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NOTES

CHIPPING AWAY AT THE *ILLINOIS BRICK* WALL: EXPANDING EXCEPTIONS TO THE INDIRECT PURCHASER RULE

*Matthew M. Duffy**

INTRODUCTION

For over thirty years, the Supreme Court's decisions in *Illinois Brick Co. v. Illinois*[1] to deny compensation to indirect purchasers[2] harmed by antitrust violations has drawn consistent criticism.[3] *Illinois Brick* limits private treble damage actions to the antitrust violator's direct customers, leaving subsequent purchasers who often suffer substantial harm without a remedy. The well-publicized Microsoft antitrust litigation provided a glaring example of the problems with this rule. Large scale purchasers who suffered considerable harm could

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

2 For simplicity, the terms antitrust violator, manufacturer, and defendant are used interchangeably to describe the party alleged to have violated antitrust law. The term direct purchaser describes the party located between the violator and the plaintiff. The terms indirect purchaser and plaintiff are used interchangeably to describe the party denied recovery by *Illinois Brick* due to its position more than one level downstream from the violator in the supply chain.

3 *See, e.g.*, ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 267–269 (2007) [hereinafter AMC REPORT], *available at* gov.info.library.unt.edu/amc/report_recommendation/amc_find_report.pdf (concluding that the rule should be repealed and noting that thirty-five states have passed "*Illinois Brick* repealers"); 2A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 346d–k (3d ed. 2007, electronic supplement); Barak D. Richman & Christopher R. Murray, *Rebuilding* Illinois Brick*: A Functionalist Approach to the Indirect Purchaser Rule*, 81 S. CAL. L. REV. 69, 70–71 (2007).

not recover, while the only parties who could sue refused to do so for fear of economic retribution.[4] In 2007, the Antitrust Modernization Commission issued its report recommending legislative repeal of *Illinois Brick*, and most commentators agree that reform is needed, even if they disagree on how to correct the rule.[5] Such sweeping calls for change have gone unanswered for over three decades, with the Supreme Court reaffirming *Illinois Brick*[6] and Congress failing to provide a legislative fix. Making a bad situation worse, many lower courts deny indirect purchaser actions even where none of the policies animating *Illinois Brick* support this result. Rather than add to the chorus calling for the *Illinois Brick* wall to come down,[7] this Note identifies circumstances, like those in the Microsoft litigation, in which none of *Illinois Brick*'s rationales apply. Where this happens, exceptions should be carved out of the rule to remedy the most egregious harm caused by denying indirect purchaser recovery. Exceptions currently receive inconsistent treatment, often accompanied by inadequate or inaccurate policy considerations. This Note creates a coherent, flexible approach to identifying and applying exceptions using policy as a guide, rather than clinging to rigid categories and rules.

Part I begins by identifying deterrence and compensation as the twin aims of antitrust law before discussing *Illinois Brick*, which deemphasized compensation and elevated other policy concerns. Part II describes how changes in the antitrust landscape have undermined most of the policy rationales once supporting *Illinois Brick*. The weaknesses of the rule discussed in Part II bolster the call for exceptions in Part III. Part III describes a variety of situations in which allowing an exception promotes antitrust goals more effectively than the rule itself, and it culminates in an argument for exceptions when the direct

4 *See generally* Jeff Patterson, Comment, *Microsoft Antitrust Litigation:* Illinois Brick *Defeats Its Intended Purpose*, 5 J. SMALL & EMERGING BUS. L. 377, 378–82 (2001) (noting the absence of direct purchasers from court dockets).

5 *See generally* AMC REPORT, *supra* note 3, at 266 n.* (noting that a number of commissioners disagreed with majority's call for repeal of the rule, arguing instead for preemption of state "repealer" statutes); Roger D. Blair & Jeffrey L. Harrison, *Reexamining the Role of* Illinois Brick *in Modern Antitrust Standing Analysis*, 68 GEO. WASH. L. REV. 1, 3 (1999) (arguing for repeal); Richman & Murray, *supra* note 3, at 100–08 (arguing for a repeal of *Illinois Brick*, a single cause of action, a "lead plaintiff" provision, and a simplified damages calculation).

6 *See* Kansas v. UtiliCorp Utd., Inc., 497 U.S. 199, 204 (1990).

7 *See, e.g.*, Daniel R. Karon, *"Your Honor, Tear Down That* Illinois Brick *Wall!" The National Movement Toward Indirect Purchaser Antitrust Standing and Consumer Justice*, 30 WM. MITCHELL L. REV. 1351 (2004).

purchaser is *unlikely* to sue,[8] rather than limiting indirect purchaser suits to cases where the direct purchaser is *legally unable*[9] to do so. The latter approach undermines not only the goals of *Illinois Brick*, but the goals of antitrust law generally in a number of cases. While greater exceptions may not make *Illinois Brick* ideal, exceptions will do more to strengthen enforcement, promote deterrence, and compensate victims than will fruitless attempts to create an ideal rule.[10] Further, exceptions do not require the Court or Congress to reach consensus on new normative goals. Exceptions do nothing more than bring *Illinois Brick* back in line with the normative goals Congress and the Court already established—goals which they appear unwilling or unable to relinquish in pursuit of an ideal rule.

