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Reconsidering Indirect-Purchaser Class Actions

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RECONSIDERING INDIRECT-PURCHASER CLASS ACTIONS

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Abstract

Few issues have proven more vexing to private antitrust enforcement than those related to indirect-purchaser class actions. The current dual system of enforcement—federal and state—exacerbates the difficulty of litigating indirect-purchaser claims by layering procedural complexity on top of substantive complexity and by explicitly allowing (perhaps even incentivizing) duplicative recovery. Almost all commentators are in substantial agreement that reform is necessary, but Congress appears unlikely to take action on the issue in the near future. This Note proposes a procedural solution that would consolidate litigation in a single federal court based on the limited-fund class action model of Federal Rule of Civil Procedure 23(b)(1)(B). Under the limited-fund model, the purpose of consolidated litigation is to determine liability before turning to the apportionment of damages. This Note also advocates for a presumption that damages are appropriately allocated to purchasers on a pro rata basis, consistent with common practice in the limited-fund class action context. Proper allocation would depend on the purchaser's position in the supply chain, with direct purchasers receiving the largest share of the recovery. This Note's proposal provides three primary advantages: (1) it eliminates the possibility of duplicative litigation; (2) it aligns the interests of all the potential plaintiffs to better incentivize vigorous antitrust enforcement; and (3) it reduces the need for complex damages calculations.

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INTRODUCTION

We are all victims of antitrust violations—the goods and services that we purchase every day are more expensive than they would otherwise be in the absence of anticompetitive conduct.[1] Even consumers who never purchase products directly from price-fixing companies or illegal monopolies have paid supracompetitive prices, either for goods whose prices were manipulated higher up the supply chain, or through increased prices of component parts or ingredients.[2] For decades, antitrust scholars, lawmakers, and judges have been divided over the wisdom of providing indirect purchasers standing to assert claims under the antitrust laws versus reserving the exclusive right to sue for direct purchasers.[3] While current federal law prohibits

1. *See* HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE 17–20 (2005). Anticompetitive conduct can refer to a wide variety of practices, from large cartels joining together to fix prices to single firms abusing their monopoly power.

2. For an economic analysis of the extent to which price fixing harms purchasers beyond merely increasing prices for units purchased, see Leonardo J. Basso & Thomas W. Ross, *Measuring the True Harm from Price-Fixing to Both Direct and Indirect Purchasers*, 58 J. INDUST. ECON. 895, 897 (2010).

3. For an early scholarly debate in the aftermath of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), compare William M. Landes & Richard A. Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of* Illinois Brick, 46 U. CHI. L. REV. 602 (1979) [hereinafter Landes & Posner, *Indirect Purchaser Standing*], and William M. Landes & Richard A. Posner, *The Economics of Passing On: A*

indirect-purchaser suits, state law in many jurisdictions, which otherwise closely mirrors federal law, grants indirect purchasers standing; alternatively, indirect purchasers may bring claims under other provisions of their state's consumer protection laws or under theories of unjust enrichment.[4]

Nearly all commentators agree that the current private enforcement regime—allowing indirect-purchaser suits in certain states but not others and sometimes in federal court though never under federal law—is overly complex and needlessly duplicative.[5] In 2007, the Antitrust Modernization Commission, a committee of twelve antitrust experts established by Congress "to examine whether the need exists to modernize the antitrust laws and to identify and study related issues," endorsed legislative reform proposals to grant indirect purchasers standing under federal law and to consolidate litigation in a single forum.[6] However, the Commission's recommendation seems unlikely to become law, and it would do little to address the difficulty of apportioning damages or clarifying issues of class-action certification.[7]

Reply to Harris and Sullivan, 128 U. PA. L. REV. 1274 (1980), with Robert G. Harris & Lawrence A. Sullivan, *Passing On the Monopoly Overcharge: A Comprehensive Policy Analysis*, 128 U. PA. L. REV. 269 (1979). Direct purchasers are parties who purchase a good from the defendant. Indirect purchasers are parties who have purchased a product at some point further down the supply chain (e.g., customers at the retail level when those at the manufacturing level fixed the prices) or as a component of a larger product (e.g., one component part in a finished automobile). For a general overview of the rule of *Illinois Brick* and the various state-level responses, see AM. BAR ASS'N, INDIRECT PURCHASER LITIGATION HANDBOOK (2007) [hereinafter INDIRECT PURCHASER LITIGATION HANDBOOK].

4. For more on consumer protection and unjust enrichment theories, see INDIRECT PURCHASER LITIGATION HANDBOOK, *supra* note 3, at 48–58. For a comprehensive overview of indirect-purchaser actions in every state, including causes of action that are the functional equivalent of indirect-purchaser actions, see AM. BAR ASS'N, INDIRECT PURCHASER LAWSUITS: A STATE-BY-STATE SURVEY (Eric J. McCarthy, Gregory S. Seador & Charles R. Price eds., 2010).

5. *See, e.g.*, William H. Page, *Class Interpleader: The Antitrust Modernization Commission's Recommendation to Overrule* Illinois Brick, 53 ANTITRUST BULL. 725, 725 (2008) (noting that nearly all informed observers have "concluded that indirect purchaser litigation in the United States is unnecessarily costly and does not serve a sensible antitrust policy"). The perceived irrationality of enforcement is not a new phenomenon. *E.g.*, HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 190 (1973) ("If Mars had antitrust laws, a visitor from that planet would surely regard the variety of methods we use for enforcing ours as beyond rational comprehension."). For a thorough criticism of the current state of indirect-purchaser litigation as failing both to adequately compensate victims and to optimally deter violations, see John E. Lopatka & William H. Page, *Indirect Purchaser Suits and the Consumer Interest*, 48 ANTITRUST BULL. 531, 535 (2003).

6. ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS, at vi–vii, 1, A.65–67 (2007), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf (internal quotation marks omitted).

7. For a criticism of the Commission's proposal to grant indirect purchasers standing, see Page, *supra* note 5. In fairness to the Commission, a proposal addressing issues of procedural

This Note suggests a different approach—certifying indirect-purchaser class action suits along the lines of limited-fund class action suits created by Federal Rule of Civil Procedure 23(b)(1)(B)—based on the goals of limiting duplicative litigation, encouraging vigorous enforcement, and simplifying complex questions of damages calculations.[8]

Limited-fund class actions resemble the traditional procedural devices of joinder and interpleader in that they reduce the possibility of wasteful, duplicative litigation, by consolidating litigation in a single forum to clarify parties' rights and obligations.[9] In general, limited-fund class actions require mandatory participation to avoid free-rider problems[10] and incentivize optimal investment in private enforcement.[11] The history of class actions, like the history of procedural law generally, is rife with examples of courts and commentators adapting an ostensibly procedural device to achieve substantive goals.[12] Applying the limited-fund model to indirect-purchaser class actions could provide an

law would have exceeded its mandate. *See* INDIRECT PURCHASER LITIGATION HANDBOOK, *supra* note 3, at 8–11.

8. FED. R. CIV. P. 23(b)(1)(B). In practice, most antitrust plaintiffs bring suit as class actions due to the high cost of litigation and the often relatively small harm suffered by individual plaintiffs. For example, a 2008 study of forty antitrust private actions found that plaintiffs brought all but six suits as class actions. *See* Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. REV. 879, 901 (2008).

9. *See* WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 4:16 (5th ed. 2014) ("All claimants interested in the fund in such proceedings must litigate their claims in that aggregate proceeding."). *Compare* FED. R. CIV. P. 23(b)(1)(B) (permitting class action treatment when "prosecuting separate actions . . . would create a risk of . . . adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members . . . or would substantially impair or impede their ability to protect their interests"), *with* FED. R. CIV. P. 19(a)(1)(B)(i) ("A person . . . must be joined as a party if . . . that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect the interest . . . ."), *and* FED. R. CIV. P. 22(a)(1) ("Persons with claims that may expose a plaintiff to double or multiple liability may be joined as defendants and required to interplead.").

10. *See infra* note 159 and accompanying text.

11. For an argument for the advantages of mandatory participation in class actions, see David Rosenberg, *The Regulatory Advantage of Class Action*, *in* REGULATION THROUGH LITIGATION 244 (W. Kip Viscusi ed., 2002) [hereinafter Rosenberg, *Regulatory Advantage*]. For the contrasting view, see Linda S. Mullenix, *No Exit: Mandatory Class Actions in the New Millennium and the Blurring of Categorical Imperatives*, 2003 U. CHI. LEGAL F. 177.

12. For an interesting history of the modern class action and an argument that the drafters of the 1966 amendments, which created the modern version of Rule 23 and the three categories of class action, meant to use the procedure to accomplish the substantive goal of facilitating civil rights class actions, see David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657 (2011). For a historical analysis, going back to the medieval period, of the ways group litigation has evolved alongside notions of individuality and collectivity, see generally STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987).

opportunity for courts and litigators to improve antitrust enforcement and mitigate some of the inherent difficulties in litigating actions potentially involving thousands of victims who have collectively suffered an enormous harm but are individually entitled to relatively small damages.

