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DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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Working Party No. 3 on Co-operation and Enforcement

ROUNDTABLE DISCUSSION ON PRIVATE REMEDIES: PASSING ON DEFENSE; INDIRECT PURCHASER STANDING; DEFINITION OF DAMAGES

-- United States --

The attached document is submitted by the delegation of the United States to Working Party No. 3 of the Competition Committee FOR DISCUSSION under Item III of the agenda at its forthcoming meeting on 7 February 2006.

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Damages Under the Federal Antitrust Laws

1. The right to damage awards under the federal antitrust laws of the U.S. is governed by Section 4 of the Clayton Act, which provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor ... and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."[1] Although treble damages "play an important role in penalizing wrongdoers and deterring wrongdoing," the treble damage provision "is designed primarily as a remedy." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 485-86 (1977). Given the availability of treble damages, additional "punitive" damages are not available in antitrust actions.

2. "Any person" has been interpreted broadly to include individuals, partnerships, corporations, and associations. A plaintiff seeking damages for an antitrust violation must first prove an actual injury to itself. "Although the antitrust violation need not be the sole cause of the injury, it must be a 'material' and a substantial cause."[2] An injury to "business" has been construed as an injury to "'commercial interests or enterprises,' including a person's occupation. ... [M]ost courts have held that injury to an enterprise in the planning stage is actionable, provided that the plaintiff has an intent and capability to enter the market and has achieved a sufficiently advanced state of preparation for doing so."[3]

3. Injury to property "encompasses any interest the law protects[,]"[4] including a payment of money wrongfully induced, higher prices paid by consumers for personal goods, and interference with a valid contract.

4. An antitrust plaintiff must show that its injury is of the type the antitrust laws were intended to prevent. Thus if a plaintiff's injury results solely from increased competition resulting from an act that violates the antitrust laws, no redressible antitrust injury has occurred. In *Brunswick Corp.*, for example, the Supreme Court denied recovery to bowling alley operators who alleged that they would be injured by the defendant's anticompetitive acquisition of rival bowling centers that would otherwise have gone out of business.[5] The Court characterized plaintiffs' theory of injury as being that "competitors were continued in business, thereby denying respondents an anticipated increase in market share." Id. at 484. The Court ultimately rejected this theory, stating that "[p]laintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." Id. at 489. *See also Atlantic Richfield Co. v. USA Petroleum Co.,* 495 U.S. 328 (1990)(cutting prices to get more business is the essence of competition; hence a competitor injured by low but nonpredatory price competition suffers no antitrust injury).

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1 15 U.S.C. § 15(a). The treble damages provision has existed since the original enactment of the Sherman Act in 1890, and was reputedly derived from the 1623 British Act Against Monopolies. Damages multipliers have existed at least since the late 13th century, when Edward I introduced double damages for cases of novel disseisin – wrongful ejection from lawfully occupied lands – when committed by a royal official. Michael Prestwich, Edward I 271 (1988).

2 ABA Section of Antitrust Law, Antitrust Law Developments (5th ed. 2002) at 840.

3 Id. at 842.

4 Id. at 843.

5 The defendant, a manufacturer of bowling equipment that was acquiring bowling alleys throughout the U.S. in repossessions from operators who could not make payments during a decline in the industry for equipment purchased on credit, had five times as many bowling centers as its nearest competitor, but controlled only 2 percent of U.S. bowling centers.

