers, or by the United States.[139] The bill would also partially overrule *Hanover Shoe* by providing that:

> [I]n any action under sections 4, 4A or 4C of the Clayton Act, the defendant shall be entitled to prove as a partial or complete defense to a damage action, in order to avoid duplicative liability, that, some or all of what otherwise would constitute plaintiff's damages has been passed onto others, who are themselves entitled to maintain an action or on whose behalf the Attorney General of the United States or of any State is entitled to maintain an action under Sections 4A or 4C of this Act.[140]

The passing-on defense would thus be available only when the persons to whom damages were allegedly passed on are themselves entitled to maintain actions as indirect purchasers. Such persons then become indispensable parties to the lawsuit. Unlike the House proposal, S. 915 specifies passing-on as an affirmative defense which must identify those to whom overcharges were passed-on with "as much particularity as is reasonable."[141]

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[137] H.R. 2244, 98th Cong., 1st Sess. § 2(b) (1983).

[138] *Id.*

[139] S. 915 would apparently create a "new" cause of action by state attorneys general on behalf of the state or local subdivisions. However, it would appear that state attorneys general are already empowered to bring such suits under the Hart-Scott-Rodino Act. *See* 15 U.S.C. §§ 15c-15h (1982).

[140] S. 915, 98th Cong., 1st Sess. § 2 (1983).

[141] *Id.*

Hearings were held on S. 915 before the Judiciary Committee on June 8, 1983.[142] Sponsors and proponents of this legislation assert that the bill not only meets the concerns expressed by *Illinois Brick* but also alleviates the harsh results of that decision. The proponents offer the following reasons for elevating attorneys general to a special position in indirect purchaser cases:

1. the limited number of plaintiffs (the United States and 50 state attorneys general[143]) will lessen the complexity problems identified in *Illinois Brick* by preventing a proliferation of indirect purchaser suits by intermediaries at different points in the distribution chain;[144]
2. the bills make specific provisions to guard against double recovery;[145]
3. the legislation will remedy perceived abuses in meritless treble damage suits which are really only in the interests of attorneys seeking windfalls in fees, by lodging the claim in the hands of the attorneys general, who presumably have no interest in attorneys' fees. Moreover, because state attorneys general are salaried public employees with no personal stake in such suits, the bulk of any recovery will go to victims, not attorneys;[146]
4. the proposals will foster deterrence by adding attorneys general as another class of potential plaintiffs to enforce the antitrust laws, along with direct purchasers who rarely sue;[147]
5. the real victims of overcharges, consumers, will be compensated under this bill.[148]

B. An Analysis of the Proposed Legislation

Both bills contain technical defects in drafting. For example, H.R. 2244 contains no limitation regarding the type of antitrust violations to which it applies. It might be read to apply to the entire gamut of antitrust violations, in addition to price fixing.[149] Moreover, the *Han-*

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[142] The witnesses at the hearings included Senators Slade Gorton (R-Wash.), Warren Rudman (R-N.H.) and Jeff Bingaman (D-N. Mex.); Governor Allen I. Olson (North Dakota); Hon. David Frohnmayer, Attorney General (Or.); Hon. Robert T. Stephan, Attorney General (Kan.); John H. Shenefield, Esq.; Harold E. Kohn, Esq.; Thomas L. Boeder, Esq.; Edward D. Cavanagh, Esq.; Leo R. McDonough; and Bernard Schramm.

[143] The Senate bill makes no mention of suits on behalf of residents of the District of Columbia. This deletion appears to have been an oversight.

[144] *Taxpayer Antitrust Enforcement Act of 1983: Hearings on S. 915 Before the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. (1983) (statement of John H. Shenefield).