This Note proceeds in three Parts, the first of which examines the development of federal and state law governing antitrust standing for direct and indirect purchasers. The second Part discusses the history of limited-fund class actions and related practical class-action issues. The third Part considers the advantages of limited-fund class action treatment in the antitrust context and further explains the rationale for using this framework in indirect-purchaser class actions.

I. INDIRECT-PURCHASER STANDING

The question of standing addresses whether the particular plaintiff before the court is the correct person to bring suit.[13] Federal courts have recognized both prudential limits on standing—limits that Congress ought to be able to alter or overcome—and constitutional limits based on the federal courts' Article III powers.[14] While the Clayton Act, which forms the basis for most private actions seeking treble damages for violations of antitrust laws, grants a cause of action to "any person" injured by such violations,[15] the U.S. Supreme Court's ruling in *Illinois Brick Co. v. Illinois*[16] has limited standing to direct purchasers.[17] The

13. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.3 (5th ed. 2007); *see also* INDIRECT PURCHASER LITIGATION HANDBOOK, *supra* note 3, at 29–33 (discussing standing for indirect purchasers).

14. Article III extends the judicial powers to all cases and controversies. U.S. CONST. art. III, § 2. For a discussion of various prudential limitations on standing, see CHEMERINSKY, *supra* note 13, §§ 2.3.4–.3.6. State legislatures and judiciaries should also be able to extend standing beyond the prudential limitations created by the federal judiciary, as they have in the context of indirect-purchaser lawsuits. In the class action context, courts usually treat the representative plaintiff's standing to sue as an implicit requirement for certification. Linda S. Mullenix, *Standing and Other Dispositive Motions After* Amchem *and* Ortiz*: The Problem of "Logically Antecedent" Inquiries*, 2004 MICH. ST. L. REV. 703, 705.

15. 15 U.S.C. § 15(a) (2012).

16. 431 U.S. 720 (1977).

17. *Id.* at 746–48. Subsequent decisions have recognized technical exceptions to the rule from *Illinois Brick*, such as when direct purchasers conspire with manufacturers, yet the narrowness of these exceptions has tended to reinforce the power of the rule. *See* INDIRECT PURCHASER LITIGATION HANDBOOK, *supra* note 3, at 11–25. Recently, the Supreme Court of Canada approved standing for indirect purchasers. *See* Mark Katz & Chantelle Spagnola, *Green Light for Indirect Purchaser Claims in Canada*, COMPETITION POL'Y INT'L (Dec. 17, 2013), https://www.competitionpolicyinternational.com/green-light-for-indirect-purchaser-claims-in-canada/. Similarly, Japan provides standing for indirect purchasers. *See* SIMON VANDE WALLE, PRIVATE ANTITRUST LITIGATION IN THE EUROPEAN UNION AND JAPAN 61–62 (2013). The countries in the European Union generally grant indirect purchasers standing as well. *Id.* at 174–75. Both Japan and the European Union also generally allow price-fixers to assert a pass-on offense—price-

Court's rationale rests on a desire to limit the scope of antitrust remedies and thus improve antitrust enforcement.[18] Most interpreters agree, or assume, that the rule from *Illinois Brick* is merely a prudential limitation that Congress or state lawmakers can amend or overrule.[19] In *California v. ARC America Corp.*,[20] the Court backed away from any strict ban on indirect-purchaser standing in federal courts by refusing to preempt state-based causes of action for indirect purchasers; instead, it held that state courts could adjudicate these claims without undermining the purposes of the federal antitrust scheme.[21]

The following Sections discuss the history and decision-making surrounding indirect-purchaser standing. The difficulties in reconciling the Court's precedents in *Illinois Brick* and *ARC America* help explain the current confusion in this area and suggest that reform is necessary.[22]

A. *A History of Indirect-Purchaser Standing Under Federal Law*

The Court decided *Illinois Brick* at a time when antitrust policy was undergoing an important shift from a progressive ideology, skeptical of big business and inclined to see a wide variety of violations, to a more business friendly approach driven by neoclassical economic reasoning and optimized by the so-called Chicago School of Antitrust.[23] The Chicago School attempted to move antitrust enforcement away from formalistic characterizations of certain per se offenses toward a more nuanced, fact-specific analysis.[24] This fact-specific inquiry required judges to balance competitive harms against cooperative benefits and

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fixers can avoid damages by claiming that the direct purchaser passed on the overcharge to the indirect purchasers. *Id.* at 61, 174. However, opt-out class actions are generally far less common in Japan and the European Union than in the United States. *Id.* at 63, 177.

18. *Ill. Brick*, 431 U.S. at 740–46 (noting evidentiary burdens and reduced incentives for direct purchasers to prosecute); *see also* Andrew I. Gavil, *Antitrust Remedy Wars Episode I:* Illinois Brick *from Inside the Supreme Court*, 79 ST. JOHN'S L. REV. 553, 554 (2005) [hereinafter Gavil, *Antitrust Remedy Wars*] ("In short, the Court believed [indirect-purchaser standing] would make for bad antitrust remedial policy.").

19. For a discussion of the various federal and state attempts to modify the rule of *Illinois Brick*, see INDIRECT PURCHASER LITIGATION HANDBOOK, *supra* note 3, at 5–8, 26–28.

20. 490 U.S. 93 (1989).

21. For a discussion of *Illinois Brick* and *ARC America*, see Ronald W. Davis, *Indirect Purchaser Litigation:* ARC America*'s Chickens Come Home to Roost on the* Illinois Brick *Wall*, 65 ANTITRUST L.J. 375 (1997). The difficulty in reconciling these two decisions has probably contributed to the perception that overruling *Illinois Brick* may still be a possibility, albeit an unlikely one.

22. For an enlightening history of the four most important Supreme Court decisions on indirect-purchaser standing—the so-called "*Illinois Brick* quartet" of *Hanover Shoe*, *Illinois Brick*, *ARC America*, and *UtiliCorp United*—from which much of this Part is drawn, see Gavil, *Antitrust Remedy Wars*, *supra* note 18, at 563–74.

23. *See id.* at 557–63 (noting the larger ideological shifts occurring within the Court and within antitrust enforcement driven by "the confluence of many political, historical, and intellectual factors").

24. *See id.* For more on the evolution of antitrust ideology and approaches to the antitrust rules, see generally HOVENKAMP, *supra* note 1, at 31–56.

was either implicitly or explicitly concerned with limiting potential false positives that might chill otherwise economically efficient behavior.[25] The courts often characterized the new mode of analysis as a "rule of reason" and tended to focus on concepts of consumer welfare and economic efficiency.[26]

Given the influence of the Chicago School and its emphasis on nuanced standards as opposed to per se rules, it was surprising to see the Court adopt a new per se ban on indirect-purchaser standing in *Illinois Brick*.[27] However, at the same time that the Court was attempting to expand rule-of-reason analysis, it was also seeking to limit the scope of the treble damages private right of action.[28] Perhaps with this goal in mind, the Court saw in *Illinois Brick* an opportunity to limit the number of potential plaintiffs and the range of issues presented when calculating damages by denying standing to indirect purchasers, a potentially large and litigious group.[29]

1. *Illinois Brick* and Offensive and Defensive Pass-On

Prior to *Illinois Brick*, defendants were more likely than plaintiffs to raise the issue of pass-on. Defendants argued that they should not be liable for antitrust damages to direct purchasers who had "passed on" the overcharge to their customers, the indirect purchasers.[30] In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*,[31] the Court denied the use

25. For a discussion of the importance of the Chicago School in establishing a dominant role for economics in antitrust law, see RICHARD A. POSNER, ANTITRUST LAW, at vii–xi (2d ed. 2001).

26. For the difference between the per se and rule-of-reason analyses, see *id.* at 39.

27. *See* Andrew I. Gavil, *Thinking Outside the* Illinois Brick *Box: A Proposal for Reform*, 76 ANTITRUST L.J. 167, 189 (2009) [hereinafter Gavil, *Proposal for Reform*] ("Foremost, *Illinois Brick* suffers from the same infirmity as all per se rules. It categorically assumes that pass on 'always or almost always' will be impossible to measure. If that is not the case, the per se rule in *Illinois Brick* will under-deter.").

28. Gavil, *Antitrust Remedy Wars*, *supra* note 18, at 554–55; *see, e.g.*, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977) (holding that to recover treble damages under the Clayton Act, the plaintiff "must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful"). Treble damages, while imprecise, are theoretically justified by the need to compensate for undetected violations—if violators only paid actual damages, violations would have no penalty, and firms could profit from their violations without cost. *See* Gavil, *Antitrust Remedy Wars*, *supra* note 18, at 603.

29. *See, e.g.*, Ill. Brick Co. v. Illinois, 431 U.S. 720, 732, 734–35 (1977) (arguing that concentrating enforcement in a smaller group of potential plaintiffs with fewer evidentiary issues will improve enforcement).

