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## Illinois Brick Revisited: An Analysis of a Developing Antitrust Jurisprudence

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**ILLINOIS BRICK REVISITED: AN ANALYSIS OF  
A DEVELOPING ANTITRUST JURISPRUDENCE**

EDWARD D. CAVANAGH\*

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## I. INTRODUCTION

In June 1977, the United States Supreme Court handed down the landmark decision in *Illinois Brick Co. v. Illinois*.<sup>1</sup> Reaffirming its decision in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*,<sup>2</sup> the Court held that in a treble damages action where defendants are charged with price-fixing in violation of Section 1 of the Sherman Act,<sup>3</sup> first purchasers, and not others down the distribution line ("indirect purchasers"), are injured by the full amount of any overcharge; and indirect purchasers are prohibited from offering proof that illegal overcharges had been "passed on" to them by their sellers.<sup>4</sup>

The holding in *Illinois Brick* was narrow in scope, a pragmatic resolution of the very complicated passing on<sup>5</sup> issue. The principle

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

2. 392 U.S. 481 (1968).

3. 15 U.S.C. § 1 (1980).

4. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 728-29 (1977).

5. Passing on or pass on refers to the process by which a buyer shifts all or part of an overcharge onto the party at the next link in the distribution line, e.g., an overcharged wholesaler would add to its selling price an amount reflecting increas-

basis for the Court's ruling was its perception that enormous complexities which would inevitably arise in tracing overcharges past first purchasers in the distribution chain would unduly complicate treble damages proceedings and thereby reduce their effectiveness.<sup>6</sup> Additionally, the Court feared that sanctioning plaintiffs' use of "passing on" would expose defendants to multiple liability and enhance the likelihood of duplicative recoveries.<sup>7</sup> While recognizing that its decision may in some cases permit antitrust violations to go unpunished and close the door on certain meritorious treble damages claims by indirect purchasers, the Court held that, on balance, the goals of the antitrust laws are better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them than by attempting to apportion the overcharge among all buyers down the distribution line who may have absorbed a part of it.<sup>8</sup>

At the same time, the Court invited Congress to provide a legislative solution to the practical problems inherent in large antitrust litigation with plaintiffs at various levels in the chain of distribution.<sup>9</sup> Although several bills had been introduced to overturn the decision in *Illinois Brick* so as to permit indirect purchasers to recover damages in price-fixing cases,<sup>10</sup> Congress has declined to enact any measure to modify or override the *Illinois Brick* holding, despite strong support for such legislation by the Department of Justice, States' Attorneys General and the plaintiffs' bar in general.<sup>11</sup>

Thus, Congress has left to the courts the task of harmonizing

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ed acquisition costs and perhaps additional profit. See, *Zinser v. Continental Grain, Inc.*, 660 F.2d 754, 760 (10th Cir. 1981); *cert. denied, sub. nom.*, *Zinser v. Palmby*, \_\_\_ U.S. \_\_\_, 5 CCH Trade Cases, ¶ 60,021 (February 22, 1982); *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1163 (5th Cir. 1979); *In re New Mexico Natural Gas Antitrust Litigation*, 1982-1 CCH Trade Cases, ¶ 64,685 (D.N.M. 1982).

6. *Id.* at 738-44.

7. *Id.* at 737.

8. *Id.* at 746-47.

9. *Id.* at 746.

10. *E.g.*, S.2772, 97th Cong. 2d Sess. (1982); S.300, 96th Cong., 1st Sess. (1979); H.R. 2060, 96th Cong., 1st Sess. (1979); S.1874, 95th Cong., 2d Sess. (1978). § 3; H.R. 11942, 95th Cong., 2d Sess. (1978), § 2; H.R. 8359, 95th Cong. 1st Sess. (1977).

11. See, *e.g.*, *Fair and Effective Enforcement of the Antitrust Laws*, S. 1874: *Hearings Before the Sub-Committee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate*, 95th Cong. 1st Sess. at 9-17, 101-04, 105-07, 107-28, 170 (Testimony of Messrs. Shenefield, Browning, Turner, Hill, Wilson, Speigel and Young respectively); *Effective Enforcement of the Antitrust Laws, Hearings Before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary, House of Representatives*, 95th Cong., 1st Sess. on H.R. 8359 at 6-25; 23-71 (Testimony of Mr. Shenefield and panel consisting of Messrs. Browning, Hill, Reed, Gorton and Marvin).

the theoretical goals of antitrust enforcement and the practical limitations on achieving these goals through the judicial process. Despite the Supreme Court's unequivocal ruling elevating direct purchasers to a preferred position as antitrust plaintiffs, the lower federal courts have been somewhat reluctant to throw out indirect purchaser claims; and in attempting to salvage such claims, have placed glosses on the *Illinois Brick* holding, which have in turn generated a series of confusing rulings on the intended scope of the direct purchaser rule and the exceptions thereto. Since these issues will ultimately have to be resolved by the Supreme Court, the need to revisit *Illinois Brick* at this time is especially intense.

The purposes of this article are to: (1) provide a comprehensive review of *Illinois Brick* and its progeny to clarify and, to the extent possible, harmonize the bewildering result-oriented judicial precedents on the offensive use of passing on which have emerged in the wake of *Illinois Brick*, contrary to the express holding in that case; (2) discuss the application of the *Illinois Brick* rationale to the related area of standing in treble damages actions and particularly to the umbrella theory of damages; and (3) reflect on whether the courts by applying the *Illinois Brick* rule have demonstrated the capacity to deal with the practical problems of complex litigation or whether legislation will be necessary to solve such problems.

## II. BACKGROUND TO *Illinois Brick*

### A. *Hanover Shoe*

It is impossible to fully grasp the philosophical underpinnings of the *Illinois Brick* decision without an in-depth understanding of the Supreme Court's earlier decision in *Hanover Shoe*. *Hanover Shoe* was a treble damages action for overcharges against defendant manufacturer of shoe machinery brought by plaintiff shoe-manufacturer which leased shoe machinery from defendant.<sup>12</sup> Plaintiff alleged that defendant's business practices, particularly its "lease only" policy with respect to shoe machinery, which prohibited plaintiff from purchasing such machinery, violated section 2 of the Sherman Act,<sup>13</sup> causing plaintiff to pay far more in rental under the lease agreement than it would have had to pay were it permitted to purchase the

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12. The *Hanover Shoe* treble damages action arose out of a government injunctive action entitled *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954) which resulted in judgment for the government. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 483 (1968).

13. 15 U.S.C. § 2.

equipment.<sup>14</sup> The Court rejected defendant's contention that plaintiff had suffered no legally cognizable damages because it has "passed on" any overcharges by simply increasing the price of shoes sold to its customers and held that except in very limited circumstances, a direct purchaser is injured by the full amount of any overcharge paid.<sup>15</sup>

The rationale underlying the rejection of the "passing on" defense was the Court's perception of the pitfalls in analyzing business decision in the "real economic world" rather than in an "economist's hypothetical [econometric] model."<sup>16</sup> The Court stated:

We are not impressed with the argument that sound laws of economics require recognizing this [passing on] defense. A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether, had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price. Equally difficult to determine, in the real economic world rather than an economist's hypothetical model, is what effect a change in a company's price will have on its total sales. Finally, costs per unit for a different volume of total sales are hard to estimate. Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff *could not* or *would not* have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued. Since establishing the applicability of the passing-on defense would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable.<sup>17</sup>

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14. 392 U.S. at 483.

15. *Id.* at 487-88.

16. *Id.* at 492.

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

1. *Bases for pricing decisions*

In making pricing decisions, a businessman looks at many parameters in addition to the cost of a single source of supply. *Id.* Hence, a shoe manufacturer would pro-

The "could not" or "would not" analysis is key to understanding *Hanover Shoe* and its offspring, *Illinois Brick*. Of course, any number of factors other than overcharges by the defendant could have occasioned a price rise by the first purchaser. Moreover, the fact that the first purchaser's price rise follows the imposition of illegal overcharges, does not establish that the first purchaser was not damaged thereby.<sup>18</sup> The timing of the defendant's price rise may have been for-

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

### 2. Impact of price increases

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

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

### 3. Ascertaining "but for" conduct

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

18. As the Court in *Hanover Shoe* further noted:

The mere fact that a price rise followed an unlawful cost increase does not show that the sufferer of the cost increase was undamaged. His customers may have been ripe for his price rise earlier; if a cost rise is merely the occasion for a price increase a businessman could have imposed absent the rise in his costs, the fact that he was earlier not enjoying

tuitous. It is quite possible that the higher price to the ultimate purchaser could have been charged long before its actual imposition. Hence, a mere showing that the first purchaser's price increase follows defendant's overcharge is not enough. Defendant must prove that the first purchaser "could not" or "would not" maintain a given price absent any overcharge; such a burden cannot be sustained in the "real economic world."<sup>19</sup>

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

*Hanover Shoe* held that a party may not defend a price-fixing charge by claiming that the plaintiff passed on any overcharges to its customers, *i.e.* passing on may not be used defensively.<sup>20</sup> *Hanover Shoe*, however, did not address the question of whether a plaintiff down the distribution line could prove that overcharges had been passed on to it; *i.e.* whether passing on could be used offensively.<sup>21</sup> The majority of lower courts upheld the offensive use of passing on,<sup>22</sup> although a few held, as the Supreme Court would eventually rule in *Illinois Brick*, that the logic of *Hanover Shoe* prohibited the offensive as well as defensive use of passing on.<sup>23</sup> However, a great deal of

the benefits of the higher price should not permit the supplier who charges an unlawful price to take those benefits from him without being liable for damages. This statement merely recognizes the usual principle that the possessor of a right can recover for its unlawful deprivation whether or not he was previously exercising it.

*Id.* at 493, n.9.

19. *Id.* at 493.

20. 392 U.S. at 491-92. This ruling is in line with prior Supreme Court holdings wherein plaintiffs had indirect claims. *E.g.*, *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918) ("The general tendency of the law, in regard to damages at least, is not to go beyond the first step").

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

22. *In re Western Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974); *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, *cert. denied*, *sub nom.* *Cotler Drugs, Inc. v. Chas. Pfizer & Co.*, 404 U.S. 871 (1971); *In re Master Key Antitrust Litigation*, 1973 CCH Trade Cases ¶ 74,680 (D. Conn. 1973); *Boshes v. General Motors Corp.*, 59 F.R.D. 589 (N.D. Ill. 1973).

23. *Donson Stores, Inc. v. American Bakeries Co.*, 58 F.R.D. 481 (S.D.N.Y. 1973); *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 50



confusion existed as to the legal basis for granting or denying offensive use of the passing on doctrine. Courts and commentators<sup>24</sup> discussed the issue in terms of "standing,"<sup>25</sup> "remoteness"<sup>26</sup> and "passing on."<sup>27</sup> It was thus left to the Supreme Court to clear the air.

### III. *Illinois Brick*

#### A. *The Illinois Brick Rule*

The issue in *Illinois Brick* was, as between two types of purchasers at different levels in the same vertical chain of distribution—those purchasing directly from defendants and the customers of such purchasers—which group had a claim for overcharges in a treble damages action, arising out of an alleged price-fixing conspiracy by manufacturers of concrete blocks in violation of section 1 of the Sherman Act.<sup>28</sup> Plaintiffs, various state and local government entities,

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 and County of Denver v. American Oil Co.*, 53 F.R.D. 620 (D. Colo. 1971).

24. *Boshes v. General Motors Corp.*, 59 F.R.D. 589 (N.D. Ill. 1973); *In re Antibiotics Antitrust Actions*, 333 F. Supp. 313 (S.D.N.Y. 1971); *Wilson v. Ringsby Truck Lines, Inc.*, 320 F. Supp. 699 (D. Colo. 1970); *see*, *Berger and Bernstein, An Analytical Framework for Antitrust Standing*, 86 YALE L.J. 809 (1977); *Handler & Blechman, Antitrust and Consumer Interest, The Fallacy of the Parens Patriae Approach*, 85 YALE L.J. 626, 638-48 (1976); Comment, *Standing to Sue in Antitrust Cases: The Offensive Use of Passing-On*, 123 U. PA. L. REV. 976, 977-79 (1975); Comment, *Mangano and Ultimate Consumer Standing: The Misuse of the Hanover Doctrine*, 72 COLUM. L. REV. 394 (1972).

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

26. *See*, *In re Antibiotics Antitrust Actions*, 333 F. Supp. 310 (S.D.N.Y. 1971) (purchasers of animal feed into which alleged priced fixed antibiotics had been incorporated too remote to sue manufacturers of such antibiotics); *Boshes v. General Motors Corp.*, 59 F.R.D. 589 (N.D. Ill. 1973).

27. *See supra* n. 22.

28. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 726 (1977). The rule of *Illinois Brick* applies only in treble damages actions and does not apply to actions for injunctions pursuant to § 16 of the Clayton Act, 15 U.S.C. § 26. *In re Chicken Antitrust Litigation American Poultry*, 669 F.2d 228, 238 (5th Cir. 1982); *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573, 589-94 (3d Cir. 1979). Nor does the *Illinois Brick* decision bar plaintiffs from pursuing state law remedies. *Compare Alton Box Board Co. v. Esprit de Corp.*, 1982-1 CCH Trade Cases ¶ 64,711 (9th Cir. 1982) (action by indirect purchasers for damages under California's Cartwright Act, Cal. Bus. & Prof. Code §§ 16720, 16750) *with* *Boccardo v. Safeway Stores, Inc.* 1982-1 CCH Trade Cases ¶ 64,886 (Cal. Ct. App. 1982) (state court antitrust action under California's Cartwright Act barred under the doctrine of res judicata by dismissal of prior federal antitrust claims on *Illinois Brick* grounds). *See*, *In re Chicken Antitrust Litigation*

admittedly did not deal directly with the defendants but rather purchased buildings into which the price-fixed concrete blocks had been incorporated.<sup>29</sup> Plaintiffs claimed that the overcharges imposed by the concrete block manufacturers had been passed on to them by intervening parties in the chain of distribution and that they had therefore suffered "injury" under section 4 of the Clayton Act.<sup>30</sup> Defendants moved for summary judgment on the authority of *Hanover Shoe*.

The Court was thus confronted with the question of whether to reaffirm the principles of *Hanover Shoe* and hold that only the overcharged direct purchaser—as opposed to the indirect purchasers down the distribution line—should be deemed to have suffered the full injury from the alleged overcharge, or to modify *Hanover Shoe* and permit multiple claims to the same overcharge by plaintiffs at different points in the chain of distribution who can show passing on.<sup>31</sup> The Court again chose to concentrate the full amount of any overcharge in the hands of the first purchaser, stating "that the overcharged direct purchaser, and not others in the chain of manufacture and distribution, is the party 'injured in his business or property' within the meaning of [section 4 of the Clayton Act]."<sup>32</sup> The majority thus adopted a rule of symmetry regarding the offensive use of passing on, thereby barring indirect purchasers from maintaining treble damages actions whenever the antitrust defendant would be precluded from asserting the passing on defense against a direct purchaser.<sup>33</sup>

The Court discussed at length the policy reasons underlying the rule of symmetry in *Illinois Brick*.<sup>34</sup>

American Poultry, 669 F.2d 228, 238 (5th Cir. 1982); see, e.g., Ala. Code § 6-5-60 (1975) (indirect purchasers have right of damages actions against violators of state antitrust laws); Cal. Bus. & Prof. Code § 16750(a) (1981) (individual may sue for indirect injury to business from antitrust violation). Cf. Fla. Stat. §§ 542.18-542.23 (1980) (state may sue *parens patriae* for violations of state antitrust laws).

29. Blocks were purchased from defendants by masonry contractors and used to build masonry structures; those structures were incorporated into entire buildings by general contractors and then sold to, among others, governmental entities. *Id.* at 726.

30. 15 U.S.C. § 15.

31. 431 U.S. at 728-29.

32. *Id.* at 729.

33. *Id.*

34. The pros and cons of the *Illinois Brick* ruling barring plaintiffs' use of the passing on theory have been debated at length in the literature; e.g., W. Landes & R. Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of Illinois Brick*, 46 U. CHI. L. REV. 602 (1979) (generally supporting the *Illinois Brick* holding); cf. R. Harris & L. Sullivan, *Passing On the Monopoly Overcharge: A Comprehensive Policy Analysis*, 128 U. PA. L. REV. 269 (1979) (criticizing the rule of *Illinois Brick*). See, W. Landes & R. Posner, *The Economics of Passing On*,

### 1. Tracing Problems

The Court found that any attempt to trace complex economic adjustments to a change in the cost of a particular factor of production would greatly complicate already complex antitrust proceedings and bog the Court down in numerous side issues which did not go to the heart of the alleged misconduct.<sup>35</sup> The Court further reasoned evidentiary complexities which were identified in *Hanover Shoe* (where passing on was used as a defense) would be present in spades where a plaintiff, several steps removed from the defendant-price-fixer in the chain of distribution, sought to use passing on offensively.<sup>36</sup>

### 2. Impairment of the Treble Damages Remedy

The introduction of complex tracing problems into antitrust litigation would, the Court feared, reduce the effectiveness of treble damages actions as a tool for enforcing the antitrust laws.<sup>37</sup> Indirect purchasers, with a comparatively small monetary interest in the litigation, have far less incentive to sue than the direct purchasers who are not only spared the burden of tracing overcharges but also permitted to recover the full amount of any overcharge under *Hanover Shoe*.<sup>38</sup>

### 3. Risks of Multiple Liability and Inconsistent Judgments

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

*A Reply to Harris and Sullivan*, 128 U. PA. L. REV. 1274 (1980); R. Harris & L. Sullivan, *Passing On the Monopoly Overcharge: A Response to Landes and Posner*, 128 U. PA. L. REV. 1280 (1980). That debate will not be rekindled here, except to note that even the most forceful opponents of the *Illinois Brick* holding fail to come to grips with a basic tenet of that ruling: proof of passing on requires a number of assumptions which cannot be easily or accurately translated from the economist's hypothetical model to the real economic world. See, e.g., R. Harris & L. Sullivan, *Passing On the Monopoly Overcharge: A Comprehensive Policy Analysis*, 128 U. PA. L. REV. 269, 277-79 (1979).

