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SCALING THE ILLINOIS BRICK WALL: THE FUTURE OF INDIRECT PURCHASERS IN ANTITRUST LITIGATION

INTRODUCTION

The Illinois Brick Company sold price-fixed bricks and concrete blocks. The State of Illinois sued Illinois Brick,¹ alleging that the illegal overcharges were passed on to it by contractors who used the bricks in building state facilities.² The trial court dismissed the suit, but the Seventh Circuit blessed the attempt.³ The Su-

¹ The suit by the state followed civil and criminal actions brought by the United States against the manufacturers. The district court accepted pleas of nolo contendere in the criminal suit and entered a consent decree in the civil case. *United States v. Ampress Brick Co.*, [1974-1] TRADE CAS. (CCH) ¶ 75,060 (N.D. Ill. 1974). The plaintiffs in the private suit included approximately 700 governmental entities in the Greater Chicago area. Their complaint alleged that the overpayments totaled more than \$3 million. *Illinois Brick Co. v. Illinois*, 97 S. Ct. 2061, 2065 (1977). Only four of the plaintiffs, however, purchased concrete blocks directly from the manufacturers, and only 7% of the 700 plaintiffs were able to state the cost to them of the concrete block used in construction. *Id.* at 2065 n.6. All but nine of the plaintiffs awarded their building contracts on the basis of competitive bidding. *Illinois v. Ampress Brick Co.*, 67 F.R.D. 461, 463 (N.D. Ill. 1975), *rev'd*, 536 F.2d 1163 (7th Cir. 1976), *rev'd sub nom.* *Illinois Brick Co. v. Illinois*, 97 S. Ct. 2061 (1977). In the one example cited in petitioners' brief, the cost of the block was reported at less than 1/2 of 1% of the total cost. 97 S. Ct. at 2065 n.6.

² Passing-on is the "process whereby a businessman who has been overcharged adjusts his own price upward to reflect the overcharge." McGuire, *The Passing-On Defense and the Right of Remote Purchasers to Recover Treble Damages Under Hanover Shoe*, 33 U. PITT. L. REV. 177, 181 (1971). See also R. POSNER, ANTITRUST CASES, ECONOMIC NOTES, AND OTHER MATERIALS 5-13, 128-29, 147-49 (1974); notes 10-18 and accompanying text *infra*. Price increases resulting from anticompetitive behavior, whether or not passed on, result in reduced output: marginal buyers who would otherwise enter the market at competitive prices purchase substitutes or do without, thereby reducing demand and forcing output to decline. See *Illinois Brick Co. v. Illinois*, 97 S. Ct. at 2068 n.13. To the extent that substitutes are either higher in price or lower in value, artificial costs are imposed on purchasers. Victims of a price-fixing scheme in a multi-level system of distribution thus fall into two classes: (1) middle-level purchaser-sellers who lose profits or who are forced out of the market, and (2) indirect purchasers who pay noncompetitive prices for the goods or for substitutes, who are forced completely out of the market, or who are unable to find substitutes. *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968), deals with the first class. *Illinois Brick* deals with the second.

The plaintiffs in *Illinois Brick* were separated from the violators by two intervening transactions. The price-fixed bricks moved from the manufacturers through subcontractors and general contractors to the ultimate-purchaser plaintiffs, allegedly carrying with them a four-cent-per-brick overcharge each time the goods changed hands.

³ *Illinois v. Ampress Brick Co.*, 67 F.R.D. 461 (N.D. Ill. 1975), *rev'd*, 536 F.2d 1163 (7th Cir. 1976), *rev'd sub nom.* *Illinois Brick Co. v. Illinois*, 97 S. Ct. 2061 (1977). The

preme Court granted certiorari,⁴ and reversed the circuit court's ruling.⁵ Relying on *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*,⁶ the Court held that, absent exceptional circumstances, section 4 of the Clayton Act⁷ bars antitrust actions by indirect purchasers invoking an offensive pass-on theory.⁸

district court, in dismissing the indirect purchasers' suit, divided buyers into three groups: immediate, final, and ultimate consumers. An immediate consumer was one who acted as a middleman. A final consumer was defined as an indirect purchaser of a product that had not been altered as it passed through the different levels in the chain of distribution. An ultimate consumer was also an indirect buyer, but one who had purchased a product that had been altered by a middleman. *Hanover Shoe*, the district court reasoned, blocked only ultimate consumers from asserting claims of injury. *Id.* at 466-67. The court held that "as to *ultimate* consumers, their injuries are too remote and consequential to provide legal standing to sue against the alleged antitrust violator." *Id.* at 468 (emphasis in original). As "ultimate consumers," the indirect purchasers of concrete blocks had no standing to sue; the court therefore granted the defendants' motion for summary judgment. *Id.*

The Seventh Circuit reversed, stating that "[t]he sweeping language of [section 4 of the Clayton Act] and the policy encouraging private enforcement of the antitrust laws persuade us that if plaintiffs can prove a violation which resulted in an injury to them, they ought to recover." 536 F.2d at 1165. The court of appeals found difficulties of proof and multiple liability insufficient justifications to support the defendants' motion for summary judgment. *Id.* at 1166-67.

⁴ 429 U.S. 938 (1976).

⁵ 97 S. Ct. 2061, 2066 (1977).

⁶ 392 U.S. 481 (1968). *Hanover Shoe*, a shoe manufacturer, sued United Shoe Machinery Corp. under § 4 of the Clayton Act (15 U.S.C. § 15 (1970)), alleging that United's policy of leasing rather than selling shoemaking machinery violated § 2 of the Sherman Act (*id.* § 2). The trial court refused to hear evidence that *Hanover Shoe*, as the direct lessor, had passed on the illegal overcharges to its customers. The Supreme Court, speaking through Justice White, affirmed that decision, reasoning that "[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step." 392 U.S. at 488 n.6 (quoting with approval *Southern Pac. Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918) (Holmes, J.)). The Court accordingly held that a direct purchaser is entitled to damages even if he has passed on the overcharge:

A wide range of factors influence a company's pricing policies. . . . 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. . . . [E]stablishing the applicability of the passing-on defense . . . would normally prove insurmountable.

Id. at 492-93.

⁷ Section 4 of the Clayton Act provides:

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

15 U.S.C. § 15 (1970) (emphasis added).

⁸ See notes 39-48 and accompanying text *infra*.

*Illinois Brick Co. v. Illinois*⁹ substantially reduces the ability of indirect purchasers to recover treble damages for antitrust violations. A number of options, however, remain available to plaintiffs seeking to circumvent the decision. Careful analysis reveals that *Illinois Brick* is a crucial step in the Court's search for effective and efficient antitrust plaintiffs. The decision properly identifies policies relevant in evaluating the legal and practical implications of passing-on, but in barring most indirect-purchaser suits the Court went too far. *Illinois Brick* therefore requires a legislative response. Congress must, however, avoid the Court's error of overreacting. It should acknowledge the competing policies identified in *Illinois Brick*, and require courts to balance them on a case-by-case basis.

I

THEORY AND HISTORY OF PASSING-ON

A. *The Theory of Passing-On*

Social scientists and policymakers recognize that anticompetitive activity usually generates "ripple effects" in the economy.¹⁰ Pass-on theory is one mechanism developed by antitrust litigants to give legal effect to this economic reality. Simply put, pass-on theory suggests that the impact of anticompetitive activity filters down the vertical chain of distribution, so that in effect a buyer other than the original purchaser pays the initial overcharge.¹¹ The ultimate purchaser bears the overcharge because the original buyer increases the price of goods by an amount equal to the overcharge.

⁹ 97 S. Ct. 2061 (1977).

¹⁰ See, e.g., R. POSNER, *ECONOMIC ANALYSIS OF LAW* 234-35 (1977). Any anticompetitive activity generates super-normal prices and reduced output. These, in turn, are usually responsible for misallocation of resources and deadweight losses to society in the form of reduced consumer surplus—i.e., the quantitative detriment to society of imperfect competition. See *id.* at 201-05; F. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 8-19 (1970). These losses—both individual and social—are usually shared to some extent by all subsequent purchasers in the vertical chain of distribution. See note 14 and accompanying text *infra*. In addition, anticompetitive activity in the vertical chain of distribution increases barriers to entry at one or more levels, as well as discrimination in pricing and supply. C. KAYSEN & D. TURNER, *ANTITRUST POLICY—AN ECONOMIC AND LEGAL ANALYSIS* 120-23 (1959).

¹¹ Throughout the Note we will refer to "indirect purchasers." However, the analysis of offensive passing-on is by no means limited to indirect purchasers. For instance, sellers may pursue buyers one or more steps removed in the vertical chain of distribution if the sellers have been injured by reason of a buyers' conspiracy to depress prices, and if the sellers' complaint fits within one of the exceptions noted in *Illinois Brick*. See notes 80-93 and accompanying text *infra*.

Both plaintiffs and defendants have invoked pass-on theory. Defendant-sellers have argued that direct-purchaser plaintiffs sustained no injury because they passed on overcharges to the next level in the chain of distribution;¹² conversely, in suits against remote sellers, indirect purchasers have argued that middlemen passed on overcharges to them.¹³

The practical difficulties of employing pass-on theory begin with the realization that few, if any, situations arise where an overcharge is completely passed on to indirect purchasers.¹⁴ That portion of the overcharge passed on is determinable, in theory, through the use of economic analysis commonly applied to excise taxes.¹⁵ Unhappily, it is difficult, if not impossible, to determine with reasonable certainty the facts needed to apply this analysis. Even if concepts like price-elasticity of demand were ascertainable, the element of irrationality in pricing and purchasing would render the analysis suspect.¹⁶ Probability and risk analysis may eliminate these defects,¹⁷ but such a solution raises serious questions of

¹² See cases cited in note 21 *infra*.

¹³ See cases cited in notes 28-29 *infra*.

¹⁴ See 97 S. Ct. 2076 n.3. The full overcharge resulting from a restraint will be passed on to indirect purchasers only where demand is perfectly inelastic: that is, where buyers will purchase a fixed quantity regardless of price fluctuation. This occurs in theory only. In real markets demand always exhibits some sensitivity to price. See generally P. SAMUELSON, *ECONOMICS* 379-86 (1973). Thus, real market forces prevent any seller along the chain of distribution from fully avoiding the effect of anticompetitive activity by passing on the entire overcharge: if he raises his price by the full amount of the initial overcharge, he will experience a correspondingly greater reduction in the number of units sold, and hence a net decrease in his profits. Cf. *id.* at 387-88 (allocation of sales tax between seller and buyer). To maintain a profit-maximizing sales level each seller along the distribution chain may pass on only a portion of the initial overcharge; he must absorb the rest. The price elasticity of demand in the market of the next sale will determine what portion of the overcharge a seller may pass on. If elastic demand prevails, the number of units sold is relatively sensitive to price increases, and the seller may pass on only a small portion. If the seller faces an inelastic demand, the quantity he can sell is less sensitive to price increases, and thus he may pass on a relatively larger portion of the overcharge. See R. POSNER, *supra* note 2, at 147-49. This suggests that remote purchasers would prefer to sue when markets exhibit inelastic demand characteristics. Because each seller will pass on a relatively large portion of the overcharge from link to link along the chain of distribution, the remote purchaser could expect a higher recovery.

¹⁵ See R. POSNER, *supra* note 10, at 509-14; Schaefer, *Passing-On Theory in Antitrust Treble Damage Actions: An Economic and Legal Analysis*, 16 WM. & MARY L. REV. 883, 887-97 (1975). The majority in *Illinois Brick* rejected the possibility of using expert witnesses to develop the facts necessary to apply this analysis. 97 S. Ct. at 2073.

¹⁶ Irrational pricing and purchasing decisions are made for a variety of reasons, even where perfect information is available. See F. SCHERER, *supra* note 10, at 19-20. Moreover, in many cases, the cost of obtaining information outweighs the benefit to be derived from it. See R. POSNER, *supra* note 2, at 81-84.

