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Removing the Illinois Brick Standing Barrier from the Texas Free Enterprise and Antitrust Act - A Matter of Choice

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Comment

Removing the *Illinois Brick* Standing Barrier from the Texas Free Enterprise and Antitrust Act—A Matter of Choice

S. Scott Parel

TABLE OF CONTENTS

I. INTRODUCTION 410
II. A BRIEF HISTORY OF PRIVATE ENFORCEMENT OF THE FEDERAL ANTITRUST LAWS LEADING UP TO THE *ILLINOIS BRICK* DECISION 411
A. The Antitrust Standing Dilemma 411
B. The Pass-on Defense: *Hanover Shoe, Inc. v. United Shoe Machine Corp.* 412
C. The Hart-Scott-Rodino Act: The Rise and Fall of the Parens Patriae Cause of Action 414
D. The Pass-on Offense: *Illinois Brick Co. v. Illinois* 415
III. THE AFTERMATH OF THE *ILLINOIS BRICK* DECISION 417
A. Congressional Response 417
B. State Reactions 418
IV. PROBLEMS WITH INDIRECT PURCHASER SUITS: AN ECONOMIC ANALYSIS 419
A. Economics and Antitrust Law 419
B. Problems with Private Enforcement 420
C. Complexity in Tracing Pricing Patterns and Passing of Costs 420
D. Deterrence vs. Compensation 421
E. The Potential for Multiple Recoveries 422
F. Direct Purchasers Bringing Suit 423
V. THE TEXAS ANTITRUST LAWS 424
A. The Texas Free Enterprise and Antitrust Act .. 424
B. Avoiding *Illinois Brick* Under the Texas Act ... 425
C. Direct Conflict with the Texas Act 426

D. PROPOSALS TO REPEAL *ILLINOIS BRICK*: TEXAS SENATE BILL 881 427
E. *ABBOTT LABORATORIES, INC. V. SEGURA* 428
VI. CONCLUSION 431

I. INTRODUCTION

Under basic economic principles, it is assumed that competition benefits businesses and consumers alike. As a result, the thrust of the federal antitrust laws is to protect competition. In order to provide adequate enforcement of these laws, Congress has fashioned several mechanisms. One of these mechanisms is private enforcement.

In the Sherman Act of 1890, this country's first federal antitrust statute, Congress provided a private cause of action for treble damages and attorney's fees to any person injured by an antitrust violation.[1] Senator Sherman himself stated, with unanimous agreement from the drafters,[2] that the enactment of section 7 was specifically intended to give a cause of action to private individuals.[3] In 1914, Congress reenacted this provision under section 4 of the Clayton Act,[4] which remains the law today.

Under the federal antitrust enforcement scheme, there are four basic goals that aim to ensure fairness and efficiency: (1) deterrence of antitrust violations;[5] (2) compensation of those injured by antitrust violations;[6] (3) avoidance of multiple liability for the same alleged antitrust violation;[7] and (4) identification and employment of manageable and intelligible judicial standards.[8] Unfortunately, there are some inherent inconsistencies among these four goals, and favoring one goal over another may lead to adverse or unintended results. This Comment looks at whether or not the Supreme Court's well-known decision in *Illinois Brick Co. v. Illinois*[9] has produced such an effect.

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1. Sherman Act, ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. § 15(a) (1994)).
2. S. REP. No. 239, 96th Cong., 1st Sess. 8 (1979).
3. 21 CONG. REC. 2456 (1890) (remarks of Sen. Sherman). *See also* 21 CONG. REC. 1767-68 (1890) (remarks of Sen. George).
4. Clayton Act, ch. 323, § 4, 38 Stat. 731 (1914) (current version at 15 U.S.C. § 15 (1987)). *See* 51 CONG. REC. 16,319 (1914) (statement of Rep. Floyd); *id.* at 15,938 (statement of Sen. Nelson). The 1955 Congress repealed section 7 of the Sherman Act because it was seen as superfluous. *See* S. REP. NO. 239.

Section 4 of the Clayton Act allows private parties to recover treble damages for antitrust violations:

> [A]ny 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 . . . without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15 (1987).

5. *See* Illinois Brick Co. v. Illinois, 431 U.S. 720, 746 (1977).
6. *See id.*
7. *See id.* at 730-31 n.11.
8. *See id.* at 737, 741-42; Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 492-93 (1968).
9. 431 U.S. 720 (1977).

In particular, this Comment looks at how the *Illinois Brick* decision influenced, and arguably weakened, the current antitrust enforcement scheme in Texas.[10] Since federal law plays a large role in the Texas scheme, it is appropriate to first conduct a brief historical review of the legislative and judicial histories leading up to *Illinois Brick*. Subsequently, this Comment will analyze the *Illinois Brick* decision and the effects of the Court's holdings on indirect purchaser suits. The analysis will focus on the Congressional and State response to the controversial *Illinois Brick* decision,[11] with an economic discussion of some of the problems and inconsistencies found in private antitrust enforcement.[12]

Finally, this Comment will discuss the current state of the Texas antitrust laws by looking at the history of antitrust enforcement in Texas and how the *Illinois Brick* decision affected Texas's antitrust enforcement policies. Analysis and discussion will focus on reformation attempts, recent case law, and whether Texas should enact a "*Brick* repealer" into its current statutory scheme.[13]

II. A BRIEF HISTORY OF PRIVATE ENFORCEMENT OF THE FEDERAL ANTITRUST LAWS LEADING UP TO THE *ILLINOIS BRICK* DECISION

A. THE ANTITRUST STANDING DILEMMA

For purposes of this Comment, it is important to differentiate between "antitrust standing,"[14] which is the issue here, and the Constitutional doctrine of standing. The antitrust laws, like all other laws, are subject to the Constitutional doctrine of standing, but the focus of "antitrust standing" is somewhat different.[15] While showing some redressable harm to a

10. *Illinois Brick* is highly relevant to Texas antitrust law because, as a general rule, the Texas antitrust laws (the Texas Free Enterprise and Antitrust Act) are to "be construed in harmony with the federal interpretations of comparable federal antitrust statutes." TEX. BUS. & COM. CODE ANN. § 15.04 (Vernon 1987 & Supp. 1995).

11. As will be discussed, the states are free to fashion their own antitrust laws. This includes the states' right to allow for indirect purchaser suits without federal preemption. *See infra* part III.B.

12. Although there is not complete agreement on the subject, many believe that economics play an important, if not predominant, role in modern antitrust analysis. "Antitrust has gone through an economics revolution in the last two decades, and that revolution is strongly reflected in the case law." HERBERT HOVENKAMP, ANTITRUST 51 (2d ed. 1993).

13. The phrase "*Brick* repealer" has been used frequently to describe a state statute that expressly allows for indirect purchaser suits under applicable state antitrust law. The effect of such a provision is to "repeal" the force and effect that *Illinois Brick* would otherwise have.

14. Under federal antitrust laws, many "persons," can sue for damages: corporations (*see* 15 U.S.C. § 12(a) (1994)); partnerships (*see* Coast v. Hunt Oil Co., 195 F.2d 870 (5th Cir.), *cert. denied*, 344 U.S. 836 (1952)); individuals (*see* Reiter v. Sonotone Corp., 442 U.S. 330 (1979)); states (*see* 15 U.S.C. § 15; Hawaii v. Standard Oil Co., 405 U.S. 251 (1972)); and the United States (*see* 15 U.S.C. § 15a).

15. *See* Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters, 459 U.S. 519, 535 n.31 (1983).

plaintiff is usually enough to satisfy the Constitutional doctrine,[16] determining "antitrust standing" requires further inquiry as to whether the plaintiff is the correct representative to bring the private antitrust action.[17]

To emphasize consumer protection under the antitrust laws, one would prefer broad standing, but the potential flood of litigation renders a broad standing preference unrealistic.[18] The Supreme Court has proffered its solution to this dilemma in a two-part test.[19] The first prong of the test asks if the plaintiff has suffered an antitrust injury,[20] and the second prong asks if the plaintiff is the most efficient enforcer of the antitrust laws.[21] This test purports to solve the dilemma by balancing two important aspects of antitrust enforcement: (1) encouraging private suits; and (2) avoiding "overkill."