5. Injuries resulting from increased or continuing competition, rather than lessened competition, are thus not subject to relief under the antitrust statutes. Courts have also declined to find antitrust injury in situations where the plaintiff's alleged injury "is deemed unrelated to the alleged antitrust violation or where the defendant's conduct injures the plaintiff without having an adverse effect on competition in general. Antitrust injury is also not likely to be found where the alleged injury would be better addressed through a breach of contract or business tort cause of action."[6]

6. A plaintiff bears the burden of proving antitrust injury, but "a somewhat relaxed standard applies to proof of the amount of the plaintiff's damages once injury has been shown."[7] The amount of damages need not be proven with mathematical precision; although "a just and reasonable estimate ... based on relevant data," including both "probable and inferential as well as direct and positive proof" is acceptable, "speculation and guesswork" are not.[8] "In price-fixing cases and cases involving monopolistic overcharges, the measure of damages in a suit by a purchaser normally is the difference between the price the purchaser paid and the price it would have paid absent the violation. ... In many other contexts, the measure of damages ordinarily is the plaintiff's lost profits."[9] Any damages attributable to factors other than the defendant's antitrust violation, such as the plaintiff's mismanagement, lawful competition, or general economic conditions, are not recoverable.

7. Section 4 of the Clayton Act was amended in 1980 to provide for pre-judgment interest, at the court's discretion when "just in the circumstances," and limited to actual damages for the period between the date of service of the antitrust complaint and the date of judgment, or any shorter period. The "circumstances" to be considered relate to bad faith or dilatory tactics of the parties. There appear to be no reported cases in which pre-judgment interest was granted under this provision.

The Antitrust Modernization Commission

8. The issue of mandatory trebling of antitrust damages is currently being reviewed by the Antitrust Modernization Commission (AMC), a body created by Congress with 12 members, 4 appointed by the President, 4 by the Senate, and 4 by the House of Representatives. The AMC is charged by statute to examine whether there is a need to modernize the antitrust laws, to identify and study related issues, and to submit a report to Congress and the President. A hearing on various civil remedies issues, including damages multipliers, attorneys' fees, pre-judgment interest, joint and several liability, contribution, and claim reduction, was held on July 28, 2005. A transcript of the hearing, along with witness statements, is available at http://www.amc.gov/commission_hearings/civil_remedies_issues.htm.

9. On the question of treble damages, witnesses at the AMC hearing raised many issues. Among the (often conflicting) positions stated were the following:

- treble damages do not overcompensate plaintiffs and in fact only serve to reinstate actual damages; damages in antitrust cases are limited because of the statute of limitations, the difficulty of proving damages and the rule against speculative damages, and the absence of pre-judgment interest, which greatly erodes the value of a judgment after years of litigation

- the continuing existence of major international price-fixing cartels demonstrates that treble damages are still necessary to deter antitrust violations

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6 ABA Section of Antitrust Law, Antitrust Law Developments (5th ed. 2002) at 848-49.

7 Id. at 869.

8 *Bigelow v. RKO Pictures*, 327 U.S. 251, 264 (1946).

9 ABA Section of Antitrust Law, Antitrust Law Developments (5th ed. 2002) at 874-75.

- a damage multiplier is necessary for optimal deterrence of unlawful conduct that may go undetected and be difficult to prove

- trebling should be discretionary, or reserved for hard core, criminal, or covert offenses

- trebling unfairly overcompensates plaintiffs and encourages costly suits that over-deter innovative and efficient behavior

- treble damages are not really treble, as they do not account for the opportunity cost of losses (pre-judgment interest) or allocative inefficiencies caused by anticompetitive conduct

- treble damages made sense in an era when much conduct was per se unlawful, but advances in economic understanding and acceptance of much efficient conduct today has eliminated the rationale for trebling, at least with respect to non-hard core offenses

- rarely do antitrust cases actually proceed to judgment and treble damage awards; the vast majority of cases are settled for amounts closer to actual damages

- few frivolous antitrust cases are brought; antitrust cases are notoriously difficult to pursue and courts have many tools to winnow out non-meritorious claims

- the law should be changed to allow for pre-judgment interest from the date of the violation.

10. The AMC's report is to "contain a detailed statement of the findings and conclusions of the Commission, together with recommendation for legislative or administrative action the Commission considers to be appropriate," and is due by July 15, 2007.