¹⁷ Probability analysis balances the rational and irrational components of aggregate

fundamental fairness and permissible proof.¹⁸ Despite these difficulties, juries often resolve complex damage issues in antitrust cases without the aid of precise analytical tools.¹⁹ Thus, prior to

pricing and purchasing decisions, allowing economists to utilize market data to determine price elasticity of demand for a given product with a reasonable degree of certainty. See W. BAUMOL, *ECONOMIC THEORY AND OPERATIONS ANALYSIS* 234-73 (1972).

¹⁸ The judicial system exists primarily to resolve conflicts and to see that justice is meted out to the particular litigants standing before the court, not to fashion principles of collective justice. Moreover, the use of mathematical proof may result in a usurpation of the responsibilities of the jury. See Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329 (1971), which criticizes the use of mathematics as a tool in decisionmaking:

One element, at least, of that ritual of conflict-settlement is the presence and functioning of the jury—a cumbersome and imperfect institution, to be sure, but an institution well calculated, at least potentially, to mediate between “the law” in the abstract and the human needs of those affected by it. Guided and perhaps intimidated by the seeming inexorability of numbers, induced by the persuasive force of formulas and the precision of decimal points to perceive themselves as performing a largely mechanical and automatic role, few jurors—whether in criminal cases or in civil—could be relied upon to recall, let alone to perform, this humanizing function, to employ their intuition and their sense of community values to shape their ultimate conclusions.

Id. at 1376 (footnote omitted). The Supreme Court of California rejected the use of probability evidence to determine guilt in *People v. Collins*, 68 Cal. 2d 319, 438 P.2d 33, 66 Cal. Rptr. 497 (1968). The prosecution bolstered a shaky identification of robbery suspects by introducing mathematical testimony showing that there was but one chance in 12 million that suspects chosen at random would have the described characteristics. The California Supreme Court found the evidence objectionable, noting that it “encouraged the jurors to rely upon an engaging but logically irrelevant expert demonstration.” *Id.* at 327, 438 P.2d at 38, 66 Cal. Rptr. at 502.

¹⁹ See *Rowan v. Howard Sober, Inc.*, 384 F. Supp. 1121, 1125 (E.D. Mich. 1974). Cf. *William H. Rankin Co. v. Associated Bill Posters*, 42 F.2d 152, 156 (2d Cir.) (“Perhaps the jury was not as competent to analyze that evidence [of plaintiff’s damages resulting from an antitrust violation] as some financial and business expert might have been, but it could draw its own reasonable conclusions from it.”), *cert. denied*, 282 U.S. 864 (1930). See generally H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 149-81 (1966) (juries competent to understand and make rational decisions based on complicated evidence). *But see Farmington Dowel Prods. Co. v. Forster Mfg. Co.*, 421 F.2d 61, 83 (1st Cir. 1970) (“[T]here was adequate reason to fear that the jury would be either confused or mesmerized by the profusion of computations.”). In *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1945), the Court discussed the uncertainty inherent in calculating antitrust damages:

[T]he jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances “juries are allowed to act upon probable and inferential, as well as direct and positive proof.” . . . Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. . . . Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.

The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty [that prevents the jury from measuring damages exactly] which his own wrong has created. . . . That principle is an ancient one, . . . and is not restricted to proof of damage in antitrust suits, although their character is such as frequently to call for its application.

Id. at 264-65.

Illinois Brick, many courts did not hesitate to send pass-on issues to the jury.²⁰

B. *The History of Passing-On*

Through the mid-1960's, a majority of courts confronting the issue recognized passing-on as a defense to private treble-damage claims.²¹ But in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*,²² the Supreme Court rejected the pass-on defense, holding that a direct purchaser could generally recover all illegal overcharges, whether or not he had passed them on.²³ *Hanover Shoe* emphasized

²⁰ See *In re Master Key Antitrust Litigation*, [1973-2] TRADE CAS. (CCH) ¶ 74,680, at 94,982 (D. Conn. 1973) ("[D]ifficulties of proof or apportionment of damages are not indubitably insurmountable and should await trial before being resolved."), *appeal dismissed*, 528 F.2d 5 (2d Cir. 1975). See also McGuire, *supra* note 2, at 193; Schaefer, *supra* note 15, at 915; Comment, *Standing to Sue in Antitrust Cases: The Offensive Use of Passing-On*, 123 U. PA. L. REV. 976, 992 (1975).

²¹ See, e.g., *Freedman v. Philadelphia Terminals Auction Co.*, 301 F.2d 830 (3d Cir. 1962) (fruit brokers and wholesaler denied recovery against auction company for assessing terminal charges where charges passed on to outlets). Prior to *Hanover Shoe*, the Supreme Court hinted that it would uphold the passing-on defense. *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156, 165 (1922) ("[N]o court or jury could say that, if the rate had been lower, [the plaintiff] would have enjoyed the difference between the rates or that any other advantage would have accrued to him."). In the so-called "oil-jobber" cases, courts permitted defensive passing-on but relied to some extent on evidence that the profit margins were guaranteed, making the cases somewhat analogous to the cost-plus situation (see notes 87-93 and accompanying text *infra*). See, e.g., *Clark Oil Co. v. Phillips Petroleum Co.*, 148 F.2d 580 (8th Cir.) (increase in price of gasoline supplied to jobbers passed on to jobbers' customers), *cert. denied*, 326 U.S. 734 (1945); *Northwestern Oil Co. v. Socony-Vacuum Oil Co.*, 138 F.2d 967 (7th Cir. 1943) (increased price of gasoline to jobber passed on to ultimate consumer), *cert. denied*, 321 U.S. 792 (1944); *Twin Ports Oil Co. v. Pure Oil Co.*, 119 F.2d 747 (8th Cir.) (no evidence that increase in prices of gasoline not reflected in retail price of gas), *cert. denied*, 314 U.S. 644 (1941); *Leonard v. Socony-Vacuum Oil Co.*, 42 F. Supp. 369 (W.D. Wis.) (complaint dismissed where plaintiff alleged price to jobber illegally high without also alleging that jobber's selling price not correspondingly increased), *appeal dismissed*, 130 F.2d 535 (7th Cir. 1942). In the 1960's, courts began to reject the pass-on defense. See, e.g., *Ohio Valley Elec. Corp. v. General Elec. Co.*, 244 F. Supp. 914 (S.D.N.Y. 1965) (generator manufacturers' defense that utilities buying generators passed on cost increase disallowed); *Atlantic City Elec. Co. v. General Elec. Co.*, 226 F. Supp. 59 (S.D.N.Y. 1964) (objections of plaintiff purchasers to defendant manufacturers' interrogatories based on pass-on defense sustained); *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 225 F. Supp. 332 (N.D. Ill. 1963) (evidence of pass-on irrelevant where plaintiff purchasers did not resell goods and alleged overcharges hidden by complex rate bases), *aff'd*, 335 F.2d 203 (7th Cir.), *cert. denied*, 375 U.S. 834 (1964). See also Pollock, *Automatic Treble Damages and the Passing-On Defense: The Hanover Shoe Decision*, 13 ANTITRUST BULL. 1183, 1192-203 (1968).

²² 392 U.S. 481 (1968).

²³ The Court elaborated:

We think it sound to hold that when a buyer shows that the price paid by him for materials purchased for use in his business is illegally high and also shows the

the practical impossibility of tracing the impact of a price-fix through the chain of distribution due to the subjective nature of pricing policies and the fluctuation of consumer demand.²⁴ The Court also noted that acceptance of the defense would substantially impair antitrust enforcement, by necessitating joinder of all injured buyers, including ultimate consumers with little interest in suing.²⁵ The costs and complexity of antitrust suits would increase, private enforcement would diminish, and "[i]n consequence, those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality."²⁶

Hanover Shoe resolved the debate over use of the pass-on defense, but left unanswered the question of whether ultimate consumers could use pass-on theory offensively against remote sellers.²⁷ The district courts and the courts of appeals dealt incon-

amount of the overcharge, he has made out a prima facie case of injury and damage within the meaning of § 4.

Id. at 489.

²⁴ As the Court in *Hanover Shoe* pointed out, courts must deal with "the real economic world rather than an economist's hypothetical model." *Id.* at 493, *quoted in* Illinois Brick Co. v. Illinois, 97 S. Ct. 2061, 2073 (1977).

²⁵ *Id.* at 494. Courts and commentators have speculated that ultimate consumers would have too small an interest in the outcome to pursue antitrust claims. See, e.g., Handler & Blechman, *Antitrust and the Consumer Interest: The Fallacy of Parens Patriae and a Suggested New Approach*, 85 YALE L.J. 626 (1976). In *City of Denver v. American Oil Co.*, 53 F.R.D. 620 (D. Colo. 1971), the plaintiff brought a class action on behalf of all governmental purchasers of asphalt in Colorado. The district court observed:

[T]he asphalt purchases of some of the smaller counties, cities and towns were of quantities of liquid asphalt which were so small that even if plaintiff is successful in the action and even if treble damages should be awarded in a class action to those small counties, cities and towns, the discovery expense to which they would be subjected would mean that they would wind up in the hole if they participated in the class action.

Id. at 628. See also Illinois Brick Co. v. Illinois, 97 S. Ct. at 2074-75. But see note 14 *supra*.

²⁶ 392 U.S. at 494.

²⁷ Several commentators, writing before *Illinois Brick*, suggested that *Hanover Shoe* did not affect offensive passing-on. See L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 771 n.3 (1977) ("[I]n *Hanover Shoe*, . . . the Court discusses the 'passing-on' of illegal overcharges in terms which presuppose that 'ultimate consumers' . . . do have a cause of action . . ."); McGuire, *supra* note 2, at 192; Schaefer, *supra* note 15, at 915 ("Decisional rules should be developed to reflect the pervasiveness of passing-on. . . . This objective can be met . . . by granting standing to claimants when economic considerations suggest that they in fact shouldered the burden of an illegal overcharge."); Comment, *Mangano and Ultimate-Consumer Standing: The Misuse of the Hanover Doctrine*, 72 COLUM. L. REV. 394, 409 (1972) ("The Supreme Court's reference to ultimate consumers did not imply that they could not bring suit, but merely that such parties would be unlikely to bring suit because of the limited damages that they, as individuals, probably had suffered."); Comment, *supra* note 20, at 993. But see Lytle & Purdue, *Antitrust Target Area Under Section 4 of the Clayton Act: Determination of Standing in Light of the Alleged Antitrust Violation*, 25 AM. U.L. REV. 795, 820 (1976) (giving ultimate consumers standing to sue would result in

sistently with suits by indirect purchasers. Some courts rejected offensive application of pass-on theory, noting that it involved the same insuperable difficulties of proof that prompted the Supreme Court to reject the pass-on defense.²⁸ Other courts, however, sanctioned offensive use of pass-on theory despite the complexities of proving injury and apportioning damages.²⁹ They noted that "[p]rivity is not required in antitrust cases,"³⁰ criticized the blind application of *Hanover Shoe*,³¹ and found that enforcement goals outweighed derivative goals such as judicial economy.³² These courts perceived little danger of duplicative liability in view of available procedural devices,³³ including consolidation and inter-

"huge economic repercussions"); Note, *The Effect of Hanover Shoe on the Offensive Use of the Passing-On Doctrine*, 46 S. CAL. L. REV. 98, 99 (1972) (*Hanover Shoe* best read to bar offensive pass-on theory in all but rare cases).

²⁸ See, e.g., *In re Sugar Indus. Antitrust Litigation*, 73 F.R.D. 322 (E.D. Pa. 1976); *Illinois v. Ampress Brick Co.*, 67 F.R.D. 461 (N.D. Ill. 1975), *rev'd*, 536 F.2d 1163 (7th Cir. 1976), *rev'd sub nom. Illinois Brick Co. v. Illinois*, 97 S. Ct. 2061 (1977); *Donson Stores, Inc. v. American Bakeries Co.*, 58 F.R.D. 481 (S.D.N.Y. 1973); *Balmac, Inc. v. American Metal Prods. Corp.*, [1972] TRADE CAS. (CCH) ¶ 74,235 (N.D. Cal. 1972); *City of Denver v. American Oil Co.*, 53 F.R.D. 620 (D. Colo. 1971); *Philadelphia Hous. Auth. v. American Radiator & Standard Sanitary Corp.*, 50 F.R.D. 13 (E.D. Pa. 1970), *aff'd sub nom. Mangano v. American Radiator & Standard Sanitary Corp.*, 438 F.2d 1187 (3d Cir. 1971); *Philadelphia Hous. Auth. v. American Radiator & Standard Sanitary Corp.*, 323 F. Supp. 381 (E.D. Pa. 1970).