I. THE POLICY OBJECTIVES OF ANTITRUST LAWS AND *ILLINOIS BRICK*

A. The Policies of the Sherman Antitrust Act: Deterrence and Compensation

With the passage of the Sherman Antitrust Act, Congress created a vigorous dual enforcement regime designed to deter anticompetitive behavior by subjecting violators to both government prosecution[11] and private treble-damage actions.[12] Vigorous enforcement was needed to combat the substantial harm trusts caused.[13] Responding to public sentiment, eliminating this harm was Congress's central goal in passing the Sherman Act. Indeed, when the Sherman Act was passed, "[t]he general disposition of the public was not in doubt. . . . The kind of remedy that the public desired was also clear enough: it wanted a law to destroy the power of the trusts."[14] Recognizing that scarce prosecutorial resources would not be sufficient to accomplish this ambitious task, Congress enlisted the help of "private attorneys

8 *See* Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133, 1145–46 (9th Cir. 2003) ("[I]ndirect purchasers can sue for damages if there is no realistic possibility that the direct purchaser will sue its supplier over the antitrust violation.").

9 *See generally infra* Part II (discussing bars on direct purchaser suits that many courts have erected).

10 *See infra* Part I.

11 *See* 15 U.S.C. § 1–2 (2006) (establishing criminal penalties of up to $1 million and ten years imprisonment for individuals and up to $100 million for corporations).

12 15 U.S.C. § 15 (allowing private victims to seek an amount three times the injury they suffered).

13 *See* William L. Letwin, *Congress and the Sherman Antitrust Law: 1887–1890*, 23 U. CHI. L. REV. 221, 222–35 (1956) (describing the harm caused by trusts to many areas of society).

14 *Id.* at 235.

general"[15] to ensure effective deterrence.[16] Using remarkably broad language, Congress authorized private treble damage actions[17] by "*any* person" harmed "by reason of *anything* forbidden by the antitrust laws."[18] In sum, private enforcement was designed to "deter violators and deprive them of the fruits of their illegal actions, and provide ample compensation to the victims of antitrust violations."[19] Private enforcers were seen as uniquely situated to ensure compliance with antitrust laws,[20] and their license was commensurate with this position.

In addition to deterring violations, Congress also reasoned that since private parties—mostly consumers and small competitors[21]—bear the brunt of antitrust violations, sound policy requires compensation.[22] As one congressman described it, the Clayton Act is praiseworthy for "open[ing] the doors of justice to every man, whenever he may be injured by those who violate antitrust laws, and giv[ing] the injured party ample damages for the wrong suffered."[23] Thus, "ensuring recompense for injured parties" and deterring violations stand as the "twin antitrust goals."[24]

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

16 *See, e.g.*, Joseph P. Bauer, *The Stealth Assault on Antitrust Enforcement: Raising the Barriers for Antitrust Injury and Standing*, 62 U. PITT. L. REV. 437, 437–38 (2001) (discussing the importance of deterrence to the antitrust framework).

17 Treble damages and attorney fees were originally brought under the Sherman Act. Now they are authorized by the Clayton Act. *See* 15 U.S.C. § 15 ("[A]ny person who shall be injured . . . by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.").

18 *Id.* (emphasis added).

19 Blue Shield of Va. v. McCready, 457 U.S. 465, 472 (1982).

20 *See* 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, 609–10 (1979) (recognizing that through contact with violators, private parties—particularly direct purchasers—have access to information and are acutely aware of the harm).

21 *See* HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY 226–29 (1955) (arguing that "[t]here can be no doubt that the Congress felt that the ultimate beneficiary in this whole process was the consumer.").

22 *See* Bauer, *supra* note 16, at 438.

23 51 CONG. REC. 9073 (1914) (statement of Rep. Edwin Webb).

24 *See* Kansas v. UtiliCorp Utd., Inc., 497 U.S. 199, 226 (1990) (White, J., dissenting). Justice White wrote for the majority in *Illinois Brick*. *See also* Landes & Posner, *supra* note 20, at 605 (recognizing the two goals of antitrust law).

B. The Policies of Hanover Shoe *and* Illinois Brick

In *Illinois Brick*, the two goals of private enforcement arguably came into conflict.[25] The plaintiff filed a treble damage action under the Clayton Act, alleging that manufacturers of concrete bricks conspired to fix prices, causing the plaintiff's suppliers to pay higher prices, which in turn harmed the plaintiffs when this overcharge was passed on to them.[26] On its face, the plaintiff's claim appeared to fall within the Clayton Act.[27] The Court, however, ruled in the defendant's favor, holding that "direct purchasers [are] injured to the full extent of the overcharge paid by them."[28] This is so even if the direct purchaser passed the entire overcharge on to subsequent customers. Consequently, direct purchasers reap a windfall (if they sue and prevail) while the plaintiffs, regardless of the extent of their injury, go uncompensated.

1. *Hanover Shoe*

To understand the Court's reasoning one must look to its decision nine years earlier in *Hanover Shoe*.[29] There, the defendants claimed that the plaintiff, a direct purchaser, had passed on any overcharge it paid to downstream purchasers, and therefore the plaintiff

25 *See* Landes & Posner, *supra* note 20, at 608–09 (noting that the Court properly choose deterrence).