***Illinois Brick* and Claims of "Passing On" Antitrust Overcharges to Indirect Purchasers**

11. In the United States, private damages for antitrust violations are available under both federal and state antitrust laws. Until relatively recently, the favored approach for virtually all plaintiffs had been to seek treble damages in federal court for violation of the antitrust laws. The 1977 Supreme Court decision in *Illinois Brick*, however, limited the availability of such a remedy under federal antitrust rules to plaintiffs who purchased directly from the defendant. Whereas direct purchasers may continue to avail themselves of federal treble damages remedies under Section 4 of the Clayton Act, indirect purchasers, *i.e.,* those who did not make their purchases directly from the defendant, have been left to pursue remedies only under state antitrust laws, many of which also afford the possibility of a treble damages award. This discussion tracks the development and impact of the Supreme Court's *Illinois Brick* doctrine, which has dramatically altered the U.S. system for seeking private damages for antitrust violations.

The intersection of "passing on" claims and the availability of remedies to Indirect Purchasers under U.S. antitrust law

12. Determining when and where indirect purchasers may sue for treble damages blends difficult questions of facts and fairness, economics, jurisprudence, and federalism. It is, of course, important to know who suffered injury, and how much injury they incurred. But deciding whether or not to permit indirect purchasers to sue in federal (and/or state) courts also inevitably implicates questions regarding the over- or under-deterrence of undesirable conduct, the effective and manageable administration of justice, and the proper relationship between federal and state authority to prosecute competitive misconduct.

13. As noted in the previous section, plaintiffs in a federal treble damages case under Section 4 of the Clayton Act[10] must have suffered antitrust injury. In addition, however, their injury must not be so remote from the defendant's conduct that the parties cannot manageably develop and present reliable evidence, and that the court cannot fairly and manageably hear all the parties' claims, affix liability, assess the injury, and impose a remedy that will both compensate victims and deter future violations. In determining how to treat claims of "passing on," the Supreme Court has sought to promote, or at least balance, all of these concerns; its resolution of the issue has profoundly limited the customers who may seek treble damages for their injuries under the federal antitrust laws.

14. The prevailing approach holds that a direct purchaser from an antitrust violator may sue under federal antitrust law for the entire amount of an unlawful overcharge, regardless of whether this purchaser passed on some or all of the overcharge to his own customers. Indirect purchasers, however, may not invoke "passing on" arguments to claim that they have incurred injury; consequently, they are virtually foreclosed from bringing damages actions under federal law. This doctrine, commonly known in U.S. law as the indirect purchaser, or *Illinois Brick*,[11] doctrine, has been among the most hotly debated antitrust issues in recent decades.[12]

15. The contours of the indirect purchaser doctrine were not resolved by *Illinois Brick* alone. In 1968, the Supreme Court held in *Hanover Shoe*[13] that an antitrust violator could not defend a suit by a direct purchaser by asserting that the purchaser had not suffered injury because it had passed on the overcharge to its own customers. Nine years later, *Illinois Brick* presented the converse issue. In this case, the Court decided that an indirect purchaser could not sue an antitrust violator for damages under Section 4 of the Clayton Act, even where the direct purchaser passed on the overcharge to the plaintiff. In response to these cases, many states created their own statutes permitting damages actions by indirect purchasers.

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10 15 U.S.C. § 15(a).

11 *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). See also *Hanover Shoe, Inc. v. United Show Machinery Corp.,* 392 U.S. 481 (1968).

12 Among the many recent discussions of *Illinois Brick* are the following: Gavil, "Antitrust Remedy Wars Episode I: *Illinois Brick* from Inside the Supreme Court," 79 ST. JOHN'S L. REV. 553 (2005); Cavanaugh, "*Illinois Brick*: A Look Back and a Look Ahead," 17 LOY. CONS. L. REV. 1 (2004); and Page, "Class Certification in the Microsoft Indirect Purchaser Litigation,"1 J.COMP. LAW & ECON. 303 (2005).

