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An *Illinois Brick* Wall Without Foundation: The “Price Paid” Rule and the Roadmap to Antitrust Immunity

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Table of Contents

- I. Introduction
- II. Background of the Direct Purchaser Rule and the Goals of *Illinois Brick*
 - A. Private Antitrust Enforcement: Compensation and Deterrence
 - B. The Direct Purchaser Rule: Encouraging Deterrence and Efficiency Through the Best Antitrust Enforcer
 - C. Exceptions to *Illinois Brick*
- III. Conflicting Judicial Approaches to the Coconspirator Exception in the Context of Upstream Price Fixing
 - A. Running Into the Wall: The Narrow Coconspirator Exception and the “Price Paid” Rule
 - B. Jumping Over the Wall: The Functional Approach to *Illinois Brick* and the “First Non-Conspirator” Rule
- IV. Rejecting the “Price Paid” rule in Favor of the “First Non-Conspirator” Rule: a Review of Economic Commentary and Supreme Court Precedent
 - A. The Roadmap to Antitrust Immunity
 - B. Market-Based Exceptions
 - C. Theories of Recovery Based on Pass-Through Damages
 - D. Artful Pleading
 - E. The Efficacy of the “First Non-Conspirator” Rule
- V. Conclusion

I. INTRODUCTION

In 1977, the Supreme Court held in *Illinois Brick Co. v. Illinois*¹ that indirect purchasers were barred from bringing private antitrust actions under Section 4 of the Clayton Act.² Embracing a functional reading of § 4, the Court sought to promote deterrence of antitrust violators and efficient enforcement of antitrust laws.³ The best scheme for vigorous private antitrust enforcement, the Court reasoned, was to incentivize the best antitrust enforcers—direct purchasers.⁴ Yet, where direct purchasers are not the most vigorous antitrust enforcers, courts have recognized that exceptions to *Illinois Brick* are essential to proper enforcement of the antitrust laws.⁵ In particular, the coconspirator exception has become an important limitation on the direct purchaser rule by granting indirect purchasers standing where an upstream producer and a direct purchaser have entered into a vertical conspiracy aimed at injuring indirect purchasers.⁶

Taking a formalistic approach to *Illinois Brick*, however, the Ninth Circuit and the Fourth Circuit have restricted the scope of the coconspirator exception to cases in which a vertical conspiracy has fixed the “price paid” by indirect purchasers.⁷ These cases stand in opposition to the “first nonconspirator” rule, a functional approach to antitrust standing supported by the Third Circuit and Seventh Circuit that grants the first purchaser from outside a vertical conspiracy standing, even where the price has been fixed upstream.⁸ This Comment argues that the circuit split should be resolved in favor of the “first nonconspirator” rule, which encourages vigorous

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

² *Id.* at 736.

³ See *infra* Part II.B.

⁴ See *Id.*

⁵ See *infra* Part II.C.

⁶ See *infra* notes 69–71.

⁷ See *infra* Part III.A.

⁸ See *infra* Part III.B.

antitrust enforcement, as opposed to the “price paid” rule, which gives would-be antitrust violators a roadmap to antitrust immunity.⁹ Part II of this Comment traces the evolution of the direct purchaser rule and the Supreme Court’s push for a functional approach to antitrust standing. Part III reviews the underpinnings of the “price paid” rule in the Ninth Circuit and Fourth Circuits, and discusses the development of the “first nonconspirator” rule in the Third Circuit and the Seventh Circuit. Part IV analyzes the “price paid” rule and its stated justifications in light of economic commentary and Supreme Court precedent, and highlights the efficacy of the “first nonconspirator” rule. This Comment concludes with a summary of the conflicting applications of the coconspirator exception and stresses the importance of a functional approach to antitrust standing that promotes efficient enforcement of the antitrust laws.

II. Background of the Direct Purchaser Rule and the Goals of *Illinois Brick*

A. Private Antitrust Enforcement: Compensation and Deterrence

Section 4 of the Clayton Act provides a private cause of action to “any person” who has been injured by an antitrust law violation.¹⁰ Importantly, § 4 is an expansive grant of power to “private attorneys general,”¹¹ containing “little in the way of restrictive language.”¹² Courts have interpreted this broad language as a reflection of Congress’s intent to promote two goals:

⁹ See *infra* Part IV.

¹⁰ Section 4 provides, in relevant part, that “[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 in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.” 15 U.S.C.A. § 15.

¹¹ *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 262 (1972).

¹² *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 472 (1982) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979)).

deterrence of violators and compensation of victims.¹³ While Congress also created a public enforcement scheme for antitrust laws,¹⁴ such enforcement has traditionally been limited to penalties and forward-looking conduct remedies¹⁵—tools that, alone, insufficiently deter antitrust violations.¹⁶ It therefore comes as no surprise that private plaintiffs have brought as much as 95% of antitrust cases in some years.¹⁷

Despite § 4’s apparent simplicity, the section has raised complex questions concerning the scope of permissible plaintiffs.¹⁸ Were courts to interpret the statute literally (i.e. “any person”), § 4 would arguably generate inefficient use of societal resources.¹⁹ Antitrust violations often create a rippling effect, resulting in market injury to remote victims.²⁰ While granting remote victims a cause of action would promote the goal of compensation, such lawsuits would

¹³ See *Blue Shield*, 457 U.S. at 472 (Section 4’s “lack of restrictive language reflects Congress’ ‘expansive remedial purpose’ in enacting § 4: Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations.); *But see* HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 654 (4th ed. 2011) (“Unfortunately, courts have never been able to create an intelligible theory of private antitrust standing capable of being applied across a full range of potential cases. The law remains haphazard and inconsistent. One reason is that neither Congress nor the courts has articulated a rationale for private enforcement.”).

¹⁴ See 15 U.S.C. § 1–2 (2006) (setting criminal penalties for illegal restraints of trade and monopolization); Hovenkamp, *supra* note 13 at 643 (“The public enforcement of the federal antitrust laws is largely in the hands of the Antitrust Division of the Department of Justice . . . and the Federal Trade Commission . . .”).

¹⁵ See Hovenkamp, *supra* note 13 at 645 (“Most civil antitrust investigations leading to challenges result in consent decrees, which are binding out-of-court settlements approved by the court . . . Remedies for civil violations of the antitrust laws can include injunctions, as well as dissolution or divestiture for illegal mergers or occasionally monopolization.”).

¹⁶ Stephen Calkins, *Civil Monetary Remedies Available to Federal Antitrust Enforcers*, 40 U.S.F. L. REV. 567, 569 (2006) (Describing how the majority of federal antitrust enforcement actions result in nothing more than injunctions, leading to “insufficient deterrence and . . . worrisome incentives.”); Joseph P. Bauer, *The Stealth Assault on Antitrust Enforcement: Raising the Barriers for Antitrust Injury and Standing*, 62 U. PITT. L. REV. 437, 438 (2001) (“Governmental resources are inherently limited, and those scarce resources can be devoted to other tasks if private parties also police unlawful conduct.”).

¹⁷ See Hovenkamp, *supra* note 13 at 652.

¹⁸ *Id.*

¹⁹ See *Id.* at 653.

²⁰ *Id.* at 653 (“For example, monopolization of a raw material can cause reduced demand for products made of that material. Suppliers of machinery for making those products may also face reduced demand, and some employees may lose their jobs. If bankruptcies result, creditors may not be paid, leases may be prematurely terminated, and taxes may go uncollected.”).

be costly to litigate and would generate only questionable gains in deterrence.²¹ Moreover, total litigation would increase as remote victims outnumber direct victims.²² And, even where the injury is minor, the promise of treble-damages would lure remote victims into the courtroom.²³ The Supreme Court feared that this broad reading of § 4 would crowd out the plaintiffs best situated to enforce antitrust laws and properly deter violators—direct purchasers.²⁴ Sacrificing compensation for deterrence, Courts adopted limitations on § 4 standing,²⁵ including the “antitrust injury” doctrine²⁶ and the *Illinois Brick* direct purchaser rule.²⁷

Recently, courts have become increasingly hostile to private plaintiffs, expanding these limitations and erecting “ever-higher hurdles to private actions.”²⁸ In particular, recent evolution of the direct purchaser rule has eschewed functionalism for formalism,²⁹ ignoring “the policies that animated the establishment of the rule.”³⁰ The “price paid” rule is emblematic of this recent trend. Derived from a rigid reading of *Illinois Brick*, the “price paid” rule limits the widely embraced conspirator exception³¹ to cases in which a vertical conspiracy has fixed the “price

²¹ *Id.* (“Private enforcement is subject to the law of diminishing returns—the more there is, the less deterrence will be obtained per enforcement dollar The amount of increased efficiency in the form of deterrence of price fixing could be very low in proportion to the increased costs of litigation.”).

²² *Id.*

²³ *Id.* at 652; “The Clayton Act’s provision of mandatory treble damages plus attorney’s fees to prevailing plaintiffs has put extraordinary pressure on courts to develop intelligible limits on antitrust enforcement rights. These statutory provisions encourage litigation by people for whom the amount of recovery discounted by the probability of success would otherwise be marginal.” *Id.* at 653–654.

²⁴ *See infra* Part II.B.

²⁵ *Id.* at 16; Bauer, *supra* note 16 at 443 (“These doctrines, and many of the cases interpreting them, are grounded on sound public policy, of placing prudential limits both on the number of private antitrust claims and the persons who may bring them.”).

²⁶ *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 497.

²⁷ *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977).

²⁸ Bauer, *supra* note 16 at 438.

²⁹ *See* Barak D. Richman & Christopher R. Murray, *Rebuilding Illinois Brick: A Functionalist Approach to the Indirect Purchaser Rule*, 81 S. CAL. L. REV. 69, 81 (2007) (“The unqualified nature of the current indirect purchaser rule places it at odds with the general body of current antitrust law. Modern antitrust . . . eschews inflexible formalist rulings that rest on categorical distinctions and instead favors a functionalist approach designed to maximize social welfare.”).

³⁰ *Id.* at 447.

³¹ *See infra* notes 69–71.

paid” by the indirect purchaser.³² By denying the best antitrust enforcer—the first indirect purchaser—standing, the rule weakens private antitrust enforcement by undermining deterrence and efficiency³³—the very objectives that animated *Illinois Brick* in the first place.³⁴ The result is that both of § 4’s goals are sacrificed: victims go uncompensated and violators go undeterred.