26 Ill. Brick Co. v. Illinois, 431 U.S. 720, 726–27 (1977). Price fixing violates Sherman Act § 1, which prohibits any "contract, combination, . . . or conspiracy in restraint of trade." 15 U.S.C. § 1 (2006).

27 *See* 15 U.S.C. § 15. There is no doubt that the defendant violated antitrust law. *See, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940) (finding horizontal price fixing to be illegal per se under Sherman § 1). In *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472–73 (1982), the Court wrote, "Consistent with the Congressional purpose, we have refused to engraft artificial limitations on the [Clayton] § 4 remedy. . . . [W]e have applied § 4 in accordance with its plain language and its broad remedial and deterrent objectives." *Illinois Brick* is anything but a plain reading of the statute. RICO statutes create a nearly identical private cause of action. *See* 18 U.S.C. §§ 1961–68 (2006) ("Any person injured in his business or property by reason of a violation of [anything forbidden by § 1962] may sue therefor . . . and shall recover threefold . . . damages . . . and . . . a reasonable attorney's fee."). In 2008, the Court rejected a defendant's argument that "indirect victims" of fraud should be barred from suing under the statute using language that is quite difficult to reconcile with the indirect purchaser rule in *Illinois Brick*. *See* Bridge v. Phoenix. Bond & Indem. Co., 553 U.S. 639, 649 (2008) ("The statute provides a right of action to '[a]ny person' injured by the violation, suggesting a breadth of coverage not easily reconciled with an implicit requirement [of directness]_._._._.").

28 *Ill. Brick*, 431 U.S. at 746.

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

suffered no injury.[30] The Court rejected this "passing-on" defense,[31] reasoning that a contrary holding would undermine deterrence by leaving private enforcement to indirect purchasers, who "would have only a tiny stake in the lawsuit and hence little incentive to sue."[32] Consequently, if the defense were effective, antitrust violators "would retain the fruits of their illegality."[33] As an alternative, the Court simply decided to grant direct purchasers the entire award, acknowledging that this may be a windfall.[34] The Court rested "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."[35] Requiring apportionment calculations to demonstrate the share of harm borne by the direct purchaser as opposed to subsequent indirect purchasers was not only expensive, it also decreased the direct purchaser's award, thereby diminishing its incentive to sue. Consequently, private enforcement would be left in the hands of poorly-motivated and difficult-to-coordinate indirect purchasers.

Hanover Shoe also reflected "an unwillingness to complicate treble-damages actions with attempts to trace the effects of the overcharge on the purchaser's prices, sales, costs, and profits, and of showing that these variables would have behaved differently without the overcharge."[36] Not only would it be difficult for courts to examine the complex economic calculations involved in determining how much an overcharge increased prices, given the number of variables, it may be impossible to determine damages.[37] Even if the entire increase in price was passed on, the direct purchaser may suffer harm from decreased sales. Determining price elasticity and weighing the other factors involved in calculating the net effect on profits caused by the price increase of a single input is indeed a daunting task. In any

30 *Id.* at 487–88.

31 *Ill. Brick*, 431 U.S. at 724. I rely on *Illinois Brick*'s interpretation of *Hanover Shoe* because it is accurate and became binding after *Illinois Brick*.

32 *Id.* at 725–26. Consumers, for example, are unlikely to sue over a fifty cent overcharge included in the price of a pair of shoes.

33 *Id.* at 725.

34 *See id.* at 746 (automatically providing the full damage award to the direct purchaser).

35 *Id.* at 734–35.

36 *Id.* at 725 (citing Hanover Shoe, Inc. v. United Shoe Mach. Corp, 392 U.S. 481, 492–93 (1968)).

37 *See id.* at 737; *see also Hanover Shoe*, 392 U.S. at 493 ("[E]stablishing the applicability of the passing-on defense would . . . normally prove insurmountable.").

event, defendants would rarely carry their burden, making the increased litigation costs largely wasteful.[38]

2. *Illinois Brick*

In *Illinois Brick*, rather than facing an antitrust violator seeking to reduce its liability by asserting defensive passing-on, the Court addressed an indirect purchaser attempting to recover by proving overcharges had been passed-on.[39] The Court first asked whether victims could use a damage theory to recover (known offensive passing-on) even if defendants were barred by *Hanover Shoe* from using the same theory to limit liability (known as defensive passing-on). The Court saw two problems with allowing "asymmetrical" passing-on. First, such a rule would "create a serious risk of multiple liability for defendants."[40] Without a passing-on defense, the direct purchaser would collect an undiluted damage award for the entire injury. If successful, a subsequent indirect purchaser would necessarily collect damages above the amount of the overcharge—trebled. The Court was "unwilling to 'open the door to duplicative recoveries' under [Clayton §] 4."[41] Second, even if procedural devices could prevent duplicative recovery, "[t]he principal basis for the decision in *Hanover Shoe* was the Court's perception of the uncertainties and difficulties in analyzing price and output decisions . . . [and] the costs to the judicial system and the efficient enforcement of the antitrust laws of attempting to reconstruct those decisions in the courtroom."[42] That a victim was advancing the theory made the underlying calculations no less "insurmountable."