The ABA Section of Antitrust Law has produced many useful references. See, *e.g.,* ABA Section of Antitrust Law, Antitrust Law Developments (5th ed. 2002) , Chaps IX B (re state enforcement) and X C (re federal suits) and annual supplements; and "Symposium" 15 ANTITRUST 28-46 (2001). Several task forces established by the Section of Antitrust Law have also provided useful analyses of, and recommendations regarding, indirect purchaser recoveries. See, *e.g.,* "Report on Remedies,"(2004) (proposing legislation repealing *Illinois Brick* and prohibiting duplicative damages), http://www.abanet.org/antitrust/comments/2004/RemediesReportCouncil.doc; and "Report of the Indirect Purchaser Task Force," 63 ANTITRUST L.J. 993 (1995).

Many useful papers have been submitted to the Antitrust Modernization Commission, which convened two panels on June 27, 2005 dealing with indirect purchaser actions. A summary of the written testimony from these panels is available at http://www.abanet.org/antitrust/pdf_docs/comments/07-05-purchaser-hearings.pdf.

For a compendium of references regarding remedies, including many entries addressing *Illinois Brick* issues, see Fox & Sirkis, "Antitrust Remedies–Selected Bibliography and Annotations," American Antitrust Institute Working Paper 06-01 (June, 2005), prepared for AAI conference on "Creative Antitrust Remedies," (June, 2005), available at http://www.antitrustinstitute.org/recent2/476.pdf.

13 *Hanover Shoe, Inc. v. United Show Machinery Corp.,* 392 U.S. 481 (1968).

These statutes were upheld by the Court in 1989 in *California v. Arc America Corp*.[14] Finally, in 1990, the Court made clear in *Kansas v. Utilicorp United Inc.*[15] that it would not freely make or apply exceptions to the indirect purchaser doctrine, even though the Court itself had contemplated such exceptions in *Hanover Shoe* and *Illinois Brick*. Each of the four cases, therefore, focuses on a different attribute of use of "passing on" arguments in U.S. antitrust law: use of "passing on" claims by the defendant; use of "passing on" claims by the plaintiff; state alternatives to the federal indirect purchaser doctrine; and exceptions to the doctrine. Below we examine the four cases in greater detail.

16. Hanover Shoe. The plaintiff in *Hanover Shoe* was a shoe manufacturer that alleged that United had maintained its monopoly power in the market for shoe manufacturing machinery by refusing to sell its more complicated machines and instead requiring its customers to enter into lengthy and restrictive leases. This approach cost customers such as Hanover more than if they had be able to purchase the machines, a difference that constituted the injury in the case, subject to trebling pursuant to Section 4 of the Clayton Act.

17. In its defense, United claimed, *inter alia*, that Hanover had not suffered injury because it had passed on any illegal overcharge to its own customers in the form of higher prices for shoes. The Court rejected this argument and held that the injury in a Clayton Act, Section 4, case should be treated as complete once the overcharge was imposed, regardless of the victim's subsequent actions to alleviate the harm.[16]

18. The Court was skeptical of United's defensive "passing-on" arguments.[17] In the Court's view, obtaining the evidence necessary to demonstrate that "passing on" mitigated or eliminated a purchaser's injury would present a virtually insurmountable task. In addition, the Court anticipated that if the "passing-on" defense were permitted, defendants would frequently assert it, thereby making treble damages actions far lengthier and more complex.[18] Moreover, the Court noted that if the defense were accepted, defendants could raise the defense against indirect purchasers as well, contending that they too had passed on the overcharge to their customers. The consequence of accepting the defense, the Court concluded, is that "those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them."[19] Accordingly, the Court rejected the use of "passing-on" claims as a defense, although it did recognize, in *dicta*, that its concerns might not be present in some circumstances, *e.g*, in instances in which it would be relatively easy to prove that the direct purchaser had not been injured, such as where a direct purchaser sold the products for which he was overcharged pursuant to a pre-existing cost-plus contract.