35. 431 U.S. at 725, 736.

36. *Id.* at 740, n.3.

37. *Id.* at 731, n.12. Justice White wrote for the majority:

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

*Id.* at 745.

38. *Id.* at 746.

able risk of multiple liability" and "open the door to duplicative recoveries."<sup>39</sup> Under *Hanover Shoe*, the direct purchaser would automatically recover the full amount of any overcharge it had passed on; allowing offensive use of passing on would enable indirect purchasers to sue for recovery of all or part of the same amount and thereby expose defendants to liability in an amount far in excess of any ill-gotten gains obtained through price-fixing.<sup>40</sup> Moreover, permitting offensive but not defensive use of passing on would inevitably give rise to inconsistent judgments.<sup>41</sup> Thus, one court might find in a direct purchaser suit that the defendants committed no illegal acts, while another court in a subsequent suit against the same defendants on the very same facts by indirect purchasers—not parties to the direct purchaser suit—might find for the plaintiffs.<sup>42</sup>

B. *Exceptions to the Illinois Brick Rule Barring Indirect Purchasers from Maintaining Treble Damages Claims*

The Supreme Court in *Illinois Brick* recognized that complex tracing problems and the possibility of duplicative recoveries did not always present insurmountable obstacles to recovery. In two very narrowly defined circumstances, the Court found that a plaintiff who did not purchase directly from the alleged antitrust violator might be able to prove that overcharges were passed on to it without the necessity of analyzing complex price-output decisions and relative elasticities: (1) a situation where there is a pre-existing cost-plus contract between the first purchaser and its customer;<sup>43</sup> and (2) where the first-purchaser is owned or controlled by its customer.<sup>44</sup>

39. *Id.* at 730.

40. *Id.* at 730-31.

41. *Id.* at 737-39.

42. The injustice of inconsistent verdicts would be further compounded by the fact that other indirect purchasers, not parties to either suit against the defendants may then under the doctrine of collateral estoppel be able to avail themselves of favorable factual findings in the prior proceeding, effectively estopping defendants from relitigating liability. *See, e.g., GAF Corp. v. Eastman Kodak Co.*, 519 F. Supp. 1203 (S.D.N.Y. 1981).

43. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977). The same exception was recognized by the Court in *Hanover Shoe* in the context of the defensive use of passing on. 392 U.S. at 494.

44. 431 U.S. at 736, n.16. While *Hanover Shoe* was silent on the application of this exception, it is clear that it pertains equally to defensive and offensive passing on situations. *Royal Printing Co. v. Kimberly-Clark Corp.*, 621 F.2d 323 (9th Cir. 1980); *In re Sugar Industry Antitrust Litigation*, 579 F.2d 13, 19 (3d Cir. 1978); *In re Coordinated Proceedings In Petroleum Products Antitrust Litigation*, 497 F. Supp. 218, 226 (C.D. Cal. 1980); *see, Dart Drug Corp. v. Corning Glass Works*, 480 F. Supp. 1091 (D. Md. 1979).

### 1. The "Pre-Existing Cost-Plus Contract" Exception

The problem of tracing does not arise in the situation where a pre-existing cost-plus contract,<sup>45</sup> fixing in advance the quantities to be purchased, exists between the first purchaser and his customer, (the "indirect purchaser"). As the Court pointed out:

In such a situation, the [first] purchaser is insulated from any decrease in its sales as a result of attempting to pass-on the overcharge, because its customer [the indirect purchaser] is committed to buying a fixed quantity regardless of price. The effect of the overcharge is essentially determined in advance, without reference to the interaction of supply and demand that complicates the determination [of the amount of the overcharge] in the general case.<sup>46</sup>

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

- a. a provision providing for automatic passing on to the full extent of the overcharge to indirect purchasers;
- b. the direct purchaser is insulated from any decrease in sales or profit; and
- c. a contract exists which commits the indirect purchaser to buying a fixed quantity regardless of price.<sup>47</sup>

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45. The Court did not define precisely what was meant by cost-plus contract. There are essentially two basic methods used in cost-based pricing: mark-up pricing and cost-plus pricing. R. Harris & L. Sullivan; *Passing On the Monopoly Overcharge: A Comprehensive Policy Analysis*, 128 U. PA. L. REV. 269, 303-04 (1979). Under mark-up pricing, widely practiced by wholesalers, the direct cost of a product is its invoice cost. *Id.* at 304. The resale price is determined by adding to the invoice cost a more or less fixed percentage mark-up over the invoice cost, designed to cover indirect costs and provide a profit. *Id.* A second type of mark-up pricing, frequently employed by retailers involves "manufacturer's suggested retail price." *Id.* at 305. The seller charges the manufacturer's suggested retail price and the mark-up is the difference between the suggested resale price and the acquisition cost. *Id.*

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

46. 431 U.S. at 736 (emphasis supplied).

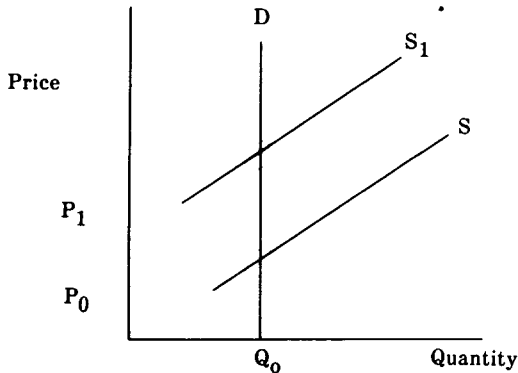
47. *Lefrak v. Arabian American Oil Co.*, 487 F. Supp. 808, 819 (S.D.N.Y. 1980);

The key element here is the *pre-existing, fixed quantity* nature of the contract.<sup>48</sup> In such a situation, the indirect purchaser is locked-in to buying a set amount; and the first purchaser suffers no injury from any overcharge because he has no loss of sales volume.<sup>49</sup> As discussed more fully below, many courts talk loosely in terms of the "cost-plus" exception,<sup>50</sup> but it is not enough under *Illinois Brick* to

*cf.* In re Beef Industry Antitrust Litigation, 1982-2 CCH Trade Cases, ¶ 64,815 (N.D. Tex. 1982).

48. A simple hypothetical will illustrate the operation of a fixed quantity, pre-existing cost-plus contract. Assume that the first purchaser (FP) and his customer, the indirect purchaser (IP), have entered into a pre-existing cost-plus contract which obligates IP to purchase specified quantities from FP. FP's source of supply, M, is engaged in a price-fixing conspiracy and pursuant thereto overcharges FP. The conspiratorial charge to FP by M (FP's acquisition cost) is \$12 per unit, while the price that would have prevailed absent a conspiracy was \$10 per unit. Under the FP-IP contract, IP must purchase 1 million units per year from FP at FP's acquisition cost plus 10%. The total cost paid by IP during the conspiracy is \$13.2 million; but for the conspiracy IP would have paid \$11 million. In other words, IP pays \$2.2 million more than he would have paid but for the conspiracy. FP on the other hand, is not out of pocket one penny, since 100% of the overcharge is passed on. FP not only suffers no volume loss but retains his 10% profit-margin over costs.

49. This situation is equivalent to perfect inelasticity of demand; the same amount will be demanded, irrespective of price. *Lefrak v. Arabian American Oil Co.*, 487 F. Supp. 808, 819 (S.D.N.Y. 1980). As the Court in *Lefrak* demonstrated, the fixed-quantity, pre-existing cost-plus contract would look as follows on a graph. *Id.* at 819, n.19.



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

have a cost-plus contract without having provisions for fixed quantities.<sup>51</sup>

## 2. The Ownership or Control Exception

In addition to the pre-existing "cost-plus" contract situation, the Court in *Illinois Brick* suggested in footnote sixteen in its opinion a second possible exception to its general holding barring proof of passing on, the "ownership or control" exception.<sup>52</sup> The rationale underlying this exception is similar to the rationale for the "pre-existing cost-plus contract" exception: where there is ownership of the first purchaser, whether by the alleged price fixer or by the indirect purchaser, the market forces are superseded and complex problems of tracing and price-output adjustments do not arise.<sup>53</sup> Furthermore, the exception is rooted in common sense, for were it not recognized, the "direct purchaser" rule of *Illinois Brick* could be easily evaded by creating dummy entities as intermediate purchasers.<sup>54</sup>

In creating the "ownership or control" exception, to the general

51. Where quantities are not contractually fixed in advance, IP may decide to decrease his volume of purchases in view of FP's price increase. Should IP reduce his volume, FP may claim injury based on lost sales. In such a situation, IP cannot claim to have suffered the full brunt of the overcharge and a detailed assessment of price/output functions would still be necessary. This, of course, would present precisely the situation which the Court in *Illinois Brick* sought to avoid. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977).

52. The Court noted:

Another situation in which market forces have been superseded and the pass-on defense might be permitted is where the direct-purchaser is owned or controlled by its customer, *cf. Perkins v. Standard Oil Co.*, 395 U.S. 642, 648, 89 S.Ct. 1871, 1874, 23 L.Ed.2d 559 (1969); *In re Western Liquid Asphalt Cases*, 487 F.2d 191, 197, 199 (1973), *cert. denied*, 415 U.S. 919, 94 S.Ct. 1419, 39 L.Ed.2d 474 (1974).

*Id.* at 736, n.16.

53. *Id.* Subsequent lower court decisions have held that the "control" exception applies not only where the direct purchaser is owned or controlled by its customer but also where it is owned or controlled by its supplier. *In re Mid-Atlantic Toyota Antitrust Litigation*, 516 F. Supp. 1287, 1292 (D. Md. 1981); *see, In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1160-61 (5th Cir. 1979); *Jewish Hospital Ass'n. v. Stewart Mechanical Enterprises, Inc.* 628 F.2d 971, 974-75 (6th Cir. 1980) *cert. denied*, 450 U.S. 966 (1981); *Reiter v. Sonotone Corp.*, 486 F. Supp. 115, 121, n.6 (D. Minn. 1980); *Dart Drug Corp. v. Corning Glass Works*, 480 F. Supp. 1091, 1104 (D. Md. 1979); *see also, Note, Scaling the Illinois Brick Wall: The Future of Indirect Purchasers in Antitrust Litigation*, 63 CORNELL L. REV. 309, 327 (1978).

54. *See, Mid-West Paper Prods. Co. v. Continental Group, Inc.*, 596 F.2d 573, 589 (3d Cir. 1979) ("... to bar the purchaser from the subsidiary [of a price-fixer] from suing on the authority of *Illinois Brick* would invite evasion [of the antitrust

rule of *Illinois Brick*, the Supreme Court did not elaborate on precisely what was meant by "ownership or control."<sup>55</sup> Nor have the lower courts, as more fully discussed below, developed a definitive test to determine "ownership or control" in the few cases which have arisen on this issue.<sup>56</sup>

#### IV. POST-*Illinois Brick* JURISPRUDENCE

In the absence of legislation, the task of delineating the parameters of *Illinois Brick* has fallen on the courts. The decision in *Illinois Brick* has undeniable potential to create harsh results in certain individual cases,<sup>57</sup> particularly where it is clear that a plaintiff-indirect purchaser has been overcharged because of an illegal conspiracy and that plaintiff-indirect purchaser is barred from recovery largely because of perceived problems in proving damages.<sup>58</sup> Not surprisingly, *Illinois Brick* has not been especially popular with the lower

laws] by the simple expedient of inserting a subsidiary between the violator and the first non-controlled purchaser.").

55. *Dart Drug Corp. v. Corning Glass Works*, 480 F. Supp. 1091, 1103 (D. Md. 1979).

56. Some clues as to exactly what the Supreme Court had in mind may be gleaned from the two cases cited in footnote 16. *Perkins v. Standard Oil Co.*, 395 U.S. 642, 647-48 (1969), involved an action under § 2 of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a), in which the defendant-supplier allegedly channeled illegal discounts to competitors of plaintiff through its 60% owned subsidiary. The Court held that plaintiff's right to recover was not impeded by the additional formal transactions which occurred prior to reaching the level of its competitor. The Ninth Circuit in *In re Western Liquid Asphalt Cases*, 487 F.2d 191, 198-99 (9th Cir. 1973) cert. denied, 415 U.S. 919 (1974) held that suppliers' sales of price-fixed asphalt to indirect purchasers through contractors whom the asphalt suppliers controlled either by acquisition of stock, or indirectly through various financial arrangements, including credit, were not insulated from liability by the holding in *Hanover Shoe*.

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

57. The Supreme Court so conceded: "It is true that, in elevating direct purchasers to a preferred position as private attorneys general, the *Hanover Shoe* rule denies recovery to those indirect purchasers who may have been actually injured by antitrust violations." *Illinois Brick Co. v. Illinois* 431 U.S. 720, 746 (1977).

58. In this respect, the rule of *Illinois Brick* is closely akin to the *per se* doctrine governing certain § 1 Sherman Act violations "which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without any elaborate inquiry as to the precise



courts, which have been torn between the mechanical, *per se* approach of *Illinois Brick*<sup>59</sup> and a more expansive approach giving the indirect purchaser-plaintiff every opportunity to fit itself within the recognized exceptions to the direct purchaser rule enunciated in *Illinois Brick*.<sup>60</sup>

Most litigation has focused on the applications of the "pre-existing cost-plus" and "ownership or control" exceptions. Several courts have broadened the "pre-existing cost-plus"<sup>61</sup> and "ownership or control"<sup>62</sup> exceptions beyond the narrowly defined limits staked out by *Illinois Brick* and in so doing, threaten to re-introduce the very same complicated issues which the *Illinois Brick* holding had supposedly

harm they caused or the business excuse for their use." Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5 (1958).

Justice Marshall's comments on the *per se* approach in his dissenting opinion in United States v. Container Corporation, 393 U.S. 333, 341 (1969), are equally apt in describing the rule of *Illinois Brick*:

Per se rules always contain a degree of arbitrariness. They are justified on the assumption that the gains from imposition of the rule will far outweigh the losses and that significant administrative advantages will result. In other words, the potential competitive harm plus the administrative costs of determining in what particular situations the practice may be harmful must far outweigh the benefits that may result. If the potential benefits in the aggregate are outweighed to this degree, then they are simply not worth identifying in individual cases.

59. *E.g.*, Mid-West Paper Products Co. v. Continental Group, Inc., 596 F.2d 573 (3d Cir. 1979).

60. *E.g.*, In re Petroleum Products Antitrust Litigation, 523 F. Supp 1116, 1119 (C.D. Cal. 1981) (Plaintiffs who admittedly could not show that they were owned or controlled by alleged conspirators were permitted to attempt to show that defendants control over them was so pervasive that they could fix the retail prices of gasoline without any uncontrolled discretion being exercised by the gasoline station operators that made the sale. *Held*: Plaintiffs had failed to establish such control). The court further stated:

I have had considerable sympathy for the plaintiffs as they faced the problem of *Illinois Brick*, and have given them somewhat extended opportunity to develop and assert just how they propose to surmount it. After several valiant written and oral attempts, the answer is clear, they simply cannot do it; *Illinois Brick* makes it impossible to proceed in these cases with the type of class that is here proposed.

*Id.* at 1119.

*See also*, In re Sugar Industry Antitrust Litigation, 579 F.2d 13 (3d Cir. 1978) (plaintiff who purchased product into which price-fixed component had been incorporated by subsidiary of alleged price fixer not barred by *Illinois Brick*).

61. *E.g.*, In re Beef Industry Antitrust Litigation, 600 F.2d 1148 (5th Cir. 1979); In re New Mexico Natural Gas Antitrust Litigation, 1982-1 CCH Trade Cases, ¶ 64,685 (D.N.M. 1982).

62. *E.g.*, Royal Printing Co. v. Kimberly-Clark Corp., 621 F.2d 323 (9th Cir. 1980).

eliminated from multi-party antitrust litigation. Other courts have fashioned implied exceptions to the direct purchaser rule<sup>63</sup> or at least suggested that the exceptions spelled out in *Illinois Brick* are not exclusive.<sup>64</sup>

#### A. *Pre-existing Cost-Plus Contract Exception Post-Illinois Brick*

The contrasting judicial attitudes on the reach of the pre-existing cost-plus exception are best illustrated in the differing results reached by the Third and Fourth Circuits on that issue. The threshold issue dividing the two circuits is whether under *Illinois Brick* an indirect purchaser-plaintiff must establish an actual pre-existing, fixed quantity cost-plus contract or whether the plaintiff need only establish the functional equivalent of such an arrangement.<sup>65</sup> In *Mid-West Paper Products Co. v. Continental Group, Inc.*,<sup>66</sup> the Third Circuit limited the use of the exception to situations where the plaintiff is a party to a fixed-quantity cost-plus contract. On the other hand, the Fifth Circuit in *In re Beef Industry Antitrust Litigation*,<sup>67</sup> ruled that a plaintiff may meet the exception by proving a pricing mechanism that operates in a manner functionally equivalent to a cost-plus contract.<sup>68</sup> While the Third Circuit test is concrete, straightforward and predictable, the Fifth Circuit formulation is abstract, vague and open-ended, and requires a court to "set sail on a sea of doubt"<sup>69</sup> whenever resolving a passing on issue. The Third Circuit formulation better reflects the narrow scope which the Supreme Court intended for any exception to the rule of *Illinois Brick*. However, upon analysis the gap between

63. The so-called unnamed co-conspirator exception. See *Fontana Aviation, Inc. v. Cessna Aircraft Co.*, 617 F.2d 478 (7th Cir. 1980); *Vermont v. Densmore Brick Co.*, 1980-2 CCH Trade Cases ¶ 63,347 (D. Vt. 1980); *Abrams v. Interco, Inc.*, 1980-2 CCH Trade Cases ¶ 63,292 (S.D.N.Y. 1980); *Reiter v. Sonotone Corp.*, 486 F. Supp. 115 (D. Minn. 1980).