Several *amicus curiae* argued that compensation *and* efforts to deprive the direct purchaser of the fruits of its illegal acts justified asymmetrical treatment of passing-on theories. In response to the latter concern, relating primarily to deterrence, the Court noted that "from the deterrence standpoint, it is irrelevant to whom damages are paid, so long as someone redresses the violation."[43] Further, the Court noted an important rationale from *Hanover Shoe*, where it recognized that "the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the *direct purchasers*

38 *See Ill. Brick*, 431 U.S. at 745.

39 *See id.* at 727.

40 *Id.* at 730.

41 *Id.* at 731 (quoting Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 264 (1972)).

42 *Id.* at 731–32.

43 *Id.* at 760 (Brennan, J., dissenting).

rather than by allowing *every plaintiff* potentially affected by the overcharge to sue only for the amount it could show was absorbed by it."[44]

This is only partially responsive to the *amicus curiae*'s concern about depriving violators of the fruits of their illegal activity, and it is wholly unresponsive to concerns about compensation. The plaintiffs did not dispute the quoted language. They argued instead that even if direct purchasers are more likely to deprive violators of the fruits of their acts, allowing indirect purchasers to sue as well would deprive violators of the fruits of their acts when the better enforcer chose not to sue. This would fill a potential gap in deterrence. The Court's quoted language addresses concerns about diluting the better enforcer's award,[45] which arise only if the defendant is allowed to reduce the direct purchaser's award by the amount of the indirect purchaser's award.[46] This, of course, is not asymmetrical at all as it implies that *both* parties are allowed to use passing-on theories, and more importantly, it is not what the plaintiffs were arguing. Thus, the Court inexplicably rejected asymmetrical passing-on because of a concern that is only raised if passing on is symmetrical.

Logically, asymmetry would actually promote deterrence. By denying defensive passing-on, thus allowing the direct purchaser to collect an undiluted award, the deterrent benefit of *Hanover Shoe* is secured. By *asymmetrically* accepting offensive passing-on, indirect purchasers would collect additional awards, giving them an incentive to sue without diminishing the direct purchaser's incentive. Rejecting asymmetry takes away the indirect purchaser's incentive to enforce altogether while doing nothing to affect the direct purchaser's incentive, reducing overall deterrence.[47]

The Court followed its confusing treatment of deterrence by simply ignoring compensation, never refuting the plaintiff's claim that asymmetry was necessary to ensure compensation, without which indirect purchasers suffer harm but have no remedy. Indeed, truly asymmetrical treatment would better compensate victims by allowing direct

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44 *Id.* at 734–35 (majority opinion) (emphasis added).

45 In at least some cases, the indirect purchaser is the better enforcer. *See id.* at 746 ("[D]irect purchasers sometimes may refrain from bringing a treble-damage suit for fear of disrupting relations with their suppliers.").

46 Dilution was a far greater concern in the defensive context. *See* Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 493 (1968) ("[I]t is not unlikely that if the existence of the defense is generally confirmed, antitrust defendants will frequently seek to establish its applicability."). Offensive passing-on will dilute an award far less frequently. *See id.* at 494 (noting that indirect purchasers "would have only a tiny stake in a lawsuit and little interest in attempting a class action").

47 *See id* at 494. Offensive passing-on could conceivably allow every plaintiff to simply collect the full award, which would avoid complicated passing-on litigation.

and indirect purchasers to recover for the harms they suffer. Thus, asymmetry better serves the twin aims antitrust law by compensating more victims and adding indirect purchasers as private enforcers without diluting the direct purchaser's incentive to sue.

The cost of asymmetry would be duplicative liability, which the Court refused to accept. In defense of its decision to elevate this concern above the twin aims of antitrust law, the Court offered only a perfunctory footnote,[48] while placing its flawed argument about deterrence in the body of its decision. Faced with a choice of which party to leave worse off, the uncompensated indirect purchaser or the doubly-liable antitrust violator, the Court opted to protect the antitrust violator. This even though the Court acknowledged in *Hanover Shoe* that indirect purchaser suits, and hence duplicative liability, would be rare.

Limited by its insistence on symmetry, the Court opted to bar all passing-on theories, offensive and defensive alike. First and foremost, the Court was worried that passing-on theories would "transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge . . . [leading to] massive multiparty litigations involving many levels of distribution and including large classes . . . ."[49] The Court overstated this concern,[50] which in any event is far less compelling when raised in order to allow an antitrust violator to profit from its crime (as in *Illinois Brick*) than when it is raised to deprive such a violator of its illegal profits (as in *Hanover Shoe*). Moreover, it is questionable how difficult the damage calculations would truly be.[51] Nev-

48 Faced with an argument that "it is better for a defendant to pay sixfold or more damages than for an injured party go uncompensated," the Court simply said, "We reject this." *Ill. Brick*, 431 U.S. at 730, 731 n.11. This makes the plaintiff's claims less palatable than necessary. Six-fold damages would not occur under the form of offensive passing-on mentioned in above. With offensive passing-on, the damages would likely be the three-fold award authorized by Congress for the direct purchaser, adding only the *portion* of this amount that the indirect purchasers could prove was passed to them.