19. Illinois Brick. In *Illinois Brick*, the State of Illinois and 700 local governments sued the defendants, manufacturers of concrete blocks, for price-fixing, and sought treble damages under Section 4

14 490 U.S. 93 (1989).

15 497 U.S. 199 (1990).

16 481 U.S. at 489-91 and note 7 (reviewing precedents).

17 The Court did contemplate one possible exception in which a purchaser could use passing on to avoid all injury. The situation postulated by the Court would arise where a monopolist imposed an equal overcharge on all of its customers, and the buyer as well as all of its rivals were able to pass on the full cost increase without losing sales. Nevertheless, the Court viewed this exception as unlikely and considered the evidentiary demands in proving it to be virtually insurmountable. *Id.* at 492.

18 *Id.* at 492-94.

19 *Id.* at 494.

of the Clayton Act.[20] The defendants sold the blocks to masonry contractors, who sold them to general contractors, who, in turn, passed on the overcharges in the prices that they charged the plaintiffs for construction projects. The plaintiffs contended that they should be permitted to seek treble damages under Section 4 because the unlawful overcharges had been passed on to them. The defendants asserted, however, that if *Hanover Shoe* prevented them from using "passing on" defensively, then indirect purchasers should not be able to use "passing on" offensively to justify damages suits by those further down the chain of distribution.

20. The Court agreed with the defendants for three basic reasons. First, the Court felt that permitting indirect purchasers to use the "passing-on" argument offensively would be inconsistent with *Hanover Shoe's* prohibition against defendants' use of the argument against direct purchasers. In the majority's view, such an asymmetry would potentially subject a defendant to multiple liability: direct purchasers might receive treble damages based on the full amount of the overcharge, and then indirect purchasers conceivably might receive treble damages based on the amount of the overcharge that was actually passed on.[21] To avoid this dilemma, the Court perceived a need either to reject suits by indirect purchasers or to overturn *Hanover Shoe*. The Court selected the former option, because it felt that it had correctly decided the earlier case and believed that considerations of *stare decisis* militated in favor of retaining that holding.[22]

21. Second, the majority believed that federal treble damages litigation by indirect purchasers would be overly complex. Tracing overcharges through multiple layers of distribution, and determining the amount and source of overcharge at each level would present daunting evidentiary tasks that, according to the Court, would magnify the litigation's intricacy and length.[23] Moreover, the Court found that permitting both direct and indirect purchasers to sue for damages might necessitate unwieldy attempts to join all injured parties (including perhaps even the ultimate consumers) into a single potentially massive action, thus further undermining the litigation's manageability.[24]

22. Third, the Court believed its rule would best promote the twin goals of treble damages litigation: deterrence and compensation. By concentrating the entire overcharge in the hands of direct purchasers, the Court believed it would maximize direct purchasers' incentives to sue and thus the deterrent impact of their efforts. By contrast, the Court reasoned, these incentives to sue would be diluted if a direct or indirect purchaser could base its action only on the amount of damages it had actually incurred.[25] The majority also believed that eliminating indirect-purchaser suits would not materially detract from efforts to compensate victims, because, in the Court's view, direct purchasers usually suffer most of the injury, whereas the harm sustained by indirect purchasers is often relatively small, to the point that many might not even seek recovery if such actions it were permitted.[26]

23. The majority opinion mentioned, although it did not formally declare, two possible exceptions to its rule. The first is where the direct purchaser has sold the goods in question to an indirect purchaser

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20 State and local governments are "persons" within the ambit of section 4 of the Clayton Act and therefore permitted to bring suit for treble damages under that statute where section 4's other requirements are satisfied.

21 431 U.S. at 730.

22 *Id.* at 736-37.

23 *Id.* at 731-32.

24 *Id.* at 737ff.