B. The Pass-on Defense: *Hanover Shoe, Inc. v. United Shoe Machine Corp.*

Prior to 1968, federal courts were faced with a recurring problem in private antitrust enforcement—the "pass-on" defense. This defense was often employed by antitrust defendants in price fixing suits. In a typical situation, a manufacturer would be sued by a wholesaler (a "direct purchaser") under section 4 of the Clayton Act for an alleged engagement in a price fixing conspiracy in violation of the antitrust laws.[22] The defendant manufacturer would respond by alleging that the wholesaler was not injured because the wholesaler had only "passed on" the overcharge or

16. Note, however, that requirements for Constitutional standing have been increasingly strict and impose a more formidable hurdle than they once did. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

17. *Associated Gen. Contractors of Cal.*, 459 U.S. at 535 n.31.

18. The Supreme Court once gave its version of the standing dilemma as follows:

> Of course, neither the statutory language nor the legislative history of [section] 4 offers any focused guidance on the question of which injuries are too remote from the violation and the purposes of the antitrust laws to form the predicate for a suit under [section] 4; indeed, the unrestrictive language of the section, and the avowed breadth of the congressional purpose cautions us not to cabin [section] 4 in ways that will defeat its broad remedial objective. But the potency of the remedy implies the need for some care in its application.

Blue Shield of Va. v. McCready, 457 U.S. 465, 477 (1982).

19. Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 110 n.5 (1986).

20. Antitrust injury is determined by looking at the "physical and economic nexus between the alleged violation and the harm to the plaintiff" and the "relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy under [section] 4 [of the Clayton Act]." *Blue Shield of Va.*, 457 U.S. at 478.

21. *Cargill*, 479 U.S. at 110 n.5.

22. For purposes of clarity, this Comment assumes a simplistic vertical arrangement of parties: a manufacturer, a wholesaler or retailer, and an ultimate consumer. Throughout this Comment, the manufacturer is generally the alleged price fixing conspirator or antitrust violator; the wholesaler or retailer, who buys directly from the manufacturer, is the "direct purchaser;" and the ultimate consumer, who buys from the wholesaler or retailer, is the "indirect purchaser."

price increase[23] it had incurred to the next purchaser (*i.e.*, an "indirect purchaser").

The Supreme Court offered a solution to this problem with its pro-enforcement decision, as it was labeled by consumer activists, of *Hanover Shoe, Inc. v. United Shoe Machine Corp.*[24] In *Hanover Shoe*, a shoe manufacturing company sued a shoe machine manufacturer for treble damages under section 4 the Clayton Act. The plaintiff shoe manufacturer alleged that the defendant had injured plaintiff's business by not allowing plaintiff to purchase shoe manufacturing equipment and only offering the equipment as leasable property.[25] The defendant answered that the plaintiff had not suffered any injury because plaintiff merely passed on the increased costs of business to the next purchaser by raising its own prices. This pass-on defense was usually sufficient to defeat the plaintiff's cause of action.[26]

But in *Hanover Shoe*, the Supreme Court effectively wiped out the pass-on theory as a viable defense by reasoning that such a defense only complicates treble-damages actions under Clayton section 4, thus lessening private enforcement.[27] In addition, the Court noted that a variety of factors influence a direct purchaser's pricing policies and that separating out the damages from a "pass-on" can sometimes be difficult or impossible.[28]

The *Hanover Shoe* Court was also concerned that indirect purchasers, those one or more transactions below the wholesaler, would have little incentive to sue. Moreover, the Court agreed that the injury to the direct purchaser was not based solely on the actual passed-on costs. The Court held that a direct purchaser's recoupment of illegal overcharges is immaterial, because if a direct purchaser were not overcharged, it could keep its resale prices lower and, in turn, make its business more profitable: "At whatever price the buyer sells, the price he pays the seller remains illegally high, and his profits would be greater were his costs lower."[29]

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23. An overcharge or price increase is generally defined as "the difference between the price that would have prevailed in a competitive market and the price that the plaintiff was forced to pay as a result of the antitrust violation." HOVENKAMP, *supra* note 12, at 293.

24. 392 U.S. 481 (1968).

25. There was no real contest as to the illegality of the defendant's conduct, according to the majority of the Court, since plaintiffs were riding on the heels of a successful criminal suit brought by the government. *Hanover Shoe*, 392 U.S. at 484. *See* 15 U.S.C. § 16(a); Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 570-72 (1951) (holding that a successful government prosecution is prima facie evidence in subsequent private actions).

26. *Hanover Shoe*, 392 U.S. at 490 n.8 (citing Keogh v. Chicago & N.W. Ry. Co., 260 U.S. 156 (1922); Wolfe v. National Lead Co., 225 F.2d 427 (9th Cir.), *cert. denied*, 350 U.S. 915 (1955); Miller Motors, Inc. v. Ford Motor Co., 252 F.2d 441 (4th Cir. 1958); Twin Ports Oil Co. v. Pure Oil Co, 119 F.2d 747 (8th Cir.), *cert. denied*, 314 U.S. 644 (1941)).

27. *Hanover Shoe*, 392 U.S. at 493.

28. *Id.*

29. *Id.* at 489. "The general tendency of the law, in regard to damages at least, is not to go beyond the first step. . . . [One's] claim accrue[s] in the theory of the law and it does not inquire into later events." Southern Pac. Co. v. Darnell-Taenzer Lumber Co., 245 U.S. 531, 533-34 (1918).

The Court concluded it was imperative that the pass-on defense be denied, because if the direct purchaser were barred from recovery and the indirect purchaser had no incentive to sue, manufacturers would "retain the fruits of their illegality because no one was available who would bring suit against them."[30]

The response to the *Hanover Shoe* decision was mixed. For plaintiffs, the decision was quite favorable because its results were very pro-consumer and pro-enforcement. Defendants, on the other hand, viewed the decision as patently unfair, arguing that disallowing such a defense would subject them to multiple recoveries by direct and indirect purchasers. Nonetheless, the Supreme Court seemed to approve of the idea that it was best to err in favor of the consumer, at least until it handed down *Illinois Brick Co. v. Illinois*[31] a decade later.

C. THE HART-SCOTT-RODINO ACT: THE RISE AND FALL OF THE PARENS PATRIAE CAUSE OF ACTION

The consumer victory in *Hanover Shoe* was short lived. After *Hanover Shoe*, federal courts continued to institute many prerequisites to private actions which rendered once effective procedural devices, like class actions, either inefficient or unavailable.[32] In addition to high prelitigation expenses, the high cost of suit management, notice requirements, and attorney's fees made the class action a virtually worthless enforcement vehicle.[33]

Although the problems and deficiencies with private enforcement vehicles were hotly contested among experts in the field,[34] these issues needed to be resolved if consumer protection was to remain valued in the United States. In the mid-1970s, Congress decided to review this apparent deterioration of private enforcement. The Congressional response was an expansion of antitrust standing via the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("Hart-Scott-Rodino Act").[35]

Although the Hart-Scott-Rodino Act added no new substantive liability, it specifically provided a parens patriae cause of action for attorneys general to bring suit on behalf of their injured constituents.[36] When enacting the Hart-Scott-Rodino Act, Congress understood *Hanover Shoe* to be a pro-enforcement decision and believed that only defendants would be prohibited from using a pass-on theory. Moreover, Representative Rodino clearly assumed that plaintiffs would not be subject to the corol-

30. *Hanover Shoe*, 392 U.S. at 494.
31. *See infra* part II.D.
32. *See* Cynthia U. Kassis, Comment, *The Indirect Purchaser's Right to Sue Under Section 4 of the Clayton Act: Another Congressional Response to* Illinois Brick, 32 AM. U. L. REV. 1087, 1096-97 (1983).
33. *See, e.g.*, Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 (1974) (holding that Rule 23 of the Federal Rules of Civil Procedure requires individual notice to all identifiable members of the class, no matter how expensive).
34. *See infra* part IV.
35. 90 Stat. 1394-96 (current version at 15 U.S.C §§ 15c-15g).
36. 15 U.S.C. §§ 15c-15g.

lary of the rule proffered in *Hanover Shoe*.[37]

This curative response by Congress was stripped of its intended power by subsequent judicial opinions which focused on the fact that no new substantive liability was created by the Hart-Scott-Rodino Act. Under this analysis, courts could force an attorney general to show the requisite antitrust injury or standing of his constituents before damages actions could be instigated.[38]

Furthermore, in 1977, the Supreme Court handed down *Illinois Brick Co. v. Illinois*, which arguably disregarded the legislative history of the Hart-Scott-Rodino Act and removed the consumer's ability, as an indirect purchaser, to privately enforce the antitrust laws.[39] The *Illinois Brick* decision was controversial because it seemed to weaken the concept of consumer protection, which was historically viewed as the dominant purpose of the antitrust laws.[40]

D. The Pass-on Offense: *Illinois Brick Co. v. Illinois*

Indirect purchasers often have trouble showing antitrust injury when dealing with a manufacturer's price fixing conspiracy as they are several levels removed from the antitrust violation. One way to resolve this problem (and to show antitrust injury) is to allege that the wholesaler, or some other middleman, has passed on the manufacturer's increased prices to the next consumer (*i.e.*, the indirect purchaser). This is the corollary of the pass-on defense in *Hanover Shoe*; this is the offensive version of the pass-on theory. Realistically, it is often the indirect purchaser who bears most, or at least some, of the passed-on costs from an illegal overcharge.[41] Therefore, allowing an indirect purchaser to employ a pass-on offense to gain antitrust standing seems appropriate. For the decade following *Hanover Shoe*, use of this offensive tactic generally went unabated.