30. The economics of "pass-on" can be complicated and often depend on the specific conditions of the relevant market at the time of price-fixing, including elasticity of demand and the amount of competition at the retail level. *See, e.g.*, Fei Deng, John H. Johnson & Gregory K. Leonard, *Economic Analysis in Indirect Purchaser Class Actions*, 26 ANTITRUST 51, 53 (2011).

31. 392 U.S. 481 (1968).

of pass-on as a defense.[32] The manufacturer defendant argued that the direct-purchaser plaintiff, a retailer, had not suffered antitrust injury because it had passed on any overcharge to its customers, the indirect purchasers.[33] Both the district court and the appellate court rejected the pass-on defense, and the Supreme Court affirmed.[34] The Court noted that, as a general principle, even if the direct purchaser can pass on the overcharge, either the reduction in demand for its product at the higher price or the increased profits it would have gained at the lower price will still injure the direct purchaser to some extent.[35] The defendant argued that, under certain economic conditions, the direct purchaser could pass on all of the overcharge and maintain its profits.[36] The Court reasoned, however, that the complex economic analysis required to determine whether such conditions were present, and if they were present, how much of the overcharge was actually passed on, was beyond the capabilities of the federal courts.[37] Additionally, the Court worried that if defensive pass-on could defeat recovery for direct purchasers, then indirect purchasers would fail to make up the difference because they have a much smaller incentive to prosecute antitrust violations since courts would limit their damages to the relatively small overcharge from a single purchase, a tiny slice of the total antitrust injury.[38]

Illinois Brick, however, presented the Court with the opposite situation—a plaintiff attempting to use pass-on offensively for

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32. *Id.* at 488. The order in which the Court addressed the cases—first considering defensive pass-on in *Hanover Shoe* before offensive pass-on in *Illinois Brick*—certainly framed the issues for the Justices in a particular way and may have been critical to the holding in *Illinois Brick*:

> I think the plaintiffs-respondents in this case, which they now have lost, are the victims of an unhappy chronology. If *Hanover Shoe, Inc. v. United Shoe Machinery Corp.* had not preceded this case, and were it not "on the books," I am positive that the Court today would be affirming, perhaps unanimously, the judgment of the Court of Appeals. The policy behind the Antitrust Acts and all the signs point in that direction, and a conclusion in favor of indirect purchasers who could demonstrate injury would almost be compelled.

Ill. Brick, 431 U.S. at 765 (Blackmun, J., dissenting) (citation omitted).

33. *Hanover Shoe*, 392 U.S. at 487–88.

34. *Id.* at 488.

35. *Id.* at 489–91 ("We hold that the buyer is equally entitled to damages if he raises the price for his own product. As long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows.").

36. *Id.* at 491–92; *see also* Deng, Johnson & Leonard, *supra* note 30, at 52–54 (explaining the textbook model of 100% pass-on and noting the model's limited real-world value).

37. *Hanover Shoe*, 392 U.S. at 492–93 ("A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether, had one fact been different . . . , he would have chosen a different price.").

38. *Id.* at 494. It's worth noting that the Court decided *Hanover Shoe* when modern class action practice was still in its earliest stages. Marcus, *supra* note 12, at 660–61.

recovery.[39] The State of Illinois, acting on behalf of itself and local governmental entities, sued Illinois Brick Company for treble damages, alleging that the brick manufacturer conspired to increase the price of bricks it sold to masons, who passed the overcharge to general contractors, who then passed the overcharge to the end consumer of bricks—the State of Illinois.[40] Therefore, the State of Illinois was two levels of distribution removed from the alleged price-fixing.[41] The district court dismissed the claim on summary judgment because the State of Illinois was an indirect purchaser, but the U.S. Court of Appeals for the Seventh Circuit reversed.[42]

The Supreme Court framed its final decision as a choice between three options: (1) overrule *Hanover Shoe* and allow for offensive and defensive use of pass-on; (2) reinforce *Hanover Shoe* and strictly prohibit both offensive and defensive pass-on; or (3) apply *Hanover Shoe* asymmetrically—allow for offensive but not defensive pass-on.[43] The Court chose the second option—a total bar on the use of pass-on[44]—in part because the economic evidence required to establish pass-on to the indirect purchaser would be the same in both offensive and defensive pass-on.[45] The Court determined that, in both contexts, pass-on would require complex, detailed analysis regarding how a change in a single price input affected the final price.[46] This task might be even more complicated in the indirect-purchaser context because courts would potentially have to apportion damages at more than one level, as in *Illinois Brick* where Illinois was two levels removed from the alleged conspiracy.[47] The Court did not wish to further complicate the "already

39. Ill. Brick Co. v. Illinois, 431 U.S. 720, 726 (1977).

40. *Id.* at 726–27.

41. *Id.* at 726. Illinois alleged that the total price-fixing conspiracy resulted in a $3 million overcharge to the State and local governments. *Id.* at 727.

42. *Id.* at 727–28.

43. *Id.* at 729–36; *see also* Davis, *supra* note 21, at 387–88. Additionally, the Court might have characterized the sale as essentially a cost-plus agreement because the State had to pay the cost of the bricks, or the Court might have adopted a more nuanced standard and avoided a per se rule of standing. *See* Gavil, *Antitrust Remedy Wars*, *supra* note 18, at 587, 589 (citing five options Justice Lewis Powell's clerk presented to him).

44. *Ill. Brick*, 431 U.S. at 731 ("[T]he reasoning of *Hanover Shoe* cannot justify unequal treatment of plaintiffs and defendants with respect to the permissibility of pass-on arguments."); *id.* at 736 ("We are left, then, with two alternatives: either we must overrule *Hanover Shoe* . . . , or we must preclude respondents from seeking to recover on their pass-on theory. We choose the latter course.").

45. *Id.* at 732.

46. *Id.* ("However 'long and complicated' the proceedings would be when defendants sought to prove pass-on, . . . they would be equally so when the same evidence was introduced by plaintiffs.").

47. *Id.* at 732–33 ("The demonstration of how much of the overcharge was passed on by the first purchaser must be repeated at each point at which the price-fixed goods changed hands before they reached the plaintiff.").

protracted treble-damages proceedings" by adding additional layers of analysis.[48]

The Court also relied on two additional factors: (1) the need for evenhandedness in applying the pass-on theory,[49] and (2) the risk of multiple liabilities.[50] The evenhandedness argument was based on a belief that the same rules should apply to defendants seeking to escape liability and plaintiffs trying to establish liability.[51] In his dissent, Justice William Brennan criticized concern for evenhandedness and focused on the policies underlying the decision in *Hanover Shoe*, noting the following:

> The interests at stake in "offensive" passing-on cases, where the indirect purchasers sue for damages for their injuries, are simply not the same as the interests at stake in the *Hanover Shoe*, or "defensive" passing-on situation. There is no danger in this case, for example, as there was in *Hanover Shoe*, that the defendant will escape liability and frustrate the objectives of the treble-damages action.[52]

Additionally, the Court insisted that "allowing offensive but not defensive use of pass-on would create a serious risk of multiple liability for defendants" because federal law allows direct purchasers to sue for the entire overcharge.[53] If the direct purchaser succeeded in suing for the entire overcharge and the indirect purchaser prevailed as well, the defendant would pay double the appropriate amount of damages.[54]

Finally, the Court maintained that direct-purchaser suits for treble damages most effectively enforced antitrust laws.[55] The Court reasoned that direct purchasers would have the greatest incentive to enforce the

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48. *Id.* at 732.

49. *See* Gavil, *Antitrust Remedy Wars*, *supra* note 18, at 596–605 (discussing the evolving views of the Justices and the importance of evenhandedness and symmetry).

50. *Id.* at 582–85 (discussing Justice Harry Blackmun's and Justice Powell's proposed options regarding whether to allow offensive pass-on and the possible problems of double recovery).

51. *Id.* at 602 & n.284.

52. *Illinois Brick*, 431 U.S. at 753 (Brennan, J., dissenting).

53. *Id.* at 730 (majority opinion).

54. *Id.* ("The risk of duplicative recoveries created by unequal application of the *Hanover Shoe* rule is much more substantial than in the more usual situation where the defendant is sued in two different lawsuits by plaintiffs asserting conflicting claims to the same fund."). For a legal argument that multiple recoveries never exist in practice, see Robert H. Lande, *Why Antitrust Damage Levels Should Be Raised*, 16 LOY. CONSUMER L. REV. 329 (2004) [hereinafter Lande, *Antitrust Damage Levels*]. For an economic argument that courts understate overcharge damages, see Basso & Ross, *supra* note 2.