25 *Id.* at 734-35

26 *Id.* at 746-47.

pursuant to a pre-existing cost-plus contract.[27] The second is where the indirect purchaser actually owns or controls the direct purchaser.[28] In each instance, it would be relatively easy to conclude that the direct purchaser was not injured.

24. *California v. Arc America*. Some states and other critics have disagreed with the Court's conclusion in *Illinois Brick* that the risk of increased complexity of indirect purchaser litigation outweighed the interest of indirect purchasers in recovery for violations of the antitrust laws.[29] In *Arc America*, four states and subsidiary governmental entities sued cement manufacturers for engaging in a nationwide price-fixing conspiracy in violation of federal antitrust laws. The plaintiffs sought treble damages under Section 4 of the Clayton Act. In their complaints, the states also alleged that the price-fixing conspiracy violated state antitrust laws. The state laws provided for treble damages and also permitted suits by indirect as well as direct purchasers. The states' claims were consolidated in federal district court with the claims of many direct purchasers challenging the conduct. After the plaintiffs reached settlement with some of the defendants, the private, direct-purchaser plaintiffs argued that *Illinois Brick* prevented the states from receiving any of the settlement fund, because the governmental plaintiffs were indirect purchasers. Although *Illinois Brick* clearly applied to claims under Section 4 of the Clayton Act, the key question before the Court was whether or not the states could recover from the settlement fund for the violation of state laws, *Illinois Brick* notwithstanding.

25. In this case, the Court faced significant issues of federalism and the relationship between the parallel systems of federal and state law that exist in the United States. The Court decided unanimously to honor the state law allowing indirect purchasers to seek damages for violation of state antitrust statutes. Accordingly, the states could participate in the distribution of the settlement fund.

26. The Court noted at the opinion's outset that "[c]ongress intended the federal antitrust statutes to supplement, not displace, state antitrust remedies."[30] Rather than assert claims of pre-emption, however, the direct purchasers contended that the state indirect purchaser statutes interfered with achieving the goals of the federal antitrust laws, deterrence and compensation. The Court rejected this argument on the ground that *Hanover Shoe* and *Illinois Brick* were intended only to provide a statutory interpretation of Section 4 of the Clayton Act. These cases therefore did not presume to declare what states may authorize under their own antitrust statutes.

27. The Court also concluded that the state indirect-purchaser laws did not undermine the goals of *Hanover Shoe* and *Illinois Brick*. The Court reasoned that a state's indirect-purchaser laws will not complicate a federal antitrust litigation because many state cases will be brought in state court.

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27 *Id.* at 732, n.12. This exception was also noted in *Hanover Shoe*, 392 U.S. at 494.

28 *Id.* at 736, n.16.

29 Gavil, "Antitrust Remedy Wars Episode I: *Illinois Brick* from Inside the Supreme Court," 79 ST. JOHN'S L. REV. 553 (2005); O'Connor, "Is the *Illinois Brick* Wall Crumbling?" 15 ANTITRUST 34, 37 (2001) ; see also *Illinois Brick* at 748-66 (Brennan, J., dissenting) (as a practical matter, procedural devices for consolidating cases and the short statue of limitations makes the prospect of multiple liability under Section 4 of the statute remote). These critics and others also assert that concentrating all of the injury in the hands of direct purchasers, as a matter of law, may frustrate rather than advance the statutory goals of deterrence and compensation.

30 *Id* at 102. The Court noted that there is a presumption against federal preemption of state law in fields that the states traditionally have regulated, and that 21 states had antitrust laws at the time that Congress passed the Sherman Act in 1890. *Id.* at n.4.

28. Although an unsuccessful defendant's resources might be strained by having to pay damages in state as well as federal litigation, the Court emphasized that *Illinois Brick* was not concerned with the amount of money a defendant would be able or required to pay overall; rather, it "was concerned that requiring direct and indirect purchasers to apportion the recovery under a single statute – § 4 of the Clayton Act – would result in one plaintiff having a sufficient incentive to sue under that statute."[31] The Court noted that the fact that direct and indirect purchasers might have to share a settlement fund does not inhibit fair compensation of victims but merely reflects the form of settlement adopted in the particular case.