[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] THE REPORT OF THE AMERICAN BAR ASSOCIATION ANTITRUST SECTION TASK FORCE TO RE-

over Shoe repealer in H.R. 2244 is arguably broader than the *Illinois Brick* repealer.[150]

The Senate bill suffers similar problems. S. 915 limits actions by states or their political subdivisions to claims arising under section 1 of the Sherman Act.[151] Actions by the United States under section 4A, of course, are not so limited, and parens patriae claims may be brought for any violation of sections 1 through 7 of the Sherman Act.[152] It is also unclear whether the provisions of S. 915 which make passing-on an affirmative defense,[153] relieve the indirect purchaser of the burden of establishing actual damage or the amount of damage. Nor does the bill specify whether indirect purchasers are entitled to recover the entire amount passed on by the direct purchaser or whether recovery will be limited to the amount of the overcharge that actually reached the indirect purchaser.[154] Finally, the requirement that the defendant identify with particularity the parties to whom the overcharge was passed on may well run afoul of newly amended Rule 11 of the Federal Rules of Civil Procedure.[155]

VIEW PROPOSED LEGISLATION TO REPEAL OR MODIFY Illinois Brick (1983) [hereinafter cited as TASK FORCE REPORT] noted in its analysis of H.R. 2244:

> The only hint of a limitation on the scope of H.R. 2244's *Illinois Brick* repealer is its use of the term "sales transaction" in § 4I(a) ("[the government purchaser or consumer represented *parens patriae*] shall not be barred . . . solely because the injury . . . did not arise from a sales transaction by the plaintiff . . . and the defendant"). The term is not defined in the bill and, while it could be interpreted as a limitation, its ambiguity makes any intended limitation too vague to be meaningful.

Id. at 20.

[150] The *Hanover Shoe* repealer contained in § 2 of H.R. 2244, unlike the *Illinois Brick* repealer, contains no reference to "sales transactions." The TASK FORCE REPORT states:

> The "sales transaction" language may have implications for the bill's *Hanover Shoe* repealer because that language is not used in the section that partially repeals *Hanover Shoe*, § 4I(b). If the "sales transaction" language in § 4I(a) in fact limits the scope of the repeal of *Illinois Brick*, its absence from § 4I(b) permits an argument to be made that Congress intended the repeal of *Hanover Shoe* to be broader than its repeal of *Illinois Brick*. This apparent internal inconsistency in H.R. 2244 should be addressed in any hearings which are held on the bill.

TASK FORCE REPORT, *supra* note 149, at 20-21.

[151] Senator Gorton, in introducing S. 915, stated that the legislation was aimed at price-fixing and bid-rigging conspiracies. 129 CONG. REC. S3876-77 (daily ed. March 23, 1983) (statement of Sen. Gorton).

[152] 15 U.S.C. § 15c (1982).

[153] *See* S. 915, 98th Cong., 1st Sess. § 2 (1983).

[154] In a distribution chain having several intermediaries, it is quite possible that the amount passed on by the first purchaser to its immediate buyer would be more than the amount of the overcharge that ultimately reaches the consumer because succeeding intermediaries may well absorb some of the overcharges. On the other hand, particularly where percentage markups are employed, the overcharge may grow larger as it is passed through to the consumer. *See, e.g., 1978 Senate Hearings, supra* note 91, at 92-93 (testimony of Dr. Betty Bock).

[155] Rule 11 provides:

Presumably, the aforementioned infirmities could be remedied by more careful drafting. Nevertheless, even if such defects were corrected, the bills are even more fundamentally flawed in that neither effectively confronts the practical problems which are encountered in litigating the passing-on issue in antitrust cases. Rather, the bills merely seek to restore the vitality of parens patriae legislation, while glossing over the concerns which the Supreme Court addressed in *Illinois Brick*.

1. Manageability

The pending legislation does not effectively address the problems of the adverse impact of the passing-on issue on the manageability of antitrust litigation which so distressed the Court in *Illinois Brick*. Under either bill, overcharges would still have to be traced through the chain of distribution to the consumer, thereby inviting the very kinds of massive evidence and complicated theories which *Illinois*

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, or represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.
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> FED. R. CIV. P. 11

Under Rule 11 an attorney thus faces sanctions if allegations are not made in good faith. S. 915 requires that those to whom overcharges have been passed be identified with particularity. It may well be impossible at the pleading stage to identify with particularity those to whom the plaintiff may have passed on overcharges. It is unclear whether the defendant can plead passing-on even though it may not be sure of the identity of the plaintiffs' customers, without running afoul of Rule 11. To force the defendant to provide specific identification of the plaintiffs' customers prior to discovery would seem unduly harsh. The Senate bill seems to leave the defendant with a Hobson's choice: not plead passing-on (with identification of plaintiffs' customers) and face possible sanctions.