55. *Ill. Brick*, 431 U.S. at 734–35 ("[W]e understand *Hanover Shoe* as resting on the judgment that the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it.").

law, while litigation over the allocation of damages between different levels of purchasers within the supply chain would not greatly improve enforcement.[56] Indirect purchasers would often suffer damages so small that "only a small fraction would be likely to come forward to collect their damages."[57] Thus, the Court established a per se rule denying indirect purchasers standing to sue for treble damages.[58]

2. Reaction to the Rule of *Illinois Brick*

While scholars and judges associated with the Chicago School approved of the decision in *Illinois Brick*,[59] consumer advocates criticized the decision for overcompensating intermediate parties at the expense of consumers and for ignoring congressional intent.[60] Not long before the Court decided *Illinois Brick*, Congress passed the Hart–Scott–Robino Antitrust Improvement Act of 1976,[61] which authorized states to bring *parens patriae* actions on behalf of indirect purchasers in their states.[62] Although the majority minimized the importance of the Hart–Scott–Robino Act by characterizing it as mere procedural litigation, it seemed clear to the dissent that Congress passed the Act with the belief that indirect purchasers would have standing under the antitrust laws.[63] The dissent argued that the majority's treatment of congressional intent appeared self-serving.[64]

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56. *Id.* at 746–47 ("[W]e question the extent to which such an attempt [to apportion damages between direct and indirect purchasers] would make individual victims whole for actual injuries suffered rather than simply depleting the overall recovery in litigation over pass-on issues." (internal quotation marks omitted)).

57. *Id.* at 747.

58. *Id.* at 728–29, 748. However, the Court did maintain a possible exception for cost-plus contracts. *Id.* at 735–36.

59. *See* Landes & Posner, *Indirect Purchaser Standing*, *supra* note 3, at 634–35 ("[S]ociety will be well-advised to allow some direct purchasers to enjoy windfalls if, as we have argued, the direct-purchaser suit is on balance a more effective instrument for enforcing the antitrust rule prohibiting price fixing than the indirect-purchaser suit."); *cf.* Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 30 (1972) (arguing that the optimal tort system should focus on achieving the optimal investment in safety, not on compensating victims or eliminating accidents).

60. Lopatka & Page, *supra* note 5, at 539–40 (summarizing criticism of *Illinois Brick* by consumer advocates). For an economic analysis showing how the rule of *Illinois Brick* can actually extend and entrench cartels, see Maarten Pieter Schinkel, Jan Tuinstra & Jakob Rüggeberg, *Illinois Walls: How Barring Indirect Purchaser Suits Facilitates Collusion*, 39 RAND J. ECON. 683 (2008).

61. Pub. L. No. 94-435, 90 Stat. 1383 (1976).

62. *Ill. Brick*, 431 U.S. at 733–34 n.14 (discussing the decision in light of the Hart–Scott–Robino Act). For a recent discussion of *parens patriae* actions arguing that they share many of the same problematic features as class actions, see Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486 (2012).

63. *Ill. Brick*, 431 U.S. at 749 (Brennan, J., dissenting).

64. *See id.* at 764 n.23.

Soon after *Illinois Brick*, states began to pass so-called "*Illinois Brick* repealers"—statutes aimed at repealing the rule of *Illinois Brick* and reinstating indirect-purchaser suits.[65] Additionally, some state courts interpreted existing antitrust laws as allowing indirect-purchaser suits, often despite explicit language stating that federal law should guide state courts in interpreting state antitrust laws.[66] In *California v. ARC America Corp.*,[67] the Supreme Court addressed the question of whether federal antitrust law preempted state repealer statutes[68] and held that it did not.[69] The Court's holding seemed to undermine the rationale of *Illinois Brick* and embrace a wider view of standing without overruling its previous decision.[70] The Court stated that the repealer statutes were "consistent with the broad purposes of the federal antitrust laws: deterring anticompetitive conduct and ensuring the compensation of victims of that conduct."[71]

Despite whatever retreat from *Illinois Brick* might have momentarily occurred in *ARC America*, the Court quickly reaffirmed and extended the rule of *Illinois Brick* in *Kansas v. UtiliCorp United, Inc.*[72] In that decision, the Court denied standing to indirect purchasers from a regulated utility company—a direct-purchaser entity with little incentive to sue and a high likelihood of passing on the overcharge to indirect-purchasers—and instead limited standing to the utility company itself.[73]

B. *Indirect-Purchaser Standing: Where Are We Now?*

The *Illinois Brick* quartet—*Hanover Shoe*, *Illinois Brick*, *ARC American*, and *UtiliCorp*—thus established a cumbersome and rigid enforcement system—only direct purchasers can sue on a federal cause of action for the entire overcharge, but indirect purchasers in certain jurisdictions can also sue for the amount of overcharge passed on to them.[74] This system has led to the possibility of duplicative recovery and has ensured duplicative litigation.[75] Ironically, this rigid dual system arose when the substantive law of antitrust began to coalesce

65. *See* Davis, *supra* note 21, at 391–95 (describing the history of *Illinois Brick* repealers).

66. *See id.* at 375–79 (detailing states that allowed indirect-purchaser class actions to move forward despite the absence of statutes repealing *Illinois Brick*).

67. 490 U.S. 93 (1989).

68. *Id.* at 100.

69. *See id.* at 105–06 (holding that state indirect-purchaser suits were not an obstacle to enforcement of the federal antitrust laws).

70. Gavil, *Antitrust Remedy Wars*, *supra* note 18, at 617.

71. *ARC Am.*, 490 U.S. at 102.

72. 497 U.S. 199 (1990).

73. *Id.* at 204.

74. Gavil, *Antitrust Remedy Wars*, *supra* note 18, at 564–74.

75. *See* Donald I. Baker, *Federalism and Futility: Hitting the Potholes on the* Illinois Brick *Road*, 17 ANTITRUST, no. 1, 2002, at 14, 15 ("That is the great irony of *Illinois Brick*—where a conservative decision led to a populist political reaction that has produced duplicative litigation and recoveries on a scale that the Supreme Court majority could scarcely have imagined in the first place.").

around common, flexible standards based on federal law and precedent.[76]

Further, in recent years, the Class Action Fairness Act (CAFA)[77] has lowered barriers to removing state-law class actions to federal court, expanded the diversity jurisdiction of federal courts in these class actions, and consequently lessened some of the disparities between state and federal antitrust enforcement, often at the expense of indirect purchasers.[78] CAFA also increased the likelihood that courts will force plaintiffs to pursue state antitrust claims in federal court, which has not traditionally recognized their injuries.[79] State-law claims brought in federal court or removed to federal court are eligible for consolidation as part of the multidistrict litigation (MDL) procedure.[80] Thus, many state-law indirect-purchaser claims now end up in federal court alongside direct-purchaser class actions.[81] Federal courts can consolidate such class actions in MDL for pretrial motions and discovery, but the transferee court cannot litigate the consolidated claims.[82] When indirect-purchaser class actions do arrive in federal court, the federal courts have been reluctant to certify class actions where plaintiffs sought recovery under different state substantive laws[83]

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76. Gavil, *Antitrust Remedy Wars*, *supra* note 18, at 557–63 (describing the shift in antitrust enforcement from 1975 to 1990).

77. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified at 28 U.S.C. §§ 1332, 1453, 1711–15 (2012)).

78. CAFA loosens the removal requirements in suits based on diversity of citizenship in four ways: (1) any defendant, including an in-state defendant, can remove; (2) any defendant can remove even if not all defendants consent to removal; (3) no time limit exists for removal; and (4) decisions to remand are reviewable. RUBENSTEIN, *supra* note 9, § 6:15. For a history of the larger goals of CAFA and the aims of the Congress that passed it, see Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823 (2008).

79. *See* Bruce V. Spiva & Johnathan K. Tycko, *Indirect Purchaser Litigation on Behalf of Consumers After CAFA*, 20 ANTITRUST, no. 1, 2005, at 12, 17 ("CAFA should now be read as a mandate for federal courts to decide such [multistate] class actions, including indirect purchaser class actions. The need to make decisions based on the laws of multiple states should no longer be an accepted basis for a federal court to deny certification, if it ever were.").

80. For a discussion of multidistrict litigation of indirect-purchaser suits, see INDIRECT PURCHASER LITIGATION HANDBOOK, *supra* note 3, at 211–23.

81. Lopatka & Page, *supra* note 5, at 534–35 (noting that plaintiffs often bring federal and state claims side by side).

82. *See* INDIRECT PURCHASER LITIGATION HANDBOOK, *supra* note 3, at 214–17. No similar process exists for consolidating indirect-purchaser claims that are not removable. For a discussion of strategies attorneys can use to coordinate across districts informally, see Joel M. Cohen & Trisha Lawson, *Navigating Multistate Indirect Purchaser Lawsuits*, 15 ANTITRUST, no. 3, 2001, at 29, 31–33.