37. *Illinois Brick*, 431 U.S. at 735 n.14. The corollary of the pass-on defense is the pass-on offense. The pass-on offense is where an indirect purchaser claims antitrust injury as a result of the direct purchaser's pass-on of the manufacturer's increase in prices. *See infra* part II.D.

38. *Illinois Brick*, 431 U.S. at 735 n.14. After the *Illinois Brick* decision eliminated indirect purchaser standing, the Supreme Court, in *Kansas v. Utilicorp United, Inc.*, held that the consumers for which the parens patriae cause of action is brought must have the requisite antitrust injuries. Kansas v. Utilicorp United, Inc., 497 U.S. 199, 219 (1990). This arguably rendered the Hart-Scott-Rodino Act ineffective because the State, under parens patriae, has no greater right to recovery than the consumers it represents.

39. *Illinois Brick*, 431 U.S. at 735 n.14.

40. The general purpose of the private treble-damages cause of action is to compensate those injured by the violation, penalize the wrongdoer, and deter future violations by such punishment. *Illinois Brick*, 431 U.S. at 746. *See also* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485 (1977); *Hanover Shoe*, 392 U.S. at 489. The *Illinois Brick* Court itself stated that the underlying legislative purpose of the Clayton Act is to create a "group of 'private attorneys general' to enforce the antitrust laws under [Clayton section] 4." *Illinois Brick*, 431 U.S. at 746 (citing Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972)).

41. *See infra* part IV.C.

In the mid-1970s the United States Department of Justice (DOJ) investigated a matter concerning an alleged price fixing conspiracy among numerous concrete block manufacturers in the State of Illinois.[42] Allegations surfaced that the block manufacturers had engaged in various antitrust violations that were subject to criminal penalties. After an in-depth investigation by the DOJ, a federal grand jury returned numerous indictments and eleven defendants subsequently plead no contest and paid criminal fines totaling approximately $20,000.00.

While the DOJ investigation was progressing, the State of Illinois's own civil investigation team discovered that many of its public building and construction projects had been overcharged by some three million dollars by the same group of defendants. The State of Illinois, along with over 700 state and local agencies, brought suit against the block manufacturers intending to prove that the block manufacturers had overcharged the State's project contractors millions of dollars which were ultimately passed on to the State. This complaint is a classic example of the offensive pass-on theory.

The Seventh Circuit unanimously held that the State had the requisite antitrust injury and standing even though the State had purchased the concrete blocks indirectly from the manufacturers through middlemen such as subcontractors and builders.[43] But the Supreme Court reversed the appellate court's decision and held, for the first time in the history of the federal antitrust laws, that the pass-on theory could not be used offensively by an indirect purchaser.[44]

The Court offered several reasons in support of its holdings. First, the Court sided with the defendants' argument that it was patently unfair to disallow the use of defensive pass-on theories while allowing offensive pass-on. The Court decided, in the interest of equity, that the rule for pass-on theories used in Clayton section 4 claims needed to be applied equally to both plaintiffs and defendants.[45]

Second, the Court sympathized with the defendants' fears that allowing offensive pass-on would subject defendant manufacturers to multiple liability. The majority of the Justices were concerned with the possibility that such defendants could face suits from the direct purchaser and indirect purchasers for the same alleged illegalities.[46]

Finally, the Court expressed great concern with evidentiary difficulties inherent in a pass-on theory.[47] The Court was skeptical about the judici-

42. Historical fact pattern taken from Illinois v. Ampress Brick Co., 536 F.2d 1163 (1976), *rev'd sub nom.* Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

43. *Ampress Brick*, 536 F.2d at 1163. This was a reversal of the district court's ruling that granted a partial summary judgment in favor of the defendant block manufacturers.

44. *Illinois Brick*, 431 U.S. at 728.

45. *Id.*

46. *Id.* at 730.

47. *Id.* at 740. "[A]llowing indirect purchasers to recover using pass-on theories . . . would transform treble-damages actions into massive multiparty litigation involving many levels of distribution and including large classes of ultimate consumers remote from the defendant." *Id.*

ary's ability to analyze the pricing and output data and tracing the price increases to subsequent injuries. The majority felt that keeping the suits simple and allowing direct purchasers to collect full amounts of treble damages would increase antitrust enforcement by avoiding the "weighing down [of] treble-damages actions with the 'massive evidence and complicated theories.'"[48]

The *Illinois Brick* rule does, however, lend itself to some exceptions. The Court held that preexisting cost-plus contracts could provide an exception to the rule because the pass-on in this type of situation is absolute and thus the effect of the overcharge is determined in advance.[49] Another important exception carved out by the Court involves situations where a direct purchaser is owned or controlled by its customer or where a middleman is a co-conspirator.[50] Other exceptions, developed after *Illinois Brick*, exist when the direct purchaser is owned or controlled by the seller,[51] when the direct purchaser is a co-conspirator with the supplier in a vertical price fixing agreement,[52] or for an injunction suit under Clayton section 16.[53]

III. THE AFTERMATH OF THE *ILLINOIS BRICK* DECISION

A. Congressional Response

The Congressional response to the *Illinois Brick* decision was, for the most part, immediate, loud, and critical. Congress expressed concern that antitrust enforcement had been severely weakened, that the *Illinois Brick* decision was retreating from aggressive enforcement, and that the deci-

48. *Id.* at 741 (citing *Hanover Shoe*, 392 U.S. at 493). Compare the *Illinois Brick* Court's concern regarding a court's calculation of damages with the holding in Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1946). In *Bigelow*, the Court held that an antitrust defendant could not object to a plaintiff's reasonable and supported estimate of damages when the wrongdoer's misconduct rendered a more precise calculation unavailable. *Bigelow*, 327 U.S. at 265.

> Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it [the rule] would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.

Id. at 264-65. *See also* Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 565-66 (1931) ("The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done."). Can these two previous holdings be squared with the *Illinois Brick* Court's concern about the judiciary's ability to compute damages?

49. *Illinois Brick*, 431 U.S. at 736.

50. *Id.*

51. *See* Royal Printing Co. v. Kimberly-Clark Corp., 621 F.2d 323 (9th Cir. 1980); Mid-West Paper Prods. Co. v. Continental Group, Inc., 596 F.2d 573 (3d Cir. 1979).

52. *See, e.g.*, Fontana Aviation, Inc. v. Cessna Aircraft Co., 617 F.2d 478 (7th Cir. 1980); *In re* Beef Indus. Antitrust Litig., 600 F.2d 1148 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980) (requiring co-conspiring middleman to be a named defendant).

53. 15 U.S.C. § 26. An indirect purchaser is allowed to maintain an injunction suit because the problems of computing damages are eliminated in assessing injunctive relief and the statute does not require that plaintiff prove actual damages. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130 (1969).

sion would deny important groups (such as the states) access to treble damages provided for under the federal antitrust laws:

> *Illinois Brick* and *Hanover Shoe* create the unsatisfactory result of denying any recovery to many truly injured persons, while granting the exclusive right to sue to the middleman who, in many cases, will either sue and obtain windfall gains or not sue and thereby allow some defendants to retain the fruits of their antitrust violations.[54]

As a result, there was an immediate flurry of House and Senate proposals to overturn or to limit *Illinois Brick*.[55] This flurry eventually turned long-term as Congressional hearings on similar proposals continued for ten years after the decision.[56] In the end, Congress failed to pass any law, and the *Illinois Brick* override effort ultimately failed at the federal level. This inability to change the law was largely due to support from business groups and from strong evidence, mostly in the form of economic data and analyses, supporting the theory that repealing *Illinois Brick* would seriously undermine antitrust enforcement rather than improve it.[57]

B. State Reactions

Fortunately, this was not the end of the debate surrounding *Illinois Brick* since states are free to fashion their own antitrust laws. States can specifically provide for indirect purchaser suits, in direct opposition to the holding of *Illinois Brick*, because "Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies."[58] Since the

54. *Effective Enforcement of the Antitrust Laws: Hearings on H.R. 8359 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 74 (1977) (statement of Professor Areeda).