Brick held would seriously impair antitrust enforcement. Trial of suits under the proposed laws would still turn largely on efforts to recreate, in the courtroom, pricing decisions of non-party middlemen who have no stake in the outcome of the litigation.

Moreover, in an industry-wide price-fixing conspiracy case, national in scope, a trial might include as many as ten to twenty corporate defendants,[156] one or more classes of direct purchasers, and fifty state attorneys general as plaintiffs. Such an extensive proceeding, even if lead counsel were appointed for the various categories of plaintiffs, could easily become so complicated and unmanageable as to make a fair trial on the evidence impossible.[157] Despite the proposed bills' provisions to limit the number of plaintiffs to fifty, the inherent complexity of indirect purchaser cases will not be lessened. The complexity encountered in tracing relates to qualitative as well as quantitative factors, and insurmountable tracing problems could arise in cases involving only one plaintiff.[158] Thus, the problems associated with tracing have little to do with the number of plaintiffs or their identity, but rather relate primarily to the speculative nature of claims several steps removed from the wrongful conduct.

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[156] Antitrust conspiracies may well involve all sellers in a given line of commerce throughout the United States or at least throughout a significant part of the country. *See, e.g., In re* Plywood Antitrust Litig., 655 F.2d 627 (5th Cir. 1981), *cert. denied*, 103 S. Ct. 3100 (1983); *In re* Fine Paper Antitrust Litig., 82 F.R.D. 143 (E.D. Pa. 1979); *In re* Corrugated Container Antitrust Litig., 80 F.R.D. 244 (S.D. Tex. 1978).

[157] *Cf. In re* Antibiotics Antitrust Actions, 1976-2 Trade Cas. (CCH) ¶ 61,058 (D. Minn. 1976) (mistrial declared after eighteen months in consolidated trial of six actions involving both direct and indirect purchaser claims because myriad problems had arisen in attempts to prove competing and conflicting claims).

[158] *See, e.g., In re* Antibiotics Antitrust Actions, 1980-81 Trade Cas. (CCH) ¶ 63,801 (E.D. Pa. 1980). In *Antibiotics* the United States sought to recover overcharges stemming from the defendants' alleged conspiracy to exclude competitors from the tetracycline field, both as a direct purchaser and as an indirect "purchaser" through certain federal programs, including Medicare, Medicaid, OCHAMPUS and the Federal Employees' Health Benefit Program. The government was not even in the chain of distribution under Medicare or Medicaid. The government acted as a reimburser of in-patient health care providers under Medicare; through Medicaid, it was a reimburser of the states who had in turn reimbursed out-patient health care providers. The United States did not itself purchase drugs at issue under these programs, but the Justice Department nevertheless claimed that the government fit within the "pre-existing cost-plus contract" exception to *Illinois Brick*. Proof of the government claim would have necessitated a painstaking review of the patchwork of varying state and federal regulations governing Medicaid and Medicare, a nearly impossible task. Hence, the complexity generated by the tracing issue is not necessarily a function of the number of plaintiffs.

2. Double Recovery and Inconsistent Judgments

While both bills seem to recognize the potential problems of double recovery, the proposed solutions are ill-advised. S. 915 would make the federal or state attorneys general necessary parties to all direct purchaser suits where the passing-on defense is interposed. The bill seems to contemplate a consolidated trial of all direct and indirect purchaser claims, although it makes no provision for the mechanics of such consolidation. This aspect of the bill is objectionable on two grounds. First, double recovery and inconsistent judgments are still possible where parens patriae actions are commenced prior to direct purchaser actions, a possibility that the bill does not contemplate. It has been suggested that because of the exigencies created by the statute of limitations, the possibility of double recovery and inconsistent verdicts is more theoretical than real.[159] Nevertheless, it is clear that such a possibility is hardly remote, for as previously noted,[160] in dismissing the parens patriae claims in the *Petroleum Products* litigation, the district court pointed out that the very same claims litigated by indirect purchasers there were being litigated by direct purchasers in another forum. Furthermore, even if all claims were consolidated in the same forum, this approach, could prove unmanageable because of the proliferation of parties participating at trial.[161]

H.R. 2244, which bars plaintiffs from recovering "for any overcharge paid or underpayment received or any amount that duplicates the recovery of another plaintiff in the action or any other action,"[162] also fails to solve effectively the double recovery problem. First, there is a serious question of whether, consistent with the fundamental tenets of due process, a claimant may be denied the right to pursue a claim on the basis of a judgment to which it was not a party.[163] Yet, H.R. 2244 would permit precisely this kind of result. Nor could such a claimant be precluded in a subsequent action on the basis of collateral estoppel, since collateral estoppel bars only those who have had a

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[159] *See Taxpayer Antitrust Enforcement Act of 1983: Hearings on S. 915 Before the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. (1983) (statement of John H. Shenefield).