83. *See, e.g.*, Castano v. Am. Tobacco Co., 84 F.3d 734, 741 (5th Cir. 1996) ("In a multi-state class action, variations in state law may swamp any common issues and defeat predominance."); *In re* Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig., 288 F.3d 1012, 1018 (7th Cir. 2002) ("[C]ourts must respect these differences [in state law] rather than apply

on the theory that such actions would undermine the common issues within the class that must predominate to certify a class under Rule 23(b)(3).[84] However, such arguments against certification may lose force once plaintiffs can no longer pursue their claims in state court.[85] The conflict between expanded jurisdiction over diversity class actions in federal court and the increased focus on common questions has left the status of indirect-purchaser class actions uncertain.[86]

II. THE LIMITED-FUND APPROACH

This Note proposes that antitrust class actions should be conceptualized and litigated similar to Rule 23(b)(1)(B) limited-fund class actions. Limited-fund class action treatment would be superior for three reasons: (1) it would eliminate duplicative litigation by consolidating all ongoing and future litigation in a single forum; (2) it would improve enforcement by aligning plaintiffs' incentives to litigate at the liability stage and to seek the maximum recovery by creating greater unity within the class; and (3) it would simplify damages calculations between levels of the supply chain by distributing damages according to a pro rata scheme.[87] While designing optimal enforcement procedures often requires balancing ease of administration and accuracy of result,[88] this Note argues that limited-fund class actions offer a better

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one state's law to sales in other states with different rules.").

84. FED. R. CIV. P. 23(b)(3) ("A class action may be maintained if Rule 23(a) is satisfied and if . . . the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members . . . .").

85. For examples of both indirect- and direct-purchaser litigation going forward in federal court, see generally In re*: TFT–LCD (Flat Panel) Antitrust Litigation*, 599 F. Supp. 2d 1179 (N.D. Cal. 2009) (finding that direct and indirect purchasers stated a claim but dismissing indirect-purchaser claims under certain state laws), and In re *DDAVP Indirect Purchaser Antitrust Litigation*, 903 F. Supp. 2d 198 (S.D.N.Y. 2012) (finding that plaintiffs stated claims under various state laws but failed to state claims under the Clayton Act). *See also* Spiva & Tycko, *supra* note 79, at 17 ("Previously, a federal court that denied certification on [the need to make decisions under a variety of state laws] could plausibly argue that plaintiffs could take their cases to their respective state courts. But a federal court that refuses to certify a class action on those grounds now would effectively deny plaintiffs a remedy by denying them any viable forum.").

86. *See generally* D. Jarrett Arp, *Be Careful What You Ask for: Unintended Consequences and Unfinished Business Under the Class Action Fairness Act*, 20 ANTITRUST, no. 1, 2005, at 8 (outlining the uncertain future of indirect-purchaser class actions).

87. A need to establish aggregate liability toward the class of purchasers as a whole will always exist. However, the detailed analysis required to establish the precise level of damages for individual purchasers—purchasing at different times, places, and different levels of the supply chain—requires a great deal of resources but adds little or nothing in terms of deterrence to would-be violators.

88. *See* Lande, *Antitrust Damage Levels*, *supra* note 54, at 332 ("We probably are better off with even a complicated and flawed damages system that at least provides a moderate level of deterrence, than with a simpler system that would lead to completely inadequate deterrence."). For a broader perspective of the American political system's unique reliance on private enforcement, see SEAN FARHANG, THE LITIGATION STATE (2010).

balance between these competing priorities. The following Sections provide a brief history of limited-fund class actions and a summary of the Court's most important precedent in this area, *Ortiz v. Fibreboard Corp.*,[89] which established the guidelines for certifying Rule 23(b)(1)(B) classes.[90]

A. *An Introduction to Limited-Fund Class Actions*

Generally, limited-fund class action treatment requires two separate inquiries: one into the existence of liability along with the total amount that the defendants can or should pay plaintiffs, and a second into the specific amounts of individual claims.[91] In the first inquiry, plaintiffs' interests are united as a class, while in the second they are adverse.[92] Before certifying a limited-fund class action, the court must determine whether the proposed class meets the requirements of Rule 23(a), including numerosity, commonality, typicality, and adequacy of representation.[93] Therefore, certification under a limited-fund theory does not require that courts avoid scrutinizing certification decisions

89. 527 U.S. 815 (1999).

90. *See infra* Section II.B.

91. FED. R. CIV. P. 23(b)(1)(B) advisory committee's notes (suggesting that courts should certify "[a] class action by or against representative members to settle the validity of the claims as a whole, or in groups, followed by separate proof of the amount of each valid claim and proportionate distribution of the fund . . . ."); *see, e.g.*, Dickinson v. Burnham, 197 F.2d 973, 978 (2d Cir. 1952) (certifying a class of seventy subscribers to a common stock fund who had responded to a class-wide notice and appeared in court to divide a common fund of assets that the court had certified at $176,254.24). Class action treatment pursuant to Rule 23(b)(1)(B) also resembles interpleader under Rule 22 in that it provides a procedure for joining multiple parties into one action when litigation moving forward without absent parties may impact their interests. *See* FED. R. CIV. P. 22.

92. *See generally* RUBENSTEIN, *supra* note 9, § 4:16 (giving an overview of Rule 23(b)(1)(B) class actions).

93. FED. R. CIV. P. 23(a)(1)–(4). Generally, the existence of a common limited fund satisfies Rule 23(a)'s commonality requirement:

> [I]mplicit in a finding that an action satisfies the requirements of Rule 23(b)(1) is a finding that the opposing party treated the class members in a common way or that the issues underlying the class members' claims are so intertwined that adjudicating the claims of some would practically impair or bar the claims of others (as in the case of a limited fund).

RUBENSTEIN, *supra* note 9, § 3:27. The adequacy of representation also plays an important role in the litigation—although courts often address the issue in the context of a Rule 23(e) fairness hearing—because a lack of representation for absent parties can defeat certification of a class or a settlement when the absent parties' interests are adverse to the settling parties' interests, as is often the case in a limited-fund class action. *See, e.g.*, *In re* Joint E. and S. Dist. Asbestos Litig., 982 F.2d 721, 741–43, 745 (2d Cir. 1992) (reversing certification because of a lack of subclasses for plaintiffs with adverse interests and opining that the same subclasses may not be necessary in a (b)(3) class action).

and the adequacy of plaintiffs' theory to establish class-wide liability.

1. Unique Features of Limited-Fund Class Actions

Rule 23(b)(1)(B) permits the court to certify a class action when:

> prosecuting separate actions by or against individual class members would create a risk of . . . adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.[94]

The Advisory Committee's notes for this rule suggest that in limited-fund situations, the court should certify "[a] class action by or against representative members to settle the validity of the claims as a whole, or in groups, followed by separate proof of the amount of each valid claim and proportionate distribution of the fund."[95]

The final distribution of the aggregate fund is often done on a pro rata basis to ensure fairness to all plaintiffs.[96] Direct- and indirect-purchaser class actions implicitly share some characteristics with limited-fund class actions—plaintiffs are united in seeking recovery but divided over what portion of the recovery ought to accrue to each plaintiff according to how much of the overcharge the direct purchaser passed on to indirect purchasers.[97] While actual harm in antitrust actions differs from the total overcharge, the Supreme Court has traditionally only recognized overcharge damages and has treated direct- and indirect-purchaser class actions as a method of apportioning that total overcharge.[98]

The limited-fund class action seems to require mandatory class treatment, denying plaintiffs any right to opt out of the class.[99]

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94. *Compare* FED. R. CIV. P. 23(b)(1)(B), *with* FED. R. CIV. P. 19(a)(1) ("A person . . . must be joined as a party if . . . that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect the interest . . . .").

95. FED. R. CIV. P. 23(b)(1)(B) advisory committee's notes.

96. *See* RUBENSTEIN, *supra* note 9, § 4:16 ("The [limited-fund] class action solves this problem [of early claims being dispositive of later claims or impairing or impeding the claims] by aggregating the claims together into one case and apportioning the available funds proportionately among all the claimants.").

97. *Cf.* Ill. Brick Co. v. Illinois, 431 U.S. 720, 737–38 (1977) (discussing the possibility of mandatory joinder of plaintiffs and the diversity of interests involved).

98. *See* HOVENKAMP, *supra* note 1, at 74 ("The Supreme Court thus assumed, first, that the 'overcharge' was the proper method of damages for each successive firm in the distribution chain; and, second, that measuring damages on down the line would require that the overcharge be traced and 'apportioned' among different levels of claimants. In most cases both assumptions are false.").

99. FED. R. CIV. P. 23(c)(2)(A)–(B) (requiring notice for classes certified under Rule 23(b)(3) but stating that "[f]or any class certified under Rule 23(b)(1) or (b)(2), the court *may*

Mandatory class treatment is necessary for Rule 23(b)(1)(B) class actions to avoid the danger of plaintiffs opting out of the class to pursue their own claims and thus exhausting the fund.[100] Giving plaintiffs the ability to opt out would destroy the purpose for certifying the original Rule 23(b)(1)(B) class action.[101] However, courts have occasionally allowed plaintiffs to opt out of mandatory class actions under Rule 23(b)(1) or 23(b)(2).[102] Courts have also required subclasses for different groups of plaintiffs whose claims may have a higher value or who might otherwise prefer an alternative compensation structure.[103]

Additionally, the traditional limited-fund class action is unique in that, after establishing liability, all of the plaintiffs' interests become adverse to one another because a larger recovery for one plaintiff means a smaller recovery for all other plaintiffs.[104] Reconciling the potentially adverse interests of plaintiffs is one of the central challenges in litigating limited-fund class actions. Plaintiffs who have stronger claims (e.g., direct purchasers, purchasers with detailed records, or large-volume purchasers) can maximize the value of their recovery and limit litigation expenses by pursuing individual litigation.[105] However, plaintiffs with smaller or negative value claims must pursue class action treatment without the benefit of the plaintiffs with the strongest claims.[106] By splitting their efforts, neither the most valuable claims nor

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direct appropriate notice to the class" (emphasis added)).