64. *In re New Mexico Natural Gas Antitrust Litigation*, 1982-1 CCH Trade Cases ¶ 64,685 (D.N.M. 1982); *In re Mid-Atlantic Toyota Antitrust Litigation*, 516 F. Supp. 1287, 1292 (D. Md. 1981) ("Analysis of the policy consideration underlying *Illinois Brick*, reveals quite clearly that the exceptions therein announced were not meant to be necessarily exclusive.")

65. *In re Beef Industry Antitrust Litigation*, 1982-2 CCH Trade Cases ¶ 64,815 (N.D. Tex. 1982).

66. 596 F.2d 573 (3d Cir. 1979).

67. 600 F.2d 1148 (5th Cir. 1979), *cert. denied, sub nom. Safeway Stores, Inc. v. Meat Price Investigators Ass'n.*, 449 U.S. 905 (1980).

68. *Id.* at 1163.

69. See, *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *modified and aff'd.*, 175 U.S. 211 (1899).

the two circuits on the pre-existing cost-plus exception issue may not be as wide as it might appear at first blush.<sup>70</sup>

### 1. *Mid-West Paper and Beef Industry Compared*

In *Mid-West Paper*, defendant manufacturer of paper bags moved for summary judgment on the authority of *Illinois Brick* against the indirect purchaser class of plaintiffs.<sup>71</sup> The indirect purchaser-plaintiffs argued that the informal oral arrangements through which they purchased paper bags from middlemen who had purchased from defendants brought them within the pre-existing cost-plus exception.<sup>72</sup> The court of appeals rejected this argument on two grounds: (1) to satisfy the pre-existing cost-plus exception, plaintiff must prove the existence of formal, fixed-quantity cost-plus contracts between themselves and their middlemen suppliers; and (2) the informal oral arrangements through which plaintiffs bought bags from middlemen were made pursuant to precisely the type of "cost-based rules of thumb" which the Supreme Court specifically held were outside the pre-existing cost-plus exception.<sup>73</sup> The court also reiterated the *Illinois Brick* ruling that to fall within the exception, cost-plus contracts must fix in advance the quantity to be purchased in order to insulate the middlemen from any loss of volume after passing along defendants' illegal overcharges.<sup>74</sup>

*Beef Industry* presented a mirror image of *Mid-West Paper* in that plaintiffs, cattle ranchers and feeders, were sellers rather than buyers, who alleged that defendants<sup>75</sup> combined to fix prices at which they purchased meat from slaughterhouses and meat packers, which, in turn, caused the plaintiffs to receive less money for cattle sold to

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70. In re Beef Industry Antitrust Litigation, 1982-2 CCH Trade Cases ¶ 64,815 (N.D. Tex. 1982).

71. *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573, 575 (3d Cir. 1979). Plaintiffs fell into three categories: (1) supermarkets and retailers which had through middlemen purchased bags manufactured by the defendants but had not purchased bags directly from the defendants; (2) a company which had purchased bags from defendants' alleged co-conspirators but not from defendants; and (3) those who had purchased bags directly from the defendants. Plaintiffs in the first group sought to avoid defendants' summary judgment motion on the grounds that they fell within the pre-existing cost-plus exception established in *Illinois Brick*.

72. *Id.* at 575-76.

73. *Id.* at 578-80.

74. *Id.* at 577 n.9.

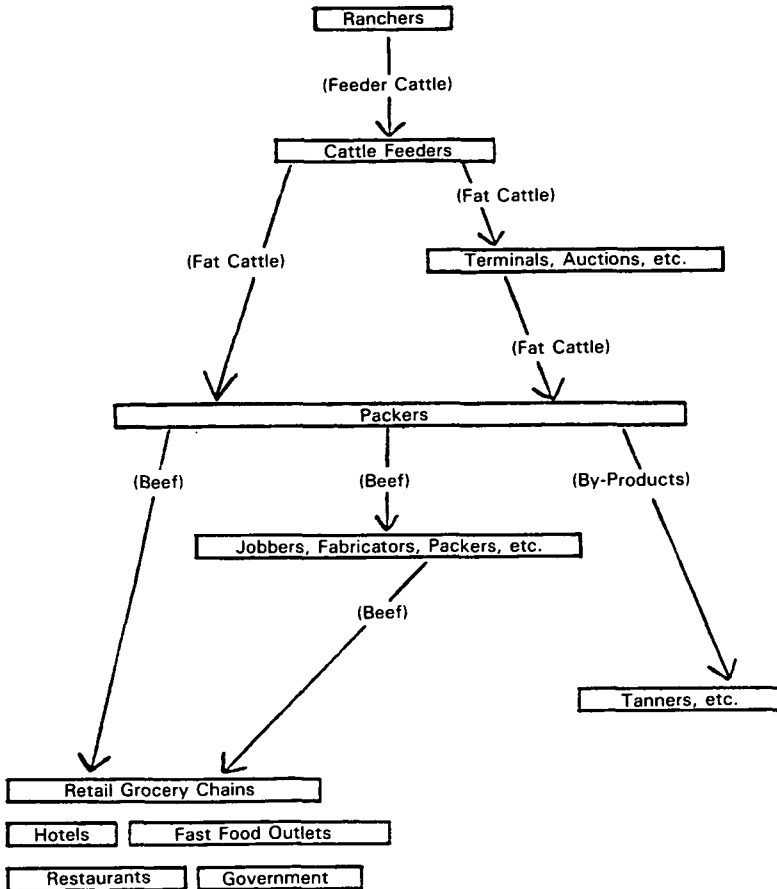
75. Defendants were seventy-five retail food chains, a wholesale grocer, the retail chain's national trade association and an industry national reporting service. In re Beef Industry Antitrust Litigation, 600 F.2d 1148, 1153 (5th Cir. 1979).

meat packers.<sup>76</sup> The chain of distribution was rather complicated;<sup>77</sup> plaintiffs did not deal directly with the defendants but claimed that defendants' collusive buying activities caused them to receive far less for their cattle than they would have otherwise received.<sup>78</sup>

In response to defendants' motion for judgment on the pleadings<sup>79</sup> based on *Illinois Brick*, plaintiffs invoked the pre-existing cost-plus exception. Plaintiffs were admittedly not parties to pre-existing, fixed-

76. *Id.*

77. The chart below was utilized by the district court on remand to describe the complex chain of distribution in the beef industry. In re Beef Industry Antitrust Litigation, 1982-2 CCH Trade Cases, ¶ 64,815 (N.D. Tex. 1982).



78. In re Beef Industry Antitrust Litigation, 600 F.2d 1148, 1153 (5th Cir. 1979).

79. FED. R. CIV. P. 12(c)

quantity cost-plus contracts with middlemen, but argued that since they sold to middlemen at prices determined by strict and unvarying application<sup>80</sup> of a formula to the defendants' published conspiratorial "Yellow Sheet" prices, they had established the "functional equivalent" of a cost-plus contract and hence were protected under *Illinois Brick*.<sup>81</sup> The court endorsed the functional equivalent argument and upheld the complaint against the motion for judgment on the pleadings.<sup>82</sup>

At the same time, the court emphasized that it was making only a threshold determination that the allegations in plaintiffs' complaints stated a claim within the "cost-plus" exception.<sup>83</sup> Plaintiffs would still

80. Plaintiffs argued that there was no reason to vary the pricing formula in the short-run. Supply was inelastic. Plaintiffs lacked storage facilities and could not withhold supply as a lever to increase prices. The retailers on the other hand, were well-equipped with freezers and could adjust their buying practices accordingly. In *re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1165 (5th Cir. 1979).

81. *Id.*

82. The Fifth Circuit held:

The complaints sufficiently allege that the impact of the retail chains' price changes upon the pricing decisions of the packers is determined in advance without regard to the interactions of supply and demand. The plaintiffs allege that the packers set the price of live cattle by strictly applying certain formulae to the Yellow Sheet or Safeway wholesale beef price. Under these allegations a plaintiff would be entitled, once he proved what the competitive wholesale price would have been for a given grade of beef in a given region at a given time, and once he established that the packer to whom he sold strictly applied a formula to the Yellow Sheet price for the particular sale, to damages in the amount of the difference between the price he actually received on that sale of fat cattle and the price he would have received absent price-fixing (computed by applying the packer's formula to the constructed competitive wholesale price.) The packer's habitual use of pre-determined formulae would enable measurement of the effect on prices for fat cattle of changes in wholesale prices. The plaintiffs have alleged the functional equivalent of cost-plus contracts.

*Id.*

83. The Fifth Circuit expressed the following *caveat* regarding the very broad functional equivalent standard:

We emphasize that we are not ruling that these plaintiffs are entitled to go to trial. The Supreme Court intended that it be determined early in the litigation whether (or to what extent) a party should be entitled to present a pass-on theory at trial. The defendants will have the opportunity to raise that issue again by summary judgment motion. Given the strictures of *Hanover Shoe* and *Illinois Brick*, the district court may and should demand from the plaintiffs in each case a pretrial demonstration that they have definite and particularized proof that they will need to establish damages.

*Id.* at 1166-67.

This caveat was reiterated by the Fifth Circuit in *In re Plywood Antitrust Litigation*, 655 F.2d 627, 640-41 (5th Cir. 1981).

have the enormous burden of adducing "definite and particularized proof" as to individual transactions that middlemen purchased pursuant to pre-determined formulae.<sup>84</sup> Ultimately, this burden proved to be too much for the plaintiffs to sustain; as noted by the district court on remand, granting defendants' subsequent summary judgment motion:

True the fifth circuit was willing to allow [functional] equivalency, but its language was skeptical and the conditions for its demonstration are exacting. Moreover, its tolerance of the effort was born in a procedural context in which it had to indulge the proffered fantasy of the feeders.<sup>85</sup>

The Fifth Circuit thus sent out conflicting signals in establishing the functional equivalent rule. On the one hand, it discouraged trial courts from dismissing indirect purchaser claims on the pleadings, provided functional equivalence had been alleged. On the other hand, the court of appeals established a level of proof so exacting as to preclude the successful use of the cost-plus exception in virtually every situation except when the indirect purchaser is party to a pre-existing fixed-quantity, cost-plus contract. Thus, the wisdom and utility of the functional equivalent rule are at best dubious. Indeed, on remand in *Beef Industry*, the enormous complexity and utter impossibility of proving passing on even under the lenient functional equivalent standard were amply demonstrated, and the district court entered summary judgment for defendants.<sup>86</sup>

84. *Id.* at 1166-67. Conceding that the "proposed proof is far from simple," the court characterized the problem as "a complexity born of quantity" rather than quality, and noted that the "kinds of proof that will be involved, however, are not new to the courts, and certainly not to antitrust courts." *Id.* at 1166.

85. *In re Beef Industry Antitrust Litigation*, 1982-2 CCH Trade Cases, ¶ 64,815 (N.D. Tex. 1982).

86. The district court upon review of the fully developed record on the passing on issue concluded that the complexity of plaintiff's proof was not merely a quantitative problem but also a complexity born of quality. *Id.* Contrary to plaintiffs' contentions that middlemen inevitably applied a rigid pricing formula, the district court found that a variety of factors influenced packers' pricing decisions, including: (1) packers' individual needs; (2) competition and negotiation for cattle; (3) estimating cattle characteristics; (4) conditions in the cattle market; (5) the by-product market; (6) published price lists; and (7) absorption of price depressions. *Id.*; see *supra* note 77. Thus it could not be said that pricing decisions were "determined in advance without regard to the interactions of supply and demand." *Id.* Moreover, defendants adduced empirical studies which demonstrated that the "Yellow Sheet" did not serve as a precise pricing formula and thus precluded credible proof of an ". . . habitual use of predetermined formula [which] would enable measurement of the effect on prices for fat cattle or changes

## 2. Functional Equivalence and *Illinois Brick*

The Fifth Circuit decision in *Beef Industry* misconceived the thrust of *Illinois Brick* and is erroneous in that: (a) the "functional equivalent" standard is contrary to both the express language and the *ratio decidendi* of *Illinois Brick*; (b) the "functional equivalent" analysis forces the courts to grapple with complicated, if not insoluble, problems of tracing overcharges and apportioning damages between direct and indirect purchasers—the very types of problems that the *Illinois Brick* holding sought to obviate; (c) such standard raises the spectres of multiple liability, duplicative recoveries and inconsistent judgments in treble damages actions; and (d) unfairly requires the parties to spend large sums of money and manpower to prosecute and to defend claims which are at best marginal.

### a. *Intended Narrow Scope of Any Exception to the Rule Barring Proof of Passing On*

Unquestionably, the Supreme Court intended that any exception to the *Illinois Brick* holding be very circumscribed.<sup>87</sup> This intent is evidenced by the fact that (1) the Court identified only two specific situations where market forces would be superseded and complex tracing and apportionment problems would not arise;<sup>88</sup> and (2) the Court categorically rejected efforts to create exceptions for particular types of markets.<sup>89</sup> Specifically, the majority rejected arguments that "cost-based rules of thumb"—strikingly similar to those used by middlemen in *Beef Industry*<sup>90</sup>—effectively supersede market forces and eliminate

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in wholesale prices." *Id.* Finally, it was impossible for plaintiffs to prove that middlemen did not absorb any of the alleged price depressions caused by defendants. *Id.* The court pointed out that existence of separate markets for beef and beef by-products makes it difficult to determine the extent to which middlemen relied on by-product revenues to subsidize absorbed declines in beef. *Id.*

87. In re Plywood Antitrust Litigation, 655 F.2d 627, 639 (5th Cir. 1981); Phillips v. Crown Central Petroleum Corp., 602 F.2d 616, 633, 634 n.4 (4th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980); Zinser v. Continental Grain Co., 660 F.2d 754, 761 (10th Cir. 1981) *cert. denied, sub nom.* Zinser v. Palmby, \_\_\_ U.S. \_\_\_, 5 CCH Trade Cases, ¶ 60,021 (February 22, 1982); Mid-West Paper Products Co. v. Continental Group, Inc., 596 F.2d 573, 578 n.9 (3d Cir. 1979); In re Mid-West Milk Monopolization, 529 F. Supp. 1326, 1337 (W.D. Mo. 1982); Lefrak v. Arabian American Oil Co., 487 F. Supp. 808, 819 (S.D.N.Y. 1980). *But see*, In re Mid-Atlantic Toyota Antitrust Litigation, 516 F. Supp. 1287, 1292 (D. Md. 1981) (exceptions enumerated in *Illinois Brick* not exclusive).

88. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977).

89. *Id.*, at 736, n.13.

90. On remand in the district court, the defendants presented empirical data which established beyond question that a defendant's "Yellow Sheet" price list was not an index of a reasonably precise pricing formula and hence nothing more than

problems of tracing, noting that such rules are not rigidly adhered to and may vary to reflect demand conditions.<sup>91</sup>

Far from confining exceptions to the direct purchaser rule, the Fifth Circuit's open-ended standard expands immeasurably the universe of transactions which may be denominated the "functional equivalent" of a cost-plus contract and hence licenses creative pleading of indirect purchasers' "proffered fantasies."<sup>92</sup> For example, contrary

a "rule of thumb." In re Beef Industry Antitrust Litigation, 1982-2 CCH Trade Cases ¶ 64,815 (N.D. Tex. 1982).

91. *Id.*, at 744. On remand in *Beef Industry*, the district court, in granting defendants' motions for summary judgment following extensive discovery of "pre-existing cost-plus contract" issue, held that middlemen in purchasing from plaintiffs did not employ rigid pricing formulae which superseded market forces but rather utilized mere cost-based rules of thumb which had been eschewed by the *Illinois Brick* holding. In re Beef Industry Antitrust Litigation, 1982-2 CCH Trade Cases, ¶ 64,815 (N.D. Tex. 1982). The district court on remand thus came to the same conclusion as the district court had originally on defendants' motion against the complaint pursuant to FED. R. Civ. P. 12(c).

In light of this fact one cannot help but question the wisdom of the Fifth Circuit in reversing the initial lower court determination in favor of the defendants in the first place. Arguably the Fifth Circuit's ruling can be justified on the grounds that since the motion was directed against the complaint, there was no evidentiary record through which one could delineate arrangements which superseded market forces from arrangements which were merely cost-based rules of thumb. By contrast, in *Illinois Brick*, the appellate courts had been favored with fully developed evidentiary records upon which to base their decisions.

However, this highly technical argument is too narrow a ground to justify the Fifth Circuit holding and serves only to underscore the foundation of sand upon which the functional equivalent standard was erected. The Fifth Circuit could have just as easily affirmed the lower court on authority of *Illinois Brick* in that the transactions in question (1) did not fall within the two narrow exceptions enunciated in *Illinois Brick*; (2) were closely akin to kinds of cost based rules of thumb specifically rejected by that decision; and (3) would involve the courts in precisely the kinds of intricate and complex analysis of price/output decisions which the Supreme Court had held lower courts should not undertake and were ill-equipped to handle. Had the Fifth Circuit merely affirmed on the basis of *Illinois Brick* instead of encouraging plaintiffs to embark on a mission that was doomed to fail from the start, the parties and the district court would have been relieved from an incredible and altogether unnecessary burden of establishing or rebutting "functional equivalence," and other courts would have been spared from a most confusing and unsound precedent.