55. The House of Representatives alone proposed six bills in two months to overturn the *Illinois Brick* decision. *See* Jerry L. Beane, *Passing-On Revived: An Antitrust Dilemma*, 32 Baylor L. Rev. 347, 362 (1980).

56. *Antitrust Enforcement Act of 1979: Hearings to Consider S. 300 Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 1 (1979); *Antitrust Equal Enforcement Act of 1979: Hearings on S. 1468 Before the Subcomm. on Antitrust, Monopoly, and Business Rights of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. (1979); *Restoring Effective Enforcement of the Antitrust Laws: Hearings on H.R. 2060, H.R. 2204 & Other Proposals Before the Subcomm. on the Monopolies and Commercial Law of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. (1979); *Taxpayer Antitrust Enforcement Act of 1983* (Illinois Brick)*: Hearings on S. 915 Before the Senate Comm. on the Judiciary*, 98th Cong., 1st & 2d Sess. (1983-84); *Antitrust Fairness Amendments of 1983 and Oversight of Corporate Interlocks: Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 98th Cong., 2d Sess. (1984); *The Antitrust Improvements Act of 1986* (Illinois Brick): *Hearings Before the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. (1986).

57. Evidence presented by Landes and Posner in *The Antitrust Enforcement Act of 1979: Hearings to Consider S. 300 Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 1 (1979) and *The Antitrust Equal Enforcement Act of 1979: Hearings on S. 1468 Before the Subcomm. on Antitrust, Monopoly, and Business Rights of the Senate Comm on the Judiciary*, 96th Cong., 1st Sess. (1979).

58. California v. ARC America Corp., 490 U.S. 93, 102 (1989). State antitrust laws are not preempted by federal antitrust laws since issues in front of the Court in *Illinois Brick* and *Hanover Shoe* were strictly issues of statutory interpretation of section 4 of the Clayton Act. *Id.* at 100-03 (citing 21 Cong. Rec. 2456 (1890) (statement of Sen. Sherman)).

federal law seemed unlikely to change, many states decided to consider the issue of indirect purchaser standing in their own legislatures.

Because many critics perceived the *Illinois Brick* decision as one of anti-enforcement, and because only two states had indirect purchaser statutes prior to *Illinois Brick*,[59] fourteen states and the District of Columbia responded by altering the substantive provisions of their antitrust laws to include "*Illinois Brick* repealers."[60] In addition to the sixteen states that now expressly allow indirect purchaser standing, eighteen states have statutes in place that could fairly be interpreted to include indirect purchaser standing.[61] But nine other states' interpretations of private antitrust enforcement are in harmony with federal judicial interpretations and federal antitrust laws.[62]

IV. PROBLEMS WITH INDIRECT PURCHASER SUITS: AN ECONOMIC ANALYSIS

A. Economics and Antitrust Law

Economic analysis has played a large role in the debate on antitrust laws. Some theorists suggest that a hands-off, laissez-faire approach to antitrust law is the best solution, relying on factors of economic competition to provide sufficient enforcement of noncompetitive behavior.[63] Others, however, suggest that heavy regulation and enforcement provides better deterrence, fairer business practices, and improved competition, which will ultimately benefit the consumer.[64] The following sections present some examples of the economic debates and concerns surrounding indirect purchaser suits, like the one in *Illinois Brick*.

59. ALA. CODE § 6-5-60(a) (1977); MISS. CODE. ANN. § 75-21-9 (1973). Note that neither statute allows for treble damages; the statutes allow for only actual damages plus $500.00.

60. This survey of states is current as of 1990. See ARC America Task Force, *Report of the American Bar Association Section of Antitrust Law Task Force to Review the Supreme Court's Decision in* California v. ARC American Corp., 59 ANTITRUST L.J. 273 app. at 305-13 (1990) [hereinafter *Task Force Report*], for a complete and detailed description of these statutes.

61. *See id.*

62. *See id.* (Texas is included in this group).

63. This viewpoint is often referred to as the Chicago school of thought, named after the University of Chicago professors that support it. *See, e.g.*, Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966); William M. Landes & Richard A. Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of* Illinois Brick, 46 U. CHI. L. REV. 602 (1979).

64. This viewpoint is often referred to as the Harvard school of thought, named after the Harvard University professors that support it. *See, e.g.*, Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH L. REV. 213 (1990); Herbert Hovenkamp, *The Indirect-Purchaser Rule and Cost-Plus Sales*, 103 HARV. L. REV. 1717 (1990) [hereinafter Hovenkamp, *The Indirect-Purchaser Rule and Cost-Plus Sales*]; Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1 (1989).

B. Problems With Private Enforcement

The efficacy of private enforcement is often debated due to its inherent deficiencies. Antitrust injuries affect millions, but each individual's share is very small.[65] Therefore, it is commonly thought that there is little incentive or expectation for consumers, as indirect purchasers, to bring suit.[66] In addition, it is usually more difficult for an indirect purchaser to detect antitrust violations, thus making him a less efficient enforcer of the antitrust laws than perhaps a direct purchaser.[67] Finally, the increased litigation costs to manufacturers will likely result in higher prices to the ultimate consumer.[68]

C. Complexity in Tracing Pricing Patterns and Passing of Costs

One of the major influences on the *Hanover Shoe* and *Illinois Brick* Courts was the problem of calculating and tracing passed-on costs. The *Hanover Shoe* Court held that calculating the subsequent price increase from an illegal overcharge was too complex to allow the pass-on defense.[69] Similarly, the *Illinois Brick* Court said that tracing the distribution of the illegal overcharge to show injury and damage apportionment was too complex to allow the pass-on offense.[70] The common concern was that courts would not be able to adequately interpret the complex information involved in an indirect purchaser suit.

Generally, one could side with the *Illinois Brick* Court and, because of the complexity of these suits, allow only direct purchasers to recover damages. Alternatively, one could argue that the calculation of a direct purchaser's damages are no more complex or unmanageable than those of an indirect purchaser.[71] Whichever side is argued, the basic problem that remains unaddressed is that businesses are likely to pass on most, or

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65. Approximately ten years ago, one commentator estimated that the gross amounts that might be awarded per consumer were likely to be less than two dollars per year. George J. Benston, *Indirect Purchasers' Standing to Claim Damages in Price Fixing Antitrust Actions: A Benefit/Cost Analysis of Proposals to Change the* Illinois Brick *Rule*, 55 Antitrust L.J. 213, 246 (1986).

66. *See* Comment, *Parens Patriae Antitrust Actions for Treble Damages*, 14 Harv. J. on Legis. 328, 329-30 (1977). The accuracy of this premise is questionable. While the House and Senate were considering S. 1874 and H.R. 8359 just months after the *Illinois Brick* decision came down, Assistant Attorney General John Shenefield testified before the Rodino Subcommittee (chaired by Representative Peter Rodino) that the United States had over $200 million at stake in pending litigation, with an approximated 95% of the damages flowing from indirect purchases. *See* Letter from C. Raymond Marvin, Washington Counsel, *National Association of Attorneys General*, to Max Frankel, Editorial Page Editor, *The New York Times* (Oct. 19, 1977) (on file with the *SMU Law Review*).

67. *See infra* part IV.D.

68. *See Southern Pac. Co.*, 245 U.S. at 534 ("Probably in the end the public pays the damages in most cases of compensated torts.").

69. *Hanover Shoe*, 392 U.S. at 493.

70. *Illinois Brick*, 431 U.S. at 740-41.