B. The Direct Purchaser Rule: Encouraging Deterrence and Efficiency Through the Best Antitrust Enforcer

By restricting output, a cartel is able to extract supra-competitive (above-market) prices when selling to a direct purchaser. The direct purchaser—who has suffered the initial “overcharge”—is often an intermediary in the chain of distribution, and as result, will often raise its own prices in response, causing some portion of the overcharge to be “passed-on” to the “next person in the distribution chain, who will do the same thing in turn until the good reaches the final consumer.”³⁵ The extent of the pass-on at each link in the distribution chain will vary depending on the level of competition in the market, the characteristics of the seller’s operations, and the degree to which the seller’s price increase results in a reduction in its volume of sales.³⁶ The final consumer and each entity down the chain that absorbed a part of the overcharge (all of whom have been injured as a consequence of an antitrust violation) would appear to have a valid cause of action based on the plain language of § 4.

The Supreme Court, however, has stressed that such a literal reading of the Clayton Act is impractical because it would result in duplicative recoveries, complex apportionment of

³² See *infra* Part III.A.

³³ See *infra* Part IV.A.

³⁴ See *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745–746 (1977); *infra* II.B.

³⁵ Herbert Hovenkamp, *The Indirect-Purchaser Rule and Cost-Plus Sales*, 103 HARV. L. REV. 1717, 1717 (1990); see also Robert G. Harris & Lawrence Sullivan, *Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis*, 128 U. PA. L. REV. 269, 346–47 (1979) (“Theoretical economics and practical information about pricing practices suggest that even in the short run massive passing on is the rule and that in the long run it is well nigh inevitable.”).

³⁶ AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW, *INDIRECT PURCHASER LITIGATION HANDBOOK*, 132 (2007).

damages along the distribution chain, and reduced incentives for the best antitrust enforcers.³⁷ Consequently, the Supreme Court has limited § 4 by creating the direct purchaser rule, which has two major components: 1) it awards direct purchasers the entire overcharge, even if they passed-on the cost to indirect purchasers;³⁸ and 2) it denies indirect purchasers standing, even if they incurred part, or all, of the overcharge.³⁹ The Court posited that the rule would improve deterrence and produce a more efficient scheme of private antitrust enforcement.⁴⁰

The origin of the direct purchaser rule is found in *Hanover Shoe, Inc v. United Shoe Machinery Corp.* Hanover, a shoe manufacturer, alleged that United Shoe, a shoe machine manufacturer, had illegally monopolized the market for shoe machinery.⁴¹ United Shoe claimed that Hanover had not been injured under § 4, arguing that any overcharge paid by Hanover had been passed-on to downstream consumers.⁴² The Supreme Court rejected the pass-on defense for two primary reasons. First, the Court asserted that the complex task of calculating the pass-through, which entails distinguishing between the effect of the overcharge and the effect of market forces, would “normally prove insurmountable.”⁴³ Second, making the pass-on defense available to violators would undermine deterrence because the final consumers in the distribution

³⁷ *Illinois Brick*, 431 U.S. at 720, 730, 736, 737, 745–746.

³⁸ *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 489 (1968).

³⁹ *Illinois Brick*, 431 U.S. at 736.

⁴⁰ *Id.* at 745–746.

⁴¹ *Hanover*, 392 U.S. at 483.

⁴² *Id.* at 491–492.

⁴³ *Id.* at 492–493; The Court detailed the difficulties in calculating the pass-through rate: “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.” *Id.*

chain “would have only a tiny stake in a lawsuit and little interest in attempting a class action.”⁴⁴ By reducing the incentive of direct purchasers to bring suit, violators would “retain the fruits of their illegality”⁴⁵ In sum, the decision granted direct purchasers a windfall: even where they had not absorbed any of the injury, direct purchasers could pursue treble-damages. The Court declined to read § 4 literally and instead adopted a functional approach to antitrust standing that encouraged deterrence and efficiency by rewarding direct purchaser enforcement.

Nine years later, the Court considered the viability of *offensive* pass-on arguments in *Illinois Brick v. Illinois*.⁴⁶ Plaintiffs, indirect purchasers, alleged that the defendant manufacturers had conspired to inflate concrete block prices.⁴⁷ Plaintiffs asserted standing under § 4, arguing that the illegal overcharge had been passed-on to them (by innocent intermediaries) through two levels of the distribution chain.⁴⁸ Creating symmetry with its decision in *Hanover*, the Court declined to apply different standards to defensive pass-on and offensive pass-on.⁴⁹ First, the Court reasoned that “unequal application of the Hanover Shoe rule” would result in duplicative liability for defendants.⁵⁰ Second, the task of calculating pass-on rates would be even more complex in the offensive context: “the evidentiary complexities and uncertainties involved in the defensive use of pass-on against a direct purchaser are multiplied in the offensive use of pass-on by a plaintiff several steps removed from the defendant in the chain of distribution.”⁵¹

⁴⁴ *Id.* at 494.

⁴⁵ *Id.*

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

⁴⁷ *Id.* at 726.

⁴⁸ *Id.* at 727.

⁴⁹ *Id.* at 731.

⁵⁰ *Id.* at 731; Duplicative liability would result, the Court explained, as follows: “Even though an indirect purchaser had already recovered for all or part of the overcharge passed on to it, the direct purchaser would still recover automatically the full amount of the overcharge that the indirect purchaser had shown to be passed on; similarly, following an automatic recovery of the full overcharge by the direct purchaser the indirect purchaser could sue to recover the same amount.” *Id.*

⁵¹ *Id.* at 732.

The Court reasoned that offensive use of a pass-on theory would require complex calculations at every link in the distribution chain.⁵²

After rejecting unequal treatment of offensive pass-on and defensive pass-on, the Court was left with two options: either overrule *Hanover Shoe* or deny indirect purchasers standing.⁵³ The Court chose the latter option for two reasons: 1) the “use of pass-on theories under § 4 essentially would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge from direct purchasers to middlemen to ultimate consumers;”⁵⁴ and 2) pass-through calculations would require courts to analyze elasticities along with the “difficulties and uncertainties” of determining the path of market forces but-for the overcharge.⁵⁵ The Court further declined to permit market-based exceptions to *Hanover Shoe*, as it would generate battles over line drawing in particular markets, ensnaring the courts in the same complex market analysis that *Hanover Shoe* had sought to avoid.⁵⁶ Finally, the court considered the impact that apportionment, adorned with complex pass-through calculations at every link in the chain, would have on the efficiency of antitrust enforcement.⁵⁷ Complex apportionment, the court posited, would increase the costs of recovery and diffuse the recovery among a large group of plaintiffs.⁵⁸

The sum result was that direct purchasers, the most vigorous private enforcers of antitrust laws, would have drastically reduced incentives to bring suit.⁵⁹ The Court therefore barred indirect purchasers from asserting pass-on claims, reasoning that direct purchasers were the most

⁵² *Id.* at 732–733.

⁵³ *Id.* at 736.

⁵⁴ *Id.* at 737. The Court further asserted that there would be a “strong possibility that indirect purchasers remote from the defendant would be parties to virtually every treble-damages action” *Id.* at 742.

⁵⁵ *Id.* at 743.

⁵⁶ *Id.* at 745.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

effective “private attorneys general.”⁶⁰ Awarding direct purchasers the full overcharge, the Court concluded, would best promote the “longstanding policy of encouraging vigorous private enforcement of the antitrust laws”⁶¹ As in *Hanover*, the court in *Illinois Brick* embraced a functional approach to antitrust standing: working around the literal reading of § 4, the Court adopted a rule to promote optimal antitrust enforcement through efficiency and deterrence. The best way to accomplish these goals was to adopt policies that encouraged the best antitrust enforcers to bring suit.

C. Exceptions to *Illinois Brick*

Several exceptions to *Illinois Brick* have developed in recognition that rigid adherence to the direct purchaser rule can weaken antitrust enforcement. Exceptions may be warranted where the baseline assumption in *Illinois Brick*—that direct purchasers are the best antitrust enforcers—does not hold.⁶² First, the “cost-plus” exception, expressly recognized by *Hanover Shoe* and *Illinois Brick*, applies where an indirect purchaser enters into a contract with a direct purchaser for a fixed quantity and a fixed markup.⁶³ Because the overcharge is passed entirely to indirect purchasers, there is no need for complex pass-through calculations.⁶⁴ Most importantly, the direct purchaser has suffered no injury, and therefore lacks incentive to bring suit under § 4.⁶⁵ Second, under the “control” exception, indirect purchasers have standing where the defendant

⁶⁰ *Id.* at 746 (quoting *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 262 (1972)).

⁶¹ *Id.* at 745 (citing *Perma Life Mufflers, Inc. v. Int’l Parts Corp.*, 392 U.S. 134, 139 (1968)).

⁶² *See California v. ARC Am. Corp.*, 490 U.S. 93 (1989) (“In *Illinois Brick*, the Court was concerned not merely that direct purchasers have sufficient incentive to bring suit under the antitrust laws . . . but rather that at least some party have sufficient incentive to bring suit.”); *In re Mid-A. Toyota Antitrust Litig.*, 516 F. Supp. 1287, 1294 (D. Md. 1981) (“*Illinois Brick* does admit of exceptions beyond those expressly recognized in the text, in circumstances where application of the rule would further neither of the policy objectives underlying the doctrine itself.”).

⁶³ *Id.* at 737.

⁶⁴ *Id.*

⁶⁵ *See Hovenkamp*, *supra* note 13 at 677.

upstream producer owns or controls the direct purchaser.⁶⁶ Because there is virtually no chance that the direct purchaser will bring suit,⁶⁷ the first-level indirect purchaser becomes the best, most vigorous antitrust enforcer.⁶⁸

Finally, courts have widely approved a third exception, the “coconspirator exception,” which applies where an upstream producer and a direct purchaser have entered into a vertical conspiracy aimed at extracting monopoly profit from indirect purchasers.⁶⁹ Under the traditional coconspirator exception, where the vertical conspiracy directly sets retail prices, courts are able to avoid pass-through calculations, as damages equal the difference between the retail price and the but-for price.⁷⁰ Because the direct purchaser is an antitrust violator and lacks incentive to sue, purchasers from outside the conspiracy must move to the forefront of private antitrust enforcement.⁷¹ Duplicative recovery concerns may still remain where a conspiring intermediary defects from the conspiracy and brings its own cause of action against its suppliers.⁷² As such, case law often requires plaintiff indirect purchasers to name the conspiring intermediaries as

⁶⁶ *Royal Printing Co. v. Kimberly-Clark Corp.*, 621 F.2d 323, 326 (9th Cir. 1980); *Mid-West Paper Prods. Co. v. Cont'l Grp., Inc.*, 596 F.2d 573, 578 n.8 (3d Cir. 1979); *Jewish Hosp. Ass'n of Louisville, Ky., Inc. v. Stewart Mech. Enters., Inc.*, 628 F.2d 971, 974 (6th Cir. 1980); *Toyota*, 516 F. Supp. at 1292.