92. In re Beef Industry Antitrust Litigation, 1982-2 CCH Trade Cases, ¶ 64,815 (N.D. Tex. 1982). There is no limit to the types of transactions that creative counsel may seek to fit within the rubric of functional equivalent.

Perhaps the most far-fetched claim of functional equivalence was put forth by the Antitrust Division in *United States v. Pfizer, Inc.*, 1980-81 CCH Trade Cases ¶ 63,801 (E.D. Pa. 1978), the civil phase of the government's action in *In re Antibiotics Antitrust Actions*. The government, having failed to prove a price-fixing conspiracy in a prior criminal action, *United States v. Charles Pfizer & Co.*, 281 F. Supp. 837



to *Illinois Brick*,<sup>93</sup> the functional equivalent standard does not require that any "cost-plus" contract between the middleman and the indirect purchaser be fixed in quantity.<sup>94</sup> Indeed, the Fifth Circuit formulation

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(S.D.N.Y. 1968), *rev'd*, 426 F.2d 32 (2d Cir. 1970), *aff'd by equally divided Court*, 404 U.S. 548 (1972), *on remand*, 367 F. Supp. 91 (S.D.N.Y. 1973), brought a civil suit for damages pursuant to § 4A of the Clayton Act, 15 U.S.C. § 15a, alleging a conspiracy to exclude competition in the production and sale of tetracycline and analogue broad spectrum antibiotics in violation of § 1 of the Sherman Act, 15 U.S.C. § 1.

The government claimed overcharges as a direct purchaser and also as an indirect "purchaser" through various federal programs, including Medicaid and Medicare. It was the latter claims that fell within the *Illinois Brick* bar. The government was not even in the chain of distribution under either Medicare or Medicaid; rather it acted as a reimbursor of in-patient health care providers under Medicare, and a reimbursor of reimbursors (the states) to out-patient health care providers under Medicaid. Despite the fact the government did not buy any of the drugs in question under these programs, the Justice Department nevertheless urged that since reimbursement under both Medicare and Medicaid was governed by a series of federal and state regulations, the United States had established the functional equivalent of a cost-plus contract.

The government's "functional equivalent" argument conveniently ignored the following points, any one of which would be fatal: (1) the government was not a purchaser, but only a reimbursor of health care providers; (2) there was no contract pre-existing or otherwise between the government and any purchaser in the chain of distribution; (3) *a fortiori*, there was no cost-plus contract; (4) even if a regulation could be viewed as a pre-existing cost-plus contract, the Medicaid regulations varied widely from state to state, and thus there was no mechanism to "make it easy" to determine the level of any overcharge; and (5) the government had no proof whatsoever of how much was expended under Medicare and Medicaid for tetracycline and related drugs.

Notwithstanding the numerous fatal shortcomings in the government's theory, the trial court denied defendants' motion for summary judgment on the Medicare and Medicaid claims. However, all government claims were eventually dismissed. *United States v. Pfizer, Inc.*, 1980-81 CCH Trade Cases ¶ 63,801 (E.D. Pa. 1980), *aff'd*, 1982-1 CCH Trade Cases, ¶ 64,578 (3d Cir. 1982).

93. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977); *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573, 580 (3d Cir. 1979); *Lefrak v. Arabian American Oil Co.*, 487 F. Supp. 808, 819 (S.D.N.Y. 1980).

94. *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1163-67 (5th Cir. 1979). On remand, the district court pointed out this anomaly and acknowledged some difficulty in "squaring functional equivalence with the rulings of the Supreme Court." *In re Beef Industry Antitrust Litigation*, 1982-2 CCH Trade Cases, ¶ 64,815 (N.D. Tex. 1982). In line with *Illinois Brick* and contrary to the Fifth Circuit, the district court found that to be within the exception to the *Illinois Brick* rule, a pre-existing cost-plus contract must be fixed in quantity:

A cost-plus contract has three elements: (1) a preexisting contract, (2) specifying a fixed quantity of products to be sold, (3) with the price per unit to be determined by an agreed-upon markup to the seller's own cost. Recent Development, *A Door in the Illinois Brick Wall—A Functional Equivalent to the Cost-Plus Contract Exception*. 33 VAND. L. REV. 481 (1980). When parties agree to a cost-plus contract, the indirect purchaser's price can be easily determined arithmetically once the middleman's costs are known. The middleman is not at risk and neither profits nor loses when

is so broad that the cost-plus exception threatens to swallow the direct purchaser rule and become the rule itself.<sup>96</sup>

b. *The "Functional Equivalent" Standard Will Re-Introduce the Very Problems that Illinois Brick Was Designed to Remedy*

The Court in *Illinois Brick* clearly envisioned that the passing on theory may be used, offensively or defensively, only when an arrangement circumvents complex market transactions which makes it "easy to prove that the [direct purchaser] has not been damaged," and underscored the need for courts to avoid becoming enmeshed in sorting out price-output decisions.<sup>96</sup> The functional equivalent test does not in *every*—and indeed may not in *any*—case permit circumvention of the market mechanism. The district court decision on remand in *Beef Industry* enumerates the types of price-output decisions in which the trial courts will routinely become embroiled under the functional equivalent standard; such issues include, *inter alia*: (1) individual purchaser's needs and adequacy of inventory; (2) fixed costs; (3) competitive bidding and negotiation process; (4) quality of the product to be purchased; (5) market conditions; (6) opportunity costs; (7) adherence to cost-based pricing formulae; and (8) absorption of price increments by middlemen.<sup>97</sup> These varied complex factors affecting pricing create the very type of uncertainty precluded by *Illinois Brick*.<sup>98</sup> Since such issues will inevitably arise in chain of distribution cases, the functional equivalent standard will ineluctably clash with *Illinois Brick* and hence serves no legitimate purpose.

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the cost to him changes. Rather, he increases or decreases the charge to his customer without ever absorbing a loss or gaining a profit.

Because the price is fully negotiated in advance of any transactions under a cost-plus contract, (i) the middleman need not make any judgments about supply and demand or other changeable conditions in the market; (ii) the middleman's price does not react to the pressures of competition; and (iii) the price does not change as the result of day-to-day negotiation with his customer. Finally, in a cost-plus contract, the relationship between the selling price and the costs to which it is tied will always remain fixed.

95. *Zinser v. Continental Grain Co.*, 660 F.2d 754, 761 (10th Cir. 1981), *cert. denied, sub. nom. Zinser v. Palmby*, \_\_\_ U.S. \_\_\_, 5 CCH Trade Cases ¶ 60,021 (February 22, 1982); *see, In re Beef Antitrust Litigation*, 1982-2 CCH Trade Cases ¶ 64,815 (N.D. Tex. 1982) ("Presumably [functional] equivalency must be demonstrated without resort to the kinds of proof and simplifying assumptions rejected by the very confinement of the exception to a cost-plus type contract.")

96. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977).

97. *In re Beef Industry Antitrust Litigation*, 1982-2 CCH Trade Cases ¶ 64,815 (N.D. Tex. 1982).

98. *Id.*

Moreover, as noted above, the *Beef Industry* holding did not require that the cost-plus contract specify fixed quantities to be purchased. Where the supposed "cost-plus" contract does not specify a fixed quantity of goods, damages cannot be determined "in advance without reference to the laws of supply and demand."<sup>99</sup> The direct purchaser may well suffer antitrust injury through loss of sales to its customers due to increased prices and seek damages for its losses.<sup>100</sup> This creates a situation whereby damages have to be apportioned between plaintiffs at two different points in the chain of distribution (the direct purchaser and the direct purchaser's customer).<sup>101</sup> Such apportionment among all potential plaintiffs which might have absorbed part of the overcharges cannot be accomplished without being embroiled in "the uncertainties and difficulties of analyzing price and output decisions"<sup>102</sup> which would "add whole new dimensions of complexity to treble damages suits and seriously undermine their effectiveness."<sup>103</sup> "Functional equivalence" is not a talisman which makes the enormous practical difficulties in unravelling indirect purchaser claims disappear.

In ruling that the functional equivalent of a pre-existing cost-plus contract need not specify a fixed quantity, the Fifth Circuit missed the thrust of the *Illinois Brick* holding.<sup>104</sup> Notwithstanding the clear language of *Illinois Brick*, the Fifth Circuit stated:

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99. *Id.*

100. *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573, 580 (3d Cir. 1979); *Lefrak v. Arabian American Oil Co.*, 487 F. Supp. 808, 819 (S.D.N.Y. 1980).

101. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745-46 (1977).

102. *Id.* at 731-32.

103. *Id.* at 737.

104. The Court in *Illinois Brick* sought to harmonize the two primary and often conflicting goals of antitrust enforcement—deterrence of future violations and compensation of victims—by holding that the private antitrust enforcement mechanism could be best effectuated by allowing only those plaintiffs who had dealt directly with the price-fixers to sue for treble damages. *See, In re Beef Industry Antitrust Litigation*, 1982-2 CCH Trade Cases, ¶ 64,815 (N.D. Tex. 1982). Finding that to permit indirect purchasers to sue would complicate antitrust actions and hence hinder rather than further the treble damages remedy, the Court thus struck the balance in favor of deterrence, conceding that some indirect purchaser-plaintiffs who were actually injured would by its decision be denied a claim for relief.

On the other hand, the Fifth Circuit in *Beef Industry* seemed to stress compensation over deterrence and provided victims of a monopsonistic price-fixing scheme with every opportunity to go to trial, even through proof at trial would entail the very kind of complexity the prior holding in *Illinois Brick* found unacceptable. As the district court on remand pointed out, "squaring functional equivalence with the rulings of the Supreme Court gives [the court] pause." *In re Beef Industry Antitrust Litigation*, 1982-2 CCH Trade Cases, ¶ 64,815 (N.D. Tex. 1982). The Fifth Circuit's functional equivalent standard cannot be easily reconciled with *Hanover Shoe* and *Illinois Brick*.

Functional equivalence is not lost simply because the proponent of passing-on theory cannot demonstrate that the middleman suffered no loss in volume as the result of raising the price to his customers. *In the cost-plus contract itself, the middleman is likely to have suffered a loss of volume and hence profits as a result of the overcharge.* His higher selling price will likely have caused potential customers to forego his product. See Note, 63 CORNELL L. REV. 309, 329 n.87. The middleman's loss of volume and the indirect purchaser's absorption of the overcharge are wholly separable items of damage.<sup>105</sup>

The court's statement that a middleman is likely to lose volume as a result of the overcharge even in the cost-plus situation is simply not true where the cost-plus contract is pre-existing and requires fixed quantities to be purchased.<sup>106</sup> In that case, the indirect purchaser is locked-in to a given quantity and the middleman cannot suffer any loss in volume. Even though the middleman's loss of volume and the indirect purchaser's absorption of any overcharge are theoretically "wholly separable items of damage,"<sup>107</sup> in situations where the cost-plus contract does not fix quantity it was the practical problem of tracing and apportioning the overcharges which led the Court in *Illinois Brick* to rule as it ruled.<sup>108</sup>

The functional equivalent standard thus puts the courts right

105. In re Beef Industry Antitrust Litigation, 600 F.2d 1148, 1164 (5th Cir. 1979) (emphasis added).

106. Not only did the Fifth Circuit err in interpreting *Illinois Brick* on the need to have a *fixed-quantity* pre-existing cost-plus contract, but it compounded the error in a lengthy explanatory footnote. The court found that *Illinois Brick* overruled its prior holding, *Yoder Bros., Inc. v. California-Florida Plant Corp.*, 537 F.2d 1347 (5th Cir. 1976), *cert. denied.*, 429 U.S. 1094 (1977), which held that the passing on defense is unavailable absent a showing that the direct purchaser suffered no harm through lost sales volume, even if the direct purchaser in fact passed on 100% of the overcharge. In re Beef Industry Antitrust Litigation, 600 F.2d 1148, 1164 n.20 (5th Cir. 1979). The Fifth Circuit expressed incredulity at the logical inference to be drawn from the *Yoder* holding, *i.e.*, that if a defendant is barred from using passing on defensively because there is no showing of a pre-existing fixed-quantity cost-plus contract, then the indirect purchaser-plaintiff in the same case is barred from asserting passing on offensively. *Id.* This symmetry is at the heart of the *Illinois Brick* holding. The court further observed that *Yoder* effectively eliminated the passing on defense, except perhaps in the "very narrow case of the pre-existing, fixed-quantity cost-plus contract." *Id.* This proposition, of course, is the very essence of the *Hanover Shoe* and *Illinois Brick* holdings.

107. In re Beef Industry Antitrust Litigation, 600 F.2d 1148, 1164 (5th Cir. 1979).

108. See *supra* notes 35-37.

back into the thicket of unravelling complex market transactions and can hardly be said to make it "easy to prove" that the direct purchasers have not been damaged. The Fifth Circuit curiously cited no cases to support its extension of the pre-existing cost-plus contract exception to cover functional equivalents of such arrangements. Rather, it relied primarily on the rather questionable analyses of "commentators."<sup>109</sup>

c. *Multiple Liability, Duplicative Recoveries and Inconsistent Judgments*

In resurrecting the tracing and apportionment issues, the holding in *Beef Industry* is pregnant with potential for multiple liability, duplicative recoveries and inconsistent judgments. Once a claim for relief is placed in the hands of several parties in the same chain of distribution, the defendant may be forced to pay, two or more times, the full amount of damages caused by its alleged wrongdoing trebled and thus face "ruinous liability," far in excess of any harm inflicted by any illegal acts.<sup>110</sup> At the same time, it is possible that different courts, on the same set of facts, may reach different results in suits by direct purchasers on the one hand and by indirect purchasers on the other hand.<sup>111</sup> For the reasons set forth in *Illinois Brick*, the risk of inconsistent judgments and the resulting proliferation of confusing judicial precedents is unacceptable.

d. *Promotion of Remote Claims*

Perhaps the most mischievous aspect of the *Beef Industry* decision is that it licenses prosecution of the very type of marginal claims, far removed from the wrongdoing, which the Supreme Court held did not give rise to "injury" within the meaning of section 4 of the Clayton Act.<sup>112</sup> Indirect purchasers may be able to resurrect claims vitiated by *Illinois Brick* by pleading "functional equivalence" together with a few rudimentary allegations of wrongdoing.<sup>113</sup> Because

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109. The court specifically cited two law review pieces, both student-prepared notes, neither of which can be deemed authoritative in light of the contrary views expressed by the Supreme Court in *Illinois Brick*, which both notes purport to analyze.

110. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 730-31, 740, 745 (1977).

111. *Id.* at 730-31.

112. *See, Illinois Brick Co. v. Illinois*, 431 U.S. 720, 728, n.7.

113. The Fifth Circuit held:

The complaints sufficiently allege that the impact of the retail chains' price changes upon the pricing decisions of the packers is determined in advance without regard to the interactions of supply and demand. The plaintiffs allege that the packers set the price of live cattle by strictly

the functional equivalent standard makes it nearly impossible to dismiss an indirect purchaser's complaint on its face, defendants are thus forced to incur substantial legal fees and suffer diversion in manpower during prolonged discovery on the complicated "functional equivalent" issue. As legal expenses mount up, it may become more economical to settle such marginal claims rather than pay the cost of defending them.<sup>114</sup> While it is likely that many indirect purchasers would have suffered some real injury, there is also a great danger that under the "functional equivalent" theory, defendants will become hostage of remote but aggressive plaintiffs with claims of dubious merit. At the same time, the functional equivalent rule holds out false

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applying certain formulae to the Yellow Sheet or Safeway wholesale beef price. Under these allegations a plaintiff would be entitled, once he proved what the competitive wholesale price would have been for a given grade of beef in a given region at a given time, and once he established that the packer to whom he sold strictly applied a formula to the Yellow Sheet price for the particular sale, to damages in the amount of the difference between the price he actually received on that sale of fat cattle and the price he would have received absent price-fixing (computed by applying the packer's formula to the constructed competitive wholesale price). The packer's habitual use of predetermined formulae would enable measurement of the effect on prices for fat cattle of changes in wholesale prices.

The plaintiffs have alleged the functional equivalent of cost-plus contracts. In *re* Beef Industry Antitrust Litigation, 600 F.2d 1148, 1165 (5th Cir. 1979).

The elements of proof to establish the "functional equivalent of a pre-existing cost-plus contract as enunciated by the Fifth Circuit are significant for what they do *not* require. First, the court of appeals makes no mention of the need for a formal, pre-existing contractual arrangement. *But see*, *Eastern Airlines, Inc. v. Atlantic Richfield Co.*, 609 F.2d 497, 498 (Temp. Emer. Ct. App. 1979) ("Implicit in the *In re Beef Industry* holding and still the required minimum under *Hanover Shoe* is the necessity of a preexisting cost-plus contract or its functional equivalent"); *In re Plywood Antitrust Litigation*, 655 F.2d 627, 647 (5th Cir. 1981) ("Appellants here never attempted to conform their allegations to the requirements of *Hanover Shoe-Illinois Brick*, even in the face of defendant's motion for summary judgment. Despite deposition testimony taken from dozens of witnesses with both direct and indirect buying experience, appellants do not cite a single example of functional equivalence of a *pre-existing* cost-plus contract. . . .").

Secondly, under the Fifth Circuit holding in *Beef Industry*, there is no requirement that the quantity to be purchased be set forth in advance. *Id.* at 1164, n.20. *But see*, *In re Beef Industry Antitrust Litigation*, 1982-2 CCH Trade Cases, ¶ 64,815,n.7 (N.D. Tex. 1982) (to be within the pre-existing cost-plus contract exception, the arrangement must fix in advance the quantities to be purchased). *See supra* note 94.