71. *Id.* at 752 (Brennan, J., dissenting).

at least some, of their overcharges to the ultimate consumer.[72] This means, as has been argued by one of the leading economic commentators, that the direct purchaser will recover, rather than absorb, most of its illegal overcharge.[73]

As mentioned in the opening of this Comment,[74] the four basic goals of antitrust enforcement are potentially inconsistent. In the federal scheme, the goal of using manageable judicial standards has taken precedence over the goals of compensating parties for their injuries and deterring antitrust violations. Although judicial complexity is a legitimate concern, it is questionable whether this issue should prime other antitrust enforcement goals. One should also question the *Illinois Brick* Court's skepticism of the judiciary's ability to calculate damages. Arguably, the *Illinois Brick* decision departs substantially from previous Supreme Court interpretations on the calculations of damages in antitrust suits. Prior to the lack of confidence displayed in the *Illinois Brick* opinion, juries were "allowed to act on probable and inferential as well as direct and positive proof" when dealing with the calculation of damages.[75] Why did the Supreme Court retreat from its previously held confidence in the lower courts? Since damages in antitrust actions are conceedingly difficult to prove, the degree of proof is lessened in such cases.[76]

D. Deterrence vs. Compensation

The federal antitrust enforcement scheme primarily seeks to deter wrongdoers from repeating their anticompetitive acts and to compensate those injured by such actions.[77] These two objectives appear to go hand in hand, but placing emphasis on one goal over the other often leads to quite different outcomes.

Many commentators would agree that deterrence is far more important than compensation, because, "from a deterrence standpoint, it is irrelevant to whom damages are paid so long as someone redresses the violation."[78] Ideally, efficient deterrence balances two objectives: (1) keeping

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72. Hovenkamp, *The Indirect-Purchaser Rule and Cost-Plus Sales*, *supra* note 64, at 1726. This theory does not deny the fact that these cost-passing businesses will be injured by the subsequent loss of sales due to the increased price. This loss of sales injury was a basis for disallowing the pass-on defense in *Hanover Shoe*. *Hanover Shoe*, 392 U.S. at 489.

73. Hovenkamp, *The Indirect-Purchaser Rule and Cost-Plus Sales*, *supra* note 64, at 1726-27. Professor Hovenkamp bases his argument upon the assumptions that the direct purchaser is competitive and subject to constant scale returns.

74. *See supra* notes 5-8 and accompanying text.

75. *Story Parchment Co.*, 282 U.S. at 564. *See also* Eastman Kodak Co. v. Southern Photo Materials Co. 273 U.S. 359, 377-79 (1927).

76. *See Bigelow*, 327 U.S. at 265 (1946).

77. *Illinois Brick*, 431 U.S. at 746; Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485-86 (1977).

78. *Illinois Brick*, 431 U.S. at 760 (Brennan, J., dissenting). Note that the majority in *Illinois Brick* agreed with this premise. *Id.* at 746. *See also* Gregory J. Werden & Marius Schwartz, Illinois Brick *and the Deterrence of Antitrust Violations—An Economic Analysis*, 35 HASTINGS L.J. 629, 638 (1984). Landes and Posner explain why deterrence is more important than compensations for antitrust enforcement: "If most antitrust violations were deterred, the occasions for compensation would be few. The converse is not true: Even if

costs of deterrence to a minimum while (2) punishing as many violators as possible. The question that remains unanswered, however, is who is better suited to deter violations, the direct purchaser or the indirect purchaser?

To be an efficient enforcer of the antitrust laws one should also be an efficient detector of violations.[79] Generally, the direct purchaser is in a better position to detect price fixing violations due to intimate contacts with its supplier and sensitivity to price increases. But one should be hesitant to infer that because the probability of detection is greater, deterrence will follow. It is also likely that deterrence costs will be less when enforcement is conducted by direct purchasers,[80] but direct purchasers are less likely to bring an antitrust suit against a supplier than an indirect purchaser.[81] Thus, we are forced to choose between the direct purchaser, an efficient detector who is not likely to bring an enforcement action, and the indirect purchaser, a less efficient detector who is more likely to bring suit individually, as a class representative, or via a parens patriae cause of action.

E. The Potential for Multiple Recoveries

The *Illinois Brick* Court expressed a concern that allowing indirect purchaser standing might result in multiple recoveries against price fixing defendants.[82] In addition, the Court noted its distrust in procedural devices for providing appropriate protection and disagreed with the premise that the risk of excess recovery should fall on the shoulders of the wrongdoers.[83]

Arguably, the current procedural rules can prevent multiple recovery, or appropriate modifications can be made.[84] Furthermore, there has been some debate as to whether a treble-damages reward actually results

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the victims of antitrust violations were fully reimbursed, the social inefficiencies of the violations would persist." Landes & Posner, *supra* note 63, at 605. Note, however, that rules such as the one in *Illinois Brick* arguably do not affect deterrence because they only affect the form of compensation, not the amount. *Id.* at 606. *But see* Robert G. Harris & Lawrence A. Sullivan, *Passing On the Monopoly Overcharge: A Response to Landes and Posner*, 128 U. PA. L. REV. 1280, 1281-86 (1980).

79. Werden & Schwartz, *supra* note 78, at 650.

80. *Id.* Note that Werden and Schwartz argue only that deterrence is less costly when enforcement is left to the direct purchaser, not that enforcement actions are more likely to occur. *Id.* This argument is based upon the premise that the suit will consist of a large number of plaintiffs and that indirect purchasers in general have high interdependence levels, meaning that the efforts of each potential plaintiff to detect violations are reduced by reliance or expectation that others will detect the violation and bring enforcement. *Id.* at 663. This view arguably ignores prosecution by a state attorney general via a parens patriae cause of action.

81. *See infra* part IV.F.

82. *Illinois Brick*, 431 U.S. at 730-31.

83. *Id.* at 731.

84. *See Task Force Report*, *supra* note 60, at 292-304 (detailing how to create a federal antitrust claim for indirect purchasers by uniform statutes or procedural amendments).

in three-fold damages to the plaintiff.[85] These are important considerations because much of the policy analysis behind restrictions on antitrust standing, as in *Illinois Brick*, is based upon the assumption that current damages are in fact three-fold.[86] If this is indeed an accurate assessment of available damages, one should question the need for such restrictive policy in private enforcement.

F. Direct Purchasers Bringing Suit

Lastly, one of the major concerns surrounding indirect purchaser suits is whether direct purchasers are likely to bring enforcement actions. If direct purchasers refuse to bring suit, and indirect purchasers are prohibited from doing so, antitrust violations will go unpunished.[87]

There are many reasons why a direct purchaser would choose not to bring an antitrust suit against its supplier. First, there is little incentive for a direct purchaser to sue its supplier if the price overcharge can be passed on to the next purchaser.[88] Second, as long as the direct purchaser is in a good relationship with its supplier, the direct purchaser has little incentive to jeopardize an important, and sometimes vital, supply relationship by bringing a lawsuit.[89] Finally, there also may be a disincentive to sue when the direct purchasers themselves are receiving benefits from an ongoing price fixing conspiracy or are controlled by the supplier.[90]

Assuming, that these obstacles can be overcome and a direct purchaser does in fact sue its supplier, does the direct purchaser's subsequent recovery represent compensation for its damages or does it represent a complete windfall? As discussed above, an overcharge, illegal or not, is generally passed on to an indirect purchaser by the direct purchaser.[91] As a result, the direct purchaser will not suffer an injury to the extent the overcharge is passed on. Yet the law, under *Illinois Brick*, allows the direct purchaser to recover all damages resulting from the price increase, regardless of what was recouped by the overcharge. Therefore, in an an-

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85. *See* Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 Ohio St. L.J. 115 (1993). Professor Lande provides a cautious, yet fully supported, argument that consumer plaintiffs who recover treble damages actually only recover 90% of their losses, approximating single damages at best. *Id.* at 164-65. Lande also provides evidence to show that defendants subject to treble-damages awards will usually only pay 107% of the attempted gains as opposed to the 300% contemplated by a treble-damages provision. *Id.* at 169.

86. *Id.* at 172. Lande argues that because treble damages really turn out to be single damages, *Illinois Brick* repealers make more sense. If these repealers lead to double recovery, then the congressional intent of the treble-damages provision, deterrence and compensation, would be more realistically fulfilled. *Id.* at 173.

87. *Illinois Brick*, 431 U.S. at 749 (Brennan, J., dissenting). Note also that a weakening of a plaintiff's legal remedies generally results in more illegal acts, but not in more suits. Steven C. Salop & Lawrence J. White, *Economic Analysis of Private Antitrust Litigation*, 74 Geo. L.J. 1001, 1019-20 (1986).

88. *Illinois Brick*, 431 U.S. at 749 (Brennan, J., dissenting).

89. Kassis, *supra* note 32, at 1108-09.

90. *Id.* at 1101, 1108-09.

91. *See supra* part IV.C.

titrust action a treble-damages award to a direct purchaser is most likely a complete windfall.