⁶⁷ *Royal Printing*, 621 F.2d at 326.

⁶⁸ *See id.*

⁶⁹ *See Lowell v. Am. Cyanamid Co.*, 177 F.3d 1228, 1231 (11th Cir. 1999); *Paper Sys. Inc. v. Nippon Paper Induss. Co., Ltd.*, 281 F.3d 629, 631 (7th Cir. 2002); *State of Ariz. v. Shamrock Foods Co.*, 729 F.2d 1208, 1211 (9th Cir. 1984); *Fontana Aviation, Inc. v. Cessna Aircraft Co.*, 617 F.2d 478, 480 (7th Cir. 1980); *Toyota*, 516 F. Supp. at 1293; *Reiter v. Sonotone Corp.*, 486 F. Supp. 115, 118 (D. Minn. 1980); *Gas-A-Tron of Arizona v. Am. Oil Co.*, No. CIV 73-191-TUC-WCF, 1977 WL 1519 at *2, *3 (D. Ariz. Dec. 7, 1977).

⁷⁰ *Shamrock* 729 F.2d at 1214; *Toyota*, 516 F. Supp. at 1292–93, 1295 (“Where market forces have been suspended, tracing problems disappear; the whole of the overcharge can be said to have ‘passed through’ to the ultimate consumer.”).

⁷¹ *See Howard Hess Dental Labs. Inc. v. Dentsply Int’l., Inc.*, 424 F.3d 363, 381 (3d Cir. 2005).

⁷² *In re Beef Indus. Antitrust Litig.*, MDL Dkt. No. 248, 600 F.2d 1148, 1163 (5th Cir. 1979). The court explained that absent joinder of the conspiring intermediaries, such intermediaries would not be precluded “from successfully asserting in their own lawsuit that they did not in fact conspire with the chains and are therefore not barred by the co-conspirator doctrine from recovering damages “ from their suppliers. *Id.* This creates “the possibility of inconsistent adjudications on the issue of the existence of a vertical conspiracy [which] leaves defendants subject to the risk of multiple liability that the Illinois Brick Court found unacceptable.” *Id.*

defendants in the suit.⁷³ The Third Circuit, moreover, avoids duplicative recovery by permitting the coconspirator exception only if the conspiring intermediary was “completely involved” in the conspiracy, which would bar the intermediary from maintaining a cause of action against its supplier.⁷⁴

III. Conflicting Judicial Approaches to the Coconspirator Exception in the Context of Upstream Price Fixing

A. Running Into the Wall: The Narrow Coconspirator Exception and the “Price Paid” Rule

The coconspirator exception was severely curtailed by the Ninth Circuit in *In re ATM Fee Antitrust Litigation*,⁷⁵ and the Fourth Circuit in *Dickson v. Microsoft Corp.*,⁷⁶ resulting in what may be termed the “price paid” rule. Simply stated, the rule provides that an indirect purchaser has standing under the coconspirator exception only where a vertical conspiracy has *directly* fixed the *price paid* by the overcharged plaintiff.⁷⁷ Adopting this bright-line rule would therefore deny standing to an indirect purchaser harmed by a vertical conspiracy’s creation of pass-through damages.⁷⁸ To justify this prohibitive view of the coconspirator exception, three principal arguments emerged from *ATM Fee* and *Dickson*: First, permitting theories of recovery dependent on pass-through damages would violate *Illinois Brick* by forcing courts to engage in complex tracing analysis;⁷⁹ second, a broad coconspirator exception would violate the Supreme

⁷³ See *id.*; *In re Midwest Milk Monopolization Litig.*, 730 F.2d 528, 530–531 (8th Cir. 1984); *McCarthy v. Recordex Serv., Inc.*, 80 F.3d 842, 855 (3d Cir. 1996); *Link v. Mercedes-Benz of N. Am., Inc.*, 788 F.2d 918, 931 (3d Cir. 1986) (collecting cases).

⁷⁴ *Howard Hess Dental Labs. Inc. v. Dentsply Int’l, Inc.*, 424 F.3d 363, 378–379 (3d Cir. 2005).

⁷⁵ *In re ATM Fee Antitrust Litig.*, 686 F.3d 741, 755 (9th Cir. 2012).

⁷⁶ *Dickson v. Microsoft Corp.*, 309 F.3d 193, 215 (4th Cir. 2002).

⁷⁷ *Id.* at 215; *ATM Fee*, 686 F.3d at 755.

⁷⁸ See *Dickson*, 309 F.3d at 215; *ATM Fee*, 686 F.3d at 755.

⁷⁹ *Dickson*, 309 F.3d at 215–216; *ATM Fee*, 686 F.3d at 750.

Court’s disapproval of market-by-market exceptions to *Illinois Brick*;⁸⁰ and finally, a broad exception would spawn artful pleading that upends *Illinois Brick*.⁸¹

In *ATM Fee*, the plaintiffs—ATM cardholders—alleged that they had been overcharged when they engaged in “foreign ATM transactions,” which occur when cardholders withdraw money from their accounts through an ATM not owned by their card-issuing bank.⁸² Critically, plaintiffs did not claim that the card-issuing defendant banks conspired to *directly* fix the foreign ATM transaction fee.⁸³ Instead, plaintiffs (indirect purchasers) alleged the existence of a vertical conspiracy in which foreign ATM owners⁸⁴ and defendant card-issuing banks (direct purchasers) conspired to raise “interchange fees,” which are intermediate fees paid by the defendant card-issuing banks to the ATM owners.⁸⁵ In turn, plaintiffs argued that the defendant banks passed-on the inflated interchange fees to ATM cardholders in the form of inflated foreign transaction fees.⁸⁶ In other words, the cardholders’ central allegation was that defendant banks and ATM owners had “conspired to fix interchange fees for the purpose and effect of fixing foreign ATM fees.”⁸⁷

⁸⁰ *Dickson*, 309 F.3d at 215; *ATM Fee*, 686 F.3d at 755 n.7.

⁸¹ *Dickson*, 309 F.3d at 215.

⁸² *ATM Fee*, 686 F.3d at 744–745.

⁸³ *Id.* at 744; Foreign ATM fees were allegedly set by the card-issuing banks *individually*. *Id.* at 745.

⁸⁴ Foreign ATM owners can be divided into three groups: “The first group includes . . . Independent Service Organizations (“ISOs”). ISOs own ATMs, but they are not banks and do not issue ATM cards (e.g., grocery stores or gas stations). The second group consists of financial institutions that accept deposits and issue ATM cards, but do not own any ATMs (e.g., credit unions or internet banks). The third and largest . . . group includes financial institutions that both issue ATM cards and own ATMs. The defendant banks . . . fit into this category.” *ATM Fee*, 686 F.3d at 745.

⁸⁵ *ATM Fee*, 686 F.3d at 746; The mechanism by which the defendant banks and ATM owners allegedly fixed “interchange” fees was the STAR Network, which is comprised of thousands of ATM owners. *Id.* at 745. The network, which is directly responsible for establishing the interchange fee, was owned and controlled by member banks, including defendant banks, until 2001. *Id.* Although the STAR network is now owned by Concord, a publicly traded corporation, Concord established a “Network Advisory Board (comprised of the larger member banks including Bank Defendants) to advise Concord concerning the interests of the large financial institutions.” *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 752. In support of this argument, plaintiffs asserted that “ATM owners have no reason to collect interchange fees from card issuers, as they may—and usually do—impose ‘surcharges’ directly on cardholders for

Plaintiffs argued that they had standing under the coconspirator exception: although plaintiffs had not paid a *directly* fixed fee, they had directly purchased from a coconspirator in a vertical conspiracy engaged in upstream price-fixing of interchange fees.⁸⁸ The coconspirator exception, according to plaintiffs, applied as long as plaintiffs had purchased directly from a coconspirator.⁸⁹ In assessing standing, then, it was immaterial that plaintiffs had been harmed by pass-on of an upstream overcharge, instead of a directly-fixed price.⁹⁰

The District Court for the Northern District of California disagreed with the plaintiffs, finding that the case involved a “fairly straightforward application of the rule set forth in *Illinois Brick*.”⁹¹ Because plaintiffs’ theory of recovery involved pass-on damages, the court assumed there would be a “need to apportion” the overcharge between plaintiffs and the defendant banks.⁹² That process, the court stated, would require calculation of the defendants’ pass-through rate to consumers—such a calculation would involve the challenges of “tracing the effects of the overcharge” to determine what portion of the price increase was attributable to the overcharge, as opposed to market forces.⁹³ The court asserted that these were the “very challenges that the *Illinois Brick* rule was designed to address.”⁹⁴

Drawing heavily from the district court opinion, the Ninth Circuit similarly found that plaintiffs ran “squarely into the *Illinois Brick* wall.”⁹⁵ Fearing complex apportionment, the court held that the coconspirator exception only applies if the theory of recovery does not involve

foreign ATM transactions.” Appellants’ Petition for Rehearing En Banc at 3–4, *In re ATM Fee Antitrust Litig.*, No. 10–17354 (9th Cir. July 26, 2012).

⁸⁸ *Id.* at 755.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *In re ATM Fee Antitrust Litig.*, No. C 04-02676 CRB, 2010 WL 3701912 at *11 (N.D. Cal. Sept. 16, 2010) aff’d on other grounds, 686 F.3d 741 (9th Cir. 2012).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *ATM Fee*, 686 F.3d. at 749 (quoting *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1049 (9th Cir. 2008)).

pass-on damages, as is the case where co-conspirators directly fix the *price paid* by plaintiffs.⁹⁶ Conversely, where co-conspirators fix an upstream price, the damage theory would rely on the “pass-on damages *Illinois Brick* prohibits.”⁹⁷

In addition to complex-apportionment concerns, the *ATM Fee* court fixated on the Supreme Court’s admonition of market-by-market exceptions to *Illinois Brick*.⁹⁸ The Ninth Circuit asserted that granting standing to indirect purchasers harmed by coconspirators’ anticompetitive, upstream conduct would improperly restrict *Illinois Brick*’s influence.⁹⁹ Without further elaboration, the court determined that extension of the co-conspirator exception amounted to carving out a new exception for a particular type of market.¹⁰⁰ The court, as a result, found that plaintiffs did not have standing under *Illinois Brick*.¹⁰¹

As in *ATM Fee*, the plaintiffs in *Dickson v. Microsoft Corp.* alleged that they had been harmed by a vertical conspiracy’s creation of pass-through damages.¹⁰² The plaintiffs (indirect purchasers) asserted that Microsoft and OEM defendants (direct purchasers)¹⁰³ had entered into anticompetitive licensing agreements that caused the OEMs to pay an inflated price for Microsoft’s operating system (OS) and Microsoft software.¹⁰⁴ Then, the OEM defendants allegedly passed-on the overcharge to plaintiffs in the form of inflated prices for personal computers (PCs) and software.¹⁰⁵ The OEM defendants agreed to be overcharged, plaintiffs argued, because the OEM defendants had received side-payments for their complicity consisting

⁹⁶ *Id.* at 750.