100. RUBENSTEIN, *supra* note 9, § 4:16.

101. *Id.*

102. *See, e.g.*, McReynolds v. Richards-Cantave, 588 F.3d 790, 800 (2d Cir. 2009) (allowing a Rule 23(b)(2) plaintiff who objected to the settlement to opt out and stating that "[t]he right of a class member to opt-out in Rule 23(b)(1) and (b)(2) actions is not obvious on the face of the rule; however, the language of Rule 23 is sufficiently flexible to afford district courts discretion to grant opt-out rights in (b)(1) and (b)(2) class actions." (internal quotation marks omitted)); *see also* RUBENSTEIN, *supra* note 9, § 4:1 ("[M]ost circuits permit a court overseeing a class action to enable opt-out rights in (b)(1) . . . cases in certain circumstances . . . .").

103. For a discussion of the need for subclasses when plaintiffs' claims have different priority, see *In re* Joint E. and S. Dist. Asbestos Litig., 982 F.2d 721, 725, 738–45 (2d Cir. 1992). For a discussion of the importance of subclasses when dealing with present and future claims, see Ortiz v. Fibreboard Corp., 527 U.S. 815, 856 (1999).

104. *See, e.g.*, *In re* Black Farmers Discrimination Litig., 856 F. Supp. 2d 1, 16 (D.D.C. 2011) (noting that in a limited-fund class action "every award made to one claimant reduces the amount of funds available to other claimants until, in the absence of equitable management of the fund, some claimants are able to obtain full satisfaction of their claims, while others are left with no recovery at all"). In the context of antitrust class actions, however, the conflicts would exist mainly between subclasses of direct and indirect purchasers and not between every plaintiff.

105. A large purchaser with an independently viable claim would likely increase its odds of recovery and decrease the costs of litigation by avoiding the expense and uncertainty of class actions.

106. For a discussion of the importance of mandatory participation in mass tort litigation

the more numerous smaller-value claims can take full advantage of the economies-of-scale necessary for successful aggregate litigation, and duplicative litigation becomes more likely.[107]

2. Challenges of Litigating Limited-Fund Class Actions

Mandatory participation in a single litigation to establish liability for the entire class is a high-stakes proposition.[108] Divergent interests between groups of plaintiffs—as well as between plaintiffs' lawyers and their clients—create the potential for collusive settlements.[109] Thus, courts must closely scrutinize any final settlement and provide adequate notice to plaintiffs with the opportunity to object to any settlement. Limited-fund class actions do not require notice to class members at the certification stage, but notice—along with the opportunity to object—is essential at the settlement stage to protect the interests of absent parties whose recovery the defendant is attempting to limit.[110] The court may also provide notice before settlement, including notice of specific issues germane to the class litigation.[111] Additionally, due process may require allowing absent plaintiffs to opt out in certain circumstances.[112]

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and a criticism of opt-out rights as compounding the problem, see David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 833–35 (2002) [hereinafter Rosenberg, *Mandatory-Litigation Class Action*]. *But see* MARTIN H. REDISH, WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT 135–37, 157–69 (2009) (emphasizing the importance of litigant autonomy and questioning the necessity of mandatory participation). For an analysis of the differing approaches to mandatory participation advanced by various scholars, see Mullenix, *supra* note 11, at 188–200.

107. *See* Rosenberg, *Mandatory-Litigation Class Action*, *supra* note 106, at 847. This explanation oversimplifies the problem somewhat, as some plaintiffs may not wish to sue at all for principled reasons. However, this problem seems less profound in the context of antitrust class actions where few people would be opposed to recovering damages from most anticompetitive practices.

108. For a summary of some of the issues, see FED. JUDICIAL CTR., MANUAL FOR COMPLEX LITIGATION § 22.73, at 421–24 (4th ed. 2004). For a discussion of the potential difficulties inherent in litigating mandatory class actions, including conflicts of interest, and possible remedies, see John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1461–65 (1995).

109. *See* Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 815 (1997) ("The same mechanism of friendly settlements can be utilized to scuttle a legitimate class action in one forum by the rapid certification and settlement of a class action in a different forum.").

110. FED. R. CIV. P. 23(e)(1) (stating that when a party proposes a settlement, "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal"). For the role of objectors in class actions, see Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. CHI. LEGAL F. 403.

111. FED. R. CIV. P. 23(d)(1)(B) ("In conducting an action under this rule, the court may issue orders that . . . require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of: (i) any step in the action; (ii) the proposed extent of the judgment; or (iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action . . . .").

112. *See* RUBENSTEIN, *supra* note 9, § 4.25 (discussing Supreme Court jurisprudence

The next Section discusses *Ortiz v. Fibreboard Corp.*,[113] one of the only Supreme Court decisions dealing with limited-fund class actions. That decision set the framework for the responsibilities of federal courts when certifying limited-fund class actions.[114]

B. *The* Ortiz *Factors*

The Supreme Court first addressed the requirements to certify a limited-fund class action in the context of complex litigation in *Ortiz v. Fibreboard Corp*.[115] The case involved the certification of a Rule 23(b)(1)(B) class of litigants previously exposed to the defendant's asbestos products.[116] Prior to *Ortiz*, federal courts had used limited-fund class actions in asbestos and other mass tort actions—tort claims involving harm to numerous victims, sometimes spanning a wide geographic area or extended time period—to try to facilitate the settlement of large, complex litigation.[117] Nevertheless, the Court had expressed skepticism about an expansive use of class action settlements in *Phillips Petroleum Co. v. Shutts*[118] and *Amchem Products, Inc. v. Windsor*,[119] driven by concern over the potential for collusive settlements between plaintiffs' lawyers and defendants as well as other potential intra-class conflicts.[120]

Ortiz broadly addressed "the conditions for certifying a mandatory settlement class on a limited fund theory under Federal Rule of Civil Procedure 23(b)(1)(B)."[121] In reversing the decision to certify, the Court examined past decisions that informed the drafting of Rule 23(b)(1)(B) and determined that a qualifying limited-fund class action must have three characteristics: (1) "a 'fund' with a definitely ascertained limit,"

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related to Rule 23(b)(1) class actions and the Due Process Clause).

113. 527 U.S. 815 (1999).

114. *See* MANUAL FOR COMPLEX LITIGATION, *supra* note 108, § 22.73, at 422–23.

115. 527 U.S. at 821.

116. *Id.*

117. *See* MANUAL FOR COMPLEX LITIGATION, *supra* note 108, § 22.73, at 421 (providing examples of courts certifying limited-fund class actions in mass torts). For an overview of several high profile mass tort proceedings, as well as a critique of and suggestions for improving mass tort class actions, see Coffee, Jr., *supra* note 108, and Alan N. Resnick, *Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability*, 148 U. PA. L. REV. 2045, 2045 (2000). For a thorough overview and comparison of mass tort litigation as class actions and in bankruptcy, see S. ELIZABETH GIBSON, FED. JUDICIAL CTR., CASE STUDIES OF MASS TORT LIMITED FUND CLASS ACTION SETTLEMENTS & BANKRUPTCY REORGANIZATIONS (2000). For specific information on asbestos litigation, see STEPHEN J. CARROLL ET AL., ASBESTOS LITIGATION, at xxvii fig.S.1 (2005), *available at* http://www.rand.org/content/dam/rand/pubs/monographs/2005/RAND_MG162.pdf.

118. *See* 472 U.S. 797, 810–12 (1985).

119. *See* 521 U.S. 591, 629 (1997).

120. *See, e.g.*, *id.* at 621 (citing Coffee, Jr., *supra* note 108, at 1379–80).

121. *Ortiz*, 527 U.S. at 821.

(2) "all of which would be distributed to satisfy all those with liquidated claims based on a common theory of liability," (3) "by an equitable, pro rata distribution."[122] The Court refused to certify the class because the lower court did not create subclasses for plaintiffs with different interests[123] and because Fibreboard was able to retain most of its value.[124] The Court noted that previous limited-fund class actions required subclasses for plaintiffs with different interests and that the settlement in *Ortiz* exhausted all of that defendant's assets.[125]

Ortiz severely limited the continuing viability of Rule 23(b)(1)(B) class actions in mass tort settlements.[126] The decision required courts to carefully scrutinize class action settlements and to even more carefully consider potential conflicts of interest within the class.[127] However, the requirements established by *Ortiz* also helped clarify the purpose of limited-fund class actions and identify situations in which these class actions might remain viable.[128] The following Part describes how antitrust class actions could meet the *Ortiz* requirements for a limited-fund class action and identifies three important advantages to treating antitrust class actions under Rule 23(b)(1)(B).