²⁹ See, e.g., *In re Western Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974); *In re Ampicillin Antitrust Litigation*, [1977-1] TRADE CAS. (CCH) ¶ 61,434 (D.D.C. 1977); *Carnivale Bag Co. v. Slide-Rite Mfg. Corp.*, 395 F. Supp. 287 (S.D.N.Y. 1975); *Boshes v. General Motors Corp.*, 59 F.R.D. 589 (N.D. Ill. 1973); *In re Master Key Antitrust Litigation*, [1973-2] TRADE CAS. (CCH) ¶ 74,680 (D. Conn. 1973), *appeal dismissed*, 528 F.2d 5 (2d Cir. 1975). *Cf. West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079 (2d Cir.) (settlement upheld despite direct purchasers' argument that indirect purchasers not proper class members), *cert. denied*, 404 U.S. 871 (1971).

³⁰ *In re Western Liquid Asphalt Cases*, 487 F.2d 191, 197 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974). Some post-*Hanover Shoe* cases, however, approached the injury issue on the basis of privity of contract between the victim and the wrongdoer. The closer the relationship between the plaintiff and defendant, the more likely it was that the plaintiff could prove his injury was proximately caused by the violation. See, e.g., *City of Denver v. American Oil Co.*, 53 F.R.D. 620, 637 (D. Colo. 1971) ("*Hanover Shoe* permits recovery when, but only when, there is privity . . .").

³¹ See *Boshes v. General Motors Corp.*, 59 F.R.D. 589, 596 (N.D. Ill. 1973) ("[I]t would be stretching *Hanover Shoe* beyond all recognition to hold that its rejection of the passing-on defense somehow returns § 4 of the Clayton Act to the 'days when 'privity' was king' . . ."). See also Pollock, *Standing to Sue, Remoteness of Injury and the Passing-On Doctrine*, 32 A.B.A. ANTITRUST L.J. 5, 14 (1966).

³² See *In re Western Liquid Asphalt Cases*, 487 F.2d 191, 199 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974).

³³ See, e.g., *Illinois v. Ampress Brick Co.*, 536 F.2d 1163, 1167 (7th Cir. 1976) ("[A]ccording standing to ultimate purchasers need not result in double recovery because appropriate means can be found to apportion any damages that might be assessed."), *rev'd sub nom. Illinois Brick Co. v. Illinois*, 97 S. Ct. 2061 (1977); *In re Western Liquid Asphalt*

pleader.³⁴

Thus, the lower courts placed varying emphases on considerations of judicial economy, antitrust enforcement, and multiple liability. In so doing, they created a confused and confusing body of case law dealing with the pass-on theory. These conflicting decisions prompted the Supreme Court to grant certiorari in *Illinois Brick*.

II

THE *Illinois Brick* DECISION

In *Illinois Brick* the Supreme Court³⁵ balanced the goals of section 4 against the burdens of complex multiparty actions and the risk of exposing defendants to multiple liability.³⁶ All of the

Cases, 487 F.2d 191, 201 (9th Cir. 1973) ("The day is long past when courts, particularly federal courts, will deny relief to a deserving plaintiff merely because of procedural difficulties or problems of apportioning damages."), *cert. denied*, 415 U.S. 919 (1974); *Boshes v. General Motors Corp.*, 59 F.R.D. 589, 596 (N.D. Ill. 1973) ("[P]rocedural resources available to both the court and the parties are sufficient to avoid . . . an inequitable result."); *In re Master Key Antitrust Litigation*, [1973-2] TRADE CAS. (CCH) ¶ 74,680, at 94,979 (D. Conn. 1973), *appeal dismissed*, 528 F.2d 5 (2d Cir. 1975).

³⁴ In addition to statutory interpleader (*see* 28 U.S.C. § 1335 (1970)) and consolidation (*see* FED. R. CIV. P. 42(a)), several lower courts suggested that the four-year statute of limitations, the availability of special masters, and the doctrines of *res judicata* and collateral estoppel minimized the threat of multiple liability. *See, e.g., In re Western Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974); *Boshes v. General Motors Corp.*, 59 F.R.D. 589 (N.D. Ill. 1973); *In re Master Key Antitrust Litigation*, [1973-2] TRADE CAS. (CCH) ¶ 74,680 (D. Conn. 1973), *appeal dismissed*, 528 F.2d 5 (2d Cir. 1975). The utility of these doctrines and procedures is questionable. For example, the defendant considering interpleader faces a Hobson's choice of interpleading all ultimate consumers and forming a massive class action, or not interpleading and remaining subject to multiple suits. For a discussion of these devices and their applicability to antitrust actions, *see* McGuire, *supra* note 2, at 197-202; Comment, *supra* note 27, at 410-11; Comment, *supra* note 20, at 993-95.

To avoid duplicative recoveries where the direct purchaser recovers first, courts could require the direct purchaser (1) to post bond in the amount of his recovery (*see* Schaefer, *supra* note 15, at 935); (2) to deposit the recovery in an escrow account (*see* McGuire, *supra* note 2, at 199); or (3) to hold the fund, at least in part, in constructive trust for the indirect purchaser (*see id.* at 198). Thereafter, if the court permits an indirect purchaser to assert a pass-on claim, part or all of his recovery would come from the direct purchaser, thereby avoiding duplicative recoveries against the known violator.

In *Illinois Brick* the defendants could have easily avoided duplicative recoveries because both direct and indirect purchasers sued simultaneously in the Northern District of Illinois. *See* 97 S. Ct. at 2084 n.22 (dissenting opinion, Brennan, J.). By failing to seek consolidation under FED. R. CIV. P. 42(a), the defendants arguably assumed the risk of duplicative awards. Brief for the United States as Amicus Curiae at 28, *Illinois Brick Co. v. Illinois*, 97 S. Ct. 2061 (1977).

³⁵ Justice White wrote for the majority of six. Justices Marshall and Blackmun joined Justice Brennan in dissent.

³⁶ *See* 97 S. Ct. at 2070-73, 2083-84. Section 4 of the Clayton Act (15 U.S.C. § 15

Justices agreed that vigorous private enforcement of the antitrust laws nurtures competition, compensates victims for their losses, and punishes violators with heavy damages.³⁷ Their disagreement focused on the best method of upholding these goals without subverting other antitrust objectives, general considerations of fairness, and efficient judicial administration.³⁸

The majority first found passing-on an all-or-nothing proposition: to allow offensive passing-on would necessitate overruling *Hanover Shoe* and restoring the pass-on defense.³⁹ Given this

(1970)) was intended to foster and encourage competition by allowing private enforcement of the antitrust laws. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972). *See also* *Perma Life Mufflers, Inc. v. International Parts Co.*, 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 anyone contemplating business behavior in violation of the antitrust laws.”). The treble-damage provision (15 U.S.C. § 15 (1970)) deters illegal conduct and compensates the victims of antitrust violations for injury to business or property. The Court’s decision in *Illinois Brick* furthers the deterrence goal of § 4 to a greater degree than it ensures compensation of injured parties. The majority quoted with approbation Justice Brennan’s dissenting statement that “from the deterrence standpoint, it is irrelevant to whom damages are paid, so long as some one redresses the violation.” 97 S. Ct. at 2075. Because indirect purchasers typically have “such a small stake” in the outcome and rarely have the motivation to assert their rights, the Court decided that § 4 goals were best achieved by direct-purchaser suits. *Id.* *But see* note 14 *supra*. The decision, however, effectively nullifies the compensatory function of § 4 in pass-on situations by allowing the uninjured direct purchaser to recover for the indirect purchaser’s injury.

In addition to deterring and compensating, § 4 seeks to ensure that wrongdoers are deprived of the “fruits of their illegality.” *Id.* (quoting *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. at 494). The best way to make sure that violators do not escape liability, the majority decided, was to limit suits to the class of plaintiffs—direct purchasers—with the fewest evidentiary obstacles in their path. *Id.*

³⁷ *Id.* at 2075 (majority), 2076 (dissent).

³⁸ *See id.* at 2074-75 (majority), 2078-79 (dissent). *See generally* note 36 *supra*.

³⁹ 97 S. Ct. at 2070. The majority gave two reasons to support this notion of symmetry. First, asymmetrical application would result in undesirable duplicative recoveries against antitrust defendants. Assuming that the direct purchaser would “automatically” recover damages in “the full amount of the overcharge,” no matter when he sued, the Court reasoned that to allow the indirect purchaser to recover would lead to overlapping recoveries. *Id.* at 2067. The validity of this argument turns on whether courts can fashion relief and employ procedural devices to avoid multiple liability. *See* notes 33-34 and accompanying text *supra*.

Second, the Court concluded that adoption of offensive pass-on theory would effectively undercut the primary rationale of *Hanover Shoe*. “The principle basis for the decision in *Hanover Shoe* was the Court’s perception of the uncertainties and difficulties in analyzing price and out-put decisions . . . and on the costs to the judicial system and the efficient enforcement of the antitrust laws of attempting to reconstruct those decisions in the courtroom.” 97 S. Ct. at 2068. Justice White perceived that the complex economic analyses and complicated proofs associated with defensive pass-on would be “multiplied in the offensive use of pass-on by a plaintiff several steps removed from the defendant.” To apply the rationale of *Hanover Shoe* consistently, the majority reasoned, offensive pass-on could survive, if at all, only if *Hanover Shoe* were repudiated. *Id.* at 2068-69.

choice, the Court concluded that disallowing both offensive and defensive passing-on would best address the goals underlying the antitrust laws.⁴⁰ If symmetrical pass-on theories were allowed, the Court reasoned, indirect purchasers would often choose not to sue.⁴¹ Not only would their injuries, and thus their recoveries, be relatively small, but the costs of litigation would often be prohibitive due to the difficulty of proving loss and the complexity associated with pass-on theories.⁴² Furthermore, the possibility of inconsistent judgments raised the unseemly specter of duplicative recoveries.⁴³ Finally, calculating the distribution of overcharges at various market levels would, even if possible, necessitate employing economic analyses of questionable validity.⁴⁴

On the other hand, the *Hanover Shoe* rule, by providing the strong incentive of full overcharge recoveries, renders direct purchasers superior section 4 plaintiffs in terms of deterring unlawful conduct and depriving violators of their illegal gains.⁴⁵ In addition,

The *Illinois Brick* plaintiffs self-servingly agreed that if they were allowed to use pass-on offensively, the manufacturers should be allowed to use pass-on defensively against direct purchasers. *Id.* at 2066. The better view was espoused by the dissent and by the United States as amicus curiae. *Id.* at 2078-79; Brief for United States as Amicus Curiae at 4-6, *Illinois Brick Co. v. Illinois*, 97 S. Ct. 2061 (1977). Justice Brennan correctly described the Court's consistent application of the *Hanover Shoe* rule as having only "superficial appeal"; in fact, the "interests at stake" in offensive and defensive pass-on are quite different. For example, allowing an offensive pass-on theory in *Illinois Brick* would promote compensation, while allowing defensive use of passing-on in *Hanover Shoe* would only have facilitated the defendant's escape from liability. 97 S. Ct. at 2078-79.

⁴⁰ 97 S. Ct. at 2075-76.

⁴¹ *Id.* at 2074-75. "The combination of increasing the costs and diffusing the benefits of bringing a treble-damage action could seriously impair this important weapon of anti-trust enforcement." *Id.* at 2075.