⁹⁷ *Id.* at 752.

⁹⁸ *See id.* at 755, n.7.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 749.

¹⁰² *Dickson v. Microsoft Corp.*, 309 F.3d 193, 215 (4th Cir. 2002).

¹⁰³ The original equipment manufacturers (OEMs)—direct purchasers of Microsoft’s operating system—consisted of Compaq Computer Corporation, Dell Computer Corporation, and PB Electronics, Inc. *Id.* at 198.

¹⁰⁴ *Id.* at 199.

¹⁰⁵ *Id.* at 200.

of various discounts, cooperation in product development, and proprietary access to Microsoft source code.¹⁰⁶

Plaintiffs argued that the coconspirator exception applied because they had directly purchased from a coconspirator.¹⁰⁷ *Illinois Brick* did not bar standing, plaintiffs argued, because the Supreme Court’s underlying policy concerns had not been implicated: first, double recovery had been prevented by joinder of the OEMs as defendants; second, the OEM’s were themselves engaged in the conspiracy, and therefore unlikely to bring a damages claim against Microsoft; and third, the damages calculation—the difference between the “but-for” price of the software absent the vertical conspiracy from the price actually paid—would not have involved complex tracing or pass-through analysis.¹⁰⁸

The Fourth Circuit disagreed and determined that the coconspirator exception only applies to price-fixing conspiracies where the upstream violator and the direct purchaser conspire to fix the price paid by the consumer.¹⁰⁹ The plaintiffs’ broad interpretation of the coconspirator exception, the court asserted, would invert *Illinois Brick* by encouraging “artful pleading.”¹¹⁰ The court further noted that such a result would be in violation of the Supreme Court’s warning in *Kansas v. UtiliCorp United*¹¹¹ against creating new exceptions to *Illinois Brick*.¹¹² In *Utilicorp*, the Court refused to adopt *market-based* exceptions to the direct purchaser rule, even

¹⁰⁶ *Id.* at 199 (citing *Gravity, Inc. v. Microsoft Corp.*, 127 F.Supp.2d 728, 732 n. 5 (D.Md.2001)); *United States v. Microsoft Corp.*, 84 F.Supp.2d 9, 42 (D.D.C.1999)).

¹⁰⁷ Brief for Appellants at 71, *Dickson v. Microsoft Corp.*, 309 F.3d 193 (4th Cir. 2002) (No. 01-2458), 2002 WL 33032432.

¹⁰⁸ *Id.* at 72–75.

¹⁰⁹ *Dickson*, 309 F.3d at 215.

¹¹⁰ *Id.*

¹¹¹ *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199 (1990).

¹¹² *Dickson*, 309 F.3d at 215.

where 100% of the overcharge was passed-on to indirect purchasers.¹¹³ The Fourth Circuit did not differentiate between such market-based exceptions and the coconspirator exception.¹¹⁴

The *Dickson* court continued by rejecting plaintiffs' argument that *Illinois Brick* policy concerns were not present. The Fourth Circuit noted that *Illinois Brick* had contemplated the reluctance of direct purchasers to bring suit against their suppliers, yet the Supreme Court chose to express a clear preference for direct-purchaser enforcement anyways.¹¹⁵ Also, *Illinois Brick*-complexity was unavoidable, according to the court, because calculation of the "but-for" price would require the court to calculate the overcharge's pass-through rate—"the exact analysis that *Illinois Brick* forbids."¹¹⁶ Although such complexity could have been avoided by awarding the plaintiffs 100% of the overcharge, the court refused to grant plaintiffs a "windfall."¹¹⁷ Accordingly, the court held that *Illinois Brick* barred the plaintiffs' damages claims.¹¹⁸

B. Jumping Over the Wall: The Functional Approach to *Illinois Brick* and the "First Non-Conspirator" Rule

In conflict with the "price paid" rule, the Seventh Circuit and the Third Circuit have produced opinions in support of the flexible "first non-conspirator" rule. The rule permits the first purchaser from outside of a conspiracy to bring a § 4 claim, even where the claim involves pass-through theories. These cases recognize that *Illinois Brick* was intended to promote vigorous antitrust enforcement—a goal that is compromised by a rigid approach to pass-on claims that leaves no parties to uphold the antitrust laws.

¹¹³ *UtiliCorp*, 497 U.S. at 216.

¹¹⁴ See *infra* Part IV.B.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 216; An indirect purchaser would receive compensation in excess of harm incurred where the direct purchaser does not pass-on the entire overcharge.

¹¹⁸ *Dickson v. Microsoft Corp.*, 309 F.3d 193, 216 (4th Cir. 2002).

The “first non-conspirator” rule was fashioned by Judge Easterbrook in *Paper Systems Inc. v. Nippon Paper Industries Co.*¹¹⁹ In *Paper Systems*, the plaintiffs, paper distributors, alleged that five fax paper manufacturers had participated in a price-fixing conspiracy.¹²⁰ Two of the manufactures sold exclusively to trading houses (direct purchasers), which resold to plaintiffs (indirect purchasers).¹²¹ The plaintiffs alleged that the trading houses, along with the manufacturers, were coconspirators in the price-fixing conspiracy.¹²² Thus, plaintiffs were the “first purchasers from *outside* the conspiracy.”¹²³ Judge Easterbrook, as a result, determined that “*Hanover Shoe* and *Illinois Brick* allocate to the first non-conspirator in the distribution chain the right to collect 100% of the damages.”¹²⁴ The court held that the first non-conspirator may collect damages where it can 1) prove the existence of a conspiracy and 2) establish overcharges.¹²⁵

Importantly, the court did not limit the “first non-conspirator” rule to instances where coconspirators fixed the “price paid” by the first consumer outside the conspiracy. Instead, the court spoke broadly, stating that plaintiffs, which included consumers that had purchased directly from the conspiring-middlemen, were entitled to collect “damages attributable to [their] direct purchases.”¹²⁶ In discussing damages, the court found that the calculation of a pass-through rate, or transfer price, would not “transgress *Illinois Brick*” as long as the process would not lead to

¹¹⁹ See *Paper Sys. Inc. v. Nippon Paper Induss. Co., Ltd.*, 281 F.3d 629 (7th Cir. 2002).

¹²⁰ *Id.* at 631.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* (emphasis in original).

¹²⁴ *Id.* at 632.

¹²⁵ *Id.*

¹²⁶ *Id.*

duplicative recovery and the difficulties of apportionment along the chain of distribution were absent.¹²⁷

Similarly, the Third Circuit has produced several cases applying a flexible approach to *Illinois Brick*. Although these cases do not explicitly adopt the “first non-conspirator” rule, they demonstrate that the “first non-conspirator” is the best antitrust enforcer, even where an upstream, fixed price has been passed-on. In *In re Sugar Industries Antitrust Litigation*,¹²⁸ plaintiffs—wholesale candy purchasers—alleged that defendant sugar manufacturers had fixed wholesale sugar prices.¹²⁹ Importantly, two of the sugar manufacturers also manufactured and sold candy directly to plaintiffs.¹³⁰ The Third Circuit therefore faced the following issue: whether *Illinois Brick* denies standing to a plaintiff who directly purchased a product (candy) from a conspirator that had fixed the price of an *upstream* ingredient (sugar).¹³¹

In determining that *Illinois Brick* was not controlling, the Third Circuit stressed that the plaintiff had purchased directly from a conspirator.¹³² Although calculating the impact of inflated sugar prices on candy prices might have proved difficult, *Illinois Brick*’s greatest concern—the “difficulty in computation . . . in parceling out damages among entities in the chain”—was not present.¹³³ The court was also concerned that rigid application of *Illinois Brick* would “leave a gaping hole in the administration of the antitrust laws” by allowing would-be conspirators to escape antitrust scrutiny “simply by incorporating the tainted element into

¹²⁷ *Id.* at 633.

¹²⁸ *In re Sugar Indus. Antitrust Litig.*, 579 F.2d 13 (3d Cir. 1978).

¹²⁹ *Id.* at 15.

¹³⁰ *Id.*

¹³¹ *Id.* at 16.

¹³² *Id.* at 17.

¹³³ *Id.*

another product.”¹³⁴ Adopting this rigid view of *Illinois Brick*, the court emphasized, would undermine deterrence and would therefore be “contrary to the spirit of the antitrust laws”¹³⁵ Consequently, *Sugar* clarifies that *Illinois Brick* permits the first non-conspirator standing even where defendants’ fixed the price of an upstream input instead of the price paid by plaintiffs, as long as there is no apportionment of damages along the chain of distribution.

Similarly, in *In re Linerboard Antitrust Litigation*,¹³⁶ plaintiffs brought suit against integrated manufacturers of corrugated boxes, corrugated sheets, and linerboard.¹³⁷ Plaintiffs alleged that defendants had restricted output of linerboard—a component of corrugated boxes and corrugated sheets—and then passed-on the inflated prices of linerboard by directly selling the finished boxes and sheets at supra-competitive prices to plaintiffs.¹³⁸ The Third Circuit reaffirmed its holding in *Sugar*, finding that plaintiffs were “entitled to recover the full amount of any overcharge,” even though defendants had not directly fixed *price paid* by plaintiffs.¹³⁹

Extending the logic of *Sugar* and *Linerboard* to the coconspirator context, the Third Circuit expressly rejected the “price paid” rule in *Howard Hess Dental Laboratories Inc. v. Dentsply International, Inc.*, recognizing that the first non-conspirator may deserve standing, even where pass-through theories are involved.¹⁴⁰ In *Dentsply*, plaintiffs—indirect purchasers of artificial teeth—argued that they had standing under the coconspirator exception because they

¹³⁴ *Id.* at 18. The court explained how would-be conspirators could exploit the loophole: “[A] refiner who illegally set the price of sugar could shield itself by putting all of the sugar into a new product, a syrup, simply by adding water and perhaps a little flavoring. We do not think the antitrust laws should be so easily evaded.” *Id.*

¹³⁵ *Id.* (citing *Perma Life Mufflers, Inc. v. Int’l Parts Corp.*, 392 U.S. 134, 139 (1968) (“[T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter any one contemplating business behavior in violation of the antitrust laws.”)).