III. LIMITED-FUND CLASS ACTIONS APPLIED TO ANTITRUST CLAIMS

In antitrust direct- and indirect-purchaser class actions, it is the amount of the total overcharge to direct purchasers rather than the defendant's total assets that limits damages.[129] While the overcharge method of determining antitrust damages inevitably understates the true harm of price-fixing, the overcharge method provides an easy-to-

122. *Id.* at 838–39, 841 (discussing the characteristics of previous limited-fund actions, which had formed the basis of the Advisory Committee's experience with limited-fund class actions).

123. *Id.* at 856–57.

124. *Id.* at 859. The Court did not decide whether the fact that Fibreboard retained some of its value sufficed to deny certification. *Id.* However, the Court appeared particularly concerned that tortfeasors could bargain their way out of substantial liability and force tort victims to litigate their claims in complex arbitration proceedings and subject them to total caps without the possibility of punitive damages. *Id.* at 859–60.

125. *Id.* at 864–65. The Court did not ultimately accept the argument that the possibility of Fibreboard losing a pending appeal against its insurers, which would have left Fibreboard unable to meet its tort obligations, was a substantial risk of a limited fund. *See id.* at 871–73 (Breyer, J., dissenting).

126. *See* MANUAL FOR COMPLEX LITIGATION, *supra* note 108, § 22.73, at 421 ("*Ortiz* put in doubt the viability of limited-fund class actions in mass tort cases.").

127. *Ortiz*, 527 U.S. at 864 ("Assuming, *arguendo*, that a mandatory, limited fund rationale could under some circumstances be applied to a settlement class of tort claimants, it would be essential . . . under Rules 23(a) and (b)(1)(B) that the class include all those with claims unsatisfied at the time of the settlement negotiations, with intraclass conflicts addressed by recognizing independently represented subclasses.").

128. *See, e.g.*, Juris v. Inamed Corp., 685 F.3d 1294, 1301, 1312–14, 1340–41 (11th Cir. 2012) (discussing the res judicata effects of a mass tort settlement class action).

129. *See supra* note 98 and accompanying text; *see also* Basso & Ross, *supra* note 2, at 897.

understand metric for establishing damages, which courts have generally assumed to be the correct measure.[130] Thus, an antitrust claim meets *Ortiz*'s first requirement—a fund with an ascertainable limit[131]—where a court finds that a method, usually total overcharge, exists for estimating the total damages purchasers have suffered.[132] The total overcharge is clearly insufficient to meet the claims of all the direct and indirect purchasers who are each suing for the total overcharge; direct purchasers can argue that they absorbed the entire overcharge while indirect purchasers can argue that direct purchasers passed on the entire overcharge.[133] An antitrust claim will also meet the second requirement of *Ortiz*—common theory of liability[134]—where the direct and indirect purchasers' counsel coordinate to allege a common theory or theories of competitive harm. The last requirement of *Otiz*—pro rata distribution[135]—will require an equitable remedy and may provide a more efficient way to distribute damages to purchasers.[136]

Litigating antitrust class actions as limited-fund class actions presents three distinct advantages: (1) it eliminates duplicative litigation and reduces the risk of duplicative recovery; (2) it improves enforcement by aligning plaintiffs' incentives to litigate at the liability stage and seeks the maximum recovery by creating greater unity within the class; and (3) it simplifies damages calculations between levels of the supply chain by distributing damages according to a pro rata scheme. The following Sections discuss each of these advantages in turn.

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130. For a discussion of the issues around computing damages and the problems with assuming that overcharge damages are a correct measure of harm to retailers and consumers, see HOVENKAMP, *supra* note 1, at 68–76.

131. *Ortiz*, 527 U.S. at 841.

132. Federal courts have previously certified limited-fund classes in situations where damages were limited by statute or regulation. *See, e.g.*, *In re* Black Farmers Discrimination Litig., 856 F. Supp. 2d 1, 22, 42 (D.D.C. 2011) (certifying a class of black farmers based on the existence of a limited fund for damages established by Congress to encourage settlement); Stott v. Capital Fin. Servs., Inc., 277 F.R.D. 316, 336, 347 (N.D. Tex. 2011) (certifying a limited fund based on a determination that defendant had to retain certain minimum amounts of capital in order to comply with securities regulations). *But see In re* Simon II Litig., 407 F.3d 125, 140 (2d Cir. 2005) (refusing to certify a class of smokers based on constitutional caps on punitive damages because any such cap was too speculative).

133. This sort of inherent conflict between the parties regarding the appropriate division of a limited recovery forms the core of a limited-fund class action. *See supra* notes 91–114 and accompanying text.

134. *Ortiz*, 527 U.S. at 841.

135. *Id.*

136. *See infra* Section III.C.

A. *Eliminate Duplicative Litigation*

Perhaps the most obvious and easily understood advantage to consolidating litigation is the savings that result from not duplicating many issues related to the litigation.[137] While CAFA has resulted in more indirect-purchaser litigation arriving in federal court where parties can consolidate it for pretrial matters, a significant amount of indirect-purchaser litigation still remains in state courts.[138] Additionally, CAFA applies only to class actions and not to lawsuits by large numbers of indirect purchasers proceeding independently,[139] whereas limited-fund class actions stay all other pending litigation.[140] Finally, the MDL procedure only consolidates litigation for pretrial matters, not for the actual litigation.[141] Limited-fund class actions consolidate all pending litigation by class members to determine liability and distribute funds.[142] Reducing duplicative litigation will also improve enforcement by allowing the legal system to litigate more distinct cases rather than concentrating resources on a few cases. Additionally, litigating antitrust claims in a single forum will reduce the need to entertain various duplicative causes of action and legal theories targeting the same allegedly anticompetitive conduct.[143] Although conflict-of-laws issues are important to the final disposition of claims, courts better handle

137. For the wide variety of complex and resource-intensive issues that may arise in antitrust litigation, see generally MANUAL FOR COMPLEX LITIGATION, *supra* note 108, §§ 30–30.4.

138. *See* ANTITRUST MODERNIZATION COMM'N, *supra* note 6, at 272 (approving of alternative methods to consolidate litigation such as MDL and the changes brought by CAFA but noting that ultimately these methods are insufficient). Two commissioners dissented from the Committee's recommendation to provide indirect-purchasers standing and consolidate litigation in a single forum in part because they believed CAFA would substantially ameliorate the problem of indirect-purchaser litigation. *Id.* at 270. *See also* Robert H. Lande, *New Options for State Indirect Purchaser Legislation: Protecting the Real Victims of Antitrust Violations*, 61 ALA. L. REV. 447, 448–49 & n.11 (2010) [hereinafter Lande, *New Options*] (noting the billions of dollars recovered in state indirect-purchaser litigation, including recent settlements in vitamin litigation).

139. *See* ANTITRUST MODERNIZATION COMM'N, *supra* note 6, at 272.

140. Courts have the authority to stay ongoing litigation under the All-Writs Act, 28 U.S.C. § 1651(a) (2012) ("The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."). For an example of a court exercising its authority to stay ongoing arbitration in a limited-fund context, see Stott v. Capital Fin. Servs., Inc., 277 F.R.D. 316, 347 (N.D. Tex. 2011).

141. *See* Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 40 (1998) (barring MDL courts from "self-assigning" venue for the purpose of trial).

142. *See supra* notes 87–112 and accompanying text.

143. For a discussion of choice-of-law issues in MDL, see INDIRECT PURCHASER LITIGATION HANDBOOK, *supra* note 3, at 83–92 (noting variations in "damage and remedy provisions; whether the pass-on defense is recognized; whether the state's law applies only to predominately intrastate activity; different statutes of limitations and standing provisions; and whether the state law protects defendants against multiple liability to direct and indirect purchasers" (footnotes omitted)).

them through subclasses and procedural motions or hearings, and these claims rarely raise issues necessitating separate trials.

B. *Improved Enforcement*

Less intuitive, but also significant, is the importance of a single class action to increase the incentives for all the parties to the litigation, including the courts, to maximize their investment in the litigation.[144] The current multi-district and multi-jurisdictional approach to litigating antitrust class actions limits the parties' incentives to invest heavily in discovery, expert witnesses, and other litigation resources.[145] Parties invest in litigation resources up to the point of negative marginal return on their investments—the point where investing additional time, money, and effort ceases to produce more benefits than costs.[146] Litigation involving fewer claims will reach this point more quickly because the maximum potential recovery from resolving fewer claims is less than the maximum potential recovery from resolving more claims.[147] This is true for all parties to the litigation. Plaintiffs in larger class actions have the potential for a larger recovery, but defendants also have the opportunity to defeat more claims, and judges have the possibility of adjudicating more claims.[148] While alternative procedures like claim and issue preclusion attempt to provide similar incentives for both sides to invest heavily in litigation, they do not provide the same certainty as consolidated litigation; thus they make parties hesitant to invest more resources when the preclusive effects of a particular judgment are unknown.[149]

Historically, private parties have constituted approximately 95% of antitrust plaintiffs,[150] making private litigation essential to the current enforcement regime. One of the major criticisms of the rule of *Illinois Brick* is that it removed an entire class of potential antitrust enforcers and provided cartels with the ability to insulate themselves from liability by sharing their supracompetitive profits with direct

144. Rosenberg, *Mandatory-Litigation Class Action*, *supra* note 106, at 848 (arguing that class action treatment provides economies of scale in litigation and encourages optimal investment).