114. Indirect purchasers have been permitted to share in settlement funds. *E.g.*, *In re Chicken Antitrust Litigation American Poultry*, 669 F.2d 228, 238 (9th Cir. 1982) (trial court did not abuse its discretion in allowing indirect purchaser-plaintiffs to share in the settlement fund where there was evidence that such plaintiffs might be within the "pre-existing cost-plus contract exception" and the "ownership or control exception"); *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1086-87 (2d Cir. 1971).

hopes for indirect purchaser-plaintiffs, for while such plaintiffs can escape motions directed against the complaint with relative ease, the exacting standard of proof set by the Fifth Circuit is virtually impossible to meet.<sup>115</sup> Indirect purchasing plaintiffs are therefore likely to find themselves out of court eventually even under the functional equivalent doctrine, but only after futilely spending large sums of money to prosecute their indirect claims.

In sum, *Beef Industry* was wrongly decided. The Fifth Circuit has re-examined and redetermined issues on which the Supreme Court reached opposite conclusions and created a dangerously broad exception which far exceeds the narrow scope of the pre-existing cost-plus contract exception enunciated in *Illinois Brick*. The *Illinois Brick* holding may well be considered harsh in certain individual cases, but its fundamental aims—to encourage aggressive enforcement of antitrust laws by parties in the best position to sue (first purchasers) and to avoid the needless complexity which is inherent in suits where plaintiffs include direct and indirect purchasers—will be continually frustrated unless lower courts strictly adhere to its clear-cut holding.

#### B. The "Ownership or Control" Exception Post-*Illinois Brick*

The cases construing the ownership or control exception are sparse. The handful of lower courts which have had occasion to deal with the ownership or control issue have, with perhaps one notable exception,<sup>116</sup> construed this exception narrowly, evidently mindful of

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115. See *supra* note 113.

116. The apparent exception is the somewhat bizarre holding in *Royal Printing, Co. v. Kimberly-Clark Corp.*, 621 F.2d 323 (9th Cir. 1980), wherein the Ninth Circuit turned the "ownership or control" exception sideways, if not on its head.

Plaintiffs in *Royal Printing* allegedly brought price-fixed paper from wholesalers who had in turn purchased from the defendants, but admittedly did not buy directly from any of the defendant-manufacturers. Plaintiffs claimed to have bought paper from the wholesaling division of defendant Crown-Zellerbach but conceded that none of the products so purchased was manufactured by Crown-Zellerbach; rather such products were manufactured by other co-conspirator defendants. In addition, plaintiffs bought paper from Butler Paper Co., a subsidiary of defendant Great Northern Nekooso. Again, the plaintiffs conceded that the paper purchased from Butler was not a product of Great Northern Nekooso, but was a product of other co-conspiring defendants.

The court, acknowledging that the "ownership or control" exception articulated in *Illinois Brick* did not apply, nevertheless held that "*Illinois Brick* does not bar an indirect purchaser's suit where the direct purchaser is a division or subsidiary of a co-conspirator." 621 F.2d at 326. Building on the ownership or control exception authorized by *Illinois Brick*, the court created a hybrid exception which creates the pitfalls the *Illinois Brick* decision sought to avoid.

Those pitfalls are avoided under properly invoked ownership or control exceptions.

*Illinois Brick's* emphasis upon the limited scope of exemptions to the indirect purchaser rule.<sup>117</sup> There is no definitive "test" for determining ownership or control; but, from the Supreme Court's use of the disjunctive, it appears that a party may bring itself within the exception if either ownership or control can be proven.<sup>118</sup>

The question of ownership can be determined in a straightforward fashion through discovery, either by interrogatories or depositions. Ownership clearly contemplates an equity interest, but how extensive must the equity interest be to constitute "ownership?" Clearly, holding 100% of the stock of a corporation unquestionably qualifies as ownership; holding a majority of shares probably does;<sup>119</sup> holding enough shares to elect a majority of the board of directors may qualify as ownership;<sup>120</sup> holding one or two per cent of the shares probably would not be considered ownership.

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As previously discussed, the rationale for that exception is that where the price-fixing seller owns or controls the first purchaser or the indirect purchaser owns or controls the first seller, market forces are superseded and complex problems of tracing and price-output adjustments do not arise. In other words, the transaction between the price-fixing seller and the controlled first purchaser is not really a sale.

The transactions upon which the plaintiffs in *Royal Printing* were permitted to sue were sales, not from manufacturer to controlled first purchaser to plaintiff, but rather from manufacturer to wholesaler (division or subsidiary of co-conspirator) to plaintiffs. In the former case, one may fairly assume that no bona fide sale took place; but in the latter case—where co-conspirators are dealing *inter se*—that assumption does not hold up, since there is no reason to assume that conspirators will not deal with one another at arms length. Indeed, the court so conceded, stating that "the wholesalers' pricing decisions are determined by market forces; therefore, footnote 16 [the ownership or control exception] is not applicable. 621 F.2d at 326, n.4.

Consequently, when conspirator A deals with the subsidiary of conspirator B, which in turn deals with the plaintiff, the very same problems identified in *Illinois Brick*—tracing and price-output decisions—arise in plaintiff's suit for alleged overcharges from price-fixing. The very type of action permitted by the court in *Royal Printing* is precisely the type of proceeding *Illinois Brick* refused to sanction. The holding is ill-conceived, poorly reasoned and will serve only to divert the talents of creative plaintiffs' lawyers into futile assaults on the *Illinois Brick* citadel.

117. *E.g.*, Jewish Hospital Ass'n v. Stewart Mechanical Enterprises, Inc., 628 F.2d 971 (6th Cir. 1980), *cert. denied*, 450 U.S. 966, (1981); In re Mid-West Paper Products Co. v. Continental Group, Inc., 596 F.2d 573, 589 (3d Cir. 1979); Technical Learning Cooperative v. DBAG, 1980-81 CCH Trade Cases, ¶ 63,612 (D. Md. 1980).

118. See, Note, *Scaling the Illinois Brick Wall: The Future of Indirect Purchasers in Antitrust Litigation*, 63 CORNELL L. REV. 309, 328 n.83.

119. It is likely that owning a majority would constitute "control," even if it did not constitute ownership.

120. Voting control of a corporation refers to the power to elect a majority of the Board of Directors. Such control of course may be accomplished even if one owns substantially less than a majority of the voting shares. The more widely dispersed the ownership of voting shares, the less one needs to exert *de facto* control of the corporation.



Establishing "control" is another matter, for one company may control another in ways other than by stock ownership.<sup>121</sup> Thus, when alleging "control" as opposed to "ownership" the plaintiff has more leeway as to the type of proof that might be developed. At the same time, the courts must be wary of attempts by the parties to transform resolution of such a threshold issue into a minitrial involving "massive evidence and complicated theories" of the very kind *Illinois Brick* was determined to avoid.<sup>122</sup>

Several barebones tests governing the application of the ownership or control exception have been articulated by the lower courts.<sup>123</sup> While the criteria vary slightly in each of these cases, it is clear that the inquiry into the ownership or control issue is essentially factual in nature which must be explored on discovery, preferably at the early stages in the proceedings so that the plaintiffs' credentials are clearly resolved long prior to trial.

Whatever legal test is followed, the courts must be careful to avoid applying the "ownership or control" exception in a manner which creates a serious risk of multiple liability to the defendants. As previously discussed, the "ownership or control" exception may apply in two distinct situations: (1) where the first purchaser is owned or controlled by the defendant; and (2) where the first purchaser is owned or controlled by the indirect purchaser.<sup>124</sup> In the former case, it is

121. A company may exert control over another company by virtue of its position as a dominant creditor. Control may also be exercised by virtue of a superior economic and bargaining power. *See, In re Petroleum Products Antitrust Litigation*, 497 F. Supp. 218, 227 (C.D. Cal. 1980).

122. *See, Illinois Brick Co. v. Illinois*, 431 U.S. 720, 742 (1977) quoting *Hanover Shoe Corp. v. United Shoe Machinery Co.*, 392 U.S. 481, 493 (1968).

123. *Jewish Hospital Ass'n. v. Stewart Mechanical Enterprises, Inc.*, 628 F.2d 971, 977 (6th Cir. 1980), *cert. denied*, 450 U.S. 966 (1981) ("... the 'control' exception is limited to relationships involving such functional economic or other unity between the direct purchaser and either the defendant or the indirect purchaser that there effectively has been only one sale."); *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573, 589 (3d Cir. 1979) ("... when the parent dominates and controls the subsidiary to such an extent that the subsidiary is deemed an agent of the parent."); *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1162 (5th Cir. 1979) (Control is established "either through acquisition of stock or indirectly through various financial arrangements, including credit," citing *In re Western Liquid Asphalt Cases*, 487 F.2d 191, 195 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974); *In re Petroleum Products Antitrust Litigation*, 497 F. Supp. 218, 227 (C.D. Cal. 1980) ("The question of how much control is required to meet the exception cannot be decided until a factual record is developed. The degree of ownership, profit taking, or ability to set prices will be important considerations in determining whether the intermediate seller is 'controlled.'").

124. *See supra* text accompanying notes 43-56.

possible that the controlled first purchaser might bring suit against the price-fixing seller, but highly unlikely. In the latter case, the possibility of a suit by the first purchaser—not owned or controlled by the seller but rather by the ultimate purchaser—is much more realistic. To avoid the double recovery argument, the plaintiff could simply make the first purchaser (which it owns or controls) a co-plaintiff, enabling the courts to resolve all disputes in one action.<sup>125</sup>

In sum, the law has been slow to develop on the “ownership or control” exception. The key question is whether the middleman is so dominated that one can say only one transaction has taken place and passing on is therefore not a concern. Of course, situations where the control argument can be raised are much less frequent than situations where one might claim a cost-plus contract or its functional equivalent. The primary battleground in the passing on sphere has been and remains in the pre-existing cost-plus contract sphere.

### C. *The So-Called “Co-Conspirator” Exception to the Rule of Illinois Brick*

Several lower courts have held that in addition to the two exceptions explicitly identified in *Illinois Brick*, a third implicit exception exists where the defendant seller and first purchaser have conspired to fix the price of goods sold to the first purchaser's customers.<sup>126</sup> The analyses of this purported exception vary considerably depending on whether or not the alleged co-conspirator-first purchaser is named as a defendant by the plaintiff-indirect purchaser.

#### 1. Middleman Named as a Co-Conspirator And Defendant

Where the plaintiff-indirect purchaser is named as a co-conspiring defendant, the concerns of *Illinois Brick* are not implicated, for in

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125. Alternatively, the court might force a recalcitrant plaintiff-indirect purchaser to join its seller (the direct purchaser) by granting a defendant's motion to dismiss unless plaintiff joins its seller within a specified period of time. If the seller declines to sue on its own and is named as a party-defendant by plaintiff, the court may realign the parties pursuant to FED. R. CIV. P. 19 to reflect their true interests.

126. See, *Jewish Hospital Ass'n. v. Stewart Mechanical Enterprises, Inc.*, 628 F.2d 971 (6th Cir. 1980), cert. denied, 450 U.S. 966 (1981); *Fontana Aviation Inc. v. Cessna Aircraft Co.*, 617 F.2d 478 (7th Cir. 1980); *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1163 (5th Cir. 1979); *In re Mid-Atlantic Toyota Antitrust Litigation*, 516 F. Supp. 1287 (D. Md. 1981); *Reiter v. Sonotone Corp.*, 486 F. Supp. 115 (D. Minn. 1980); *Technical Learning Collective, Inc. v. Daimler-Benz Atkiesgesellschaft*, 1980-81, CCH Trade Cases ¶ 63,612 (D. Md. 1980); *Dart Drug Co., v. Corning Glass Works*, 480 F. Supp. 1091 (D. Md. 1979); see also, *Chatham Brass Co. v. Honeywell, Inc.*, 512 F. Supp. 108, 116 (S.D.N.Y. 1981).

such a case, the problem of passing on is not raised.<sup>127</sup> Rather, the situation presented is a classic vertical price-fixing conspiracy, resale price maintenance.<sup>128</sup> Thus, if the first purchaser is a partner in crime with the price-fixing original seller, there should be no concern about "passing on." We need not trace the overcharge through the chain of distribution; the illegal price in such a case is not that charged by the original seller to the first purchaser but rather the price jointly imposed by the conspiring seller and first purchaser on the latter's customers.<sup>129</sup> Unlike the classic passing on case as exemplified by *Illinois Brick*, the middleman is a conspirator, not merely an intermediate functionary able to pass along any overcharges because of prevailing economic conditions or market power.

However, the courts must be alert to distinguish those situations in which there is a true basis for alleging a vertical conspiracy from those in which vertical conspiracy is alleged merely to avoid the limitations of *Illinois Brick*.<sup>130</sup> Obviously, there is great potential for abuse in a rule which says that an indirect purchaser may sue if it names its seller and its seller's seller as defendants-co-conspirators but may not sue if no conspiracy is alleged.<sup>131</sup> Early, focused discovery efforts and appropriate summary judgment or partial summary judgment motions will serve to delineate the bona fide vertical conspiracy claims from those designed to evade *Illinois Brick* on indirect purchaser suits.<sup>132</sup>

## 2. Middleman Named as a Co-Conspirator But Not as a Defendant

In the situation where a vertical conspiracy between the original seller and the middleman is alleged but the middleman is not joined as a defendant, the lower courts are split as to whether an indirect purchaser should be permitted to proceed on the vertical conspiracy

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127. *In re Mid-Atlantic Toyota Antitrust Litigation*, 516 F. Supp. 1287, 1295 (D. Md. 1981).

128. *Id.* at n.18.

129. *Id.* at 1295; see *Chatham Brass Co. v. Honeywell, Inc.*, 512 F. Supp. 108, 116 (S.D.N.Y. 1981).

130. See *In Re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1163 (5th Cir. 1979).

131. Such a rule would encourage the indirect purchaser-plaintiff to allege vertical conspiracies even where none existed, in order to avoid dismissal on *Illinois Brick* grounds.

132. See *In Re Beef Industry Antitrust Litigation*, 600 F.2d 1149, 1166 (5th Cir. 1979).

theory.<sup>133</sup> Unfortunately, there has been a dearth of hard legal analysis of this issue, particularly in cases where the courts have recognized the exception.

The argument for requiring the co-conspirator to be named as a defendant in order to invoke the co-conspirator exception parallels the argument in opposition to the umbrella theory wherein the plaintiff seeks to recover overcharges from a price fixer based on purchases from non-defendants.<sup>134</sup> It is arguable that in such a situation, the defendant faces multiple liability for the same alleged wrongdoing; thus, the defendant may be sued by the indirect purchaser-plaintiff and subsequently by the unnamed defendant and be forced to pay treble damages in amounts far in excess of any ill-gotten gains.<sup>135</sup> This situation is quite different from the situation where the alleged co-conspirators are named as defendants and the rights of all those potentially liable to the defendants can be adjudicated in one proceeding.<sup>136</sup>

The rejoinder to this argument is that the claim of potential multiple liability is more illusory than real in that (1) the co-conspiring middleman would be unlikely to sue his seller and (2) the co-conspiring middleman would be barred from suing the defendant seller under the *in pari delicto* doctrine set forth in *Perma-Life Mufflers, Inc. v. International Parts, Corp.*<sup>137</sup>

133. *Technical Learning Collective, Inc. v. Daimler-Benz Atkiesgesellschaft*, 1980-81 CCH Trade Cases, ¶ 63,612 (D. Md. 1980).

134. See *infra* text accompanying notes 188-220.

135. See *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1163 (5th Cir. 1979); *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573, 586 (3d Cir. 1979); *Technical Learning Collective, Inc. v. Daimler-Benz Atkiesgesellschaft*, 1980-81 CCH Trade Cases, ¶ 63,612 (D. Md. 1980); *Dart Drug Co. v. Corning Glass Works*, 480 F. Supp. 1091 (D. Md. 1979).

136. *Technical Learning Collective, Inc. v. Daimler-Benz Atkiesgesellschaft*, 1980-81 CCH Trade Cases, ¶ 63,612 (D. Md. 1980).

137. 392 U.S. 134 (1968). In *Perma-Life*, the Supreme Court held that the *in pari delicto* defense could not be invoked where the plaintiff co-conspirator had been compelled by the defendant to participate in the alleged conspiracy. The Court did not rule on the question of whether the plaintiff might be barred where there is "truly complete involvement and participation in a monopolistic scheme . . . wholly apart from the idea of *in pari delicto*." *Id.* at 140; ABA ANTITRUST LAW DEVELOPMENTS at 297-98.

However, as subsequent lower court cases have pointed out, at least five members of the Court were of the view that the defense would be available under such circumstances. *Abraham Construction Corp. v. Texas Industries, Inc.*, 604 F.2d 897, 902 (5th Cir. 1979); *In re Mid-Atlantic Toyota Antitrust Litigation*, 516 F. Supp. 1287, 1295 (D. Md. 1981).

The court in *In re Mid-Atlantic Toyota Antitrust Litigation*<sup>138</sup> resolved the argument by developing the following analytical framework for cases where the vertical conspiracy is alleged between the defendant seller and an unnamed allegedly co-conspiring middleman:<sup>139</sup>

a. Review whether permitting an indirect purchaser-plaintiff to sue would run afoul of *Illinois Brick* by (1) creating problems of tracing or (2) create a risk of multiple liability for defendants. As previously noted,<sup>140</sup> there is generally no tracing problem but there may be a problem of multiple liability.

b. Review the co-conspirator's alleged participation in the conspiracy. If the *in pari delicto* defense would be applicable, the suit may proceed without naming the alleged co-conspirator as defendant, since there could be no multiple liability. If the *in pari delicto* defense would not pertain, then the suit on a "co-conspirator exception" theory would be barred, unless the alleged co-conspirator were named as a defendant.