¹³⁶ *In re Linerboard Antitrust Litig.*, 305 F.3d 145 (3d Cir. 2002).

¹³⁷ *Id.* at 148.

¹³⁸ *Id.* at 151, 159.

¹³⁹ *Id.* at 159–160.

¹⁴⁰ See *Howard Hess Dental Labs. Inc. v. Dentsply Int’l, Inc.*, 424 F.3d 363, 381 (3d Cir. 2005). While the court did not go as far as *Paper Systems*, which provided the first non-conspirator with a general grant of standing, *Dentsply* recognized that the first non-conspirator deserves standing where the middlemen would be barred by the complete involvement defense. *Id.* at 380 n.13.

had purchased directly from Dentsply’s dealers, and that the dealers (along with Dentsply) were coconspirators in an exclusive-dealing conspiracy.¹⁴¹ The court first acknowledged the unquestioned availability of the coconspirator exception for retail price maintenance (RPM) conspiracies,¹⁴² which is another way of describing the traditional coconspirator exception recognized by the “price paid” rule.¹⁴³ Next, the court asked whether the coconspirator exception extended beyond the “price paid” rule to non-RPM conspiracies, which would include “exclusive-dealing or [upstream] price-fixing at the manufacturer level.”¹⁴⁴ A non-RPM conspiracy, the Third Circuit explained, would potentially “allow Dentsply to charge its dealers a supra-competitive price at wholesale.”¹⁴⁵ The dealers, in turn, would pass-on some portion of the overcharge to plaintiffs.¹⁴⁶ The court noted that the economics of a “non-RPM” conspiracy may be viable where a mechanism exists to compensate the middleman for effectively agreeing to be overcharged.¹⁴⁷

Rejecting the “price paid” rule, the *Dentsply* court formulated a “limited” coconspirator exception to cover non-RPM conspiracies.¹⁴⁸ The court stated that the “limited” exception would only apply “where the middleman would be barred from bringing a claim against their former co-conspirator . . . because their involvement in the conspiracy was ‘truly complete.’”¹⁴⁹

¹⁴¹ *Id.* at 378.

¹⁴² *Id.* at 378.

¹⁴³ “Resale price maintenance” describes a vertical price fixing scheme in which the initial seller and the direct purchaser fix the downstream, retail price, or the “price paid” by consumers. *Id.* at 377 n.9.

¹⁴⁴ *Id.*; The “exclusive-dealing” option reflects the alleged scheme in *Dentsply* and *Dickson*, while manufacturer-level price-fixing reflects the scheme alleged in *In re ATM*. *Supra* notes 85, 104–106, 141 and accompanying text.

¹⁴⁵ *Id.* at 380.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 378 n.12; The *Dentsply* court explained that the compensation mechanism, or side-payment, might have been Dentsply’s role in policing a dealer-level, horizontal price-fixing conspiracy that generated extra profit for the dealers. *Id.*

¹⁴⁸ *Dentsply*, 424 F.3d at 378.

¹⁴⁹ *Id.* at 378–379; In *Dentsply*, the dealers’ involvement in the exclusive-dealing conspiracy was not truly complete due to the following District Court findings: first, the dealers were not “substantially equal” participants in

A middleman’s involvement would be “truly complete” where the court could bar the middleman from suing a manufacturer who successfully brings the “complete involvement defense.”¹⁵⁰

The court analyzed the exception in light of the policy concerns enunciated by *Illinois Brick*. The court first reasoned that the limited exception would avoid the risk of duplicative recovery by barring completely-involved middlemen from recovery.¹⁵¹ Second, the exception avoided *Illinois Brick*’s related concern for efficient antitrust enforcement by guaranteeing a non-diluted recovery for middlemen not completely involved in the conspiracy.¹⁵² Finally, the third *Illinois Brick* concern—complex apportionment of overcharges—was diminished because “there would be no need to ‘apportion’ damages between direct and indirect purchasers under the limited exception.”¹⁵³ The court, however, determined that plaintiffs were eligible to recover only the portion of the overcharge passed-on by the middlemen, reasoning that the portion of the overcharge that the middlemen absorbed would not injure plaintiffs.¹⁵⁴ Although apportionment along the chain of distribution would not be required, courts would still face the complex task of calculating the pass-through rate of the overcharge, which, the *Dentsply* court asserted, would cut against the grain of *Illinois Brick*.¹⁵⁵ Although the limited exception would result in pass-

the conspiracy; second, the dealers’ participation was not “voluntary in any meaningful sense.” *Id.* at 384 (quoting Dist Ct. Mem. Op. at 20–21 (Dec. 19, 2001)).

¹⁵⁰ *Dentsply*, 424 F.3d at 379; The “complete involvement defense” bars a plaintiff’s cause of action against a conspirator where the plaintiff participated in, and was completely involved in, the conspiracy. *Id.* at 381. “[E]very Court of Appeals that has decided the issue has held that antitrust plaintiffs who were involved in a conspiracy at a requisite level are barred from suing.” *Id.* at 382.

¹⁵¹ *Id.* 424 F.3d at 380.

¹⁵² *Id.* at 381.

¹⁵³ *Id.* at 380 n.15.

¹⁵⁴ *Id.* at 380 n.14; *But cf.* *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 494 (1968) (creating a regime under which plaintiffs could receive a windfall by recovering for injuries not absorbed); *Supra* notes 204–209 and accompanying text.

¹⁵⁵ *Dentsply*, 424 F.3d at 380 n.15; Had the court permitted plaintiffs to recover the entire overcharge (giving plaintiffs a windfall), there would be no need to calculate the overcharge’s pass-through rate. Under this set of

through calculations, the court held that adopting no exception at all—the result created by the “price paid” rule—would be even less desirable.¹⁵⁶ Citing to *Illinois Brick*’s ultimate aim of encouraging “vigorous private enforcement of antitrust laws,”¹⁵⁷ the court was unwilling to find that “no plaintiff outside the [non-RPM] conspiracy” had standing.¹⁵⁸

IV. Rejecting the “Price Paid” Rule in Favor of the “First Non-Conspirator” Rule: a Review of Economic Commentary and Supreme Court Precedent

A. The Roadmap to Antitrust Immunity

The central problem created by the “price paid” rule is that it generates a roadmap for would-be conspirators to avoid antitrust laws.¹⁵⁹ In *Sugar* and *Linerboard*, the Third Circuit recognized that rigid application of *Illinois Brick* would leave a hole in the antitrust laws: in those cases, the courts refused to immunize vertically integrated producers that 1) inflated the price of an upstream input and 2) incorporated the inflated price into a downstream commodity it sold directly to consumers.¹⁶⁰ The roadmap to antitrust immunity created by the “price paid” rule effectively mirrors the loophole recognized by the Third Circuit. The only difference is that the “price paid” roadmap adds an additional component to the mix: where an upstream producer is unable to implement its scheme unilaterally—as was the case in *Sugar* and *Linerboard*—the producer must establish a vertical scheme that enlists the help of its direct purchasers.

circumstances, the limited exception would completely avoid *Illinois Brick*’s concern with complexity. *Id.* at 380 n.14.

¹⁵⁶ *Id.* at 381 (citing *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1169 (3d Cir.1993) (“[W]hile complex apportionment problems are implicated here, we do not hold that litigation must be avoided solely because it might be difficult to ascertain damages. Injured parties cannot be penalized and left without recourse because measurement of their damages is difficult.”)).

¹⁵⁷ *Id.* (emphasis added) (quoting *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745 (1977)).

¹⁵⁸ *Dentsply*, 424 F.3d at 381.

¹⁵⁹ Amici Curiae Brief of Interested Retailers and the American Antitrust Institute in Support of Appellants’ Petition for Rehearing En Banc at 3, *In re Atm Fee Antitrust Litig.*, No. 10–17354 (9th Cir. Aug. 6, 2012).

¹⁶⁰ See *In re Sugar Indus. Antitrust Litig.*, 579 F.2d 13, 18 (3d Cir. 1978); *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 159–160 (3d Cir. 2002); *supra* III.B.

Recent economic literature has recognized that *Illinois Brick* can be exploited by such vertical schemes, creating a blueprint for immunity from antitrust laws.¹⁶¹ By sharing monopoly profits with its direct purchasers, an upstream cartel can ensure its direct purchasers (the only parties eligible to sue under the “price paid” rule) lack incentive to bring suit.¹⁶² Direct purchasers (who, at the outset, are overcharged) receive “side-payments” as compensation for their complicity, ranging from “hush money to grease the palms of key decision makers to overt money transfers between the companies.”¹⁶³ The direct purchasers, in turn, pass-on the overcharge to its customers, injuring the remaining chain of production and reducing total welfare.¹⁶⁴ If successful, “[t]he cartel is effectively shielded from exposure through private litigation by an ‘Illinois Wall’ of direct purchasers.”¹⁶⁵

Successful implementation of the “price paid” roadmap would require satisfaction of several conditions. First, the side-payment should exceed the sum of 1) the opportunity cost forfeited by direct purchasers’ in declining to bring a civil action,¹⁶⁶ 2) the direct purchasers’ lost profits as a consequence of a reduced volume in sales,¹⁶⁷ and 3) any portion of the overcharge absorbed by the direct purchaser. Second, the upstream cartel must be able to prevent its direct

¹⁶¹ See Maarten Pieter Schinkel, Jan Tuinstra & Jacob Rüggeberg, *Illinois Walls: How Barring Indirect Purchaser Suits Facilitates Collusion*, (Amsterdam Ctr. for Law & Econ. Working Paper No. 2005-02, 2008); The authors of *Illinois Walls* discuss how upstream cartels could effectuate the blueprint for immunity through *tacit* cooperation with direct purchasers. *Id.* at 19. Implementation of the blueprint through *overt* cooperation would be nearly identical, with the exception that the side-payment scheme would exist pursuant to an illegal, vertical agreement between the upstream cartel and direct purchasers.

¹⁶² *Id.* at 3; see also Edmund H. Mantell, *Denial of a Forum to Indirect-Purchaser Victims of Price Fixing Conspiracies: A Legal and Economic Analysis of Illinois Brick*, 2 PACE L. REV. 153, 217 n.157 (1982) (“Direct purchasers in such an enviable position will be understandably reluctant to kill the goose that lays the golden eggs by suing the price-fixers.”).

¹⁶³ Schinkel, *supra* note 161 at 3; The facts in *Dickson* and *Denstply* present possible examples of this side-payment scheme. *Supra* notes 104–106, 141, 147 and accompanying text.