⁴² The majority concluded that apportioning recoveries would not only increase court costs but decrease the benefits to each plaintiff, by "add[ing] whole new dimensions of complexity to treble-damage suits and seriously undermin[ing] their effectiveness." *Id.* at 2070. Even if procedural devices could satisfactorily bring all potential claimants together, the result would be "massive multiparty litigations involving many levels of distribution and including large classes of ultimate consumers remote from the defendant." *Id.* at 2072.

⁴³ *Id.* at 2070 n.18. Under a symmetrical application of pass-on theory, duplicative liability will not result if all factfinders reach the correct conclusions. It is the risk of inconsistent factfindings that raises the risk of overlapping liability. On the other hand, asymmetrical application of passing-on will necessarily result in duplicative awards since indirect purchasers will be able to recover even if direct purchasers recover the full overcharge.

⁴⁴ 97 S. Ct. at 2073.

⁴⁵ *Id.* at 2074-75. The legislative history of § 4 indicates, however, that Congress intended treble-damage suits to serve as an "antitrust weapon" that is "available to the people." 21 CONG. REC. 3146, 3147 (1890) (remarks of Senators Reagan and George). Justice Brennan, in dissent, found "[a] further indication of Congress' desire to create a remedy for all persons [in] the elimination of the jurisdictional amount requirement for antitrust actions." 97 S. Ct. at 2079 n.11. See also *John Lenore & Co. v. Olympia Brewing Co.*, 550

barring both pass-on theories would substantially reduce the complexity of section 4 actions.⁴⁶ Although recognizing the compensatory aim of section 4, the majority refused to take that concept to its "logical extreme."⁴⁷ The Court feared that permitting all indirect purchasers to sue would merely reduce overall recoveries rather than "make individual victims whole for actual injuries."⁴⁸ In light of these considerations, the Court concluded that as a general rule only direct purchasers could be "injured in [their] business or property" within the meaning of section 4.⁴⁹

The dissenters argued that the uncertainties and complexities of estimating damages were unconvincing reasons to deny a whole class of plaintiffs the opportunity to prove their injuries.⁵⁰ Justice Brennan observed that direct purchasers who wish to maintain business relationships with overcharging suppliers would simply pass on price increases and not sue.⁵¹ Moreover, the dissenters

F.2d 495, 498 (9th Cir. 1977) (recent Supreme Court opinion construed § 4 more as remedial than as deterrence- or punishment-oriented statute).

Many commentators have questioned the deterrent effect of private treble-damage actions. See, e.g., Parker, *Treble Damage Action—A Financial Deterrent to Antitrust Violations?*, 16 ANTITRUST BULL. 483 (1971). Cf. Erickson, *The Profitability of Violating the Antitrust Laws: Dissolution and Treble Damages in Private Antitrust*, 5 ANTITRUST L. & ECON. REV. 101 (1972) (calling for structural reform of markets); Schaefer, *supra* note 15, at 910-11 (noting that some violations benefit society), 912 (discussing factors making antitrust violations profitable).

⁴⁶ 97 S. Ct. at 2070-75.

⁴⁷ *Id.* at 2075.

⁴⁸ *Id.*

⁴⁹ *Id.* at 2066. Section 4 of the Clayton Act (15 U.S.C. § 15 (1970)) is set out in note 7 *supra*.

⁵⁰ *Id.* at 2082. The dissenters also argued vigorously that the enactment of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (codified in principal part at 15 U.S.C.A. §§ 15c-15h (West Supp. 1977)) precluded the Court from holding that indirect purchasers are not injured within the meaning of § 4. 97 S. Ct. at 2080. Title III of the Act permits state attorneys general to bring *parens patriae* damage suits on behalf of state residents injured by antitrust violations. See notes 68-79 and accompanying text *infra*. The legislative history of the Act indicated that Congress believed it was plugging a gap in § 4 of the Clayton Act by providing a mechanism to protect rights "which every consumer already has in theory, but which small consumers are in practice unable to exercise." 122 CONG. REC. H2065 (daily ed. Mar. 18, 1976) (remarks of Rep. Seiberling). The majority, however, asserted that *Illinois Brick* was not a *parens patriae* suit, and cited the House Report, which describes the Act as creating "no new substantive liability," but merely a new procedural device. 97 S. Ct. at 2069 n.14. See H.R. REP. NO. 499, 94th Cong., 1st Sess. 6, 9, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2572, 2575, 2578.

⁵¹ 97 S. Ct. at 2084. This criticism assumes that the restraint's impact on direct purchasers never reaches the point where a direct purchaser finds it more lucrative to sue his suppliers than to maintain business relationships with them. For instance, to the extent that suppliers uninformed in the conspiracy exist in the relevant market, the direct purchaser's incentive to sue remains unimpaired, because competitive alternatives to the re-

noted that *Illinois Brick* frustrates the compensatory and deterrent goals of the treble-damage provision by precluding injured consumers bearing "the brunt of antitrust injuries" from recovering their damages.⁵² Available procedural safeguards, in the view of the dissenters, would adequately protect defendants against overlapping losses.⁵³

III

CIRCUMVENTING *Illinois Brick*

Can litigants devise methods to circumvent the restrictions of *Illinois Brick*? The Court's broad pronouncements appear to prevent large numbers of indirect purchasers from suing.⁵⁴ However, the exceptions noted by the Court and alternative grounds of private recovery will allow many indirect purchasers to pursue antitrust claims.⁵⁵ In addition, state *parens patriae* actions will help ensure that antitrust violators do not go unpunished.

straint exist. The criticism also assumes that the market affected by the restraint is not a monopsony, *i.e.*, a market dominated by a single purchaser. See P. SAMUELSON, *supra* note 14, at 586. A powerful buyer can blunt the impact of any restraint to the extent he exercises market power over his suppliers. In short, the direct purchaser's incentive to sue depends on the unique characteristics of the markets involved. This incentive is not necessarily impaired by a desire to maintain business relationships with suppliers.

⁵² 97 S. Ct. at 2076-77. Moreover, in *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948), the Supreme Court construed the goals of the federal antitrust laws broadly, stating: "[§ 4] does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . [but] 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 236, *quoted in Illinois Brick Co. v. Illinois*, 97 S. Ct. at 2076 (dissenting opinion, Brennan, J.). Nevertheless, in the majority's judgment, "the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers than by allowing every plaintiff . . . to sue only for the amount it could show was absorbed by it." 97 S. Ct. at 2069. As the dissent points out, however, the trebling of damages provides an incentive for plaintiffs with small claims to sue. *Id.* at 2079 n.12.

⁵³ 97 S. Ct. at 2083-84. See notes 33-34 and accompanying text *supra*. The dissent noted that the problem of multiple liability would arise in only two situations: "(1) where suits by direct and indirect purchasers are pending at the same time but in different courts; and (2) where additional suits are filed after an award of damages based on the same violation in a prior suit." 97 S. Ct. at 2083.

⁵⁴ For a post-*Illinois Brick* case evidencing this result, see *In re Folding Carton Antitrust Litigation*, [1977-2] TRADE CAS. (CCH) ¶ 61,596 (N.D. Ill. 1977) (indirect purchasers summarily removed from plaintiff class in light of *Illinois Brick*).

⁵⁵ These possibilities, in turn, present direct purchasers with problems; the Court's insistence on treating offensive and defensive passing-on identically (see 97 S. Ct. at 2066-70) indicates that defendants should be permitted to utilize the exceptions articulated in *Illinois Brick* to diminish or eliminate the direct purchaser's recovery where indirect purchasers are permitted to sue.

A. State Antitrust Laws

Due to the breadth of federal legislation,⁵⁶ the treble-damage remedy of the Clayton Act,⁵⁷ and the provision that a prior adverse antitrust judgment is *prima facie* proof of present violation,⁵⁸ most antitrust plaintiffs prefer to sue under federal antitrust law.⁵⁹ But even if *Illinois Brick* precludes indirect purchasers from recovering under the Clayton Act,⁶⁰ state antitrust laws may provide an equivalent remedy.⁶¹

⁵⁶ Note, *The Commerce Clause and State Antitrust Regulation*, 61 COLUM. L. REV. 1469, 1470-71 (1961) (federal law, unlike many state statutes, permits private actions; unclear hands defense "has all but disappeared" in federal antitrust suits).

⁵⁷ 15 U.S.C. § 15 (1970).

⁵⁸ *Id.* § 16(a).

⁵⁹ *Cf.* Note, *supra* note 56, at 1470 (several factors favor suits based on federal statutes). Many plaintiffs prefer alleging federal violations due to the preferability of the federal forum. "Federal judges are experienced in handling complex and protracted antitrust litigation, and the Federal Rules of Civil Procedure contain special rules for the treatment of 'big' cases." *Id.* at 1470 (footnote omitted).

Plaintiffs suing under federal antitrust law will often also allege violations of state antitrust laws. Under the doctrine of pendant jurisdiction, the state claim may ride into federal court on the back of the federal claim. *See Hurn v. Oursler*, 289 U.S. 238 (1933). However, in light of *Illinois Brick*, it will be difficult, if not impossible, for indirect purchasers to pursue state claims in federal courts. *See Hagans v. Lavine*, 415 U.S. 528, 536 (1974) (pendant claim cognizable in federal courts only if federal claim "substantial"). On the other hand, state courts can try federal claims, because federal courts have original, but not exclusive, jurisdiction "of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies." 28 U.S.C. § 1337 (1970). *But see Van Dussen-Storto Motor Inn, Inc. v. Rochester Tel. Corp.*, 72 Misc. 2d 34, 338 N.Y.S.2d 31 (1972) ("original" jurisdiction means "exclusive" jurisdiction). A defendant may remove a federal claim asserted in state court to federal court. 28 U.S.C. § 1441 (1970).

⁶⁰ *Illinois Brick* cuts off the indirect purchaser only from the protection of § 4 of the Clayton Act. Section 16 of the Act (15 U.S.C. § 26 (1970)), which provides for injunctive relief, has a lower threshold for showing injury than does § 4. The plaintiff need only demonstrate "threatened loss or damage." *See Buckley Towers Condominium, Inc. v. Buchwald*, 533 F.2d 934, 938 (5th Cir. 1976) ("[T]o achieve standing under Section 16 a plaintiff must demonstrate a loss or injury cognizable in equity proximately resulting from the alleged antitrust violation."). However, because anticompetitive activities are characteristically clandestine, equitable relief usually comes too late to furnish any real protection. An antitrust litigant might also bring a declaratory judgment action to determine his legal rights under the antitrust laws. *See* 28 U.S.C. § 2201 (1970). He must be able to show, however, that a justiciable controversy exists. *Id.* A declaratory judgment has the force and effect of a final decree, and, under 28 U.S.C. § 2202, the courts may grant any "necessary or proper" relief. *See also Wilson Tariff Act § 77*, 15 U.S.C. § 8 (1970) (any person injured in business or property may bring treble-damage action against unlawful conspiracies involving importation of foreign goods); *Automobile Dealer Franchise Act, id.* §§ 1221-1225 (new cause of action independent of federal antitrust laws, permitting franchised automobile dealer to bring action for damages against automobile manufacturer for failure to comply with terms of franchise).

⁶¹ At least 40 states have statutes providing for private rights of action for antitrust

Many states have a strong policy against anticompetitive activity,⁶² and have passed statutes that embody the principles underlying the Sherman Act.⁶³ In increasing numbers, states have

violations. For a list of these statutes, see Rhodes, *Some Thoughts on the Search for Private Rights of Action Under State Antitrust Statutes Lacking "Little Clayton 4" Provisions*, 25 EMORY L.J. 767, 769 n.15 (1976). Six states (Florida, Georgia, Massachusetts, New York, North Dakota, and Texas) with antitrust statutes do not specifically provide for private enforcement. *Id.*

Private antitrust actions originally grew out of common-law contract and tort concepts. See *Brown & Allen v. Jacobs Pharmacy Co.*, 115 Ga. 429, 41 S.E. 553 (1902); M. HANDLER, H. BLAKE, R. PITOFKY, & H. GOLDSCHMID, *CASES AND MATERIALS ON TRADE REGULATION* 1-96 (1975); L. SULLIVAN, *supra* note 27, at 155-61. Thus, in states lacking statutory provisions for private enforcement, courts may nevertheless apply antitrust principles. See, e.g., *Collins v. Main Line Bd. of Realtors*, 452 Pa. 342, 349, 304 A.2d 493, 496 (applying in state suit principles of Sherman Act, which "is merely the application of the common-law doctrine concerning the restraint of trade"), *cert. denied*, 414 U.S. 979 (1973).