Hence, where the indirect purchaser-plaintiff alleges that the unnamed co-conspirator-direct-purchaser was a substantially equal partner in the wrongdoing with the initial seller and thus subject to the *in pari delicto* defense, the complaint should withstand a motion to dismiss.<sup>141</sup> Where plaintiff claims that there was a vertical price-fixing conspiracy, the better practice would be to name any and all alleged co-conspirators as co-defendants and thereby obviate any argument that the defendant is being exposed to possible multiple liability. No such claim can be raised, provided all possible first-purchasers to whom defendant might arguably be liable are joined as defendants-co-conspirators.

To summarize, where the first purchaser and the antitrust violator are participants in a vertical price-fixing conspiracy, the key issue raised in *Illinois Brick*—passing on—is not present, since the conspiratorial price is not that charged by the seller to the first purchaser but rather the price jointly imposed on the indirect-

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138. 516 F. Supp. 1287 (D. Md. 1981).

139. *Id.*

140. See *supra* text accompanying notes 127-37.

141. The issue of the direct purchaser's participation in any alleged conspiracy can be explored in the early stages of discovery. If the price-fixing initial seller can adduce proof during discovery that the direct purchaser was not a participant in the claimed conspiracy, the court should entertain a motion for summary judgment dismissing the indirect purchaser claims as barred under *Illinois Brick*.

purchaser plaintiff by the co-conspiring seller and first purchaser. Where all alleged co-conspirators are named in the complaint, neither of the primary concerns of *Illinois Brick*—tracing and potential multiple liability—are encountered. Where less than all co-conspirators are named as defendants, it is arguable that the defendant may face multiple liability. Defendant would not face such liability where the unnamed conspirator is subject to the *in pari delicto* defense as against that defendant; *i.e.*, where the unnamed conspirator is a true member of the conspiracy. However, the multiple liability argument can be eliminated if the indirect purchaser-plaintiff names all the alleged co-conspirators as defendants.

#### V. EXTENSIONS OF THE *Illinois Brick* HOLDING BEYOND THE "PASSING ON" ISSUE: STANDING

The rule of *Illinois Brick* barring plaintiff's proof of passing on is one of three judicially created antitrust doctrines designed to limit the class of plaintiffs who might bring treble damages actions;<sup>142</sup> the others are "antitrust injury"<sup>143</sup> and "standing."<sup>144</sup> Each of these doctrines addresses different aspects of the problem of deciding when a person is "injured in his business or property"<sup>145</sup> under section 4 of the Clayton Act.<sup>146</sup> While these doctrines are in some sense analytically distinct,<sup>147</sup> at the same time, they are functionally akin,

142. *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573, 582 (5th Cir. 1979); *Pollock v. Citrus Associates of the New York Cotton Exchange, Inc.*, 512 F. Supp. 711, 717-18 (S.D.N.Y. 1981); *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 494 F. Supp. 1246, 1253 (E.D. Pa. 1980).

143. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (antitrust injury is the "injury of the type of the antitrust laws were intended to prevent and that flows from that which makes defendant's acts unlawful"); *see, Calvani, The Mushrooming Brunswick Defense: Injury to Competition, Not to Plaintiff*, 50 ANTITRUST L.J. 319, 320-24 (1982).

144. *E.g.*, *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972); *Mulvey v. Samuel Goldwyn Productions*, 433 F.2d 1073 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971); *Malamud v. Sinclair Oil Corp.*, 521 F.2d 1142 (6th Cir. 1975); *Cromar Co. v. Nuclear Materials and Equipment Corp.*, 543 F.2d 501 (3d Cir. 1976); *Pollock v. Citrus Associates of the New York Cotton Exchange, Inc.*, 512 F. Supp. 711, 717-18 (S.D.N.Y. 1980); *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 494 F. Supp. 1246, 1253 (E.D. Pa. 1980).

145. *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573, 582 (3d Cir. 1979); *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 494 F. Supp. 1246, 1253 (E.D. Pa. 1980).

146. 15 U.S.C. § 15.

147. *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573, 582 (3d Cir. 1979); *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 494 F. Supp. 1246, 1253 (E.D. Pa. 1980). Nevertheless, courts have questioned the meaningfulness, if not correctness, of such distinctions. *E.g.*, *Juneau Square Corp. v. First Wisconsin*

since together they comprise the mechanism through which "the courts have patrolled the portals to a treble damages action."<sup>148</sup> Consequently, it is not surprising that despite the rather specific focus of the *Illinois Brick* holding to passing on issues in a single chain of distribution,<sup>149</sup> the lower courts<sup>150</sup> have looked to the broader significance of that decision and applied its rationale to resolve questions of standing in treble damages actions.<sup>151</sup>

Under section 4 of the Clayton Act, any person "injured in his business or property by reason of anything forbidden in the antitrust laws"<sup>152</sup> may bring a treble damages action against the alleged violator. Read literally, section 4 would authorize suits for threefold damages by almost anyone claiming ill effects from a purported antitrust violation, regardless of how far removed the plaintiff might be from the illegal conduct.<sup>153</sup> Notwithstanding the apparent limitless sweep of section 4, the lower courts "have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to anti-

National Bank, 445 F. Supp. 965, 968-69 (E.D. Wis. 1978) (The analytical distinction between "standing" and "injury" "presents somewhat of an anomaly," and such an interpretation contradicts other Supreme Court decisions on standing); *Ostrofe v. H.S. Crocker Co.*, 670 F.2d 1378, 1386-87 (9th Cir. 1982) (the distinctions between the concepts of standing and antitrust injury are unclear).

148. *Id.*

149. *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 494 F. Supp. 1246 (E.D. Pa. 1980).

150. *E.g.*, *Montreal Trading, Ltd. v. AMAX, Inc.*, 661 F.2d 864 (10th Cir. 1981) *cert. denied*, \_\_\_ U.S. \_\_\_, 5 CCH Trade Cases ¶ 60,021 (March 8, 1982); *Reading Industries, Inc. v. Kennecott Copper Corp.*, 631 F.2d 10 (2d Cir. 1980), *cert. denied*, 452 U.S. 916 (1981); *see cases cited supra* note 144; *see*, P. AREEDA & D. TURNER, ANTI-TRUST LAW par. 333 (1978).

151. The lower courts have not looked to *Illinois Brick* on questions of antitrust injury. Consequently, the discussion of the extension of the *Illinois Brick* rationale will focus primarily on standing. The leading case on the issue of antitrust injury has been, and continues to be, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

152. Section 4 of the Clayton Act reads:

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 the suit, including a reasonable attorney's fee. . . .

153. *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573, 581 (3d Cir. 1979); *Pollock v. Citrus Associates of the New York Cotton Exchange, Inc.*, 512 F. Supp. 711, 717 (S.D.N.Y. 1980).

trust violation;"<sup>154</sup> and while antitrust violations may well create foreseeable "ripples of injury" throughout the economy, the courts have not permitted those suffering a mere "ripple effect" to sue under section 4.<sup>155</sup> The standing limitation,<sup>156</sup> a restriction not unlike the proximate cause doctrine in tort law,<sup>157</sup> is designed to narrow the universe of antitrust plaintiffs "to those individuals whose protection is the fundamental purpose of the antitrust laws."<sup>158</sup>

A number of "tests" for standing have been developed under various rubrics, including "direct injury,"<sup>159</sup> "target area,"<sup>160</sup> "zone of

154. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 263, n.14 (1972). *See*, *Blue Shield of Virginia v. McCready*, \_\_\_ U.S. \_\_\_, 1982-2 CCH Trade Cases ¶ 64,791, at 71,882 (1982) (While the Court has "refused to engraft artificial limitations on the § 4 remedy . . . it is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property.").

155. *John Lenore & Co. v. Olympia Brewing Co.*, 550 F.2d 495, 499 (9th Cir. 1977). *See also*, *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1295-96 (2d Cir. 1971); *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573, 581 (3d Cir. 1979); *cf.* *Blue Shield of Virginia v. McCready*, \_\_\_ U.S. \_\_\_ 1982-2 CCH Trade Cases, ¶ 64,791, at 71,882 ("despite the broad wording of § 4 there is a point beyond which the wrongdoer should not be held liable.")

156. As Professor Areeda points out, the principles underlying the standing limitation include: (1) concern that a given defendant may be subjected to virtually unlimited liability and that courts would be required to make increasingly speculative determinations of antitrust injury and amount of damages, particularly as plaintiffs become more and more remote from the actual wrongdoing; (2) courts may be reluctant to punish an alleged violator who, acting in good faith, committed minor antitrust transgressions, particularly where the plaintiff's injury is a mere ripple effect; (3) courts may also be reluctant to go through a lengthy and expensive trial at the behest of a ripple-effect plaintiff; and (4) it is desirable to dismiss remote and insubstantial claims, which but for the standing limitation might survive a motion to dismiss, on standing grounds well before trial. P. AREEDA, *ANTITRUST ANALYSIS* ¶ 160, at 80-1 (3d ed. 1981).

157. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 760 (1977) [Brennan, J., dissenting]; *see*, *Blue Shield of Virginia v. McCready*, \_\_\_ U.S. \_\_\_, 1982-2 CCH Trade Cases, ¶ 64,791 at 71,882 (1982).

158. *Cromar Co. v. Nuclear Materials and Equipment Corp.*, 543 F.2d 501, 505 (3d Cir. 1976), *quoting* *In re Multidistrict Vehicle Air Pollution*, 481 F.2d 122, 125 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973); *see*, *Blue Shield of Virginia v. McCready*, \_\_\_ U.S. \_\_\_, 1982-2 CCH Trade Cases, ¶ 64,791, at 71,884 (1982) ("As a consumer of psychotherapy services entitled to financial benefits under the Blue Shield plan, we think it clear that [plaintiff] was 'within the area of the economy . . . endangered by [that] break down of competitive conditions' resulting from Blue Shield's selective refusal to reimburse.").

159. *Loeb v. Eastman Kodak Co.*, 183 F. 704 (3d Cir. 1910).

160. *E.g.*, *California State Council of Carpenters v. Associated General Contractors of California, Inc.*, 648 F.2d 527, 536-37 (9th Cir. 1980); *Reading Industries, Inc. v. Kennecott Copper Corp.*, 631 F.2d 10 (2d Cir. 1980), *cert. denied*, 452 U.S. 916 (1981); *In*



interest,"<sup>161</sup> "balancing approach,"<sup>162</sup> and hybrids of the foregoing.<sup>163</sup> Under these various "tests," courts have generally denied standing to employees,<sup>164</sup> lessors or landlords,<sup>165</sup> suppliers,<sup>166</sup> stockholders,<sup>167</sup> creditors,<sup>168</sup> franchisors,<sup>169</sup> patentees,<sup>170</sup> and utility rate-payers<sup>171</sup> of the antitrust victim.<sup>172</sup> On the other hand, courts have granted standing to shareholders in derivative actions,<sup>173</sup> insurers forced to pay higher claims due to antitrust activity,<sup>174</sup> and in certain cases, shareholders

re Multidistrict Vehicle Air Pollution MDL No. 31, 481 F.2d 122, 126-28 (9th Cir.), *cert. denied sub nom.*, *Morgan v. Automobile Manufacturers Assn.*, 414 U.S. 1045 (1973); *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972).

161. *Malamud v. Sinclair Oil Corp.*, 521 F.2d 1142 (6th Cir. 1975).

162. *E.g.*, *Bravman v. Bassett Furniture Industries, Inc.*, 552 F.2d 90, 99 (3d Cir. 1977), *cert. denied*, 434 U.S. 823 (1978); *Cromar Co. v. Nuclear Materials and Equipment Corp.*, 543 F.2d 501, 505 (3d Cir. 1976).

163. *E.g.*, *Montreal Trading, Ltd. v. AMAX, Inc.*, 661 F.2d 864, 867 (10th Cir. 1981), *cert. denied*, \_\_\_ U.S. \_\_\_, 1982-1 CCH Trade Cases ¶ 60,021 (March 8, 1982) ("direct injury" and "proximate cause").

164. In re Industrial Gas Litigation, 1982-2 CCH Trade Cases, ¶ 64,807 (7th Cir. 1982); *Reibert v. Atlantic Richfield Co.*, 471 F.2d 727 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973); *NAACP v. New York Clearing House Ass'n.*, 431 F. Supp. 405 (S.D.N.Y. 1977). *But see*, *Ostrofe, v. H.S. Crocker Co.*, 670 F.2d 1378, 1385 (9th Cir. 1982):

The harm to an employee discharged by his employer for refusing to participate in effectuating an antitrust conspiracy flows immediately, not remotely or indirectly, from the employer's violation of the Act; it is neither incidental to nor derivative from injuries done to others. Thus, there is no more proximate victim who might be better qualified to bring suit for the damages sustained. [Footnote omitted.]

165. *E.g.*, *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.* 454 F.2d 1292 (2d Cir. 1971).

166. *E.g.*, *Volasco Products Co. v. Lloyd A. Fry Roofing Co.*, 308 F.2d 383 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963).

167. *Pitchford v. PEPI, Inc.*, 531 F.2d 92 (3d Cir. 1975), *cert. denied*, 426 U.S. 935 (1976); *Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727 (3d Cir. 1970); *Ash v. IBM Corp.*, 353 F.2d 491 (3d Cir. 1965), *cert. denied*, 384 U.S. 927 (1966); *Loeb v. Eastman Kodak Co.*, 183 F. 704 (3d Cir. 1910); *but see*, *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1235 (6th Cir. 1981), *cert. denied*, \_\_\_ U.S. \_\_\_, 102 S.Ct. 388 (1981) (a shareholder has standing to assert antitrust claims under the "zone of interest" test).

168. *Loeb v. Eastman Kodak Co.*, 183 F. 704 (3d Cir. 1910)

169. *E.g.*, *Billy Baxter, Inc. v. Coca-Cola Co.*, 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971).

170. *SCM Corp. v. Radio Corp. of America, Inc.*, 407 F.2d 166 (2d Cir.), *cert. denied*, 395 U.S. 943 (1969).

171. *Jeffrey v. Southwestern Bell*, 518 F.2d 1129 (5th Cir. 1975); *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 315 F.2d 564 (7th Cir. 1963).

172. *See generally*, ABA ANTITRUST DEVELOPMENTS at 259-60, n.46; P. AREEDA & D. TURNER, ANTITRUST LAW, par. 33 (1978).

173. *Kauffman v. Dreyfus Funds, Inc.*, 434 F.2d 727, 737 (3d Cir. 1970).

174. *Nationwide Mutual Insurance Co. v. Automotive Service Councils of Delaware, Inc.*, 490 F. Supp. 282, 285 (D. Del. 1980).

themselves.<sup>175</sup> However, recent cases have criticized courts' efforts to pigeon-hole various classes of plaintiffs under "talismanic rubrics" as foreclosing otherwise meritorious claims "simply because another anti-trust victim interfaces the relationship between the claimant and the violator."<sup>176</sup>

The rules on antitrust standing are frequently difficult to reconcile, and no bright line rule has emerged from the many conflicting precedents.<sup>177</sup> Nor has the Supreme Court stepped in to clear the air. While the Court has apparently approved the concept of standing to limit the class of potential treble damages plaintiffs,<sup>178</sup> it has left the lower courts free to map out within very broad guidelines the appropriate parameters for antitrust standing,<sup>179</sup> and has yet to decide which of the many standing tests developed by the lower courts are permissible under section 4 of the Clayton Act.<sup>180</sup>

The Supreme Court in *Illinois Brick* expressly declined to ground its holding on standing principles.<sup>181</sup> Nevertheless, since the "indirect

175. *Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1235 (6th Cir. 1981), *cert. denied*, \_\_\_ U.S. \_\_\_, 102 S.Ct. 388 (1981).

176. *California State Council of Carpenters v. Associate General Contractors of California, Inc.*, 648 F.2d 527, 537 (9th Cir. 1980); *In re Multidistrict Vehicle Air Pollution MDL No. 31*, 481 F.2d 122, 127 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973). *See, Ostrofe v. H.S. Crocker Co.*, 670 F.2d 1378 (9th Cir. 1982).

177. *In re Uranium Antitrust Litigation*, 473 F. Supp. 393, 401 (N.D. Ill. 1979); ABA ANTITRUST DEVELOPMENTS at 260.

178. *See, Blue Shield of Virginia v. McCready*, \_\_\_ U.S. \_\_\_, 1982-2 CCH Trade Cases, ¶ 64,791, at 71,881 (1982) (Court recognized two types of limitations on the availability of the § 4 remedy to particular types of persons: (1) where allowing standing would create a serious risk of double recovery; and (2) where the injury is too remote from the alleged wrongdoing.). The courts have been less stringent in formulating standards for standing in actions for injunctions pursuant to § 16 of the Clayton Act, 15 U.S.C. § 26. *In re Multidistrict Vehicle Air Pollution Litigation*, 481 F.2d 122 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973), *dismissed on remand*, 367 F. Supp. 1298 (C.D. Cal. 1973), *aff'd*, 538 F.2d 231 (9th Cir. 1976).

179. *Blue Shield of Virginia v. McCready*, \_\_\_ U.S. \_\_\_, 1982-2 CCH Trade Cases, ¶ 64,791 (1982); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 263, n.14 (1972); *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573, 581, n.28 (3d Cir. 1979); *D. Berger & R. Bernstein, An Analytical Framework for Antitrust Standing*, 86 YALE L.J. 809, 840-45 (1977).

180. *Blue Shield of Virginia v. McCready*, \_\_\_ U.S. \_\_\_, 1982-2 CCH Trade Cases, ¶ 64,791 at 71,882, n.12 ("we have no occasion here to evaluate the relative utility of any of these possibly conflicting approaches toward the problem of remote antitrust injury."); *Pollock v. Citrus Associates of New York Cotton Exchange, Inc.*, 512 F. Supp. 711, 718, n.6 (S.D.N.Y. 1980).

181. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 728, n.7 (1977). However, at least one lower court has held that *Illinois Brick* restricts standing under the target area test:

However, the Supreme Court's decision in *Illinois Brick [sic] v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977), if it did not completely

purchaser" doctrine of *Illinois Brick* limits antitrust plaintiffs in much the same way as the standing doctrine<sup>182</sup> and in view of the Supreme Court's silence on the standing issue, the lower courts have looked to the rationale of *Illinois Brick* for guidance in deciding standing cases.<sup>183</sup>

The courts have applied the reasoning of *Illinois Brick* to three specific situations where an antitrust plaintiff's standing is at issue: (1) where plaintiff in a price-fixing action claims damages for overcharges based on purchases from non-defendant, non-conspirators, the so-called "umbrella theory;"<sup>184</sup> (2) where plaintiff brings an antitrust action alleging market manipulations by the defendants but cannot prove that he made any purchases at supracompetitive levels from the defendants;<sup>185</sup> and (3) where several chains of distribution are involved.<sup>186</sup>

In each instance, the question is whether granting standing would violate the three basic policy considerations articulated in *Illinois Brick*: (1) to prevent injection of complex issues into already complicated antitrust proceedings; (2) to minimize possibility of multiple liability and duplicative recoveries based on the same alleged wrongful acts; and (3) to avoid impairment of the treble damages remedy.<sup>187</sup>

#### A. *The Umbrella Theory of Damages*

Simply put, the umbrella theory of damages argues that where

reject the target area test, established that being in a target area was not sufficient to confer standing if factors deleterious to the effective administration of the antitrust laws were also present.

*In re Folding Carton Antitrust Litigation*, 88 F.R.D. 211, 218 (N.D. Ill. 1980).

182. *Pollock v. Citrus Associates of the New York Cotton Exchange, Inc.*, 512 F. Supp. 711, 718 n.6 (S.D.N.Y. 1980).

183. *Id.*

184. *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573, 580-86 (3d Cir. 1979); *In re Folding Carton Antitrust Litigation*, 88 F.R.D. 211, 220 (N.D. Ill. 1980); *In re Petroleum Products Antitrust Litigation*, 497 F. Supp. 218, 227-28 (C.D. Cal. 1980); *In re Bristol Bay, Alaska, Salmon Fishery Antitrust Litigation*, 530 F. Supp. 36, 38-9 (W.D. Wash. 1981).

185. *Strax v. Commodity Exchange, Inc.*, 524 F. Supp. 936 (S.D.N.Y. 1981); *Pollock v. Citrus Associates of the New York Cotton Exchange, Inc.*, 512 F. Supp. 711 (S.D.N.Y. 1981); *cf.*, *Montreal Trading, Ltd. v. AMAX, Inc.*, 661 F.2d 864 (10th Cir. 1981), *cert. denied*, \_\_\_ U.S. \_\_\_, 5 CCH Trade Cases ¶ 60,021 (March 8, 1982).

186. *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 494 F. Supp. 1246 (E.D. Pa. 1980); *cf. Reading Industries Inc. v. Kennecott Copper Corp.*, 631 F.2d 10 (2d Cir. 1980), *cert. denied*, 452 U.S. 916 (1981).

187. *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 494 F. Supp. 1246, 1252-55 (E.D. Pa. 1980).

defendants are engaged in a conspiratorial scheme to fix the prices of goods in which they control a substantial share of sales, their agreed-upon supracompetitive prices create an umbrella which supports higher prices by rival non-conspiring sellers who have been freed of the competitive constraints on their pricing decisions that would have been exerted but for the conspiracy.<sup>188</sup> Thus, the prices of the non-conspirators tend to inch up toward the conspiratorial levels and the buyer is forced to pay supracompetitive prices whether he buys from a conspirator or a non-conspirator.<sup>189</sup> To illustrate, assume X, Y and Z, manufacturers of screws, are engaged in a price-fixing arrangement which has set the price of screws at twenty dollars per unit. A, a competitor of the conspirators but not a party to the illicit arrangement, can as much as double his price from ten dollars per unit and still not be out of line with the prices of his rivals, nor face loss of sales from price-sensitive customers.<sup>190</sup> A is able to reap monopoly returns without being party to the illicit scheme. A's higher prices are thus arguably linked to the illegal activity. It makes no difference to the buyer whether he purchases from a conspirator or a non-conspirator; either way a supracompetitive price is extracted.

Prior to *Illinois Brick*, the case law on the umbrella theory was sparse; but several district court decisions permitted plaintiffs to proceed on the umbrella theory of damages.<sup>191</sup> The *Illinois Brick* holding, of course, does not bear directly on this situation, for the plaintiff here is not an indirect purchaser claiming damages have been passed on to it, but rather a direct purchaser claiming overcharges that would not have been imposed but for the defendant's conduct. Thus, no tracing problem would arise.<sup>192</sup>

On the other hand, a plaintiff in this situation is somewhat

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188. *Collecting Overcharges Under the Umbrella Theory*, N.Y.L.J. June 16, 1981, p.1.

189. Plaintiffs have attempted to apply the umbrella theory to overcharge situations other than those stemming from price-fixing. In *United States v. Pfizer Inc.*, 1980-81 CCH Trade Cases ¶ 63,801 (E.D. Pa. 1980), the government adopted the umbrella theory in an action where the defendants allegedly engaged in a conspiracy to exclude competitors and thus drove prices to supracompetitive levels. The action was dismissed without a determination of the viability of the umbrella theory.

190. It would be only natural for A to raise its prices, given the dispositions of traders "to follow their most intelligent competitors." See, *American Column & Lumber Co. v. United States*, 257 U.S. 377, 399 (1921).

191. *Bray v. Safeway Stores, Inc.*, 392 F. Supp. 851, 863-64 (N.D. Cal. 1975); *Wall Products Co. v. National Gypsum Co.*, 357 F. Supp. 832 (N.D. Cal. 1971); *Washington v. American Pipe and Construction Co.*, 280 F. Supp. 802 (W.D. Wash. 1968).

192. The measure of damages would be simply the price actually paid less the price that would have prevailed "but for" the illegal conspiracy.

analogous to the indirect purchaser in *Illinois Brick*—neither deals directly with the alleged price-fixers. Under the umbrella theory, defendant is forced to disgorge thrice the ill-gotten gains which accrued to a non-conspiring competitor. Thus, defendants may face ruinous liability, far exceeding the scope of their wrongdoing. While no tracing problem as such is presented, there are obvious problems in determining the extent to which defendants' misconduct caused anti-trust injury to the plaintiff.

The leading post-*Illinois Brick* case on the validity of the umbrella theory is once again *Mid-West Paper*.<sup>193</sup> A plaintiff therein, Murray's of Baederwood ("Murray's"), sought damages based on its direct purchases from a non-conspiring competitor of the defendants.<sup>194</sup> The Third Circuit, Judge Higginbotham dissenting,<sup>195</sup> granted defendants' summary judgment motion on the grounds that Murray's lacked standing. In so holding, the majority cited three key tenets of *Illinois Brick*: (a) Murray's proof would involve complex economic analysis; (b) the defendant might be exposed to multiple liability; and (c) the effectiveness of the treble damage remedy might be imperiled.<sup>196</sup>

### 1. Complex Economic Analysis

The court found that the price that a non-conspirator would have charged but for the conspiracy could not be ascertained with reasonable certainty.<sup>197</sup> The plaintiff would be saddled with the nearly impossible burden of proving that the non-conspirator's price rise was directly caused exclusively by defendants' conduct and not by other factors.<sup>198</sup> As pointed out in *Hanover Shoe* and discussed above,<sup>199</sup> it would be virtually impossible to say that but for the conspiracy,

193. *Mid-West Paper Products, Co. v. Continental Group, Inc.*, 596 F.2d 573, 580-87 (3d Cir. 1979).

194. *Id.* at 580-81.

195. *Id.* at 595 *et. seq.*

196. *Id.* at 582-87; *In re Petroleum Products Antitrust Litigation*, 497 F. Supp. 212, 227 (C.D. Cal. 1980). *See also*, *Ambook Enterprises v. Time, Inc.*, 612 F.2d 604, 623 (2d Cir. 1979), *cert. dismissed*, 448 U.S. 914 (1980) (plaintiffs may not recover from defendants for overcharges based on transactions with non-defendants).

197. *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573, 582-87 (3d Cir. 1979).

198. *Id.* at 584. The Third Circuit held:

[T]he rationale underlying *Illinois Brick*—that it would be almost impossible, and at the very least unwieldy, to attempt to trace the incidence of the anti-competitive effect of defendants' conduct—bears even greater truth in the context of a purchaser from a competitor of the defendants.

*Id.*

199. *See supra* text accompanying notes 12-19.

the non-conspiring seller "could not" or "would not" have raised its prices.<sup>200</sup> Initially, such a determination would involve the court in complex analysis of price/output decisions, even more complicated than those envisioned by the *Illinois Brick* decision.<sup>201</sup> Indeed, the very same problems involved in determining the price/output decisions of the non-conspiring middleman in the pass on situation would be present where the seller is not part of the conspiracy.<sup>202</sup>

## 2. Multiple Liability

Permitting plaintiffs to recover overcharges from defendants based on purchases from non-conspirators could subject defendants to massive liability, far in excess of the illicit gains attained by price-fixing.<sup>203</sup> Surely one of the primary goals of antitrust law is to force price fixers to disgorge ill-gotten gains;<sup>204</sup> but under the umbrella

200. If the conspirator raised its price by \$X and a direct purchaser from the conspirator raised its price by \$X, there is arguably a causal nexus between the price increases by the conspirator and by its direct purchaser. However, where the non-defendant sellers' costs are not raised by conspiring competitors' price increment, the impact of price-fixing can be determined only by examining complex market forces. In *re Folding Carton Antitrust Litigation*, 88 F.R.D. 211, 220 (N.D. Ill. 1980).

201. The court in *Folding Carton* vividly illustrated the difficulties which would be encountered in analyzing and evaluating such proof:

The affidavit of the plaintiffs' expert illustrates how complicated their proof would be. His conclusion that the prices plaintiffs paid were affected by the defendants' conspiracy was reached after an examination of the difference between the percentages of the independent (presumably the non-defendants) and integrated (presumably the defendants) companies' costs and net profits as a percent of sales. Eleven separate costs were studied. The proof includes speculation about why cost to sales percents were different in two categories; the expert's opinion was that the defendants hid the effect of the conspiracy by an accounting transfer mechanism not available to the non-defendants because of the features of independent as opposed to integrated companies. Charming plaintiffs' case will be complicated, therefore, by examinations of the differences between integrated and independent companies involved, and of the myriad factors which determine costs and prices.

*Id.* at 220.

202. *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573, 580-86 (3d Cir. 1979).

203. *Id.*, at 586. The Third Circuit reasoned:

Allowing recovery for injuries whose casual link to defendants is tenuous . . . could subject antitrust violators to potentially ruinous liabilities, well in excess of their illegally earned profits, because under the theory propounded by [plaintiffs], price-fixers would be held accountable for [illegal] prices that arguably ensued in the entire industry.

*Id.*

204. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 730-31 (1977); *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573, 580-86 (3d Cir. 1979).

theory, defendants must do more than surrender the overcharges they exacted. They must, in effect, make the plaintiffs whole. Essentially the umbrella theory makes defendants insurers of a "competitive" price level in the industry. It is patently unfair to hold defendants liable for overcharges paid to a competitor, particularly where the defendants had no control over the price at which non-conspirators sold their goods, for in such circumstances, defendants would face potentially ruinous liability, contrary to the stated goals of antitrust law to maintain a competitive economy.<sup>205</sup>

### 3. Impairment of the Treble Damages Remedy

The *Illinois Brick* decision concentrated the full treble damages recovery in the hands of the direct purchasers<sup>206</sup> to give them an incentive to sue and thereby assure vigorous enforcement of the antitrust laws.<sup>207</sup> Having so designated direct purchasers as the most effective class of plaintiffs to assume the mantle of private attorneys general, it would seem counterproductive to permit purchasers from non-conspirators to look to conspiring defendants for recovery of any over charges, particularly where the proof of causation would be highly conjectural and would serve to complicate and prolong trial, thereby discouraging rather than encouraging active antitrust enforcement.<sup>208</sup> Moreover, it would be indeed anomalous to permit purchasers from non-conspiring competitors of defendants to proceed against the defendants to recover the competitors' profits, even though such purchasers may not have been harmed at all, but at the same time, to deny in-

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205. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 730-31 (1977); *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573, 586 (3d Cir. 1979). *Accord*, *In re Folding Carton Antitrust Litigation*, 88 F.R.D. 211, 220 (N.D. Ill. 1980), where the court stated:

Although defendants' price-fixing may have given non-conspiring sellers an opportunity to raise their prices while remaining relatively competitive, it also gave the non-conspiring sellers an opportunity to compete more effectively with the defendants by setting prices below the artificial umbrella raised by the defendants. The defendants should not have to answer in a suit for the actions of the non-defendant sellers in taking the former anticompetitive opportunity and eschewing the latter competitive one.

206. This is true except in very rare instances, such as where the indirect purchaser bought pursuant to a pre-existing cost-plus contract.

207. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 735, 745-46 (1977); *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573, 585-86 (3d Cir. 1979).

208. *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573, 586 (3d Cir. 1979).

direct purchasers, who admittedly always absorb at least part of the illegal overcharge, the right to sue the very same defendants.<sup>209</sup>

Although several courts<sup>210</sup> have followed the lead of *Mid-West Paper*, the issue of the umbrella theory's viability is by no means settled. Not suprisingly, the Fifth Circuit in *In re Beef Industry Antitrust Litigation*,<sup>211</sup> rejected the majority view in *Mid-West Paper* and, embracing Judge Higginbotham's dissent,<sup>212</sup> upheld claims based on the umbrella theory:

It is immaterial whether or not a steer purchased from plaintiff found its way into the hands of a conspirator retailer. It is enough if, as alleged, the conspirators' activities caused a general depression in wholesale prices and the intermediary purchasing from a plaintiff based his pricing decision on the depressed wholesale beef price.<sup>213</sup>

The Fifth Circuit's footnote discussion of the umbrella theory is woefully lacking in legal analysis and for that reason alone is of dubious precedential value. Moreover, the court failed to recognize the fundamental factual differences in *Mid-West Paper* and *Beef Industry*. In *Mid-West Paper*, the question was whether a direct purchaser from a non-defendant had standing to pursue claims against the defendants, while in the *Beef Industry* case, the question was whether an *indirect* seller to a non-defendant had standing to seek redress from the named defendant. The factual situation in *Beef Industry* was thus far more complex than in *Mid-West Paper*, and thus it would seem more difficult to sustain the umbrella theory in the *Beef Industry* type case. However, the court made no effort to deal with this difference. Even its reliance on the *Mid-West Paper* dissent is misplaced. The thrust of the minority opinion was that where a *direct* purchaser was involved, the problems of tracing and multiple liability did not arise.<sup>214</sup> The same reasoning would not pertain where plaintiff is an

209. *Id.*

210. *In re Folding Carton Antitrust Litigation*, 88 F.R.D. 211, 217-20 (N.D. Ill. 1980); *In re Petroleum Products Antitrust Litigation*, 497 F. Supp. 218, 227-28 (C.D. Cal. 1980).

211. 600 F.2d 1148, 1166, n.24 (5th Cir. 1979).

212. *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573, 595 (3d Cir. 1979).

213. *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1166, n.24 (5th Cir. 1979).

214. *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573, 595 *et. seq.* (3d Cir. 1979) (Higginbotham, J., dissenting). The Fifth Circuit did recognize that if the majority ruling in *Mid-West Paper* were accepted, then *a fortiori*, the indirect sellers' claims based on sales to non-defendants would be barred. *Id.*



indirect purchaser. *Beef Industry* is thus lacking the solid underpinnings of sound legal analysis and compelling logic which characterized the decision in *Mid-West Paper*;<sup>215</sup> the Fifth Circuit seemed more interested in finding a way to keep plaintiffs in court than in methodically working its way through the issues before it.

The umbrella theory was recently upheld by a district court in *In re Bristol Bay, Alaska, Salmon Fishery Antitrust Litigation*.<sup>216</sup> Emphasizing the fact that plaintiffs had purchased directly from non-conspiring sellers, the court found that no tracing problems existed and that hence permitting plaintiffs to recover for purchasers from non-conspirators would not create a conceptual strain with the *Illinois Brick* holding.<sup>217</sup> The court also ruled that there would be no possibility of double recovery on the facts presented and that the policies of *Illinois Brick* would be furthered by sanctioning the umbrella theory:

Of course, there are certain aspects of *Illinois Brick* that parallel this case: because both deal with the question of standing under § 4 of the Clayton Act, a number of the policy considerations are necessarily the same. Those policies—creating a vehicle for recovery to those for whom it is most appropriate, and providing that the damages obtained are not unreasonably large—are not violated by this decision. Rather, they are enhanced and followed.<sup>218</sup>

The court also made it clear that plaintiffs had the burden of establishing the causal link between defendants' wrongful acts and their injury and that the court in granting standing did not lessen the onus of proving that it was defendants' acts and not other market forces which created the price structure that prevailed when plaintiffs sold their fish.<sup>219</sup>

In so holding, the court ignored the potential complexities involved in proving that the price rise by non-conspiring sellers was caused by the acts of defendants and not other market forces.<sup>220</sup> It further overlooked the potential unfairness in forcing defendants to disgorge claimed overcharges which the defendants had not imposed and from which they did not derive any benefit. Thus, like the court in *Beef*

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215. *In re Bristol Bay, Alaska Salmon Fishery Antitrust Litigation*, 530 F. Supp. 36, 38 (W.D. Wash. 1981).