¹⁶⁴ *Id.*; The “direct purchaser customers react . . . to the increase in the price of one of their factor inputs by raising the price to their customers,” resulting in “gross injury” to the downstream chain. Mantell, *supra* note 162 at 214.

¹⁶⁵ Schinkel, *supra* note 161 at 3.

¹⁶⁶ *Id.* at 4; The opportunity cost would be sizeable due to the availability of treble damages. *Id.*

¹⁶⁷ Mantell, *supra* note 162 at 214 (The transfer payment must compensate the direct purchaser for the “profits lost . . . as a consequence of their price/output adaptation to the cost increase”).

purchasers from defecting and bringing suit.¹⁶⁸ Third, the upstream cartel's profits, reduced by the side-payments, must be greater than the profits that the cartel could earn under competitive conditions.¹⁶⁹ Finally, the market structure must incentivize collusion between the upstream cartel and the direct purchasers: the most plausible scenario is where the cartel sells a product subject to inelastic demand to only a few, large direct purchasers.¹⁷⁰

The “price paid” rule bars indirect purchasers from bringing suit against conspirators engaged in the above scheme, allowing upstream producers and direct purchasers to “exploit their common interest at the expense of . . . indirect purchasers”¹⁷¹ with impunity.¹⁷² This rigid constraint on the coconspirator exception results in a “perversion of the spirit of antitrust legislation” by incapacitating the “very parties who are likely to be the most vigorous private enforcers of the antitrust laws.”¹⁷³ Notably, neither of the circuits adopting the “price paid” rule dismissed (or even discussed) the roadmap created by their decisions, focusing instead on a mechanical, and ultimately incorrect, reading of *Illinois Brick*.

B. Market-Based Exceptions

¹⁶⁸ Schinkel, *supra* note 161 at 4.

¹⁶⁹ *Id.*

¹⁷⁰ Mantell, *supra* note 162 at 213; Where there are only a few, large direct purchasers, the “situation resembles bilateral monopoly.” *Id.* Under these market conditions, the side-payment scheme is viable because buyers and sellers have the incentive to “exploit their common interest at the expense of third parties, the indirect purchasers.” *Id.* Conversely, where direct purchasers are “numerous and relatively small,” the cartel would be more likely unilaterally extract monopoly return from direct purchasers. *Id.* Additionally, the side-payment scheme is more likely to occur in product markets subject to inelastic demand because conspirators will have an increased ability to pass-on price increases down the chain and therefore maximize total monopoly profit. *See id.* at 216 n.156.

¹⁷¹ *Id.* at 213.

¹⁷² Amici Curiae Brief of Interested Retailers and the American Antitrust Institute in Support of Appellants’ Petition for Rehearing En Banc, *supra* note 159, at 19 (“If you want to avoid application of the antitrust laws, conspire with a middleman to fix the price of a component part of something the middleman sells . . . Under the [price paid rule] . . . both conspirators are immune from antitrust prosecution by the private attorney general contemplated by § 4.”).

¹⁷³ Mantell, *supra* note 162 at 218; *see also*, Dickson v. Microsoft Corp., 309 F.3d 193, 223 (4th Cir. 2002) (Gregory, J., dissenting) (The “price paid” rule “is essentially a free pass to any conspiracy that can make the damage it inflicts difficult to pin down . . . Until now, that has never been the law.”); Amici Curiae Brief of Interested Retailers and the American Antitrust Institute in Support of Appellants’ Petition for Rehearing En Banc, *supra* note 159 at 19 (“When you deny standing to the true direct purchaser outside of the conspiracy, you effectively immunize the conspiracy from civil liability. There is simply no question that such a result was not what the Supreme Court intended in either *Illinois Brick* or *Utilicorp*.”).

The “price paid” rule relies on the argument that extension of the coconspirator exception would undermine *Illinois Brick* by violating the Supreme Court’s disapproval of market-by-market exceptions to the direct purchaser rule expressed in *Illinois Brick* and *UtiliCorp*.¹⁷⁴ In *UtiliCorp*, plaintiffs sought an exception to *Illinois Brick* based on the economics of the natural gas market: because the gas market resulted in a 100% pass-on of overcharges to indirect purchasers, plaintiffs argued that there was no reason to fear the complex process of calculating pass-through admonished by *Illinois Brick*.¹⁷⁵ The Supreme Court rejected this argument, reasoning that future indirect purchasers would similarly argue that their market situation allowed for manageable pass-on calculations and that they, too, deserved a market-based exception to *Illinois Brick*.¹⁷⁶ Echoing the logic behind the *Illinois Brick* warning against market-by-market exceptions, the Court asserted that the judiciary would be burdened by an unwieldy classification system for varying market situations coupled with endless litigation “over where the line should be drawn” for each market.¹⁷⁷ The Court predicted that such a system would result in the same “massive evidence and complicated theories” the direct purchaser rule sought to avoid in the first place.¹⁷⁸

The coconspirator exception, however, is not a *market-based* exception to the direct purchaser rule. Instead, the exception is legally based, a recognition that different rules apply to different kinds of conspiracies (not different kinds of markets).¹⁷⁹ The coconspirator exception

¹⁷⁴ See *supra* note 80 and accompanying text.

¹⁷⁵ *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 208 (1990).

¹⁷⁶ *Id.* at 216.

¹⁷⁷ *Id.* (quoting *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745 (1977)).

¹⁷⁸ *Id.* (quoting *Illinois Brick*, 431 U.S. at 745).

¹⁷⁹ See *Dee-K Enters., Inc. v. Heveafil Sdn. Bd.*, 982 F. Supp. 1138, 1153 (E.D. Va. 1997) (The Supreme Court’s warning against exceptions “was made in the context of a plaintiff seeking an exception for a particular *industry*, not an exception for certain corporate structures and relationships); *In re Cathode Ray Tube Antitrust Litig.*, No. MDL 1917, 2012 WL 5987861 at *5 (N.D. Cal. Nov. 29 2012) (The coconspirator exception is “not based on

serves as a reminder that while *Illinois Brick* bars indirect purchaser claims against *horizontal* conspiracies transacting with *innocent* direct purchasers, a different set of rules apply to claims against *vertical* conspiracies between producers and direct purchasers.¹⁸⁰ As a result, the coconspirator exception is not really an exception at all, but a categorical rule that *Illinois Brick* does not apply where plaintiffs have purchased directly from a vertical conspiracy.¹⁸¹

In support of the “price paid” rule, the courts in *Dickson* and *In re ATM* advanced an odd argument: after recognizing that the coconspirator exception has been firmly established among the circuits, the courts, without explanation, asserted that *extension* of the exception violated the Supreme Court’s warning against market-based exceptions.¹⁸² But broadening the coconspirator exception does not create a new market-based exception to *Illinois Brick*; instead, it is a legal recognition that courts should not deny standing to the first innocent purchaser from a vertical conspiracy, regardless of the method used by the conspiracy to implement its scheme. And, as discussed above, the coconspirator exception is really a categorical rule that *Illinois Brick* is

market-specific factors” nor “case-specific factors.” Instead, the exception applies where *Illinois Brick*’s “policy of encouraging private antitrust suits would be stymied by mechanical application of its bright-line rule.”)

¹⁸⁰ See *Lowell v. Am. Cyanamid Co.*, 177 F.3d 1228, 1232–1233 (11th Cir. 1999) (The coconspirator exception is not “based on the facts of a particular market; *Illinois Brick* simply does not apply to this kind of conspiracy.”); Amici Curiae Brief of Interested Retailers and the American Antitrust Institute in Support of Appellants’ Petition for Rehearing En Banc, *supra* note 159 at 18 (The coconspirator exception is “not based on the economics of a particular industry, which the Supreme Court disapproved in *Illinois Brick* and *UtiliCorp* Rather, these decisions simply support the proposition that the direct purchaser rule has no application until one is outside the conspiracy.”).

¹⁸¹ See *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 604 (7th Cir. 1997) (Where plaintiffs purchase directly from a vertical conspiracy, “any indirect-purchaser defense would go by the board”); *Lowell*, 177 F.3d at 1232 (“*Illinois Brick* does not apply to a single vertical conspiracy where the plaintiff has purchased directly from a conspiring party in the chain of distribution.”); see also *California v. ARC Am. Corp.*, 490 U.S. 93, 97 (1989) (“Indirect purchasers” include only those who “did *not* purchase . . . directly from the price-fixing defendants.”) (emphasis added); *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 207 (1990) (Plaintiffs are “indirect purchasers” if “they are *not* the immediate buyers from the alleged antitrust violators.”) (emphasis added).

¹⁸² *Dickson v. Microsoft Corp.*, 309 F.3d 193, 215 (4th Cir. 2002); *In re ATM Fee Antitrust Litig.*, 686 F.3d 741, 755 n.7 (9th Cir. 2012).

inapplicable to all claims alleging vertical conspiracy.¹⁸³ It would be odd to shape the scope of a rule which says that *Illinois Brick* does not apply by (incorrectly) applying *Illinois Brick*.

C. Theories of Recovery Based on Pass-Through Damages

The “price paid” rule further relies on the argument that extension of the coconspirator exception violates *Hanover Shoe* and *Illinois Brick* by permitting a theory of recovery that requires complex pass-through calculations.¹⁸⁴ This argument fails for three reasons. First, when *Hanover Shoe* and *Illinois Brick* discussed pass-through damages, the Supreme Court did not contemplate a vertical conspiracy involving direct purchasers. Second, calculation of the pass-through rate is not always required, as alternative econometric techniques are available to measure damages. Finally, even if pass-through calculations are barred, and there are no alternative ways to calculate damages, courts have a simple alternative: award indirect purchasers the full overcharge. Although the award might give plaintiffs a windfall gain, such a result is consistent with *Hanover Shoe*.

Hanover Shoe and *Illinois Brick* did not create a *per se* ban on all theories of recovery dependent on complex pass-through calculations. In *Hanover Shoe*, the Court was critical of pass-on arguments in the context of defensive pass-on, reasoning that the pass-on defense would lead to under-enforcement of antitrust laws and poor deterrence of antitrust violators.¹⁸⁵ While *Hanover Shoe* was also generally critical of pass-through calculations,¹⁸⁶ the Court did not have the opportunity to consider pass-through in the context of a vertical conspiracy, where the first

¹⁸³ *Supra* note 181 and accompanying text.

¹⁸⁴ *Dickson*, 309 F.3d at 215–216; *ATM Fee*, 686 F.3d at 750.

¹⁸⁵ See *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 494 (1968); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 734–735 (1977) (“[W]e understand *Hanover Shoe* as resting on the judgment that the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it.”).