While the direct purchaser receives this windfall, which is arguably much more than treble damages of his sustained injury,[92] the indirect purchasers and ultimate consumers will not receive anything. It may be easier for the courts to avoid complex economic theories in apportioning damages, but is it fair to over reward one injured party while other injured parties receive absolutely nothing?

V. THE TEXAS ANTITRUST LAWS

A. The Texas Free Enterprise and Antitrust Act

Texas, once a pioneer of antitrust enforcement, was one of the first states in the union to enact its own antitrust laws.[93] In 1983, Texas enacted its modern antitrust scheme as the Texas Free Enterprise and Antitrust Act ("Texas Antitrust Act" or "Texas Act").[94] The general purpose of the 1983 reenactment was to modernize the rarely used or enforced, century-old antitrust laws.[95] To consumers, the Texas Act was seen as promising because it added a treble-damages and attorney's fee provision and seemed to allow a parens patriae cause of action.[96]

After the 1983 reenactment, many questions remained unanswered as to how Texas courts would construe certain provisions of the Act. Not unlike any other newly enacted statutory scheme, it would take years for these issues to work their way up through the courts for judicial comment. Therefore, the sole beacon was the general guiding principle found in section 15.04 of the Act.[97]

Section 15.04 states that the purpose of the Texas Act is to "maintain and promote economic competition in trade and commerce occurring wholly or partly within the State of Texas and to provide the benefits of that competition to consumers in the state."[98] With this purpose in mind, section 15.04 provides that the Texas Act "shall be construed to accomplish [the above] purpose and shall be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes to the extent consistent with [the above] purpose."[99]

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92. The plain language of 15 U.S.C. § 15 says that an injured plaintiff is entitled to receive "three-fold the damages" of the antitrust injury "by him sustained." 15 U.S.C. § 15.

93. Antitrust Acts of May 25, 1899, 26th Leg., p. 246, c. 146, and March 31, 1903, Acts 1903, 28th Leg. p. 119, c. 94.

94. Tex. Bus. & Com. Code Ann. §§ 15.01-.26 (Vernon 1987 & Supp. 1996).

95. David J. VanSusteren, Note, *The Texas Free Enterprise and Antitrust Act—Analysis and Implications*, 22 Hous. L. Rev. 1181, 1181 (1985).

96. Tex. Bus. & Com. Code Ann. §§ 15.20-.24; VanSusteren, *supra* note 94, at 1182, 1220.

97. Tex. Bus. & Com. Code Ann. § 15.04.

98. *Id.*

99. *Id. See also* Caller-Times Publishing Co. v. Triad Communications Inc., 826 S.W.2d 576, 580-81 (Tex. 1992). Although the Texas Antitrust Act is seen as mirroring federal antitrust law, there is an important distinction between section 4 of the Clayton Act

The important caveat in the general purpose, as stated in section 15.04, is that federal interpretations are to be followed *only to the extent* that they are consistent with the goal of protecting competition and consumers in Texas.[100] Thus, the Texas Act provides a general rule to follow federal interpretations, but does not mandate absolute incorporation.[101]

In light of the *Illinois Brick* decision, this section of the Texas Act creates a special dilemma. To conform with the constructional mandate of section 15.04, Texas courts seem obligated to follow the *Illinois Brick* decision and not allow indirect purchaser standing. But this is to be done only to the extent that *Illinois Brick* is seen as promoting "economic competition" in Texas and to the extent that it provides Texas consumers with the "benefits of that competition."[102] Therefore, the real focus should not be on whether Texas should follow *Illinois Brick* because it is a federal decision, but rather on what effects *Illinois Brick* has on the Texas economy and its consumers.

B. Avoiding *Illinois Brick* Under the Texas Act

The Texas Antitrust Act can be read to not include the bar on indirect purchaser suits set forth in *Illinois Brick*. First of all, the Texas Act expressly defines an injured plaintiff under the Act as "any person . . . whose business or property has been injured" by unlawful conduct.[103] Note that on its face the Act provides a remedy to all "injured" persons and does not distinguish between direct and indirect purchasers.[104]

Second, the *Hanover Shoe* decision and the doctrine of stare decisis severely restricted the *Illinois Brick* Court in making its decision.[105] The Texas judiciary, however, is free to disregard this reliance on stare deci-

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and section 15.21(a) of the Texas Antitrust Act. The Texas provision requires a finding that the defendant's conduct was "willful" or "flagrant" to recover treble damages and attorney's fees, while the comparable federal provision does not require such a finding.

100. Tex. Bus. & Com. Code Ann. § 15.04.

101. *See, e.g., Caller-Times Publishing Co.*, 826 S.W.2d at 580-81 (supporting this analysis by declining to follow any particular circuit). "Moreover, even where there is agreement at the federal level, our state courts can under section 15.04 reject precedent which fails to comport with the purpose of the state act." Jerry R. Selinger, *Sherman Marches on Austin: Some Comments About the New Antitrust Act*, 47 Tex. Bus. J. 56, 60 (1984).

102. Tex. Bus. & Com. Code Ann. § 15.04.

103. *Id.* § 15.21(a).

104. Since Texas antitrust law is to be harmonized with federal judicial interpretation, it is important to note how the Supreme Court has interpreted the Texas Act's counterpart, section 4 of the Clayton Act: "The lack of restrictive language in [section] 4 reflects Congress'[s] expansive remedial purpose of creating a private enforcement mechanism to deter violators and deprive them of the fruits of their illegal actions, and to provide ample compensation to the victims of antitrust violations." *Blue Shield of Va.*, 457 U.S. at 472. As we have recognized, "[t]he statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Id.* at 472.

105. *Illinois Brick*, 431 U.S. at 736 ("[W]e must overrule [*Hanover Shoe*] . . . or we must preclude respondents from seeking to recover on their pass-on theory.").

sis[106] and allow indirect purchaser standing based on a plain language interpretation of and the policy considerations set forth in the Texas Act. One could argue, for example, that *Illinois Brick* "is a United States Supreme Court decision construing *federal* antitrust law, with a holding that runs counter to the clearly expressed consumer purpose of the Texas Antitrust Act."[107]

Third, if the purpose of the Act is to protect competition and provide the benefits of competition to the consumer, then it seems mandatory that indirect purchasers have recovery rights because they are "consumers" as contemplated by the Texas Act.[108] The *Illinois Brick* decision arguably thwarts consumer protection under the Texas Act while providing no indication as to how competition and the consumer are benefited by its force.

C. Direct Conflict with the Texas Act

Arguments can also be made to show that the holding in *Illinois Brick* is actually in direct conflict with the Texas Antitrust Act.[109] When applying the *Illinois Brick* decision to the Texas Act, one must keep in mind that *Illinois Brick* was decided in light of the *Hanover Shoe* decision.[110] But upon careful examination of the Texas Act, it is quite possible that Texas law does not even condone the holding in *Hanover Shoe.*

Section 15.21 of the Texas Act allows a plaintiff to recover only the "actual damages sustained" in an antitrust suit.[111] Since the Texas Act does not define the term "actual damages," the common law meaning of

106. Question whether the *Illinois Brick* Court's purported reliance on stare decisis is well supported. First, indirect purchasers were allowed to sue until 1977, when the Court handed down *Illinois Brick.* Second, the *Illinois Brick* rule is the corollary of the rule set forth in *Hanover Shoe*, with arguably different effects. Finally, if the doctrine of stare decisis is really being followed, how does one explain the significant departure from other Supreme Court decisions with pro-consumer holdings: "The most elementary conceptions of justice and public policy require that the [antitrust] wrongdoer shall bear the risk of uncertainty which his own wrong has created." *Bigelow*, 327 U.S. at 265 ("uncertainty" refering to the inability to precisely calculate damages due to the defendant's antitrust violations).

107. Brief of the State of Texas as Amicus Curiae in Support of Appellants at 20, Segura v. Abbott Labs., Inc., 873 S.W.2d 399 (1994) (No. 03-93-00319-CV), *aff'd*, 907 S.W.2d 503 (1995) (emphasis in original).

108. Interestingly, the Texas Act does not define "consumers." Consumers are generally defined as the "users of the final product." Black's Law Dictionary 316 (6th ed. 1990). "Consumers are to be distinguished from manufacturers (who produce goods), and wholesalers or retailers (who sell goods)." *Id.* (parentheses in original). Borrowing from other Texas statutes, the Texas Deceptive Trade Practices-Consumer Protection Act (DTPA) defines a consumer to be "an individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or acquires by purchase or lease, any goods or services . . . ." Tex. Bus. & Com. Code Ann. § 17.45(4) (Vernon 1987).