State enforcement of state antitrust laws may also provide a weapon against antitrust violators effectively immunized from liability by *Illinois Brick*. Although the federal antitrust laws are based on the plenary power of the Commerce Clause, states may regulate commerce that is not wholly intrastate if the activity has a local impact. See *Standard Oil Co. v. Tennessee*, 217 U.S. 413 (1910) (Holmes, J.) (federal antitrust laws do not preclude states from antitrust enforcement activity); *Commonwealth v. McHugh*, 326 Mass. 249, 265, 93 N.E.2d 751, 762 (1950) ("If State laws have no force as soon as interstate commerce begins to be affected, a very large area will be fenced off in which the States will be practically helpless to protect their citizens without, so far as we can perceive, any corresponding contribution to the national welfare."); *State v. Sterling Theatres Co.*, 64 Wash. 2d 761, 764, 394 P.2d 226, 228 (1964) ("[S]tate action incidentally affecting commerce is valid when there exists sufficient local significance and impact to justify the exercise of the police power."); *State v. Milwaukee Braves, Inc.*, 31 Wis. 2d 699, 721, 144 N.W.2d 1, 12 ("The state may, ordinarily, protect the interests of its people by enforcing its antitrust act against persons doing business in interstate commerce . . ."), *cert. denied*, 385 U.S. 990 (1966). Cf. *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738 (1976) (wholly intrastate activity may still violate Sherman Act if it has any interstate impact). See generally J.J. FLYNN, *FEDERALISM AND STATE ANTITRUST REGULATION* 64-108 (1964). Assorted other reasons also minimize public enforcement of state antitrust laws: "the chronic lack of legislative appropriations and attorney general interest . . . ineffective or nonexistent investigative procedures . . . cumbersome and often unworkable remedies and sanctions . . . [and] antiquated laws and procedures." Rubin, *Rethinking State Antitrust Enforcement*, 26 U. FLA. L. REV. 653, 697-98 (1974) (footnotes omitted).

⁶² "[O]nly seven states . . . are presently without a statute of general application prohibiting either monopolies or restraints of trade, or both." Rubin, *supra* note 61, at 658. The case law also underscores states' anticompetitive policies. See, e.g., *Speegle v. Board of Fire Underwriters*, 29 Cal. 2d 34, 44, 172 P.2d 867, 873 (1946) ("[U]nder the common law of this state combinations entered into for the purpose of restraining competition and fixing prices are unlawful. . . . The public interest requires free competition so that prices be not dependent upon an understanding among suppliers of any given commodity, but upon the interplay of the economic forces of supply and demand.").

⁶³ See *State v. Milwaukee Braves, Inc.*, 31 Wis. 2d 699, 716, 144 N.W.2d 1, 9, *cert. denied*, 385 U.S. 990 (1966); Rubin, *supra* note 61, at 658 n.28. In fact, legislation against monopolies and restraints of trade originated in the states. By 1890, when Congress passed the Sherman Act, 21 states had already passed antitrust laws. See Note, *supra* note 56, at 1469 n.1. But see Rubin, *supra* note 61, at 657 n.22 (13 states had pre-1890 antitrust statutes).

adopted or amended antitrust statutes to allow treble-damage remedies and attorneys' fees awards.⁶⁴ Although most state statutes speak in terms of "injury," the criteria for determining which plaintiffs are sufficiently injured to proceed under state laws are unclear.⁶⁵ In light of *Illinois Brick's* inhibitory effect on consumer suits alleging Clayton Act violations, state courts sympathetic to consumer claims may liberally construe the meaning of "injury," and allow indirect purchasers to recover under state law. State courts, however, are procedurally ill-equipped to handle large lawsuits, and far less experienced than federal courts in dealing with complex litigation.⁶⁶ The complexity-avoidance and judicial-economy rationales of *Illinois Brick*, although articulated in the context of a federal suit, are thus even more compelling in the state-court setting. It therefore seems likely that state courts will rely on the persuasive authority of *Illinois Brick* to bar suits by indirect purchasers.⁶⁷

The federal laws are so pervasive that state enforcement of antitrust policies has by and large taken second place to federal enforcement. But Congress, in passing the Sherman Act (15 U.S.C. §§ 1-7 (1970)), intended to supplement, rather than supplant, state regulations and "to arm the Federal courts within the limits of their constitutional power that they may co-operate with the State courts in checking, curbing, and controlling the most dangerous combinations that now threaten the business, property, and trade of the people of the United States." 21 CONG. REC. 2457 (1889) (remarks of Senator Sherman). See generally H. THORELLI, *THE FEDERAL ANTITRUST POLICY* 164-225 (1955).

⁶⁴ See, e.g., CAL. BUS. & PROF. CODE § 16750 (1964 & West Supp. 1977); Illinois Antitrust Act § 7, ILL. REV. STAT. ch. 38, § 60-7(2) (1975); MINN. STAT. ANN. § 325.8019 (West Supp. 1977); VA. CODE § 59.1-9.12(b) (Supp. 1977); WASH. REV. CODE ANN. § 19.86.020 (Supp. 1976); WIS. STAT. ANN. § 133.01 (West 1974). In many states, the trial court has the discretion to authorize an award of up to three times the amount of actual damages. See Rhodes, *supra* note 61, at 769. Hawaii establishes a minimum recovery in antitrust actions of "\$1,000.00 or threefold damages . . . sustained, whichever sum is the greater." HAW. REV. STAT. § 480-13(a)(1) (Supp. 1975).

⁶⁵ See, e.g., *Weissensee v. Chronicle Publishing Co.*, 59 Cal. App. 3d 723, 728, 129 Cal. Rptr. 188, 191 (1976) ("In private actions . . . it is basic 'that the suitor must have suffered damages flowing directly from the violation of the Act.'"); *Saxer v. Philip Morris, Inc.*, 54 Cal. App. 3d 7, 23, 126 Cal. Rptr. 327, 336 (1975) ("The alleged antitrust violation need not be the sole or controlling cause of the injury in order to establish proximate cause, but only need be a substantial factor in bringing about the injury."); *Elliott v. Amerada Petroleum Corp.*, [1959] TRADE CAS. (CCH) ¶ 69,247 (Cal. Super. Ct. 1959) (state court not bound by federal law of antitrust injury).

⁶⁶ See note 59 *supra*.

⁶⁷ At least one state instructs its courts to "be guided by the interpretation given by the federal courts to the various federal statutes dealing with the same or similar matters" dealt with in the antitrust statutes of that state. WASH. REV. CODE ANN. § 19.86.920 (Supp. 1976). Should states sanction offensive pass-on theory under their statutes, one ironic scenario would find federal courts exercising diversity jurisdiction over state antitrust claims. See 28 U.S.C. § 1332 (1970). This would result in the very complexity and risk of multiple liability the Court attempted to avoid in *Illinois Brick*. The possibility of this result may influence state courts to accommodate federal interests by following *Illinois Brick*.

B. *Parens Patriae*

At common law, a state may sue as "*parens patriae*, trustee, guardian or representative of all her citizens."⁶⁸ However, in *Hawaii v. Standard Oil Co.*,⁶⁹ the Supreme Court held that section 4 of the Clayton Act precluded an action brought by a state suing on behalf of its citizens and on its own behalf "to recover damages for injury to its general economy."⁷⁰ Congress reversed this result by passing the Hart-Scott-Rodino Antitrust Improvements Act.⁷¹ Under the Act, state attorneys general may sue for monetary relief in the name of the state on behalf of citizens injured by anticompetitive activity.⁷² According to the legislative history of the Act, it creates "no new substantive liability" and operates only where citizens of the state would otherwise have a cause of action under section 4.⁷³ Thus, the State of Illinois could not amend its complaint to allege a *parens patriae* action on behalf of its ultimate-consumer citizens.⁷⁴ In many cases, however, a state could move to assert the claims of *direct* purchasers who have not sued because of delicate business relationships with suppliers.⁷⁵ In such a case, *parens patriae* presents no problems of apportionment, because the

⁶⁸ *Louisiana v. Texas*, 176 U.S. 1, 19 (1900).

⁶⁹ 405 U.S. 251 (1972).

⁷⁰ *Id.* at 264. The state alleged conspiracy and combination to restrain trade and commerce in the sale by the defendant of refined petroleum products. *Id.* at 253. The Supreme Court found that "[a] large and ultimately indeterminable part of the injury to the 'general economy,' . . . is no more than a reflection of injuries to the 'business or property' of consumers, for which they may recover themselves under § 4." *Id.* at 264.

⁷¹ 15 U.S.C.A. §§ 15c-15h (West Supp. 1977).

⁷² "Any attorney general of a State may bring a civil action in the name of such State, as *parens patriae* on behalf of natural persons residing in such State . . . for injury sustained by such natural persons to their property by reason of any violation of Sections 1 to 7 of this title." 15 U.S.C.A. § 15c(a)(1) (West Supp. 1977).

⁷³ See H.R. REP. No. 499, 94th Cong., 2d Sess. 6, 9, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 2572, 2575, 2578. The Senate Report states: "Of course, State Attorneys General still would be required to prove that defendants violated the antitrust laws; that consumers were damaged by such violation in the form of higher prices or otherwise; and the approximate amount of such damage." S. REP. No. 803, 94th Cong., 2d Sess. 43 (1976).

⁷⁴ To the extent that *Illinois Brick* denies indirect purchasers the right to sue, it effectively nullifies the new *parens patriae* legislation. 97 S. Ct. at 2084 n.23 (dissenting opinion, Brennan, J.).

⁷⁵ See *Illinois Brick Co. v. Illinois*, 97 S. Ct. at 2075, 2077; *In re Western Liquid Asphalt Cases*, 487 F.2d 191, 198 (9th Cir. 1973), cert. denied, 415 U.S. 919 (1974). There are many instances in which direct purchasers would not bring suit because they are "neither motivated nor in a financial or strategic position to maintain a private antitrust action." *Boshes v. General Motors Corp.*, 59 F.R.D. 589, 598 (N.D. Ill. 1973). See Schaefer, *supra* note 15, at 913 ("Direct purchasers . . . may escape injury by passing on an illegal overcharge or may be related so intimately to the violator that they have no desire to pursue private law enforcement.").

state, if successful, will recover the full amount of the initial overcharge.⁷⁶

The *parens patriae* suit has a number of drawbacks. Most problematic is the limited availability and use of the action. Only a state attorney general can sue in *parens patriae*,⁷⁷ and it is unlikely that mandamus will lie to compel attorney general action.⁷⁸ The risk of sporadic enforcement due to political and financial considerations further diminishes the utility of *parens patriae*.⁷⁹ Finally, the lack of

⁷⁶ See *Illinois Brick Co. v. Illinois*, 97 S. Ct. at 2067. A recovery on behalf of direct purchasers is "automatic"—the state will recover if it proves that an overcharge occurred and that direct purchasers were injured by it, irrespective of evidence that the direct purchasers passed on all or part of the overcharges. *Id.*

⁷⁷ 15 U.S.C.A. § 15c(a)(1) (West Supp. 1977) expressly authorizes the "attorney general of a State" to bring a *parens patriae* action "on behalf of natural persons residing in such State." "State attorney general," within the meaning of the Act, refers to "the chief legal officer of a State, or any other person authorized by State law to bring actions under section 15c." *Id.* § 15g(1). Under § 4F(a) of the Act (*id.* § 15f(a)),

[w]henver the Attorney General of the United States has brought an action under the antitrust laws, and he has reason to believe that any State attorney general would be entitled to bring an action under [this Act] based substantially on the same alleged violation . . . , he shall promptly give written notification thereof to such State attorney general.