29. Finally, the Court rejected the suggestion that the finding liability under separate federal and state antitrust laws created an impermissible risk of multiple liability. The concern in *Illinois Brick,* however, is only that a defendant might face multiple liability under Section 4 of the Clayton Act, not that a defendant might be found liable under separate state and federal statutory schemes. The Court found no clear Congressional intent that it should interpret Section 4 to preclude finding liability under other statutes as well.[32]

30. In most states, the *Arc America* opinion has triggered the adoption of what are commonly known as *Illinois Brick* repealer statutes. Although they vary widely in their features, these statutes permit action by or on behalf of indirect purchasers for violation of state antitrust or consumer protection laws.[33] They are now available in approximately two-thirds of the states.[34]

31. As a result, direct purchasers may bring treble-damages suits in federal courts (where multiple, related suits may be consolidated), while indirect purchasers bring suits in one or more state courts. Although this creates potential litigation management difficulties, state attorneys general and litigants in related suits in different states are developing informal, voluntary means for cooperation that are often effective.[35]

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31 *Id* at 104

32 *Id.* at 105.

33 Among the variations, some permit any indirect purchaser to sue, where others are more restrictive, *e.g.*, permitting recovery by indirect purchasers only if they are governmental entities or authorizing only the state's attorney general to bring a suit on behalf of the class of all indirect purchasers, whereas others permit private plaintiffs to maintain such suits as well. Some states allow recovery under the state's antitrust laws, whereas others states permit indirect purchasers to sue for damages or restitution under the state's unfair trade practice or consumer protection laws. State statutes authorizing suits by indirect purchasers also vary with respect to the amount of damages they permit; for example, some allow treble damages and others do not. State statutes also differ with respect to the types of proof of injury they require and the types of defenses they permit. The variety of these approaches provides a wide range of examples that can help to demonstrate what, if any, types of causes of action by or for indirect purchasers will prove to be both fair and effective. See Cohen and Lawson, "Navigating Multistate Indirect Purchaser Lawsuits," 15 ANTITRUST 29, 30 (2001); O'Connor, *supra*, 15 ANTITRUST at 34-35.

34 A 2001 counting finds that 25 states and the District of Columbia have "*Illinois Brick"* repealer statutes; three states permit indirect purchaser suits by state judicial decision; and one permits recovery by indirect purchasers under state consumer protection laws. Cavanaugh, "*Illinois Brick*: A Look Back and a Look Ahead," 17 LOY. CONS. L. REV. 1, 2, n.3 (2004). Significantly, for 13 of the states that were not on Cavanaugh's list, the court in *Fed. Trade. Comm. v. Mylan Labs.*, 99 F.Supp 2d 1 (D.D.C. 1999) held that the attorneys general could seek restitution on behalf of indirect purchasers, although for some of these states *Illinois Brick* precluded claims for damages.

35 Cohen and Lawson, *supra*. Some commentators argue that experience with these state repealer statutes suggests that the evidentiary and litigation difficulties raised in the *Illinois Brick* opinion may not be prohibitive. *See e.g.,* O'Connor, *supra, at 37.* These commentators note that while antitrust litigation by indirect purchasers may be difficult, it is no more demanding than other forms of complex litigation, and

32. *Kansas v. Utilicorp United, Inc.*[36] In this case, an investor-owned public utility, as well as other utility companies and purchasers of natural gas, sued five natural gas producers and a pipeline company. The plaintiffs sued for overcharges that they paid as direct purchasers from the defendants. The states of Kansas and Missouri filed separate actions under Section 4 of the Clayton Act on behalf of all natural persons and governmental entities within the states that had paid inflated prices for natural gas to any utility. The suits were consolidated in federal court, which then dismissed the governmental plaintiff's claims, because they were by or on behalf of indirect purchasers. The Court of Appeals affirmed, as did the Supreme Court.