[160] *See supra* notes 59-63 and accompanying text.

[161] *See supra* note 74.

[162] H.R. 2244, 98th Cong., 1st Sess. § 2(b) (1983).

[163] Under the due process clause of the 5th and 14th amendments, a party may not be precluded from litigating an issue on the basis of a prior judgment unless that party had a full and fair opportunity to be heard in the prior case in which the judgment had been rendered. *See* Allen v. McCurry, 449 U.S. 90 (1980); Montana v. United States, 440 U.S. 147 (1979); *see also* C. WRIGHT, THE LAW OF FEDERAL COURTS § 100A, at 683 (4th ed. 1983).

full and fair opportunity to litigate the claim in a prior action.[164] Where a claimant is not a party to a prior suit, it cannot be said to have had a full and fair opportunity to litigate that issue and thus cannot be barred by the prior suit.

Second, the House bill would encourage a race to the courthouse between litigants at different links in the distribution chain, with competing claims.[165] Not only is this result poor policy from the standpoint of judicial administration, but it would burden the courts with claims which have been rushed through discovery and with trials of issues that have not been fully sharpened through disclosure. Furthermore, it is unfair to force the parties to go forward to trial when they have not had ample time to prepare their cases.

3. Attorney-Motivated Suits

The legislation, merely by designating a state attorney general as the appropriate representative of indirect purchasers, will not necessarily sound the death knell for suits brought to enrich lawyers rather than victims. State attorneys general may choose to deputize members of the private bar to prosecute antitrust suits on behalf of the state.[166] In such cases, there may well be a temptation for the private attorneys involved to continue marginal suits and hold out for a settlement in order to be assured of their fees. Even where suits are meritorious, some portion of the recovery, which would otherwise go to victims, will be diverted to private attorneys where the state chooses to deputize the private bar.

4. Deterrence

The bills are likely to discourage direct purchaser suits and thereby hinder the deterrent function of the treble damage remedy. Under

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[164] Allen v. McCurry, 449 U.S. 90 (1980).

[165] Section 2 of H.R. 2244 provides that a plaintiff may not recover any amount which duplicates the recovery of another plaintiff in any action for overcharges, based on the same conduct of the defendant. Plaintiffs are thus encouraged to try their claims as soon as possible to avoid preclusion.

[166] Because antitrust actions frequently raise complex issues in a very specialized area of federal practice, state attorneys general, who deal primarily in state law claims, often retain private practitioners specializing in antitrust law to prosecute their federal claims. *See, e.g.*, Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977); West Virginia v. Charles Pfizer & Co., 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971).

Hanover Shoe, the direct purchaser was assured a full recovery regardless of passing-on and thus had an incentive to sue antitrust violators.[167] To the extent the proposed legislation overrules *Hanover Shoe*, the direct purchaser, faced with the possibility that it may establish liability and still be denied recovery because it passed on overcharges, will be less eager to sue.

By discouraging direct purchaser suits, the bills are likely to discourage private enforcement activity. Direct purchasers have traditionally been among the most active antitrust enforcers. Indeed, a recent survey indicates that direct purchasers do in fact sue and that the threat of direct purchaser suits acts as a deterrent force.[168] This conclusion is further supported by the fact that direct purchasers have obtained substantial recoveries since the *Illinois Brick* decision.[169] At the same time, there is no empirical data substantiating the position that *Illinois Brick* has triggered a decline in treble damage suits.

A final negative element of the legislation is its provisions which enable defendants to wreak havoc in antitrust litigation by interposing the passing-on defense in virtually every case.[170] Defendants would be encouraged to engage in delaying tactics during discovery in efforts to wear down plaintiffs, thus hindering antitrust enforcement.

5. Compensation

Theoretically, the legislation would compensate consumers when passing-on could be demonstrated. Nevertheless, a number of serious

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[167] Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968).