¹⁸⁶ *Hanover Shoe*, 392 U.S. at 492–493.

non-conspirators are the best antitrust enforcers. Banning all pass-through theories, in this context, would generate the very result that *Hanover Shoe* sought to avoid—allowing antitrust violators to “retain the fruits of their illegality.”¹⁸⁷

In *Illinois Brick*, the Court considered pass-through complexity in conjunction with other policy factors such as apportionment along the entire chain of distribution, duplicative recovery, and efficient enforcement of antitrust laws.¹⁸⁸ While the Court recognized that pass-through complexity, alone, was undesirable, the Court’s principal fear was the *combination* of its concerns: an apportionment process that would require complex pass-through calculations at *multiple* links in a long distribution chain.¹⁸⁹ Weighing the *combined* impact of these factors,¹⁹⁰ the Court denied standing to indirect purchasers who alleged that they had incurred pass-through damages subsequent to a *horizontal* conspiracy’s overcharge of *innocent* direct purchasers.¹⁹¹ While the Court clearly expressed its aversion to pass-through calculations in *that context*, the Court did not hold that pass-through calculations were to be prohibited in *all contexts*.¹⁹²

In the context of the broad coconspirator exception, there would be no danger of duplicative recovery, the pass-through calculation would occur at only one link in the chain, and direct purchasers would not be the best antitrust enforcers.¹⁹³ And, because *Illinois Brick* is categorically inapplicable to allegations of vertical conspiracy, lower courts faced with such

¹⁸⁷ *Id.* at 494.

¹⁸⁸ See *Illinois Brick*, 431 U.S. at 720, 730, 736, 737, 745–746 (1977).

¹⁸⁹ See *id.* at 745.

¹⁹⁰ *Id.* (“The *combination* of increasing the costs and diffusing the benefits of bringing a treble-damages action could seriously impair the important weapon of antitrust enforcement.”) (emphasis added).

¹⁹¹ *Id.* at 726–727, 728–729.

¹⁹² See *Laumann v. Natl. Hockey League*, No. 12 CIV. 1817 SAS, 2012 WL 6043225 at *6 (S.D.N.Y. Dec. 5, 2012) (“[T]he purpose of *Illinois Brick* was *not* to prevent the only non-conspirators in a multi-level distribution chain . . . from bringing a private antitrust suit.”); *Dickson v. Microsoft Corp.*, 309 F.3d 193, 223 (4th Cir. 2002) (Gregory, J., dissenting) (“The real concern of *Hanover Shoe* and *Illinois Brick* is the complexity of measuring the pass-on of an *actual* overcharge, and its potential negative effect on deterrence and compensation, not the mere difficulties determining what the price would have been in a competitive market.”) .

¹⁹³ See *Dickson*, 309 F.3d at 221–223 (Gregory, J., dissenting).

allegations could assess the propriety of pass-through calculations on independent grounds. The court in *Dentsply*, for example, found that pass-through calculations were acceptable, as the alternative—denying all recovery outside the vertical conspiracy—was even less desirable.¹⁹⁴ Similarly, in *Sugar*, the court acknowledged that it would be difficult to calculate the rate at which a sugar price overcharge was passed-on to candy prices, but that such difficulties did not compare to performing pass-through calculations along an entire distribution chain.¹⁹⁵ The alternative—to leave a “gaping hole in the administration of the antitrust laws”—was unacceptable.¹⁹⁶ Finally, the court in *Paper Systems* determined that pass-through calculations were permissible as long as apportionment along the chain of distribution and duplicative recovery were absent.¹⁹⁷

Moreover, modern econometric techniques may allow courts to calculate damages without calculating the pass-on rate; as a result, courts would avoid some of the difficulties associated with pass-through analysis, including elasticity measurements.¹⁹⁸ When measuring damages (the amount by which indirect purchasers were overcharged) courts have several options.¹⁹⁹ They can calculate the overcharge head-on, which would require a determination of the overcharge’s pass-through rate from the direct purchaser to the indirect purchaser (the method criticized by *Hanover Shoe* and *Illinois Brick*)—use of this process, however, is

¹⁹⁴ *Howard Hess Dental Labs. Inc. v. Dentsply Int’l., Inc.*, 424 F.3d 363, 381 (3d Cir. 2005).

¹⁹⁵ *In re Sugar Indus. Antitrust Litig.*, 579 F.2d 13, 18 (3d Cir. 1978).

¹⁹⁶ *Id.*

¹⁹⁷ *Paper Sys. Inc. v. Nippon Paper Induss. Co., Ltd.*, 281 F.3d 629, 633 (7th Cir. 2002).

¹⁹⁸ The difficulty of performing elasticity measurements appears to be the *Illinois Brick* Court’s primary concern with pass-through analysis. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720, 741 (1977).

¹⁹⁹ *See EUROPEAN COMMISSION DG COMPETITION, DRAFT GUIDANCE PAPER: QUANTIFYING HARM IN ACTIONS FOR DAMAGES BASED ON BREACHES OF ARTICLE 101 OR 102 OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION* 48 (2011). (“[W]here an indirect customer brings a claim for compensation of an overcharge caused by a cartel, that indirect customer can either show that there was an initial overcharge and that this overcharge was passed on to him or he may quantify the overcharge passed on to his level in the same manner as a direct customer would quantify an initial overcharge, namely by comparing the actual price he paid with the likely price in a non-infringement scenario . . .”).

uncommon, even in state courts that allow indirect purchaser lawsuits.²⁰⁰ Alternatively, indirect purchasers can calculate the difference between the price they actually paid with the “but-for” price, or the price absent the conspiracy—the formula already used in traditional overcharge cases.²⁰¹ In calculating the “but-for” price, courts can avoid pass-through analysis by using comparator-based methods,²⁰² such as the “before and after” method and the “yardstick” method.²⁰³

Finally, even if *Hanover Shoe* and *Illinois brick* effectuate a *per se* ban on pass-through calculations, and there are no alternative ways to calculate damages, courts can avoid pass-through complexity altogether by awarding indirect purchasers the entire overcharge paid by direct purchasers. In *Royal Printing Co. v. Kimberly Clark Corp.*,²⁰⁴ the plaintiff, an indirect purchaser, alleged that defendant manufacturers of paper products had overcharged their wholesale divisions, which allegedly passed-on the overcharge to plaintiff.²⁰⁵ Because the Ninth Circuit interpreted the *Illinois Brick* criticism of pass-on calculations as a binding prohibition on

²⁰⁰ See PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, ¶ 346k1 (“To be sure, one way to compute passed-on overcharges is by assessing demand and supply elasticities and querying how much the intermediary will absorb, how much it will raise its price, how much it will pass on, and what its output reduction would be. However, that is not the typical way in which passed-on damages are computed in litigation.”).

²⁰¹ European Commission DG Competition, *supra* note 199 at 8–9; See also Areeda, *supra* note 200 (“To be sure, the overcharge paid by the consumer has been passed on, but computation of passed-on damages is not invariably more complex than computation of direct purchaser overcharges.”).

²⁰² Areeda, *supra* note 200 (“Most damage models that estimate indirect purchaser damages do not compute the pass-on at all.”); European Commission DG Competition, *supra* note 199 at 48 (“[C]omparator-based methods can provide useful insights into the amount of overcharge paid by indirect customers, without it being necessary to identify the degree of pass-on By using a time comparison, for instance, for the prices paid by the indirect customer before and during the infringement, it can be possible to ascertain how much those prices rose because of the infringement, without having to make a finding concerning the pass-on rate.”).

²⁰³ The “before and after” method compares prices prior to (or after) the anticompetitive conduct with prices while the conduct was occurring. Areeda, *supra* note 200. The “yardstick” method compares the price in the anticompetitive market with the price in a similar, competitive market. *Id.* Neither method requires pass-through calculations. *Id.*

²⁰⁴ *Royal Printing Co. v. Kimberly Clark Corp.*, 621 F.2d 323 (9th Cir. 1980). Notably, *Royal Printing* involved the “control exception,” not the coconspirator exception. Nevertheless, the court’s logic is directly applicable here: “The two exceptions share a common logic—where the relationship between the parties in a multi-tiered distribution chain is such that plaintiffs are the first or *only* victims of alleged anticompetitive agreements, the rationale for the *Illinois Brick* bar disappears.” *Laumann v. Natl. Hockey League*, No. 12 CIV. 1817 SAS, 2012 WL 6043225 at *6 (S.D.N.Y. Dec. 5, 2012).

²⁰⁵ *Royal Printing*, 621 F.2d at 324, 327.

all pass-on theories, it faced two alternatives: award the indirect purchaser the entire overcharge occurring at the wholesale level, or bar indirect purchaser-standing completely.²⁰⁶ The court chose the first option, arguing that barring standing was intolerable because it “would close off every avenue for private enforcement of the antitrust laws”²⁰⁷ The *Royal Printing* court recognized that the downside of awarding indirect purchasers the full overcharge is that it presents them with “an opportunity for a windfall gain.”²⁰⁸ But *Hanover Shoe*, the court emphasized, “teaches that in such situations there is nothing wrong with the plaintiff winning a windfall gain, so long as the antitrust laws are vindicated and the defendant does not suffer multiple liability”²⁰⁹

D. Artful Pleading

Finally, the “price paid” rule relies on the argument that the broad coconspirator exception would generate artful pleading that evades and inverts *Illinois Brick*.²¹⁰ This concern is misplaced for two reasons. First, bare allegations of vertical conspiracy do not suffice under the heightened pleading standards created by *Bell Atlantic Corp. v. Twombly*.²¹¹ Pursuant to *Twombly*, plaintiffs must allege facts moving the vertical conspiracy over “the line between

²⁰⁶ *Id.* at 327.

²⁰⁷ *Id.*; see also *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1145 (9th Cir. 2003) (“[I]ndirect purchasers can sue for damages if there is no realistic possibility that the direct purchaser will sue its supplier over the antitrust violation.”)

²⁰⁸ *Royal Printing*, 621 F.2d at 327; The windfall gain would result where indirect purchasers “recover an amount, trebled, that exceeds its actual damages (because market forces probably forced the middlemen to absorb part of the overcharge)” *Id.*

²⁰⁹ *Id.* at 327. Highlighting the “price paid” rule’s unwarranted hostility towards pass-through calculations, the combination of *Royal Printing* and *In re ATM* produces an odd result in the Ninth Circuit: “[P]urchasers who pay overcharges indisputably ‘passed on’ by subsidiaries of conspirators will have standing (per *Royal Printing*), but those who pay overcharges even arguably ‘passed on’ by the conspirators themselves will lack for standing.” Appellants’ Petition for Rehearing En Banc at 3–4, *In re ATM Fee Antitrust Litig.*, No. 10–17354 (9th Cir. July 26, 2012).