109. Arguments and support herein taken from Brief of the State of Texas at 21-22, *Segura* (No. 03-93-00319-CV).

110. *Illinois Brick*, 431 U.S. at 728-29.

111. Tex. Bus. & Com. Code Ann. § 15.21.

the phrase must be employed.[112] Inherent in the Texas common law analysis is the "one satisfaction" rule, which limits the recovery of damages to those amounts actually lost.[113] Thus, the phrase "actual damages sustained" suggests that if a direct purchaser passed on *any* part of the illegal overcharge to an indirect purchaser, the direct purchaser should not be able to recover the full amount of damages provided for under *Hanover Shoe.*

If, as suggested above, a direct purchaser is likely to pass on at least some of the overcharged price and the direct purchaser could only recover the damages it sustained, it follows that there would be some monetary amounts left unrecovered.[114] Therefore, it seems that the Texas judiciary has good reason and support to disregard the holdings in *Hanover Shoe* and *Illinois Brick.* Whereas the Texas Act disallows a direct purchaser to recover all of the damages sustained by a defendant's misbehavior, there are still unpaid damages available for an indirect purchaser to collect as "actual damages sustained."

D. Proposals to Repeal *Illinois Brick*: Texas Senate Bill 881

In 1993 the Texas Senate was presented with a proposed amendment to section 15.21 of the Texas Antitrust Act.[115] This proposal was an "*Illinois Brick* repealer," but it had very conservative provisions.[116] First, the Senate bill only proposed a parens patriae cause of action, thus disallowing a private citizen from bringing the suit.[117] Second, the bill would have allowed an antitrust defendant to use a complete or partial pass-on defense, in direct contravention to *Hanover Shoe,* to provide for equal treatment of plaintiffs and defendants.[118] Finally, the proposed legislation specifically required strict adherence to applicable procedural devices, such as consolidation and transfer mechanisms, to resolve issues of multiple liability.[119]

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112. *See* Brown v. American Transfer and Storage Co., 601 S.W.2d 931, 939 (Tex. 1980) (interpreting the meaning of "actual damages" to be those damages recoverable at common law since the DTPA did not define the phrase).

113. Bradshaw v. Baylor Univ., 84 S.W.2d 703, 705 (Tex. 1935); *see* Stewart Title Guar. Co. v. Sterling, 822 S.W.2d 1, 7 (Tex. 1991) (applying the one satisfaction rule to private remedies in the Texas Insurance Code Article 21.21).

114. *See supra* part IV.C. This point highlights the inherent unfairness in the current enforcement scheme. Since the direct purchaser should theoretically be allowed to recover only the damages that it suffers (*i.e.*, the amount not passed on), the indirect purchaser should be able to recover the remaining amount. Instead, the current scheme allows the direct purchaser to recover the entire amount, regardless of passed-on costs.

115. Tex. S.B. 881, 73d Leg., R.S. (1993).

116. Compare this proposal to California's *Brick* repealer which allows private citizen suits (in addition to a parens patriae suit); provides for recovery of treble damages, interest on actual damages, court costs, and reasonable attorney's fees; contains nothing precluding or limiting multiple liability; and has no provision for consolidation of direct and indirect purchaser claims. Cal. Bus. & Prof. Code § 16750(a) (West Supp. 1996).

117. Tex. S.B. 881 (subsection (d)(1)).

118. *Id.* (subsection (d)(2)).

119. *Id.* (subsection (d)(3)).

Unfortunately, there were no recorded debates on the proposed amendment, which makes it is difficult to know exactly what transpired on the Texas Senate floor. One should not underestimate, however, the lobbying power of the business community as it was not likely to approve of the amendment. Regardless, the bill never passed, and Texas consumers were still without an indirect purchaser action for private antitrust enforcement.

In 1995, The Texas Supreme Court had an opportunity to remedy the deficiencies in the Texas antitrust scheme. The case of *Abbott Laboratories, Inc. v. Segura*[120] promised to be the best chance for reform since the failure of Senate Bill 881 two years earlier.[121] But *Illinois Brick* reigned once again leaving the injured uncompensated while the defendants kept the "fruits of their illegalities."

E. *Abbott Laboratories, Inc. v. Segura*

In 1972, the Special Supplemental Food Program for Women, Infants and Children ("WIC program") was established to assist pregnant, postpartum, and breast-feeding women, infants, and young children from families without adequate income whose physical and mental health is threatened because of malnourishment or inadequate health care.[122] Under the WIC program, the federal government buys various food and health care supplies directly from the manufacturers. In turn, these supplies are distributed by the state to the ultimate consumers.

In the late 1980s and the early 1990s, an onslaught of investigation surrounded some of the companies participating in the WIC bidding process. Allegations soon arose that three major players in the infant formula market had committed various antitrust violations, including bid rigging in the WIC program and price fixing throughout the traditional U.S. markets.[123]

In 1991, the State of Texas filed a parens patriae suit alleging that Abbott Laboratories and Bristol-Meyers Squibb Co. had engaged in illegal price fixing and had conspired with the American Academy of Pediatrics to limit competition in the infant-formula market.[124] Specifically, the

120. 907 S.W.2d 503 (1995).

121. This case seemed promising as there were women and children plaintiffs, deep-pocket corporate defendants, and nationwide prosecution and settlement for these defendants' price fixing actions.

122. 42 U.S.C. § 1786 (1994).

123. Thomas M. Burton, *Spilt Milk: Methods of Marketing Formula Land Abbott in Hot Water*, WALL ST. J., May 25, 1993, at A1. Estimates were that Abbott Laboratories, Bristol-Meyers Squibb Co., and American Home Products, the three allegedly implicated, once owned about 98% of the U.S. market that was worth about $2 billion annually. *Id.*

124. Ross Ramsey, *Makers of Baby Formula Settle with State for $1.5 Million*, HOUS. CHRON., Nov. 18, 1995, at 1. Bristol-Meyers subsidiary, Evansville, makes the Enfamil brand of infant formula and Abbott Laboratories's subsidiary, Ross Laboratories, makes the Similac brand. State Attorney General Dan Morales estimated that the two companies controlled about 85% of the infant formula market in Texas. *Id.* The American Academy of Pediatrics ("Academy") was implicated due to the fact that pediatricians had an overwhelming influence over parents in that the parents were likely to purchase the brands that

State accused the companies of concerted action to raise prices of their formulas 120% over 10 years, while the price of milk, the main ingredient, only rose 36%.[125]

The State, alleging that the price fixing conspiracy had damaged the citizens of the State of Texas, sought to recover millions in actual damages, treble damages, and to enjoin the companies from continuing their alleged price fixing behavior. Soon thereafter, a small class of plaintiffs, individuals who had "indirectly" purchased the formula at the alleged overcharge, intervened and plead the same factual allegations that the State had claimed, but plead them as violations under the Texas Deceptive Trade Practices-Consumer Protection Act (DTPA).[126]

The small class of plaintiffs was denied a cause of action because the court felt that the plaintiffs were trying to use the DTPA as a back door to assert a claim against a manufacturer from whom they did not directly purchase.[127] As a result, the Texas Supreme Court confirmed its adherence to the *Illinois Brick* rule, reasoning that the State had no more power than its consumers, and that the consumers in this action were indirect purchasers who had no antitrust standing.[128] Since the *Illinois Brick* rule does not apply to injunction suits, the State's request for injunctive relief was left intact.[129]

In November of 1995, Abbott Laboratories and Bristol-Meyers Squibb Co. settled the remainder of the case by giving the State $1 million worth of infant formula and other products and $500,000 in attorney's fees.[130]

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were given as samples to them by their doctors. According to the lawsuit, the Academy received millions of dollars in contributions from Abbott Laboratories and Bristol-Meyers in return for recommendations of their formulas. *Id.*

125. Stuart Eskenazi, *Formula Makers Supply Food in Texas After Settling Lawsuit*, AUSTIN AMERICAN-STATESMAN, Nov. 18, 1995, at B1.

126. TEX. BUS. & COM. CODE ANN. §§ 17.41-.63. Intervenors specifically brought their action under § 17.50(a)(3). *Segura*, 907 S.W.2d at 504.