Furthermore, the United States Attorney General "shall, upon request by such State attorney general, make available to him . . . any investigative files or other materials which are or may be relevant." *Id.* § 15f(b).

⁷⁸ Under the new legislation specifically authorizing state attorneys general to sue, a state citizen could conceivably obtain a writ of mandamus compelling the attorney general to bring a *parens patriae* action. Mandamus, however, generally lies only where the public officer fails even to consider taking action. See, e.g., *Lindell Co. v. Board of Permit Appeals*, 23 Cal. 2d 303, 144 P.2d 4 (1943); *Rice v. Draper*, 207 Mass. 577, 93 N.E. 821 (1911); *State ex rel. Ramsey v. Industrial Comm'n*, 140 Ohio St. 246, 42 N.E.2d 981 (1942). In such a case, it forces the official to decide whether to take action, but does not affect the decision itself; in other words, mandamus requires a decision, but not a particular outcome. *Lindell Co. v. Board of Permit Appeals*, 23 Cal. 2d 303, 315, 144 P.2d 4, 11 (1943). *But see Goodell v. Woodbury*, 71 N.H. 378, 52 A. 855 (1902) (chief of police compelled to prosecute named violators of state liquor laws). Courts may, however, mandate specific action if an agency's failure to act constitutes an abuse of discretion. See *State ex rel. Cook v. Richards*, 61 S.D. 28, 245 N.W. 901 (1932) (state attorney compelled to take appeal from decision of board of county commissioners). Nevertheless, because of the overwhelmingly discretionary nature of *parens patriae* actions, mandamus will likely remain, in this context, a seldom-used remedy of marginal value. See generally *Nader v. Saxbe*, 497 F.2d 676 (D.C. Cir. 1974) (United States Attorney General's decision not to prosecute violators of Federal Corrupt Practices Act held immune from judicial review); Note, *The Use of Mandamus to Control Prosecutorial Discretion*, 13 AM. CRIM. L. REV. 563, 593-94 (1976).

⁷⁹ The minority House Report accompanying the bill H.R. 8532, 94th Cong., 2d Sess. (1976) voiced concern that appointing state attorneys general to champion antitrust actions would

provide a political incentive for antitrust enforcement in cases where even treble damage awards provide no economic incentive.

We believe that politics and antitrust will not make a happy marriage. The

direct compensation for purchasers actually injured reduces the mechanism's attractiveness: to the extent that those injured are not those who benefit from an increase in the state treasury, windfall gains result, thus compromising the compensatory goal of the antitrust laws.

C. *The Ownership-or-Control Exception*

The Court in *Illinois Brick* implied that where a defendant-supplier owns or controls the intermediary in a vertical chain of distribution, an indirect purchaser may sue the supplier.⁸⁰ If, for example, a direct purchaser is a wholly-owned subsidiary of the supplier, the exception would apply.⁸¹ This situation is clearcut. But in cases involving only part-interests, courts will have to determine what degree of ownership suffices to bring the exception into play.⁸² To the extent a supplier holds an equity interest in a

temptations for the politically ambitious to ride into the public eye as its champion against "fat cat" antitrust violators by filing lawsuits to the sound of political trumpets may be too great. Since antitrust cases take years to complete, the politically ambitious attorney general need not fear the embarrassment of a string of losses.

H.R. REP. No. 499, 94th Cong., 2d Sess. 24-25, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 2572, 2593. Other critics found the bill constitutionally defective under *Buckley v. Valeo*, 424 U.S. 1 (1976), on the ground that Congress cannot give state officials the power to enforce the federal antitrust laws. Handler & Blechman, *supra* note 25, at 669-70.

⁸⁰ See 97 S. Ct. at 2070 n.16.

⁸¹ By citing two decisions after articulating the ownership-or-control exception, the Court hinted at two types of cases that probably satisfy the exception: (1) parent-subsidiary relationships, in which a seller holds a majority of the direct purchaser's stock, and (2) credit or other coercive relations, through which the seller has substantial influence over the direct purchaser's actions. The Court first cited *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969), a suit brought under § 2(a) of the Robinson-Patman Act (15 U.S.C. § 13(a) (1970)). There, the defendant allegedly provided discriminatorily low gasoline prices to competitors of the plaintiff. The price advantage passed through a wholesaler, who transferred the gasoline to its 60%-owned subsidiary, which resold the gasoline to its 55%-owned subsidiary, the direct competitor of the plaintiff. The Court held that the plaintiff's right to recover the losses he suffered due to Standard Oil's wrongdoing was not impeded "simply because the product in question passed through an additional formal exchange before reaching the level of Perkins' actual competitor." 395 U.S. at 648.

The Court also cited *In re Western Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974), in which the Ninth Circuit permitted the plaintiffs to show that overcharges were passed on to them because, *inter alia*, "documents obtained . . . during discovery tend to indicate that [the defendants] control a high percentage of their direct customers of asphalt, either through acquisition of stock, or indirectly through various financial arrangements, including credit." *Id.* at 195. The court did not define what degree of control the "credit" or other "financial" arrangements must show; a simple allegation of such arrangements convinced the court to deny the defendant's motion for summary judgment.

⁸² Courts could insist on outright equity control—for example, 51% ownership of stock—before raising the bar against suits by indirect purchasers. On the other hand, a

direct purchaser who successfully sues for overcharges, the supplier will recoup his own loss through the direct purchaser's gain. Because this recoupment, regardless of its size, undercuts treble-damage deterrence and punishment, courts should liberally apply the ownership exception.

The "control" exception calls for a different analysis.⁸³ A potential antitrust defendant with control over the direct purchaser can prevent the filing of a suit.⁸⁴ Thus, courts should invoke the exception only to ensure that sellers do not insulate themselves from suit by creating clever distribution systems, or by strong-

minority interest might be sufficient to activate the exception. Most likely, application of the exception will generally depend on the interplay between ownership and the "management" functions of the shareholder, *i.e.*, the overlap of ownership and control. See generally H. HENN, HANDBOOK OF THE LAW OF CORPORATIONS § 188 (2d ed. 1970) ("In a strict sense, management of a corporation is vested in its board of directors and shareholders have no functions of management as such. In the broader sense of participation in control, shareholders have various management functions.").

⁸³ The Court's use of the disjunctive "ownership *or* control" (97 S. Ct. at 2070 n.16 (emphasis added)) suggests that forms of nonfinancial dominance may activate the exception. In addition, courts should recognize that many cases will involve both ownership *and* control. In these cases courts should be sensitive to concerns of both recoupment by the violator and the unlikelihood of direct-purchaser actions.

⁸⁴ The attributes of many franchising arrangements, for example, will place them squarely within the ownership-or-control exception. Franchisors frequently maintain a strong grip over their franchisees by dictating product lines, quality standards, and hours of operation. In addition, they often make other policy decisions normally committed to independent management. See, *e.g.*, *Continental T.V., Inc. v. GTE Sylvania Inc.*, 97 S. Ct. 2549 (1977) (franchisee controlled by restrictions on sales of Sylvania products from places other than licensed location); *Coe v. Easu*, 377 P.2d 815 (Okla. 1963) (franchisor oil company owned gas station licensed to franchisee, displayed its trademark on the premises, and controlled maintenance standards and hours of operation). See generally *Caves & Murphy, Firms, Markets, and Intangible Assets*, 42 So. ECON. J. 572 (1976). In view of widespread and far-reaching franchisor control, persons purchasing from franchisees should often be able to recover damages resulting from franchisors' anticompetitive acts. Decisions determining whether franchise arrangements are "investment contracts" within the Securities Act of 1933 (15 U.S.C. § 77(b)(1) (1970)) may shed light on the scope of the control exception since an "investment contract" exists only when expected profits are to be generated "solely from the efforts of others." *SEC v. W.J. Hoywey Co.*, 328 U.S. 293, 301 (1946). Cf. *United States v. Herr*, 338 F.2d 607 (7th Cir. 1964) (franchise agreement under which franchisor hired, trained, and managed sales force, held a security). However, most federal courts have rejected attempts by franchisees to fit their franchise contracts into the definition of "investment contract," and have held that the franchisor's control over the franchisee was insufficient to give rise to a security. See, *e.g.*, *Mr. Steak, Inc. v. River City Steak, Inc.*, 460 F.2d 666 (10th Cir. 1972).

A plaintiff might assert one other form of nonfinancial dominance: conspiracy. By alleging the existence of an agreement to conspire that "controlled" pricing decisions at each level in the chain of distribution, ultimate buyers can illustrate that there are no competitive markets separating them from the illegal actions of the manufacturer. Thus they could avoid *Illinois Brick's* prohibition on *indirect* purchaser suits. See generally notes 94-98 and accompanying text *infra*.

arming direct purchasers into choosing not to sue.⁸⁵ If the direct purchaser has sued, this exception should not apply, regardless of the original seller's degree of control.⁸⁶

D. *The Cost-Plus Contract Exception*

The rule of *Illinois Brick* does not apply where an indirect purchaser buys a predetermined quantity of price-fixed goods under a cost-plus contract. Difficulties of proof disappear where the direct purchaser in setting his price automatically adds a contractually predetermined sum to the price he paid the initial seller; accordingly, *Illinois Brick* permits the indirect purchaser to sue.⁸⁷ This exception was devised in *Hanover Shoe*,⁸⁸ but subsequent decisions seldom mentioned it. Courts that noted the exception in permitting indirect-purchaser suits never based their decisions solely on the presence of a cost-plus contract.⁸⁹

⁸⁵ If manufacturers attempt to insulate themselves from suit by establishing distribution systems that place all potential plaintiffs in the position of indirect consumers, the "ownership or control" exception will present a significant roadblock. However, if the lower courts actively use the "control" exception to scrutinize the formation of franchise distributorships, the creation of distributorships will decline. This result conflicts to some extent with the policy bases of the Court's holding in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 97 S. Ct. 2549 (1977), which encourages formation of distributorships by allowing manufacturers to regulate franchisees without interference from *per se* rules.

⁸⁶ Courts should permit indirect purchasers to sue, however, if the direct-purchaser plaintiff is not vigorously pursuing his cause of action—a likely result where the wrongdoer controls the direct-purchaser plaintiff.

⁸⁷ "[T]he pre-existing cost-plus contract makes easy the normally complicated task of demonstrating that the overcharge has not been absorbed by the direct purchaser." 97 S. Ct. at 2068 n.12. *See also id.* at 2070. "[T]he purchaser is insulated from any decrease in its sales as a result of attempting to pass on the overcharge, because its customer is committed to buying a fixed quantity regardless of price." *Id.* at 2070. The direct purchaser may still have a cause of action to the extent extra costs imposed by the restraint cause potential customers to purchase elsewhere, and lost profits result.

⁸⁸ 392 U.S. at 494.

⁸⁹ *See, e.g., In re Western Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973) (problems of proof and multiple liability stressed), *cert. denied*, 415 U.S. 919 (1974); *Boshes v. General Motors Corp.*, 59 F.R.D. 589, 597 (N.D. Ill. 1973) ("It can also be argued that facts such as those presented here were contemplated to fall within the so-called 'cost-plus' exception, although in that event the exception may be broader than the rule."); *In re Master Key Antitrust Litigation*, [1973-2] TRADE CAS. (CCH) ¶ 74,680 (D. Conn. 1973) (issue of cost-plus contract considered in conjunction with proof of damages and multiple recovery), *appeal dismissed*, 528 F.2d 5 (2d Cir. 1975). *Cf. West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1088 (2d Cir. 1971) (indirect purchasers allowed portion of settlement in part because "arrangements under which the wholesalers and retailers resold these products were, in virtually all cases, cost plus a set percentage markup."), *cert. denied*, 404 U.S. 871 (1971). *But see Obron v. Union Camp Corp.*, 477 F.2d 542 (6th Cir. 1973) (pass-on defense permitted due to fixed-price contract where distributor billed his customers at the manufacturer's list price and therefore suffered no damages).