33. In its opinion, the Court displayed its antipathy for exceptions to the *Illinois Brick* rule, even in the context of regulated industries. The Court concluded that no exception to *Hanover Shoe* and *Illinois Brick* was needed in this situation to promote its indirect-purchaser rule.[37] In particular, the Court was unpersuaded by the States' contention that problems of apportioning the injury were less formidable in this situation because industry regulation ensured that the direct purchasers, *i.e.,* the utilities, passed on the entire overcharge. The Court felt, however, that the task of apportioning the injury between direct and indirect purchasers remained problematic due to complex or unknowable factors regarding market conditions, the timing of the utilities' efforts to pass on the overcharge, and the inclinations of state regulators in managing the utilities and industry prices. The Court opined that the presence of regulation arguably militated more for not making an exception, because regulators could require utility companies to pass on to consumers at least part of any Section 4 recovery that the overcharged utilities obtained from the producers.[38]

34. The Court also asserted, without much discussion, that it did not find the risk of multiple recovery to be less because of the industry regulation. In addition, bringing all interested parties together in one massive lawsuit would make a complicated case even more complex.[39]

35. Regarding the third *Illinois Brick* rationale, the majority rejected the States' contentions that the utilities would lack sufficient incentives to sue their suppliers because regulators would permit them to pass on all the overcharges. Nonetheless, the Court felt that Section 4's trebling of damages would provide the utilities with ample incentive to challenge the gas producers, because, even if regulators required the utilities to compensate consumers for their injuries, the utilities might be able to retain what remained of their treble damages recovery.[40]

36. After disposing of the case on the facts, the Court moved to a broader point:

> The rationales underlying *Hanover Shoe* and *Illinois Brick* will not apply with equal force in all cases. We nonetheless believe that justification exists for our stated decision not to "carve out exceptions to the [direct purchaser] rule for particular types of markets." . . . In sum, even assuming that any economic assumptions underlying the *Illinois Brick* rule might be disproved in a specific case, we think it an unwarranted and counterproductive exercise to litigate a series of exceptions. Having

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existing techniques for calculating damages should be adequate, and will continue to improve with experience. *See also Illinois Brick* at 748-66, at 759 (Brennan, J., dissenting).

36 *Kansas v. Utilicorp United,* 497 U.S. 199 (1990).

37 *Id.* at 206-07.

38 *Id*. at 208-12.

39 *Id.* at 212-13

40 *Id.* at 2214-15.

> stated the rule in *Hanover Shoe,* and adhered to it in *Illinois Brick*, we stand by our interpretation of § 4.

497 U.S. at 216, *quoting Illinois Brick*, 431 U.S. at 744.

37. The Court did not abandon the possibility raised in *Hanover Shoe* and repeated in *Illinois Brick,* that an exception might be warranted where a direct purchaser sells to the indirect purchaser pursuant a pre-existing cost-plus contract.[41] Rather, the Court found that the exception was not applicable to the facts before it. Nor did the Court limit, or even mention, the second exception it suggested in *Illinois Brick,* which might arise where the direct purchaser is owned or controlled by the indirect purchaser.[42]

38. Lower courts have suggested additional exceptions.[43] The most prominent of these arises when the seller and direct purchaser, such as a manufacturer and wholesaler, are part of a conspiracy, in which case a party that purchases from the wholesaler is actually purchasing directly from the conspiracy. Application of such a "co-conspirator" exception does not require apportionment of injury through several layers of distribution and therefore does not violate the rationale underlying the *Illinois Brick* rule.[44]

41 See note 20, *supra*.

42 See note 21, *supra*

43 ANTITRUST LAW DEVELOPMENTS (FIFTH) (2002) 859-61.

44 *Id.* at 860 and n.117; *In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F.3d 599, 604, 614-15 (7th Cir. 1997).