[168] TASK FORCE REPORT, *supra* note 149. The Task Force prepared a list of 308 civil and criminal price-fixing cases filed by the Justice Department against corporate defendants during the period 1975-1982. The Task Force then contacted counsel for such defendants and sent them a questionnaire to determine whether private antitrust litigation followed the government suits; the Task Force also conducted its own independent investigation. It found follow-up litigation in 174 of the 291 cases included within the survey. However, where road building cases were excluded, the Task Force found that after the date of the *Illinois Brick* decision, June 9, 1977, there were 94 government actions filed. Information was obtained in 79 of those cases. The Task Force found that there were direct purchaser actions or settlements in 62 (78%) of such cases. *Id.*

[169] *E.g.*, *In re* Plywood Antitrust Litig., 655 F.2d 627 (5th Cir. 1981), *cert. denied*, 103 S. Ct. 3100 (1983) ($173 million); *In re* Folding Carton Antitrust Litig., 557 F. Supp. 1091 (N.D. Ill. 1983) ($200 million); *In re* Fine Paper Antitrust Litig., 82 F.R.D. 143 (E.D. Pa. 1979) ($50 million); *In re* Corrugated Container Antitrust Litig., 80 F.R.D. 244 (S.D.Tex. 1978) ($380 million). *See Taxpayer Antitrust Enforcement Act of 1983: Hearings on S. 915 Before the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. (1983) (statement of Harold E. Kohn).

[170] H.R. 2244, 98th Cong., 1st Sess. § 2(a) (1983); S. 915, 98th Cong., 1st Sess. § 2 (1983).

practical questions regarding the actual mechanisms for compensating consumers have not been addressed by the legislation. For example, how will the recovered overcharges be channelled back to consumers?[171] What will be the cost to the states of administering the recovered funds? What costs will consumers incur in proving claims? In the end, the costs to the public of prosecuting indirect purchaser claims in terms of lengthier and more expensive trials, clogged dockets and added burdens to the judicial system, may well outweigh any benefits received.

C. Alternatives to Federal Legislation

Most of the criticism of *Illinois Brick* has emanated from state government officials, especially state attorneys general, who claim that *Illinois Brick* has left them virtually powerless to combat price-fixing.[172] The states are not, however, without devices to protect themselves from antitrust violations. Two possible avenues to circumvent *Illinois Brick* exist: mandatory assignments of antitrust claims to the states by those selling to the states; and state legislation.

1. Assignments

One way to avoid *Illinois Brick* is for a state to procure from its sellers an assignment of possible antitrust claims as a condition of doing business.[173] As an assignee of a direct purchaser, the state would have the same rights as the direct purchaser. The assignment solution, however, is by no means a perfect answer to frustrated state

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[171] *See, e.g.*, New York v. Dairylea Coop. Inc., 547 F. Supp. 306 (S.D.N.Y. 1982), *appeal dismissed*, 698 F.2d 567 (2d Cir. 1983). In *Dairylea*, the State of New York's proposal to distribute $6.7 million settlement to consumers by means of rebates or cents-off coupons was rejected by the court as giving defendant an unfair marketing advantage. The State of New York thus had a recovery without a mechanism to compensate consumers.

[172] *See, e.g., 1977 Senate Hearings, supra* note 74, at 9-17, 101-04, 105-07, 107-28, 170 (testimony of Messrs. Shenefield, Browning, Turner, Hill, Wilson, Speigel and Young respectively); *1977 House Hearings, supra* note 113, at 6-71 (testimony of Mr. Shenefield and panel consisting of Messrs. Browning, Hill, Reed, Gorton and Marvin).

[173] *See In re* Fine Paper Litig. State of Wash., 632 F.2d 1081 (3d Cir. 1980).

> Although the common law did not favor the assignment of causes of action, by and large that attitude has been overcome. In any event, the status of assignments under the Sherman and Clayton Acts is a matter of federal law, and, in this connection, a number of cases have assumed that such assignments are valid.

Id. at 1090 (citations omitted).

attorneys general. Assignments may not fully protect the state, particularly where it purchases from a seller who has in turn purchased from another middleman, not part of the manufacturers' price-fixing conspiracy. In this situation, an assignment may not effectively circumvent the *Illinois Brick* prohibition because the presence of another intermediary in the chain creates tracing difficulties. This difficulty can be alleviated somewhat by careful investigation into the source of goods sold to a state. Where feasible, the state could also deal directly with manufacturers.