49 *Ill. Brick*, 431 U.S. at 737, 740. It is worth noting that this cuts against offensive passing-on, but the Court could have opted for allowing full recovery by both direct and indirect purchasers. This would increase the risk of duplicative recovery, however.

50 *See supra* note 46. The same argument applies here. Changes in class action procedures do make indirect purchaser actions more likely, but to the extent that this undermines my argument, it equally undermines one of the primary bases for *Hanover Shoe*. *Hanover Shoe*, 392 U.S. at 494.

51 *See, e.g.*, AREEDA & HOVENCAMP, *supra* note 3, ¶ 346k (describing simpler apportionment mechanisms).

ertheless, allowing all passing-on theories would undoubtedly complicate antitrust litigation.

Again accepting that the Court was bound to find a symmetrical outcome, rejecting passing-on theories was supported by all the reasons stated in *Hanover Shoe*. Principally, the Court was concerned that passing-on would dilute the direct purchaser's incentive to sue thereby decreasing deterrence. Bound by symmetry, this conclusion is probably correct though it is by no means undisputed.[52] Direct purchasers not only suffer the most harm in an average antitrust case, they also interact regularly with the violator. This superior incentive and access generally makes them better private enforcers, but if they were required to prove the portion of the overcharge they did not pass on, their award would shrink and the difficulty of obtaining that award would increase substantially. This would likely decrease deterrence, though it is possible that indirect purchaser suits would make up for any decrease.

Additionally, *Hanover Shoe* rejected a passing-on theory. Thus, stare decisis, which "weigh[s] heavily in the area of statutory construction,"[53] may have been compelling by itself.[54] As for compensation, the Court recognized its importance,[55] though it refused "to carry the compensation principle to its logical extreme by attempting to allocate damages among" all injured parties.[56] Questionable as it is, *Illinois Brick* remains good law, and there are at least some plausible policy reasons to support the rule. This discussion merely highlights the weakness of these rationales, making a stronger case for exceptions where it is clear that the rationales completely disappear.

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52 *Compare* Landes & Posner, *supra* note 20, at 605 (assuming the Court in *Illinois Brick* was faced with a choice of deterrence or compensation, and defending the rule as an effective way to promote the former), *with* Robert G. Harris & Lawrence A. Sullivan, *Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis*, 128 U. PA. L. REV. 269, 351–52 (1979) (arguing that direct purchasers would pass-on most of the overcharge and prefer stable relationships with suppliers rather than suing where they suffered little harm); *see also* AMC REPORT, *supra* note 3, at 273 ("The record before the Commission was mixed on whether the deterrence of antitrust violations is best achieved by limiting recoveries to direct purchasers or permitting indirect purchasers to sue as well.").

53 *Ill. Brick*, 431 U.S. at 736.

54 *See id.*

55 *See id.* at 746.

56 The Court's decision falls far short of the logical extreme. The only way to do less would be to compensate no one. In any event, few parties would be denied compensation given that few indirect purchasers would sue. *See id.* at 747. Why the Court used this fact to assuage fears of under-compensation but not to assuage fears of duplicative liability is never explained.

II. How Modern Developments Have Undermined The Policies of *Illinois Brick*

Far from strengthening *Illinois Brick*, modern developments make the rule even less defensible. An anti-enforcement trend combined with state "*Illinois Brick*-repealer" statutes amplify the shortcomings of the rule and implicate the very policy concerns the rule sought to avoid. Against a backdrop of decreased government enforcement,[57] direct purchasers face new substantive and procedural hurdles, increasing the need for indirect purchaser suits, particularly when it is obvious that direct purchasers are not going to function as private attorneys general.

A. The Anti-Enforcement Trend

1. Substantive Obstacles to Private Antitrust Enforcement

Where plaintiffs once prevailed merely by establishing that an agreement fit into one of many categories deemed per se unreasonable, the Court now requires more extensive evidence of anticompetitive effect. Overturning a century-old precedent, *Leegin v. PSKS*[58] is a typical example of the Court's substantive shift from per se treatment to "rule of reason" analysis.[59] Such decisions rest on opinions of "[r]espected economic analysts."[60] Debating the merits of these decisions is beyond the scope of this Note.[61] These examples illustrate

57 Since the 1970s, despite a likely increase in antitrust violations, the Antitrust Division of the Department of Justice has lost personnel and filed fewer cases. *See* Robert Pitofsky et al., Trade Regulation 56, 61 (6th ed. 2010); *see also* ABA Section of Antitrust Law, Report of the Task Force on the Antitrust Division of the U.S. Department of Justice 19–20 (1989) (noting that the Division cannot perform its core function); ABA Section of Antitrust Law, The State of Federal Antitrust Enforcement—2001, 14–15 (calling for more federal antitrust enforcement resources and declaring existing resources to be inadequate to accomplish its charge).

58 Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007) (overruling Dr. Miles Med. Co. v. John D. Park & Sons, 220 U.S. 373 (1911)).

59 *See* State Oil Co. v. Khan, 522 U.S. 3 (1997) (applying rule of reason to vertical maximum resale price maintenance); Northwest Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 288 (1985) (applying rule of reason to group boycott); United States v. Arnold, Schwinn, & Co., 388 U.S. 365, 368 (1967), *overruled by* Cont'l T.V., Inc. v. GTE Sylvania, 433 U.S. 36 (1977) (applying rule of reason to all vertical non-price restraints).