The majority in *Illinois Brick* specifically excluded "cost-based rules of thumb" from the exception, a restriction that confines it to a narrow set of facts.⁹⁰ Although cost-based rules of thumb may, at times, operate smoothly and predictably, the chance of secret price cuts and the sheer magnitude of the resulting accounting problems militate strongly against a general exception founded on cost-based rules of thumb.⁹¹ Thus, courts should normally resist invitations to apply the cost-plus contract exception. On the other hand, the cost-plus contract exception evinces the Court's willingness to allow recovery absent difficulties of proof.⁹² Courts should therefore permit suits brought by indirect purchasers capable of demonstrating the functional equivalent of a cost-plus contract.⁹³

⁹⁰ 97 S. Ct. at 2074. The Court rejected the assertion that offensive passing-on could be used by the State of Illinois because the middleman-contractors charged the state a fixed percentage above their costs. A pre-existing cost-plus contract, and not simply reliance on cost-based price setting, is necessary to activate the exception. The majority's rejection of a cost-based pricing exception reflects its belief that in practice such formulas would do little to reduce complexities of proof. For example, in those situations where a buyer makes many purchases over an extended period of time, variations in mark-ups would complicate tracing, thus undercutting the Court's concern for judicial economy. As the Court noted,

[f]irms in many sectors of the economy rely to an extent on cost-based rules of thumb in setting prices. . . . These rules are not adhered to rigidly, however; the extent of the markup (or the allocation of costs) is varied to reflect demand conditions. . . . The intricacies of tracing the effect of an overcharge on the purchaser's prices, costs, sales, and profits thus are not spared the litigants.

Id.

⁹¹ Even in industries with "generally accepted" mark-ups, price-shaving from these "cost-based rules of thumb" occurs in a fashion similar to secret price-cutting within a cartel. See generally F. SCHERER, *supra* note 10, at 158-64.

Two problems underlie the tendency for informal price-fixing and output-restricting agreements to break down. First, the parties to the conspiracy may have divergent ideas about appropriate price levels and market shares, making it difficult to reach an understanding which all will respect. Second, when the group agrees to fix and abide by a price approaching monopoly levels, strong incentives are created for individual members to cheat—that is, to increase their profits by undercutting the fixed price slightly, gaining additional orders at a price which still exceeds marginal cost.

Id. at 160. Another problem with utilizing "cost-based rules of thumb" is determining "cost." Secret rebates, kickbacks, or other factors may cause the cost element to fluctuate, and as a result, over- or under-compensate indirect purchasers relying on cost-based rules of thumb as effective cost-plus contracts.

⁹² See note 87 *supra*.

⁹³ For example, when a single indirect buyer sues for the overcharge on a single purchase passed on by an intermediary using cost-based rules of thumb, variations in the pricing formula would be irrelevant, and the method for determining the amount of the overcharge passed-on would be substantially the same as that used in cases involving purchases made pursuant to a pre-existing cost-plus contract. In both instances, costs could

E. Vertical Restraints

The "indirect" purchaser alleging a vertical conspiracy⁹⁴ or other vertical restraint⁹⁵ should be able to remove himself from the reach of *Illinois Brick* if he purchased directly from an intermediary involved in the restraint. If, for example, a purchaser proves a vertical conspiracy involving both manufacturers and middlemen, he has effectively extracted himself from the indirect purchaser classification.⁹⁶ Because the liability of coconspirators is joint and

be determined by examining the middleman's purchasing records. The only difference between the two situations is that under a pre-existing cost-plus contract, cost figures appear on the contract, while under cost-based pricing they appear in the middleman's pricing records. Cf. [1977] ANTITRUST & TRADE REG. REP. (BNA) No. 822, at B-6 (July 14, 1977) ("[T]he effect of the overcharge is determined in advance without regard to considerations of supply and demand."). Although the Court intended the exception to have a "narrow scope," any situation in which the overcharge is essentially determined in advance, "without reference to the interaction of supply and demand" (97 S. Ct. at 2070) would function in the same way.

⁹⁴ A vertical conspiracy arises where buyers and sellers in the vertical chain of distribution conspire to achieve an anticompetitive end. See generally *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948). It thus differs from a "horizontal" conspiracy, i.e., a conspiracy between competitors on the same level of manufacturing or distribution.

⁹⁵ See generally L. SULLIVAN, *supra* note 27, at 375-500. In addition to vertical conspiracies, commonly encountered vertical restraints include resale price maintenance agreements, territorial or customer restrictions, and exclusive dealing requirements. Some vertical restraints violate the antitrust laws only if they are unreasonable. See, e.g., *Continental T.V., Inc. v. GTE Sylvania Inc.*, 97 S. Ct. 2549 (1977) (vertical location restriction on retailers not per se violation). Others, however, are per se violations. See, e.g., *Fortner Enterprises v. United States Steel Corp.*, 394 U.S. 495 (1969) (tying arrangement a per se violation); *United States v. Loew's Inc.*, 371 U.S. 38 (1962) (same); *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958) (same); *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) (vertical resale price ceiling agreements per se violation). However, the legal standard applicable to a vertical restraint should not affect the validity, under *Illinois Brick*, of a complaint alleging the restraint's existence.

⁹⁶ By asserting that an agreement to conspire resulted in price-fixing at each level in the chain of distribution, plaintiffs can offer to prove that there are no "competitive" markets separating them from the manufacturer; the manufacturer and the middleman are in essence a single entity—the conspiracy—with which the plaintiff is in privity. At least one court has alluded to this doctrine as a possible "exception" to the general rule barring offensive passing-on. In *Donson Stores, Inc. v. American Bakeries Co.*, 58 F.R.D. 481 (S.D.N.Y. 1973), a group of consumers filed a motion to intervene as plaintiffs on behalf of a class in a suit brought by retail grocery stores against baking companies for alleged price-fixing. The district court held that:

In the absence of an allegation that the alleged price fixing occurred at the point of their purchase, i.e., that the manufacturers were guilty of unlawful vertical price fixing at the retail level, the proposed intervenors have no legally cognizable claim. The bare allegations in the proposed complaint that the retailers passed on the overcharge to consumers do not state a claim upon which relief can be granted.

Id. at 485.

several,⁹⁷ problems of apportioning defendants' liability do not occur.⁹⁸ Similarly, other vertical restraints may directly injure a plaintiff despite intervening vertical transactions. Thus, *Illinois Brick* is inapposite where a plaintiff-purchaser sues a defendant-manufacturer for damages inflicted by reason of vertical customer restrictions agreed to by the manufacturer and the intervening wholesaler.⁹⁹ Courts should take care to distinguish indirect purchasers from direct purchasers: a line of vertical transactions separating the plaintiff from the defendant should not always trigger an indirect purchaser analysis; an allegation of vertical restraint should catalyze a more searching inquiry.

⁹⁷ See *Atlanta v. Chattanooga Foundry & Pipeworks*, 127 F. 23, 26 (6th Cir. 1903), *aff'd*, 203 U.S. 390 (1906).

That there was evidence tending to show that the plaintiff had been compelled to pay an unreasonable price for the pipe which it bought during the continuance of the unlawful combination complained of is not to be disputed. That its purchases were made exclusively from the Anniston Pipe Company . . . and that it is not suing that corporation, is of no vital significance.

Id. at 25.

A number of courts have found that an antitrust plaintiff need not sue all possible defendants but may choose to sue one particular conspirator. *National Wrestling Alliance v. Meyers*, 325 F.2d 768, 775 (8th Cir. 1963) (*dicta*); *Walker Distrib. Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1, 8 (9th Cir. 1963); *Washington v. American Pipe & Constr. Co.*, 280 F. Supp. 802, 804 (S.D. Cal. 1968).

⁹⁸ If manufacturers and distributors or sellers are coconspirators in an antitrust violation, they are jointly and severally liable for the overcharge. The injured consumer can, therefore, recover all his damages from any or all of the conspirators because all are implicated in the conspiracy. See note 97 *supra*. Restoring the indirect purchaser to "privity" with the violator eliminates the problem of tracing the overcharge through a number of market levels.

The problem of apportioning damages among the defendants in an action for contribution would pose few problems. Either damages could be split evenly, with each defendant paying an equal share, or a tort theory might be applied whereby each coconspirator would contribute in proportion to his wrongdoing. For a summary of the tort rule, see *Dawson v. Contractors Transp. Corp.*, 467 F.2d 727, 729 (D.C. Cir. 1972). Despite cases rejecting contribution in the antitrust context (*e.g.*, *El Camino Glass v. Sunglo Glass Co.*, [1977-1] TRADE CAS. (CCH) ¶ 61,533, at 72,110-11 (N.D. Cal. 1976)), one commentator urges that, "as a matter of both law and sound antitrust policy, contribution among coconspirators in treble damage actions should be allowed whether or not the coconspirators are joined in the action." Corbett, *Apportionment of Damages and Contribution Among Coconspirators in Antitrust Treble Damage Actions*, 31 FORDHAM L. REV. 111, 112 (1962). He suggests that § 4 actions are in tort, whether under the Sherman Act or the Clayton Act. *Id.* at 114.

⁹⁹ See *Lamp Liquors, Inc. v. Adolph Coors Co.*, 410 F. Supp. 536, 539 (D. Wyo. 1976) (arrangement between manufacturer and wholesaler limiting customers actionable by retailer, but held that enforcement of antitrust laws would conflict with state law enacted pursuant to 21st Amendment); *Call Carl, Inc. v. BP Oil Corp.*, 403 F. Supp. 568, 573 (D. Md. 1975) (plaintiff retailer failed to show existence of actionable vertical conspiracy between gasoline marketer and subsidiary to fix prices and refuse to deal).

IV

RESPONDING TO *Illinois Brick*

Illinois Brick enunciates a general rule barring suits by indirect purchasers under section 4 of the Clayton Act. More fundamentally, however, the decision attempts to reconcile the often competing policy interests associated with private enforcement of the antitrust laws in federal court. On some points, the Court in *Illinois Brick* was correct: indirect purchasers who fall within the discernable exceptions to the decision's general rule are efficient and effective plaintiffs. In addition, the Court properly perceived that overreliance on indirect-purchaser suits impairs the utility of the private treble-damage action as an antitrust enforcement device.

The Court's error was in distilling an inflexible rule from generalizations based on shifting policy considerations. The Court correctly perceived the relevant variables: private enforcement, fair compensation, effective deterrence, duplicative recoveries, and judicial economy.¹⁰⁰ It failed to appreciate, however, that a case-by-case analysis would prove far more responsive to the Court's own concerns by encouraging, rather than prohibiting, efficient indirect-purchaser suits.¹⁰¹ For this reason, legislative modification of the decision is desirable. The drafters of current proposed remedial legislation, however, have failed to recognize the validity of the policy goals identified in *Illinois Brick*. The proposed bills therefore go too far in reversing the rule of *Illinois Brick*.

The Kennedy-Rodino proposal¹⁰² effectively nullifies the *Il-*

¹⁰⁰ Courts may in future cases find that *Illinois Brick* does not apply to a limited class of indirect-purchaser suits despite the absence of any specific exception. In a case where damages resulting from passing-on are readily provable, either because of the simple factual nature of the claim or the ingeniousness of the plaintiff, the suit should proceed so long as there is no danger of multiple liability. For example, where an indirect purchaser sues a small number of sellers, whose residence in the same state facilitates joinder, the court should not dismiss the suit *ab initio*. If the suit presents no possibility of duplicative damages and raises no problems of apportionment, the policy bases underlying *Illinois Brick* suggest that the court should permit, not bar, the action. This exception, like the cost-plus contract exception, should be narrowly drawn. However, recognition of an absent-policy-bases "exception" will insure that those few indirect purchasers whose suits impose no super-normal costs on the judicial system will proceed. Antitrust enforcement will thus increase, without resulting in inordinate judicial costs or unfairness to litigants.

¹⁰¹ Courts make similar value judgments when considering the manageability of class actions under FED. R. CIV. P. 23(a). Under *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), the manageability of a class suit hinges on constitutional issues, such as individual notice to each affected class member and due process of law.