²¹⁰ *Dickson v. Microsoft Corp.*, 309 F.3d 193, 215 (4th Cir. 2002); See also Appellees’ Response to Petition for Rehearing En Banc at 15, *In re ATM Fee Antitrust Litig.*, No. 10–17354 (9th Cir. July 31, 2012) (“[I]f an allegation that a manufacturer and a middleman ‘fixed’ the manufacturer’s price to the middleman were alone sufficient to confer standing on consumers . . . the *Illinois Brick* rule could be easily evaded: any arms-length middleman buyer could be characterized as a ‘conspirator’ with respect to the price it agreed to pay the manufacturer seller.”).

²¹¹ *Bell A. Corp. v. Twombly*, 550 U.S. 544 (2007).

possibility and plausibility of entitlement to relief.”²¹² In doing so, allegations of conscious parallelism are insufficient; plaintiffs must instead present “allegations plausibly suggesting (not merely consistent with) agreement”²¹³ *Twombly*, as a result, has significantly raised the hurdle for antitrust plaintiffs at the pleading stage, undermining the notion that plaintiffs could easily avoid *Illinois Brick* through artful pleading.²¹⁴

In *Temple v. Circuit City Stores, Inc.*, for example, consumer plaintiffs (indirect purchasers) alleged a vertical conspiracy between Visa and MasterCard and merchants of Visa and MasterCard (direct purchasers).²¹⁵ Plaintiffs alleged that the merchants—who had been overcharged due to the “unlawful tying practices of Visa and MasterCard”—had entered into an agreement with Visa and MasterCard to pass on the inflated prices to consumers.²¹⁶ Plaintiffs, however, failed to provide any facts that supported the existence of an anticompetitive agreement or conspiracy.²¹⁷ The *Temple* court determined that the merchants’ conduct could have resulted from either vertical conspiracy or independent decision-making.²¹⁸ The *Temple* court therefore dismissed the claim, noting that plaintiffs had provided only a “naked assertion” of vertical conspiracy in an attempt to avoid *Illinois Brick*.²¹⁹ *Temple* serves as evidence, then, that artful pleading of a vertical conspiracy is unlikely to upend *Illinois Brick*.

²¹² *Id.* at 557. The Supreme Court sought to curb abusive discovery in antitrust cases by avoiding “the potentially enormous expense of discovery” *Id.*

²¹³ *Id.*

²¹⁴ See Hovenkamp, *supra* note 13 at 689 (“*Twombly* has had a significant impact on antitrust pleading—both greatly increasing the percentage of dismissals and producing longer and more factually detailed complaint.”).

²¹⁵ *Temple v. Cir. City Stores, Inc.*, No. 06 CV 5303 (JG), 2007 WL 2790154, at *1 (E.D.N.Y. Sept. 25, 2007).

²¹⁶ *Id.* at *1, *2. The merchants agreed to pay the inflated fees, according to plaintiffs, for “business reasons,” including the fear that merchants would otherwise lose their business with Visa and MasterCard entirely. *Id.* at 2.

²¹⁷ *Id.* at 7.

²¹⁸ *Temple*, No. 06 CV 5303 (JG), 2007 WL 2790154, at *7 (E.D.N.Y. Sept. 25, 2007).

²¹⁹ *Id.*

Second, Rule 11 sanctions are available to curb abuses of pleading rules.²²⁰ As the dissent in *Dickson* noted, artful pleading concerns are not relevant to standing issues under *Illinois Brick* and *Hanover Shoe*.²²¹ The dissent reasoned that the “direct purchaser rule is designed to *encourage* and *incentivize* private enforcement of the antitrust laws, not immunize corporate wrongdoers from having to litigate antitrust claims.”²²²

E. The Efficacy of the “First Non-Conspirator” Rule

The coconspirator exception is premised on a straightforward principle: direct purchasers engaged in a vertical conspiracy to harm downstream customers lack incentive to enforce antitrust laws.²²³ Unlike the “price paid” rule, the “first nonconspirator” rule correctly applies the coconspirator exception by encouraging litigation against *all* vertical conspiracies that exploit downstream consumers—the method by which the harm is consummated, whether it be fixing the “price paid” or the pass-on of an upstream overcharge, is irrelevant. In doing so, the “first nonconspirator” rule furthers the goals of *Illinois Brick*—deterrence and efficiency—by granting standing to the best antitrust enforcer: the first purchaser from outside the conspiracy.²²⁴

Granting standing to the first nonconspirator from a vertical conspiracy avoids the concerns expressed by *Illinois Brick*. First, the concern that indirect-purchaser standing would dilute the incentives of innocent direct purchasers (the best antitrust enforcers in *horizontal* price-fixing conspiracies) to bring suit is absent—here, direct purchasers are conspiring

²²⁰ *Dickson v. Microsoft Corp.*, 309 F.3d 193, 223 (4th Cir. 2002) (Gregory, J., dissenting) (“[T]here are mechanisms, primarily Rule 11, to deal with the abusive and unethical conduct of litigants and lawyers.”).

²²¹ *Dickson*, 309 F.3d at 223 (Gregory, J., dissenting).

²²² *Id.* (emphasis in the original). The dissent found troubling “the majority’s unhesitating unwillingness to cut off compensation to *all* injured consumers based on hypothetical abuses of liberal pleading rules.” *Id.* (emphasis in the original).

²²³ *Supra* note 69, 71 and accompanying text.

²²⁴ The “first nonconspirator” rule is the “correct reading of *Hanover Shoe* and *Illinois Brick*.” It maximizes deterrence by giving the right to sue to the plaintiff with the most incentive to sue.” *Dickson*, 309 F.3d at 222 (Gregory, J., dissenting).

intermediaries that already lack incentive to bring suit. Second, duplicative recovery, to the extent it remains possible by a coconspirator's defection, may be avoided through two methods: joinder of conspiring intermediaries as defendants to the suit²²⁵ or a requirement that any coconspirator's involvement be "truly complete."²²⁶ Third, apportionment at multiple links in the distribution chain is not needed, as only the first nonconspirator would have standing to sue. Finally, complex pass-through calculations, and in particular, elasticity measurements, may be avoided using alternative econometric techniques,²²⁷ or by awarding the first nonconspirator the entire overcharge paid by direct purchasers.²²⁸

V. Conclusion

Courts have widely adopted the "coconspirator exception" to the *Illinois Brick*, which traditionally applies where an upstream producer and its direct purchasers enter into a vertical conspiracy to fix retail-level prices. Under the exception, courts grant indirect purchasers standing because direct purchasers—usually the best antitrust enforcers—are conspiring intermediaries that lack incentive to bring suit. Denying indirect purchasers standing in such situations would therefore leave the antitrust laws with no viable enforcer: the first indirect purchaser, then, becomes the best antitrust enforcer. This principle is consistent with, and in-fact bolstered by, *Illinois Brick*, as the concerns that are associated with indirect-purchaser standing—duplicative recovery, apportionment along the chain of distribution, and complex pass-through calculations—are absent.

²²⁵ *Supra* note 73 and accompanying text; *Dickson*, 309 F.3d at 222 (Gregory, J., dissenting) ("As for any lingering doubt over whether the conspiring intermediary is the best plaintiff, or concern regarding multiple recovery, the case law has rightly recognized the importance of joining the intermediary in the suit . . .").

²²⁶ *Supra* note 149 and accompanying text.

²²⁷ *Supra* notes 198–203 and accompanying text.

²²⁸ *Supra* notes 204–209 and accompanying text.

In addition to price fixing at the retail-level, economic literature indicates that vertical conspiracies are able to exploit antitrust laws in a second way. Pursuant to an agreement with conspiring direct purchasers, upstream suppliers may charge supra-competitive prices, resulting in an initial overcharge to direct purchasers. Direct purchasers, then, would pass-on the overcharge to indirect purchasers, while also receiving “side-payments” from the supplier—the mechanism by which monopoly profits are shared—as compensation for their complicity in the scheme.

The Ninth Circuit and the Fourth Circuit, however, have limited the reach of the coconspirator exception, granting indirect purchasers standing where vertical conspiracies are engaged in traditional, retail-level price fixing (fixing of the “price paid”), but not where such conspiracies fix upstream prices and operate pursuant to the side-payment scheme described above. In adopting the “price paid” rule, these courts have reasoned that extension of the coconspirator exception would 1) transgress the Supreme Court’s warning against creating new exceptions to the direct purchaser rule; 2) require pass-through theories that are barred by *Illinois Brick*; and 3) allow plaintiffs to avoid *Illinois Brick* through artful pleading. The Ninth Circuit and Fourth Circuit would bar indirect purchasers from maintaining a cause of action, even where they could successfully plead and prove the existence of a vertical conspiracy that fixes upstream prices with the intent to extract monopoly profits from indirect purchasers. Future conspirators, as a result, have been handed a roadmap to avoid antitrust laws.

The justifications for the “price paid” rule, moreover, are derived from an incorrect reading of *Illinois Brick*. First, the Supreme Court did not create a blanket ban on all exceptions to the direct purchaser rule: the Court only prohibited *market-based* exceptions, not exceptions tailored to address new kinds of conspiracies that were outside the contemplation of *Illinois*

Brick. Second, *Illinois Brick* should not be interpreted to bar all indirect purchaser claims involving pass-through theories, but only those that *also* involve duplicative recovery and complex calculations along an entire chain of distribution. And, even if *Illinois Brick* were a bar, pass-through calculations may be avoided through the use of alternative econometric techniques or by awarding indirect purchasers the entire upstream overcharge. Finally, artful pleading is unlikely under the heightened pleading standards created by *Twombly*, and Rule 11 sanctions act as a deterrent for plaintiffs seeking to abuse pleading rules.

The correct approach to antitrust standing is found in the Third Circuit and the Seventh Circuit. The “first nonconspirator” rule, which grants standing to the first purchaser from outside the conspiracy, increases the efficacy of antitrust enforcement by elevating indirect purchasers where the preferred antitrust enforcers, direct purchasers, have conspired to generate the antitrust harm. This approach deters all vertical conspiracies that exploit downstream consumers, not just those that effectuate harm by fixing retail-level prices. Courts, as a result, should adopt flexible approaches to antitrust standing by viewing *Illinois Brick*’s concerns as a reflection of the Supreme Court’s overall intent to incentivize the best antitrust enforcers, not as mechanical prohibitions against indirect purchaser standing.