127. This was viewed by the *Segura* court as a clever pleading designed to circumvent the indirect purchaser rule proffered in *Illinois Brick* by using the DTPA. *Id.* at 507 ("We will not interpret the DTPA in a manner that rewards creative pleading at the expense of consistent application of legal principles."). Note, however, that other state courts have allowed indirect purchasers to sue Abbott Laboratories and Bristol-Meyers for price fixing under both the state antitrust law and the state consumer protection law. *See, e.g.*, Mack v. Bristol-Meyers Squibb Co., 673 So. 2d 100, 103-04 (Fla. Dist. Ct. App. 1996) (finding engagements in "unfair methods of competition by fixing prices at artificially-inflated [sic] levels to the detriment of Florida consumers" to constitute a "violation of the Florida DTPA"); Blake v. Abbott Labs., Inc., No. 03A01-9509-CV-00307, 1996 WL 134947, at *6-7 (Tenn. Ct. App. Mar. 27, 1996) (holding that "reasonable minds cannot differ, in good conscience, that price fixing is not an unfair practice" as contemplated by the Tennessee Consumer Protection Act).

128. *Segura*, 907 S.W.2d at 504. The *Segura* court relied heavily on Kansas v. Utilicorp United, Inc., 497 U.S. 199 (1990), which held that attorneys general may only bring a money damages action on behalf of consumers with the requisite antitrust injury and standing. Since the State was not purchasing under the WIC program and the intervenors were indirect purchasers, the State did not have the requisite antitrust injury to give them standing in light of *Illinois Brick*.

129. *Segura*, 907 S.W.2d at 504. *See Zenith Radio Corp.*, 395 U.S. at 130. Injunctive claims are exempt from *Illinois Brick* because there are no problems of computing damages in an injunction suit. *Id.*

130. Eskenazi, *supra* note 124, at B1.

Although the settlement was made to avoid the pending injunction and subsequent loss of profits, it was generally seen as a victory by the Attorney General and the Texas Health Department. There are, however, some real concerns with the outcome of this case.

First of all, the Attorney General's office originally estimated the lawsuit to be worth hundreds of millions to Texas consumers who bought the formula over the alleged price fixing period of ten years.[131] Assuming that the allegations were in fact true and that the estimated damages were reasonably accurate, the fact that the suit settled for a very small fraction of its estimated worth essentially allowed the defendant companies to retain most of the profits from their wrongdoing while leaving the injured parties undercompensated.

It is noteworthy that a similar case filed in Florida netted the State Attorney General nearly $12 million from Abbott (paying $8 million) and Bristol-Meyers (paying $4 million).[132] Also of interest was a consolidated action filed in state court in Tallahassee, which included the State of Florida as a plaintiff, that settled for an amount totaling more than $200 million.[133] Initially, this sizable Florida settlement was considered to pose a significant financial threat to Abbott Laboratories,[134] but within weeks this initial perception changed and the settlements were not considered by Abbott representatives and Wall Street analysts to be a serious financial threat.[135] In fact, Abbott's stock only dropped $1.00, about 3.5%, in the week following the settlement announcements.[136]

The results of these Florida actions are important for two reasons. One, Florida law had a statute that could be read to include an indirect purchaser cause of action.[137] Since there was no specific case law disallowing such a claim, the injured parties had greater settlement leverage and were able to recover a greater percentage of their estimated damages under their parens patriae suit. Two, there should be less concern about price fixing defendants being subject to multiple litigation because Abbott settled nine state-court lawsuits, a Federal Trade Commission suit, five state investigations, and one competitor suit, all of which are based upon the same or similar allegations, for hundreds of millions of dollars without suffering any substantial signs of economic injury or decreased sales.[138]

131. Ramsey, *supra* note 123, at 1.

132. *$8 Million Settlement Reached in Baby Formula Case*, MIAMI HERALD, May 25, 1993, at 5B.

133. *Id.*

134. Burton, *supra* note 122, at A1.

135. Carolyn Hirshman, *Analyist: Lawsuits Won't Affect Abbott's Stock*, BUS. FIRST-COLUMBUS, June 7, 1993, at 4.

136. *Id.*

137. The Florida statute does not specifically provide for an indirect purchaser cause of action, but can be read to include such an action, much more so than the Texas Act. *See supra* part III.B.

138. Hirshman, *supra* note 134, at 4.

The *Segura* court's holding is also troubling because it seems to render the cumulative remedies provisions of the Texas Antitrust Act and the DTPA ineffective.[139] When making statutory interpretations, we must assume that the legislature acts with full knowledge of the existing laws.[140] Therefore, it must be assumed that when the Texas legislature enacted the Texas Act it knew of, and made reference to, the DTPA, which was already in effect. "[H]ad the legislature intended to exclude DTPA coverage for conduct potentially violating the state antitrust act, it would have done so under the 'exemptions' provision of the DTPA."[141] Although this seemed to be a valid argument, the majority in *Segura* did not address it and apparently disapproved of such analysis.

Finally, the *Abbott* case raises a great concern as to the effectiveness of direct purchaser enforcement of the Texas antitrust laws.[142] Assuming again that the alleged facts are taken as true, it is interesting that not a single direct purchaser in Texas brought suit against Abbott Laboratories or Bristol-Meyers in light of the fact that the alleged price increases far surpassed the cost of milk, that there was public concern with bid rigging in the WIC program, and that California, Florida, and Alabama had settled similar cases with the companies.[143] Is it not true that direct purchasers are supposed to be the most efficient detectors of these type of price fixing conspiracies?[144]

These "red flags" were arguably sufficient to raise concern for any purchaser of the formula, direct or indirect. Not only did the Texas direct purchasers in this case have this "public" information pointing to antitrust violations, they also had direct knowledge of the increased pricing in the infant formula market. If such blatant price fixing had really taken place over a ten-year period, how can Texas express confidence in having direct purchaser suits as the sole means of private antitrust enforcement for price fixing violations?

VI. CONCLUSION

The debates surrounding antitrust policy today are far from one-sided, and there are persuasive arguments to be made both in favor and in dis-

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139. *Segura*, 907 S.W.2d at 514 (Gammage, J., dissenting). The cumulative remedies provisions for the Texas Antitrust Act and the DTPA are found, respectively, at TEX. BUS. & COM. CODE ANN. §§ 15.02(a), 17.43.

140. Acker v. Texas Water Comm'n, 790 S.W.2d 299, 301 (Tex. 1990); Irving Fireman's Relief and Retirement Fund v. Sears, 803 S.W.2d 747, 750 (Tex. App.—Dallas 1990, no writ).

141. *Segura*, 907 S.W.2d at 514 (Gammage, J., dissenting). The exemption provision of the DTPA is found at TEX. BUS. & COMM. CODE ANN. § 17.49.

142. Note that the Federal Trade Commission, the equivalent of a direct purchaser under the WIC program, did go after Abbott Labatories and Bristol-Meyers, but was largely unsuccessful because the United States Department of Agriculture "failed to act to assure an open and honest competitive bid system." Thomas M. Burton, *Federal Judge Clears Abbott in Formula Case*, WALL ST. J., June 1, 1994, at A3.

143. Juan Elizondo, Jr., *Texas Settles Suit for $1 Million in Products from Formula Firms*, FORT WORTH STAR-TELEGRAM, Nov. 18, 1995, at 26.

144. *See supra* part IV.D.

approval of allowing indirect purchaser suits. The controlling issue, however, seems to be where to place the risk of error. Does one choose to place the burdens of such risk on big business or on consumers? Currently, federal law seems to place this risk on consumers, but the growing trend is for the states to place the risk on big business instead.

In forming its own antitrust policies, Texas has apparently decided that it is more favorable to protect big business than its own consumers, even though the laws as written should be construed to provide the opposite result. Both the Texas courts and legislature have had opportunities to change this position, but neither has chosen to do so. As a result, the Texas antitrust laws arguably support or condone the following: (1) it is acceptable for manufacturers to retain a portion of their profits from illegal overcharges; (2) it is appropriate to allow direct purchasers to either not pursue antitrust violations or to receive windfall judgments; and (3) there is little benefit in compensating injured consumers or allowing the state attorney general to police antitrust violations.

Antitrust policy focuses on many factors driving and influencing the economic marketplace. As a result, "[f]inding the proper balance between the efficiencies that result from scale economies on the one hand, and our distrust of bigness and some of its anticompetitive consequences on the other hand, is a problem that is pervasive in antitrust policy today."[145] Thus, the difficulty of antitrust policy-making involves not only a detailed economic analysis, but also a complex extrapolation of classroom theories to real world markets. Unfortunately, the focus of antitrust debate is often directed at solving the economic problem, thus leaving the real problems and unfairness ignored or unresolved.

145. HOVENKAMP, *supra* note 12, at 66.