¹⁰² S. 1874, 95th Cong., 1st Sess. (1977) (A Bill to Restore Effective Enforcement of the Antitrust Laws); H.R. 8359, 95th Cong., 1st Sess. (1977) (identical House bill).

Illinois Brick decision by amending section 4 to read, in part, "[t]hat any person who shall be injured in fact, directly or indirectly . . . may sue therefor . . . and shall recover threefold the damages by him sustained."¹⁰³ This version restores the substantive rights of indirect purchasers under section 4 of the Clayton Act.¹⁰⁴ By requiring a direct purchaser to prove injury-in-fact, the amendment also resurrects the passing-on defense where a direct-purchaser plaintiff has mitigated damages by passing on illegal overcharges.¹⁰⁵

A later version of the Senate proposal, the Consumer Antitrust Act of 1977, remains in committee.¹⁰⁶ This bill specifically sets forth congressional findings and purposes, and details congressional intentions in amending section 4.¹⁰⁷ In addition to overrul-

¹⁰³ *Id.* The bills would add the "in fact, directly or indirectly" language to § 4 and § 4A of the Clayton Act (15 U.S.C. §§ 15 & 15a (1970)). Fearful that *Illinois Brick* might also nullify the new *parens patriae* legislation (see notes 68-79 and accompanying text *supra*), the bill's drafters added the same language to § 4C(a)(1) of the Clayton Act (15 U.S.C.A. § 15c(a)(1) (West Supp. 1977)).

¹⁰⁴ The crucial words in the Kennedy-Rodino proposal are "directly or indirectly," a phrase that repudiates the restrictions *Illinois Brick* places on indirect-purchaser suits. In the words of Congressman Rodino, the Court's decision "flouts the intent of Congress [as exemplified in the Hart-Scott-Rodino Antitrust Improvements Act] and it must be changed." [1977] ANTITRUST & TRADE REG. REP. (BNA) No. 823, at A-4 (July 21, 1977).

¹⁰⁵ See generally *id.* at A-11 (statement of John H. Shenefield, Acting Assistant Attorney General, before the Senate Antitrust Subcommittee). Shenefield's testimony indicates that the Kennedy-Rodino bill will nullify the restrictions *Hanover Shoe* placed on defensive passing-on. In his view, the Kennedy-Rodino bill

[a]ddresses the Court's fear of multiple liability by permitting any plaintiff to recover who can prove injury in fact. A defendant would not be faced with the prospect of being denied the right to use passing-on defensively in a suit by direct purchasers, while nevertheless being subject to an award of damages in a suit by purchasers further down the distribution chain based on an allegation that the illegal overcharge was passed to them.

Id. at A-11.

When introducing the bill on the floor of the Senate, Senator Kennedy said that the new legislation would improve the effectiveness of antitrust enforcement in two ways:

[F]irst, . . . many persons who . . . are denied recovery under *Illinois Brick*, because they are "indirect" parties, will have their remedy restored, and second, . . . the windfall recovery now received by direct parties who recover the full amount of the overcharge, even though they have passed on most or all of the overcharge, will be eliminated.

123 CONG. REC. S12,040 (daily ed. July 15, 1977). At this writing, both the Senate and House bills are still in committee.

¹⁰⁶ Telephone interview with Terry Lytle, counsel to Senate Antitrust Subcommittee, Nov. 8, 1977. See N.Y. Times, Oct. 28, 1977, at A-30, col. 1.

¹⁰⁷ The bill finds that *Illinois Brick* "frustrates effective antitrust enforcement and deprives many consumers of a just remedy for their injury." S. 1874, 95th Cong., 1st Sess. § 2(a)(3) (1977) (revised version). The purposes of the bill include the restoration of a cause of action to indirect purchasers (§ 2(b)(1)), the prevention of windfall recoveries

ing *Illinois Brick*, the new version overrules *Hanover Shoe*: the defendant is entitled to prove as a partial or complete defense to a treble-damage claim that the plaintiff has passed-on the overcharge to others.¹⁰⁸ Apparently in an attempt to minimize strike suits, the revised bill prohibits indirect purchasers from asserting their claims in class actions.¹⁰⁹

Such radical surgery is inappropriate. Returning the law to its pre-*Hanover Shoe* state will reduce the threat of private suits by removing the direct purchaser's full overcharge recovery. Courtroom proceedings, however, even absent consumer class actions, will be considerably complicated; this will impose potentially prohibitive costs on plaintiffs and the judicial system. Furthermore, symmetrical use of pass-on theories may often result in the defendant either escaping liability completely or facing a multitude of inconsistent judgments resulting in duplicative damage awards. Finally, it is unclear what effect removing direct purchasers' "automatic" recoveries would have on their incentive to sue, and whether indirect-purchaser actions would take up the slack.

Apportioning damages and employing procedural devices to bring interested parties together can avoid many of the problems inherent in recognizing an offensive pass-on theory.¹¹⁰ A better legislative response, however, would (1) retain to some extent the *Hanover Shoe* bar to defensive passing-on; (2) acknowledge the validity of the policy bases of *Illinois Brick*, perhaps even to the extent of condoning the decision on its facts, while eschewing any notion of excluding most indirect purchasers from the courtroom; (3) formulate guidelines founded on these policies to be applied on a case-by-case basis; and (4) promulgate special procedures to help meet the goals underlying *Illinois Brick*.¹¹¹

(§ 2(b)(2)), and the preservation of the right of state attorneys general to sue on behalf of resident consumers (§ 2(b)(3)).

¹⁰⁸ S. 1874, 95th Cong., 1st Sess. § 3(b) (1977) (revised version). Section 2(b)(6) of the Kennedy bill reserves to the courts the "applications and revision of existing principles of remoteness, target area and proximate cause which have been applied to limit the persons who can recover for antitrust violations." The *Illinois Brick* majority distinguished the problem of standing from the problem of injury, which it termed "analytically distinct." 97 S. Ct. at 2066 n.7.

¹⁰⁹ N.Y. Times, Oct. 28, 1977, at A-30, col. 1.

¹¹⁰ See note 34 and accompanying text *supra*.

¹¹¹ A convenient starting point for legislative analysis based on these factors is provided in the following proposed statute:

Sec. 1(a). In any private or class action brought pursuant to sections 4, 4A, or 4C of the Clayton Act, plaintiffs shall be limited in their recovery to three times any actual damages sustained, directly or indirectly. Proof of indirect injury by

Whether couched in terms of expanding the *Hanover Shoe-Illinois Brick* exceptions or in terms of forging a substitute general rule, legislative guidelines would provide an appropriate reference point from which courts could evaluate indirect-purchaser suits. This approach would facilitate a flexible application of the *Hanover Shoe* rule, and simultaneously permit reconciliation and preservation of the policy bases underlying *Illinois Brick*.

Emanations from the Court itself tend to support a case-by-case approach. The Court's disinclination to fashion *per se* rules in the substantive areas of antitrust law casts doubt on the validity and consistency of the rule articulated in *Illinois Brick*.¹¹² A *per se*

plaintiffs shall be contingent on demonstrating that the action is manageable and presents neither substantial problems of proof nor substantial risk of unfairness to defendants or other litigants.

Sec. 1(b). Where suits by indirect purchasers or sellers have been dismissed for reasons of unmanageability, unfairness, or difficulty of proof, the court may, in a subsequent action brought by a direct purchaser or seller, preclude proof that the plaintiffs passed on the defendant's overcharges.

Sec. 1(c). Where a defendant, pursuant to section 1(a) of this Act, attempts to show that one or more plaintiffs passed on all or part of an overcharge resulting from illegal activity, the court may condition the use of this defense on joinder of any or all indirect purchasers or sellers alleged to have sustained all or part of the damages.

Sec. 1(d). In fashioning orders and relief under the authority of this Act, courts shall take into consideration the following factors:

- (1) the need to protect litigants from duplicative liability;
- (2) the need for effective enforcement of the antitrust laws; and
- (3) the need to avoid unjust enrichment accruing to plaintiffs and defendants.

Sec. 1(e). In every action brought pursuant to this Act, parties may be freely joined, subject only to the limits imposed by the due process clause of the United States Constitution. A court may order such joinder on its own motion.

¹¹² During the same month that *Illinois Brick* was decided, the Court refused to apply a *per se* rule to vertical territorial restraints. In *Continental T.V., Inc. v. GTE Sylvania Inc.*, 97 S. Ct. 2549 (1977), the Court held that the location restrictions which Sylvania imposed upon its retailers should be judged under the "rule of reason" and that "departure from the rule of reason standard must be based upon demonstrable economic effect rather than . . . upon a formalistic line drawing." *Id.* at 2562. The Court's decision was a refusal to find a broad area of commercial practice illegal "without elaborate inquiry as to the precise harm [the vertical restraints] have caused or the business excuse for their use." *Id.* at 2558.

Although *Illinois Brick* does not use *per se* rule language, the decision has the same sweeping effect. In this sense, the Court's rationale in *Continental T.V.* conflicts with its decision in *Illinois Brick*. In fact, the Court in *Continental T.V.* cautioned against *per se* rules because

[o]nce established, *per se* rules tend to provide guidance to the business community and to minimize the burdens on litigants and the judicial system of the more complex rule of reason trials . . . but those advantages are not sufficient in themselves to justify the creation of *per se* rules. If it were otherwise, all of antitrust law would be reduced to *per se* rules, thus introducing an unintended and undesirable rigidity in the law.

rule should obtain, if at all, only after lower courts have had extensive dealings with indirect purchasers.¹¹³ In addition, recognition of the cost-plus exception evinces even the Court's willingness to hear suits brought by indirect purchasers where the policy bases underlying the decision are absent.¹¹⁴ Applying this case-by-case analysis to the many antitrust fact patterns will require sophisticated analysis. But with continued Supreme Court guidance, lower courts could permit suits by indirect purchasers where actions by direct purchasers do not appear likely and where the costs of such enforcement are not prohibitive to either courts or litigants. Only by distinguishing between efficient and inefficient plaintiffs can courts properly address concerns of enforcement and fair compensation. A case-by-case approach would also allow courts to fashion creative responses to problems of apportionment and multiple liability. Legislation requiring a balancing approach thus would conform to, rather than contravene, the policies underlying *Illinois Brick*.

CONCLUSION

The *Illinois Brick* decision eliminates the availability of the treble-damage remedy for most indirect purchasers damaged by passed-on overcharges. Although the policies underlying this result are unquestionably valid, *Illinois Brick* does not provide the optimal rule for finding effective and efficient antitrust plaintiffs. This failure necessitates legislative action. Bills introduced in the

Id. at 2558 n.16. Likewise, a rule that bars all indirect buyers from suing regardless of the complexities of their claims, results in "undesirable rigidity in the law." *Id.* See also *In re Western Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974), where the Ninth Circuit stated that:

We do not believe that the Supreme Court [in *Hanover Shoe*] intended a *per se* rule with respect to passing on The Court was applying policy to a specific case. We do not think we should sacrifice enforcement of the antitrust laws in this case in favor of considerations of judicial economy when, we must assume, proof of passing on is at hand, and in triable form.

Id. at 199. Courts sympathetic to plaintiffs' claims may likewise attempt to distinguish the cases before them by contending that the facts of a particular case do not present insuperable tracing or multiple-liability problems, therefore making the logic of *Illinois Brick* inapplicable. See note 100 *supra*.

¹¹³ In *White Motor Co. v. United States*, 372 U.S. 253 (1963), the Court emphasized its reluctance to fashion *per se* rules affecting vertical territorial restraints, stating that "[w]e need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a 'pernicious effect on competition and lack . . . any redeeming virtue' and therefore should be classified as *per se* violations of the Sherman Act." *Id.* at 263 (quoting *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958)).

¹¹⁴ See notes 87-93, 100, and accompanying text *supra*.

wake of the decision, however, ignore problems generated by simply resurrecting offensive and defensive passing-on. Congress should carefully reread *Illinois Brick*, pay close attention to the policies it seeks to uphold, and pass legislation requiring courts to evaluate and balance those policies on a case-by-case basis.

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