The assignment solution also does not deal with the fundamental issue of access to the courts for those who claim to have been injured by antitrust violations.[174] Nevertheless, in a potentially large number of cases, it does provide state indirect purchasers with a mechanism for recovery within the existing legal framework. Clearly, this solution may not be everything the states had desired, but given the adverse impact which the pending federal legislation may have on direct purchaser claims, especially those provisions permitting the passing-on defense, the assignment route provides at least some alternative.

2. State Legislation

Alternatively, the states may seek to bypass the *Illinois Brick* holding by enacting new legislation or modifying existing law to guarantee consumer protection against price-fixing. One possible solution would be to permit indirect purchasers to prove passing-on in antitrust actions brought under state law.[175] This approach, however, brings with it the very same practical difficulties identified in *Illinois Brick* with respect to indirect purchaser actions brought under the federal antitrust laws: tracing, complexity, double recovery and duplicative liability.[176] Nevertheless, these practical problems may well be of a lesser magnitude where the scope of the proceeding is state-

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[174] *1979 House Hearings, supra* note 85, at 50 (statement of Scott M. Matheson).

[175] Seven states have enacted statutes which permit indirect purchaser suits. *See* CAL. BUS. & PROF. CODE § 16750(a) (Deering Supp. 1984); D.C. CODE ANN. §§ 28-4501 (1981); HAWAII REV. STAT. § 480-14(c) (Supp. 1982); ILL. REV. STAT. ch. 38, ¶ 60-7 (Smith-Hurd Supp. 1983-1984); N.M. STAT. ANN. § 57-1-13 (Supp. 1983); S.D. CODIFIED LAWS ANN. § 37-1-5 (1977); WIS. STAT. § 133.18(1) (Supp. 1983-1984). At least 27 other states have statutes which may be read to allow indirect purchaser suits. *See* Note, *Indirect Purchaser Suits Under State Antitrust Laws: A Detour Around the* Illinois Brick *Wall*, 34 STAN. L. REV. 203 (1981).

[176] *See supra* note 24 and accompanying text.

wide rather than nationwide.[177]

Moreover, state antitrust statutes which are in direct conflict with section 4 of the Clayton Act and the interpretive cases thereunder, raise troublesome and difficult questions which may impair the harmonious but delicately balanced relationship between the state and federal systems. For example, does the doctrine of pre-emption force dismissal of indirect purchaser claims brought under state law?[178] May defendants remove state law indirect purchaser claims to federal court on the grounds of pendent jurisdiction or diversity and then obtain dismissal on authority of *Illinois Brick*?[179] Should the federal courts invoke the abstention doctrine when faced with state-based indirect purchaser claims?[180] Does res judicata bar a subsequent state indirect purchaser suit after a prior indirect purchaser suit under federal law has been dismissed by the federal courts?[181] Answers to these questions are only beginning to emerge from state courts.

State legislatures may avoid the aforementioned problems by taking a more thoughtful and creative approach to trade regulation. States are not compelled to enact statutes which track verbatim the

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[177] *See, e.g.*, California v. California & Hawaiian Sugar Co., 588 F.2d 1270, 1273 (9th Cir. 1978).

[178] Under the doctrine of pre-emption, state legislative action must yield to federal legislation where a valid federal law conflicts with a state law. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-24, at 377-78 (1978). Several courts have held that the pre-emption doctrine does not force dismissal of indirect purchaser claims brought under state law. *See* California v. California & Hawaiian Sugar Co., 588 F.2d 1270, 1273 (9th Cir. 1978); *but see* Alton Box Board Co. v. Esprit de Corp., 682 F.2d 1267 (9th Cir. 1982) (pre-emption is an issue).

[179] Several reported California decisions have denied removal under these circumstances. *See* Goldberg v. CPC Int'l, Inc., 495 F. Supp. 233 (N.D. Cal. 1980), *rev'd*, 678 F.2d 1365 (9th Cir.), *cert. denied*, 103 S. Ct. 259 (1982); California v. California & Hawaiian Sugar Co., 588 F.2d 1270, 1273 (9th Cir. 1978).