60 *Leegin*, 551 U.S. at 882.

61 It is unclear if elevated standards were a legitimate response to a litigation bonanza or an inappropriate response to increased meritorious litigation. *Compare* Steven Salop & Lawrence J. White, *Commentary*, 3 Private Antitrust Litigation: New Evidence, New Learning (Lawrence J. White ed., 1988) (noting that private suits

both a pervasive anti-enforcement trend making it more difficult for plaintiffs to prevail absent expert economic testimony and an increased willingness to "ramble through the economic wilds" courts once feared.[62]

2. Procedural Changes Make Deterrence More Difficult

Procedural changes are the vanguard of a "stealth assault on antitrust enforcement."[63] If plaintiffs survive general pleading standards, which themselves have become more onerous,[64] they may still be denied standing for a variety of reasons. *Associated General Contractors v. California Carpenters*[65] (*AGC*) noted that the common law limited the Clayton Act's broad language[66] and identified a number of factors relevant to standing including whether the violation caused the alleged harm,[67] whether this is the type of plaintiff and the kind of injury addressed by antitrust laws,[68] the directness of the asserted injury,[69] whether there is a better-situated plaintiff to bring the suit,[70] the amount of speculation necessary to calculate damages,[71] judicial manageability,[72] the prospects of either complex apportionment or duplicative recovery,[73] and the chances of diluting the damage award

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grew from the mid-1960s before peaking in 1977, while private actions decreased in the 1980s), *with* PITOFSKY ET AL. *supra* note 577, at 63–64 (noting that until the 1960s plaintiffs were rarely successful even when relying on estoppel from successful government prosecutions).

62 United States v. Topco Assoc. Inc., 405 U.S. 596, 609–10 n.10 (1972).

63 *See generally* Bauer, *supra* note 16, at 441–42, 444–46 (discussing how an overly expansive antitrust injury requirement is yet another sign of hostility to antitrust enforcement, leading to under-deterrence).

64 *See generally* Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007). *Twombly*, which requires plaintiffs to plead a plausible factual basis that is more substantial than what was previously required to survive a motion to dismiss under Fed. R. Civ. Pro. 12(b)(6), is particularly onerous for antitrust plaintiffs who are harmed by parties who can quite easily hide the facts plaintiffs would need to meet the standard. Parallel action and stray remarks to the press, which were found to be insufficient to unlock discovery, are all plaintiffs can expect to gather before discovery in many cases. *Twombly* itself was an antitrust case.

65 459 U.S. 519 (1983).

66 *See id.* at 534.

67 *Id.* at 537.

68 *Id.* at 538.

69 *Id.* at 540.

70 *Id.* at 542.

71 *Id.* at 544.

72 *Id.* at 543.

73 *Id.* at 544.

through apportionment, thereby decreasing deterrence.[74] Taken together,

> [A]ll of these "tests" . . . [limit] . . . the universe of would-be claimants, by identifying the better (or best) claimants, and then eliminating other potential plaintiffs who present the risk of duplicative recovery, or for whom the fact or amount of damages may prove unduly speculative, or where problems of proof may be particularly complex.[75]

Antitrust injury and standing requirements add more weight to the plaintiff's already heavy burden, making private enforcement even less likely.[76] In *Illinois Brick*, the Court recognized and quickly dismissed concerns that "direct purchasers *sometimes* may refrain from bringing a treble-damages suit for fear of disrupting relations with their suppliers."[77] In light of the anti-enforcement trend, *sometimes* is now more frequent. Assuming the harm done to business relationships by suing remains constant, as the probability of success diminishes, so too does the likelihood that the cost of suing—in terms of damaged relationships—will outweigh the projected benefit. Exceptions that were less necessary when *Illinois Brick* was decided are all the more important now because the chance that no one will sue has increased.

Moreover, it is unclear whether the assumption that direct purchasers are superior enforcers is still valid,[78] and it is clear that indirect purchasers are more likely enforcers than previously thought.[79] Thus, who should enforce is now a closer and more important question, making a more nuanced approach that allows for more exceptions particularly appropriate. By accepting *Illinois Brick* as the default rule, exceptions can be fashioned to both preserve the direct purchaser's award in cases where the direct purchaser is appropriately motivated and incentivize a "more remote party . . . to perform the

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74 *Id.* at 545.

75 Bauer, *supra* note 16, at 442 (citations omitted).

76 Professor Bauer notes that in six of the seven cases involving antitrust injury to reach the Supreme Court, the injury was insufficient to support the claim. The two antitrust standing suits split evenly, with one granting and one denying standing. *See id.* at 441 n.22.

77 Ill. Brick. Co. v. Illinois, 431 U.S. 720, 746 (1977) (emphasis added).

78 *See supra* note 52 (identifying academics on both sides of this debate).