216. *Id.* at 38-39.

217. *Id.*

218. *Id.* at 39.

219. *Id.* at 37-38, n.3.

220. *See supra* note 17.

*Industry*, the court in *Bristol Bay* engaged in a result-oriented analysis failing to examine in-depth the policy considerations underlying *Illinois Brick*. Had it done so, an opposite result might well have been reached.

### B. Market Manipulation

A second factual situation which courts have reviewed in light of *Illinois Brick* arises where plaintiffs allege that defendants conspired to manipulate the market so as to artificially restrict the supply of a commodity, thereby driving up its price, and claim damages for overcharges irrespective of whether they can prove that they actually purchased from the named defendants. The threshold question here is whether this factual setting is distinguishable from that in which the umbrella theory, wherein plaintiff seeks recovery from defendant based on purchases from non-defendants, is at issue. The handful of lower courts which have faced this issue have not been uniform. The court in *Liang v. Hunt*,<sup>221</sup> held on the authority of *Mid-West Paper* that such plaintiffs lacked standing unless they could prove actual purchases from defendants. However, two cases arising in the Southern District of New York, *Strax v. Commodity Exchange Inc.*<sup>222</sup> and *Pollock v. Citrus Associates of the New York Cotton Exchange*,<sup>223</sup> have reached opposite results rejecting *Liang* and distinguishing *Mid-West Paper*.

Plaintiffs in *Liang* brought an action under section 1 of the Sherman Act and the Commodity Exchange Act<sup>224</sup> alleging that defendants illegally manipulated the soybeans futures market thereby artificially inflating the price of soybean futures, and claiming damages even though they had not purchased soybean futures at supracompetitive levels from defendants.<sup>225</sup> The court rejected the anti-trust claim,<sup>226</sup> finding the case indistinguishable from the *Mid-West Paper* holding which denied standing to a plaintiff seeking damages under an umbrella theory.<sup>227</sup>

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221. *Liang v. Hunt*, 477 F. Supp. 891, 896-97 (N.D. Ill. 1979).

222. 524 F. Supp. 936 (S.D.N.Y. 1981).

223. 512 F. Supp. 711 (S.D.N.Y. 1981).

224. 7 U.S.C. § 6a(1).

225. *Liang v. Hunt*, 477 F. Supp. 891, 896-97 (N.D. Ill. 1979).

226. *Liang v. Hunt*, 477 F. Supp. 891, 896-97 (N.D. Ill. 1979). The court also held that plaintiff had no private right of action under § 4b of the Commodity Exchange Act, 7 U.S.C. § 6b. That holding has been overruled by *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, \_\_\_ U.S. \_\_\_, \_\_\_ S.Ct. \_\_\_, 72 L.Ed.2d 182 (1982).

227. 512 F. Supp. at 718-19. As pointed out by the court in *Leist v. Simplot*, 638 F.2d 283, 286-87 (2d Cir. 1980), futures trading is a "zero-sum" game. One selling

In *Pollock*, plaintiffs short-sellers of orange juice futures, alleged that defendants had manipulated the price of orange juice futures contracts by withholding their respective "long" positions from trading and effectuated a squeeze which drove such futures contracts to artificially high levels.<sup>228</sup> The court rejected the interpretation of *Mid-West Paper* put forth in *Liang v. Hunt* and distinguished market manipulation from the umbrella pricing situation, noting that defendants' restrictive activity in the orange juice futures market in *Pollock* forced prices up throughout that market, whereas the activities of the defendants in *Mid-West Paper* had no similar compelling effect on non-defendant bag sellers.<sup>229</sup>

Following *Pollock*, the court in *Strax v. Commodity Exchange, Inc.*<sup>230</sup> also concluded that *Illinois Brick* and its progeny did not bar recovery by plaintiffs who had alleged defendants' conspiratorial manipulation of the silver market but who had not alleged transacting sales directly with any of the defendants.<sup>231</sup> The court held that allegations that "defendants' actions had a 'primary impact' on the market in which [plaintiff] Strax traded 'as a whole'" were sufficient to support plaintiff's standing and "proof of the impact of defendants' alleged action on that market would not require speculation or attenuated theories of damages" so as to raise the bar of *Illinois Brick*.<sup>232</sup> The court further noted that were it to adopt defendants' arguments and deny standing, the result would be to effectively preclude the application of the antitrust laws to any economic activity effected through an exchange system, since it is simply impossible

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a futures contract is said to be "short;" one buying a futures contract is said to be "long." One seeking to liquidate his futures position must buy a futures contract if he is "short" or sell a futures contract if he is "long." Money is made or lost by measuring the price differential between the original transaction and the offsetting transaction. Every gain is matched by a corresponding loss. Thus, by withholding the long positions and hence restricting the supply of contracts, the price of such contracts would rise.

228. In a market in which supply is restricted, prices move up naturally pursuant to basic laws of supply and demand. In a market in which an oligopoly or price fixing arrangement allows a relatively small seller to raise its price to the level protected by the price "umbrella," the small seller is not "compelled" to raise his price to the same extent as a seller in a supply restricted market. Thus, the severe difficulties attendant with proving damages in an "umbrella" pricing situation, which troubled the court in *Mid-West Paper Products, supra*, are not present in the case at bar. *Pollock v. Citrus Associates of the New York Cotton Exchange*, 512 F. Supp. 711, 719, n.9 (S.D.N.Y. 1981).

229. 512 F. Supp. at 719.

230. 524 F. Supp. 936 (S.D.N.Y. 1981).

231. *Id.* at 939.

232. *Id.*

to prove that a given purchaser bought from a particular seller in such a context.<sup>233</sup>

A more difficult question is whether the results reached in *Pollock* and *Strax* would apply where market manipulation is alleged outside the context of an exchange market. The Tenth Circuit recently faced this issue in *Montreal Trading, Ltd. v. AMAX, Inc.*<sup>234</sup> Plaintiff, an international trader in commodities and thus essentially a middleman, alleged that defendants, potash producers, pursuant to a price-fixing scheme, had intentionally withheld potash from the market.<sup>235</sup> Although plaintiff never actually purchased potash from defendants, it claimed damages through defendants' concerted refusal to sell potash which plaintiff could have resold at a profit.<sup>236</sup> Relying on *Illinois Brick*, the court of appeals held that plaintiff lacked standing, since as a non-purchaser its claims were inherently speculative and since any treble damages recovery against defendants would be totally out of line with the "fruits of the illegality," easily bankrupting the defendants.<sup>237</sup> The court, noting that *Illinois Brick* would permit a direct purchaser to recover from a price-fixer for lost sales, suggested that had plaintiff been able to show a prior course of dealing with the defendants, its claims may not have been inherently speculative and hence the *Illinois Brick* rationale limiting standing would not pertain.<sup>238</sup>

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233. *Id.* at 940.

234. 661 F.2d 864 (10th Cir. 1981), *cert. den.*, \_\_\_\_ U.S. \_\_\_\_, 5 CCH Trade Cases ¶ 60,021 (March 8, 1982).

235. *Id.* at 865.

236. *Id.* at 867.

237. *Id.* at 868.

238. Precisely such a situation was presented *In re Uranium Antitrust Litigation*, MDL 342. Plaintiff Westinghouse Electric Corporation was, *inter alia*, a middleman in the purchase and sale uranium and brought a treble damages action against nearly every major uranium producer in the world, alleging coordinated price-fixing and refusal to deal schemes designed to drive Westinghouse from the field. Westinghouse alleged that defendants, aware of Westinghouse's contractual commitments to sell uranium at specified prices to utilities, either refused to sell uranium to Westinghouse or offered to sell only at conspiratorially set prices so exorbitant that Westinghouse would be soon bankrupted if it agreed to pay them. Moreover, when defendants did sell uranium, they imposed resale restrictions designed to prevent such uranium from falling into Westinghouse's hands indirectly. Thus, Westinghouse alleged that defendants had specifically targeted its uranium business for extinction.

Defendants moved to dismiss Westinghouse's price-fixing claims on the grounds that under *Illinois Brick* and *Mid-West Paper*, one had to be a purchaser to recover damages for price-fixing and as a non-purchaser, Westinghouse lacked standing to prosecute such claims. Defendants' arguments were somewhat disingenuous, since their conspiratorial activities were designed to, and did in fact, make it impossible for Westinghouse to become a purchaser of uranium. *Illinois Brick*, of course, had no "purchaser" requirement. Indeed, in the parent case—*Hanover Shoe, Inc. v. United Shoe*

C. *The Application of Illinois Brick to Suits  
by Competitors in Parallel Chains of Distribution*

As previously discussed, *Illinois Brick* involved a single chain of distribution with an overcharge passed down the distribution line to the ultimate purchaser.<sup>239</sup> Thus, where plaintiff is a competitor of defendants and alleges predatory conduct targeted at its business operations, an issue quite distinct from that of an *overcharged purchaser* in a single chain of distribution arises. In *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*,<sup>240</sup> plaintiff Zenith alleged that defendants conspired to fix prices of consumer electronic products sold in America at prices below prevailing levels as part of a scheme to monopolize the consumer electronic products field in the United States.<sup>241</sup> Zenith in that case did not seek overcharges, but rather lost profits.<sup>242</sup> Hence, the rule of *Illinois Brick* barring proof of passed on overcharges is inapposite.<sup>243</sup>

Nevertheless, Judge Becker in a carefully crafted and tightly reasoned opinion, found that the rationale of *Illinois Brick* was still pertinent to the court's standing inquiry and that the "... applicability of the *Illinois Brick* rule to fact patterns which diverge from the model of a single distribution chain should be determined by assessing, in each factual situation, the weight of the policies articulated by the Supreme Court in *Illinois Brick* and by the Third Circuit in *Mid-West*."<sup>244</sup> Thus, the same analytical framework applicable to the "umbrella" cases is applicable where, as in *Zenith*, the gravamen of the competitive injury is broader than mere overcharges in a single distribution chain.<sup>245</sup>

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Machinery Corp., 392 U.S. 481 (1968)—the plaintiff was not a purchaser but the Supreme Court upheld its right to damages. Even if *Mid-West Paper* were read as requiring direct purchases from a defendant, the decision makes clear that the Court was addressing only non-predatory situations. This was a clear-cut case of predation.

The Court denied defendants' motion in an unpublished decision without an opinion and unfortunately left significant questions regarding the reach of *Illinois Brick* unresolved. The various cases that comprised *In re Uranium Antitrust Litigation* have been settled.

239. See *supra* text accompanying notes 28-30.

240. 494 F. Supp. 1246 (E.D. Pa. 1980).

241. *Id.* at 1247-48.

242. *Id.* at 1254.

243. *Id.* at 1255.

244. *Id.* at 1253. Those factors, as noted *supra*, are: (1) complex problems created by tracing; (2) impairment of the treble damage remedy; and (3) multiple liability and inconsistent verdicts. See *supra* text accompanying notes 35-42.

245. See, *Dart Drug Corp. v. Corning Glass Works*, 480 F. Supp. 1091, 1101 (D. Md. 1979) (*Illinois Brick* does not bar a claim under § 2 of the Sherman Act grounded on predatory acts by competitors.).

This is not to say that every plaintiff claiming to be a competitor of the defendant has *ipso facto* established standing to proceed. Indeed, courts have traditionally denied standing where the link between defendant's alleged anti-competitive conduct and plaintiff's injury are so attenuated as to force the court to engage in speculation or adopt complex assumptions, which would threaten the treble damages remedy.<sup>246</sup>

A leading case in which standing was denied on these very grounds is *Reading Industries, Inc. v. Kennecott Copper Corp.*<sup>247</sup> In a claim which the court characterized as "bizarre," plaintiff, a manufacturer of copper tubing, alleged that competitors conspired to keep plaintiff's costs of acquiring scrap copper artificially high.<sup>248</sup> There were three pricing systems for copper: (1) the price quoted by defendants for domestically refined copper; (2) the price quoted on the London Metals Exchange [LME]; and (3) the price quoted in the copper scrap market, wherein plaintiff purchased its copper.<sup>249</sup> Plaintiff alleged that defendants by keeping prices artificially *low* in the domestic and LME markets which, through a complex rationing system which allocated low price copper among customers who demand more copper at such prices than defendants would supply, caused the price of scrap copper to be artificially inflated.<sup>250</sup> Relying on *Illinois Brick*, the court held plaintiff had no standing, observing that it would have to engage in hopeless speculation regarding the impact of the alleged conspiracy in the market for refined copper on the price of scrap copper.<sup>251</sup> Each case must be reviewed on its own facts in light of

246. P. AREEDA & D. TURNER, ANTITRUST LAW, par. 335 *et. seq.* (1978).

247. 631 F.2d 10 (2d Cir. 1980).

248. *Id.* at 11.

249. *Id.*

250. *Id.* at 12.

251. The Court reasoned:

Reading's theory of antitrust injury depends upon a complicated series of market interactions between the two sources of copper: the refined copper market in which defendants acted and the copper scrap market in which Reading allegedly sustained injuries. To establish a causal chain, the actions of innumerable individual decision-makers must be reconstructed, including the decisions to purchase additional quantities of copper by fabricators who bought copper from the defendants; the impact of those purchasing decisions of the speculators in the LME market; the pricing decisions of copper end-product users, as affected by the LME price, who sold their consumed copper goods for scrap to scrap dealers; and finally the pricing decision of the independent scrap dealers who determined the scrap market price that Reading faced.

In *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977), the Supreme Court held that no antitrust action could be

the *Illinois Brick* holding which articulates the caution to be employed in assessing claims of parties removed from the claimed anticompetitive acts.<sup>252</sup>

## VI. REFLECTIONS ON POST-*Illinois Brick* CASE LAW DEVELOPMENT

The *Illinois Brick* holding barring indirect purchasers from prosecuting treble damages actions was clear and unambiguous; the confusion which has developed in subsequent passing on cases has arisen from the tendencies of the lower courts to "indulge the proffered fantasy"<sup>253</sup> of the remote plaintiff rather than to apply the *Illinois Brick* ruling in full measure. The Fifth Circuit's functional equivalent standard is the primary source of present confusion in the progeny of *Illinois Brick*. However, the very thorough and well reasoned opinion of Judge Higginbotham in the *Beef Industry* case on remand hopefully signals the death-knell of the functional equivalent rule. As that opinion correctly points out, pricing which is "formulaic and mechanical" derived through "non-judgmental mathematical calculation"—*sine qua non* of functional equivalence—is non-existent in the real world except where transactions are governed by a pre-existing, fixed-quantity, cost-plus contract.<sup>254</sup> The pricing practices sanctioned by the Fifth Circuit as functional equivalents of cost-plus contracts turned out to be nothing more than "cost-based rules of thumbs" rejected by *Illinois Brick*.<sup>255</sup> To the extent that other courts follow the

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brought for higher prices paid by an indirect purchaser, who stood at the end of a vertical distribution line, extending from the sale of the raw material, where the alleged conspiratorial conduct occurred, to its use in a finished product, which the plaintiff purchased as the ultimate consumer, three levels down the distribution chain. The list of speculative economic behavioral assumptions about the marketplace that the Court found sufficiently remote to invalidate that chain, *id.* at 741-42, 97 S.Ct. at 2072, pales in comparison to those necessary to support Reading's claim. Indeed, to find antitrust damages in this case would engage the court in hopeless speculation concerning the relative effect of an alleged conspiracy in the market for refined copper on the price of copper scrap, where countless other market variables could have intervened to affect those pricing decisions. The court's task of tracing would be difficult, if not impossible, raising in aggravated form the problem that *Illinois Brick* was intended to avoid.

631 F.2d at 13-14.

252. *Engine Specialties, Inc. v. Bombardier Ltd.*, 605 F.2d 1, 18 (1st Cir. 1979), *cert. denied*, 449 U.S. 890 (1980).

253. *In re Beef Industry Antitrust Litigation*, 1982-2 CCH Trade Cases ¶ 64,815 (N.D. Tex. 1982).

254. *Id.*

255. *Id.*

lead of the district court decision in *Beef Industry* and refuse to be seduced by the functional equivalent arguments, the post-*Illinois Brick* uncertainty regarding the status of indirect purchaser-plaintiffs will disappear.

Thus, the courts have demonstrated the capacity to deal with the enormous procedural and practical problems engendered by the complex issues which are inherent in major antitrust damage litigation. In particular, the courts have proved able to fashion rules to avoid unduly harsh results were *Illinois Brick* to be given an indiscriminately broad sweep.<sup>256</sup> Accordingly, there is no need for the legislature to intrude into the passing on area. The courts are closer to major antitrust litigation than the legislature and have not only a greater appreciation of the practical problems spawned by big cases but also a better handle on how to eliminate them.

#### CONCLUSION

While the majority of courts have given the *Illinois Brick* decision the narrow interpretation which the Supreme Court intended, a few courts have attempted "to set sail on a sea of doubt"<sup>257</sup> by creating new exceptions to the general rule or by so straining the recognized exceptions to the rule, that the holding is rendered meaningless. A primary virtue of the *Illinois Brick* holding is to bring some semblance of certainty and predictability—two features which are hardly hallmarks in complex antitrust matters—into treble damages litigation. Courts which have chosen to undercut *Illinois Brick* by result-oriented decisions which create new exceptions or expand without authorization existing exceptions are thus undermining the treble damages remedy and the enforcement of the antitrust laws.

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256. *E.g.*, In re Sugar Industry Antitrust Litigation, 579 F.2d 13 (3d Cir. 1978).

257. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *modified and aff'd.*, 175 U.S. 211 (1899).