145. *Id.* at 848–49.

146. *Id.* at 848.

147. *Id.* at 848–49.

148. *Id.* at 849, 851, 853 (describing the importance of optimal incentives for courts to reach the optimal investment in judicial resources).

149. *Id.* at 849.

150. HOVENKAMP, *supra* note 1, at 58 & n.4. For the most recent statistics, see U.S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY (Dec. 30, 2013), *available at* http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2013/december/C02Dec13.pdf.

purchasers.[151] Therefore, providing better incentives to litigate a variety of cases should produce better outcomes such as more accurate results and more comprehensive enforcement.

C. *Pro Rata Distribution*

The Supreme Court has required pro rata distribution for Rule 23(b)(1)(B) class actions.[152] Professor Andrew I. Gavil has proposed a similar approach to indirect-purchaser damages based on a schedule of distribution.[153] Using a pro rata scheme offers several benefits over calculating the amount of overcharge that direct purchasers passed on, a complex and often inconclusive inquiry.[154] First, a pro rata system for allocating the overcharge would simplify the damages inquiry and eliminate the need to perform complex calculations of the amount of overcharge passed on.[155]

Second, a pro rata system would preserve the incentives for all parties along the supply chain to sue because each purchaser would be sure to receive a portion of three times the total overcharge due to the Clayton Act's treble damages provision.[156] Without a pro rata system of recovery, direct purchasers, who likely have greater resources than indirect purchasers, might take advantage of the damage-allocation phase of litigation to claim a greater share of damages than they actually suffered. A pro rata scheme would ensure that all parties have the possibility of a significant recovery and eliminate the possibility of losing recovery to another group of purchasers.[157]

Third, a pro rata scheme would ensure the unity of plaintiffs' interests in pursuing maximum recovery from the defendant.[158] In contrast, a scheme that awards damages in proportion to actual harm might facilitate free-rider problems because parties with weaker claims could wait until liability is proven in the first stage of litigation and then

151. *See* Schinkel, Tuinstra & Rüggeberg, *supra* note 60, at 685 (discussing how "direct purchasers benefit with the cartel members at the expense of the rest of the chain of production and final consumers").

152. *See supra* notes 115–128 and accompanying text.

153. Gavil, *Proposal for Reform*, *supra* note 27, at 195. Professor Robert H. Lande also discussed the merits of pro rata distribution, among other possible mechanisms, for distributing the overcharge among indirect purchasers. *See* Lande, *New Options*, *supra* note 138, at 475–84. The State of Nevada already authorizes pro rata distribution in *parens patriae* suits. NEV. REV. STAT. § 598A.160(2) (2013).

154. For a discussion of the many practical difficulties of proving pass-on, see Deng, Johnson & Leonard, *supra* note 30. Alternative methods for calculating damages other than focusing on the overcharge exist, e.g., the "yardstick" method and the "before-and-after" method. HOVENKAMP, *supra* note 1, at 74.

155. Gavil, *Proposal for Reform*, *supra* note 27, at 195.

156. *Id*.

157. *Id.* at 196.

158. *Id.*

invest heavily in showing their own damages in the second stage.[159] By establishing ex ante the percentage of any recovery for which a class of plaintiffs will be eligible, pro rata recovery unites plaintiffs' interests in pursuing the maximum possible recovery. Pro rata recovery ensures that each party to the litigation will benefit from prevailing on the issue of liability or increasing the total amount of liability.[160] However, a protracted damages inquiry would needlessly delay final recovery in a situation where litigation has likely already dragged on over a considerable period of time.[161]

Fourth, a pro rata scheme would facilitate negotiations by clarifying the rights of the various plaintiff classes to the total overcharge.[162] Plaintiffs would bargain in the shadow of an established remedial scheme and without inherent intra-class conflict.[163] Settlement in the context of mass tort class actions has often fallen apart because of the adverse interests of different subclasses of plaintiffs.[164] An ex ante scheme for distributing overcharge damages would solve this problem and make settlement more feasible.[165]

Finally, a pro rata scheme would facilitate class certification and simplify conflicts within the class.[166] While CAFA has facilitated the removal of indirect-purchaser litigation to federal court, federal courts have often refused to certify such class actions because the courts find that individual issues, such as the amount of overcharge passed on, tend to predominate.[167] Limited-fund class actions do not have the same predominance requirement because of their focus on litigating the liability issue and eliminating complex individual issues related to

159. Rosenberg, *Regulatory Advantage*, *supra* note 11, at 263. This free-rider problem mirrors many of the current difficulties facing class actions in general. By litigating individually, parties lose the potential benefits of pooled resources, and they drive up litigation costs by needlessly duplicating their efforts. *See id.* at 263–65.

160. Gavil, *Proposal for Reform*, *supra* note 27, at 196.

161. *See* Lande, *New Options*, *supra* note 138, at 458 n.52 (noting that some evidence suggests the average cartel lasts seven to eight years and litigation requires another four to five years).

162. Gavil, *Proposal for Reform*, *supra* note 27, at 196 (discussing additional benefits of pro rata distribution for settlement negotiation between different purchaser levels).

163. *Id.*

164. *See, e.g.*, Ortiz v. Fibreboard Corp., 527 U.S. 815, 864–65 (1999) (refusing to certify a settlement class action in part because parties with adverse interests were not represented during negotiations).

165. Courts would still limit the plaintiffs participating in the negotiations as indirect purchasers to those from jurisdictions that grant such purchasers standing to sue.

166. Gavil, *Proposal for Reform*, *supra* note 27, at 196.

167. Lopatka & Page, *supra* note 5, at 535 (noting that individual issues tend to predominate in indirect-purchaser litigation and that these suits rarely offer indirect purchasers much in the way of meaningful compensation).

calculating actual damages.[168] By determining proper distribution ex ante, the courts can focus their efforts on issues of procedural law, the defendant's liability, and the amount of the overcharge, and thereby reduce the amount of resources wasted on subjective determinations of predominance and common proof, which, unfortunately, often overwhelm class action litigation.[169]

CONCLUSION

This Note began with the observation that antitrust violations affect every one of us.[170] From this observation flow two conclusions: (1) antitrust enforcement will never compensate all of the victims of competitive harm, and (2) collective-action problems will always undermine enforcement because no individual plaintiff is likely to suffer the full force of antitrust injury so that some amount of procedural intervention will be necessary to ensure robust enforcement.[171] This Note's approach attempts to limit these two difficulties by aligning the interests of the victims of anticompetitive behavior and empowering them to pursue their claims as a unified class. While this approach sacrifices some litigant autonomy and disavows any claims to actual compensation, it could significantly strengthen enforcement capabilities and eliminate duplicative litigation. It is unclear whether federal courts are willing to consolidate antitrust litigation in a single forum, especially when it means preempting ongoing state litigation.[172] The MDL procedure, however, offers an intriguing model. This Note suggests adapting existing procedures—Rule 23(b)(1)(B)—to meet the changing needs of modern class-action litigation. Private enforcement to achieve public policy goals has long been an essential component of the

168. *See supra* notes 91–114 and accompanying text.

169. *See* Gavil, *Proposal for Reform*, *supra* note 27, at 196 (noting the perverse incentives for plaintiffs' lawyers to file multiple claims across multiple jurisdictions and for defense lawyers to exploit fears of pass-on to demand even greater requirements before certification); *see also* Rosenberg, *Mandatory-Litigation Class Action*, *supra* note 106, at 851–52 (noting the free-rider incentives for courts to rely on precedent, stare decisis, estoppel, and incorporation by reference to avoid meaningful engagement and analysis of the issues presented in complex litigation).

170. *See supra* note 1 and accompanying text.

171. Alternatively, public entities such as state attorneys general, the U.S. Department of Justice, or the Federal Trade Commission could have the exclusive or primary power to sue. For a variety of reasons, enforcement in the United States has relied heavily on private parties and resisted providing broad power and resources to government enforcers. *See generally* FARHANG, *supra* note 88, at 16 (arguing "that legislative-executive conflict over control of the bureaucracy drives Congress to rely upon litigants and courts as an alternative to administrative power").

172. Most state antitrust litigation is based largely and explicitly on federal precedents. *See* Davis, *supra* note 21, at 375–79 (discussing examples of state law based on federal precedents but differing on issues of indirect-purchaser standing). Therefore, federalism concerns—taking authority away from state lawmakers and courts—seem relatively minor because almost all the states have expressed little interest in developing unique antitrust rules, except, ironically, when it comes to the issue of indirect-purchaser causes of action. *Id.*

American legal system. Future reform should focus on building on existing structures to better meet public policy goals.