79 *See* AMC REPORT, *supra* note 3, at 269 ("Indirect purchaser litigation under state law has become increasingly common, especially since the mid-1990s.").

office of a private attorney general" in the growing number of cases where the direct purchaser is not so motivated.[80]

B. Duplicative Recovery is Caused by Illinois Brick

Justice Blackmun called the plaintiffs in *Illinois Brick* "victims of an unhappy chronology."[81] His words were as descriptive as they were prophetic. In the wake of *Illinois Brick*, most states passed so-called "*Illinois Brick*-repealer" statutes.[82] Blackmun thought that the Court's support for indirect purchaser standing would have been at least as strong, "perhaps [even] unanimous," if *Illinois Brick* had come before *Hanover Shoe* because "[t]he 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."[83]

California v. ARC America Corp. (*ARC*)[84] suggests that the Court may now agree.[85] In that case, the district court, affirmed by the Ninth Circuit, dismissed the plaintiff's indirect purchaser claims authorized under a state *Illinois Brick*-repealer statute, concluding that the repealer statutes were preempted because they would frustrate the policies announced in *Illinois Brick*.[86] The Supreme Court reversed, allowing states to authorize indirect purchaser suits, noting that federal laws were intended to supplement, not replace, state antitrust laws.[87] Generally, state laws are to be preempted when the law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,"[88] suggesting that if repealer statutes frustrated Congress's purposes, they would fall. Then the Court noted, "We construed [Clayton] § 4 as not authorizing indirect purchasers to recover under federal law *because that would be contrary to the*

80 Associated Gen. Contractors of Cal., Inc. v. Cal. Council of Carpenters, 459 U.S. 519, 542 (1983).

81 Ill. Brick Co. v. Illinois, 431 U.S. 720, 765 (1977) (Blackmun, J., dissenting).

82 *See* AMC Report, *supra* note 3, at 269 ("At the present, more than thirty-five states [representing over seventy percent of the nation's population] permit indirect, as well as direct, purchasers to sue for damages under state law.").

83 *Ill. Brick*, 431 U.S. at 765 (Blackmun, J., dissenting).

84 490 U.S. 93 (1989).

85 *See generally* Ronald W. Davis, *Indirect Purchaser Litigation:* ARC America *'s Chickens Come Home to Roost on the* Illinois Brick *Wall*, 65 ANTITRUST L.J. 375, 394–95 (1997) (noting that *Illinois Brick* was a deviation from traditional antitrust laws and that *ARC* undermined *Illinois Brick* by conforming more consistently with those traditional antitrust principles).

86 *ARC*, 490 U.S. at 99.

87 *See id.* at 101–02.

88 *Id.* at 101 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

purposes of Congress."[89] The Ninth Circuit correctly observed that like federal indirect purchaser suits, state indirect purchaser suits would (1) compel complicated passing-on and apportionment calculations,[90] (2) subject defendants to multiple liability,[91] and (3) dilute the incentive for direct purchasers to sue.[92] These are the same prudential reasons, announced in *Illinois Brick* as congressional purposes, that justified blocking indirect purchaser suits. To summarize, these state laws authorize indirect purchaser suits, such suits raise prudential concerns contrary to the purposes of Congress, and laws contrary to Congress's purposes are preempted. Yet these laws were not.

In response to this logical convolution, the Court wrote that state laws authorizing indirect purchaser suits are "consistent with the broad purposes of the federal antitrust laws: deterring anticompetitive conduct and ensuring the compensation of victims of that conduct."[93] These very same "broad purposes" were subjugated to prudential concerns in *Illinois Brick*, purportedly in accord with congressional intent. Here, these same "broad purposes" now justify disregarding the exact same prudential concerns to reach the opposite result: subjugating prudential concerns in favor of compensation. The Court continued:

> It is one thing to consider the congressional policies identified in *Illinois Brick* and *Hanover Shoe* in defining what sort of *recovery* federal antitrust law authorizes; it is something altogether different, and in our view inappropriate, to consider them as defining what federal law allows States to do under their own antitrust law.[94]

Recovery—the means by which compensation is achieved—was clearly no match for prudential concerns in Congress: "We construed

89 *Id.* at 103 (emphasis added).

90 *See id.* at 103–04. Bolstering the Ninth Circuit's analysis, the Class Action Fairness Act greatly increases the likelihood that that a large number of state indirect purchaser claims will end up in federal court by decreasing the standards for diversity jurisdiction. *See* 28 U.S.C. § 1711 (2006); AMC REPORT, *supra* note 3, at 269.

91 *See In re* Cement & Concrete Antitrust Litig., 817 F.2d 1435, 1445 (9th Cir. 1987); *see also ARC*, 490 U.S. at 105. The Court responded by noting that nothing prevents states from imposing liability "over and above that authorized by federal law." *Id.* This argument fails because states did not want to create *double* liability. *See* AMC REPORT, *supra* note 3, at 274 ("[A] number of states expressly instruct courts to avoid duplicative damages; no state expressly affords duplicative damages."). Ironically, though no decision-maker wanted duplicative liability, the Court's decision forced that result because states also sought compensation for all antitrust victims.

92 So long as the defendant cannot use defensive passing-on at the federal level, dilution is not a concern. It was in this case because a combined pool of damages had already been awarded. *ARC*, 490 U.S. at 105.

93 *Id.* at 102.

94 *Id.* at 103 (emphasis added).