[180] Under the abstention doctrine, a federal court may decline to hear state law claims even though it has appropriate jurisdiction over the matter in order to avoid needless conflict with a state's administration of its own affairs. C. WRIGHT, LAW OF FEDERAL COURTS§ 52, AT 302-03. (4TH ED. 1983). THUS, EVEN IF AN INDIRECT PURCHASER CLAIM IS PROPERLY BEFORE THE FEDERAL COURT AS A PENDENT CLAIM OR UNDER DIVERSITY JURISDICTION, THE COURT IS NOT OBLIGATED TO ENTERTAIN IT. THE PENDENT JURISDICTION DOCTRINE HAS ALWAYS GIVEN THE FEDERAL COURTS CONSIDERABLE DISCRETION IN DECIDING WHETHER TO HEAR STATE LAW CLAIMS. *See* United Mine Workers v. Gibbs, 383 U.S. 715 (1966). Nor are federal courts required to hear state law claims merely because diversity is present; indeed, federal courts have traditionally declined to hear probate matters and domestic relations suits. C. WRIGHT, *supra* § 25, at 143-46. Given the rather clear statements of the Supreme Court in *Illinois Brick* regarding indirect purchaser claims under federal law, federal courts are likely to be less than eager to entertain such cases under state law.

[181] *See* Boccardo v. Safeway Stores, Inc., 134 Cal. App. 3d 1037, 184 Cal. Rptr. 903 (Ct. App. 1982) (where prior unappealed federal court action containing both direct and indirect purchaser claims was dismissed, subsequent state action held barred as an attempt to split a cause of action).

language of federal antitrust statutes. They are free to experiment with alternative modes of recovery. Thus, a state may choose to abolish private antitrust suits and lodge all claims in the hands of its attorney general through civil penalty proceedings. Such actions would determine overcharges in the aggregate and then apportion the damages to each individual claim.[182] On the other hand, the entire recovery could go to the state treasury to reduce the general level of taxes. Alternatively, all antitrust claims could be handled informally through administrative proceedings. Another remedy would be to compel violators to reimburse consumers through acts of public service or charitable contributions.[183] Thus, there are any number of avenues which states may pursue to avoid the practical problems identified in *Illinois Brick* but at the same time compensate consumers and force wrongdoers to disgorge ill-gotten gains.

V. Conclusion

The pending legislation is fraught with practical difficulties which would create insurmountable hurdles to fair and effective management of antitrust cases, thereby frustrating the twin aims of treble damage litigation — deterrence and compensation. Indirect purchaser claims are inherently complex, raise novel and difficult problems of proof, present serious risks of multiple liability and place staggering burdens on courts and litigants. The enormous procedural and practical problems engendered by the complex issues which are inherent in major antitrust treble damage litigation are best handled by the courts. The judiciary is in a better position to determine which claims are meritorious and which are brought primarily for the benefit of attorneys. Legislative intrusion into the passing-on domain may have a result quite opposite from that intended by Congress. By

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[182] *See* Sneeden, *Illinois Brick: Do We Look to the Courts or Congress?*, 24 Antitrust Bull. 205 (1979).

[183] Such remedies should be carefully created to avoid giving a defendant an unfair competitive advantage. *Cf.* New York v. Dairylea Coop. Inc., 547 F. Supp. 306 (S.D.N.Y. 1982), *appeal dismissed*, 698 F.2d 567 (2d Cir. 1983) (plan to effectuate distribution of $6.7 million in settlement funds through rebates and cents-off coupons set aside because it gave defendant a competitive edge). *See In re* Folding Carton Antitrust Litig., 557 F. Supp. 1091, 1110 (N.D. Ill. 1983) (unclaimed settlement funds to be used to establish a tax-exempt foundation for research and study of complex litigation and to promote competition, while deterring antitrust violations); *see also* West Virginia v. Charles Pfizer & Co., 314 F. Supp. 710, 728, 733-34 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079, 1084, 1091 (2d Cir.), *aff'd*, 404 U.S. 548 (1971) (unclaimed settlement funds to be returned to state attorneys general for use in *pro bono* endeavors for the benefit of consumers adversely affected by defendants' misconduct).

creating a procedural quagmire of competing and speculative damage claims it will become even more difficult for all plaintiffs to be compensated for antitrust violations in the future.