§ 4 as not authorizing indirect purchasers to *recover* under federal law because that would be contrary to the purposes of Congress."[95] Inexplicably, the Court then stated: "[N]othing in *Illinois Brick* suggests that it would be contrary to congressional purposes for States to allow indirect purchasers to recover under their own antitrust laws."[96] In fact, *Illinois Brick* suggested the opposite: allowing indirect purchaser suits was simply too high a price to pay for compensation given the exact prudential concerns presented both in that case and here. There are two ways to reconcile this confusion. One explanation places state legislatures' decisions regarding the relative importance of prudential concerns above Congress's decisions on the same point, even when Congress is acting within its authority and definitively chose to place those prudential concerns at the top of the policy heap. This is clearly incompatible with the Supremacy Clause. The other option is admitting that *Illinois Brick* got it wrong and that deterrence and compensation truly are more important, according to Congress, than prudential concerns. Logic notwithstanding, the Court chose neither option, and far from ending this unhappy chronology, the Court simply made it worse.

Duplicative liability is now allowed if it comes under state law but not if it comes under federal law.[97] Indeed, had *Illinois Brick* been decided differently, repealer statutes would not have been necessary, and the risk of duplicative liability could have been limited if not eliminated by joinder rules.[98] In any event, *ARC* provides indirect purchasers with Supreme Court precedent supporting the proposition that risk of duplicative liability does not necessarily foreclose indirect

95 *Id.* (emphasis added).

96 *Id.*

97 *See* ABA SECTION OF ANTITRUST LAW, REPORT ON REMEDIES 2 (2004) ("[*Illinois Brick* repealers are responsible for] creating the prospect of multiple litigation and the possibility of duplicative exposure."); ABA SECTION OF ANTITRUST LAW, THE STATE OF FEDERAL ANTITRUST ENFORCEMENT — 2004, 53 (same).

98 AMC REPORT, *supra* note 3, at 266, 274 ("[B]ecause indirect purchasers typically cannot join direct purchasers in pursuing remedies in federal court . . . direct and indirect purchasers have often brought multiple, duplicative lawsuits in federal and state courts. . . . [T]he potential for duplicative recoveries remains a serious concern as long as direct and indirect purchaser actions proceed without coordination in separate courts."); *see* Ill. Brick Co. v. Illinois, 431 U.S. 720, 737–38 (1977) (suggesting that mandatory and permissive joinder could reduce if not eliminate the prospect of duplicative liability). If anything, multi-district litigation makes federal consolidation easier, adding strength to the argument that *Illinois Brick* actually creates more duplicative liability than it prevents.

purchaser recovery.[99] Contrary to *Illinois Brick*, *ARC* elevated the "broad purposes" of antitrust law, including compensation, above prudential concerns. At a minimum, this suggests that the Court is willing to entertain broader exceptions to *Illinois Brick* where compensation would be drastically underserved, even if duplicative liability is a concern.

C. Calculating Difficulties and Judicial Economy

ARC also implicated the same apportionment challenges *Illinois Brick* sought to avoid. Calculating the passed-on portion of an overcharge was seen as "insurmountably" difficult, yet *ARC* approved state laws explicitly requiring such calculations. Congress ensured that federal courts will be increasingly called upon to do these calculations under the Class Action Fairness Act,[100] which grants federal jurisdiction with *minimal* diversity in many class actions.[101] Since *ARC*, the apportionment-difficulty rationale has been substantially undermined. The decision belies the Court's hesitancy in ranking it too high on the list of policy priorities, especially as both experience and economic theory have proven it largely overstated.[102] Nevertheless, *Illinois Brick* has spared federal courts from a great deal of concededly difficult apportionment issues, and the rationale still supports the indirect purchaser rule. Indirect purchasers arguing for an exception thus are unlikely to succeed if their damage theory depends on apportioning an overcharge that was arguably passed-on. The case for an exception even if apportionment is implicated could become much stronger if, however, the plaintiffs show that they will simply end up litigating the same issues in the same court under a state *Illinois Brick*-repealer statute and diversity jurisdiction.

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99 *See infra* Part III.C (discussing various lower court requirements to assuage fears of duplicative liability before granting an exception to *Illinois Brick*).

100 28 U.S.C. § 1711 *et seq.* (2006).

101 *Id.* (stating that classes of 100 members with at least $5 million in controversy require minimal diversity only); *see also* AMC REPORT, *supra* note 3, at 269.

102 *See* AREEDA & HOVENKAMP, *supra* note 3, ¶ 346k1 (discussing a number of reliable methods for calculating indirect purchaser damages); Richman & Murray, *supra* note 3, at 99 ("[S]tate courts have exhibited a capacity to handle suits from indirect purchasers and to calculate pass-on damages under *Illinois Brick* repealer statutes . . . ."); *see also* Paper Sys. Inc. v. Nippon Paper Indus. Co., 281 F.3d 629, 633–34 (7th Cir. 2002) (holding, per Judge Easterbrook, that courts are capable of apportioning damages if need be); AMC REPORT, *supra* note 3, at 274 ("Witnesses argued that recent advances in econometrics and other methodologies have made such assessments somewhat more manageable. . . .").

ARC and *Illinois Brick* combine to produce a solution that is both unfair and wasteful: the latter case prevents victims from recovering while the former allows duplicative adjudication of the same claims.[103] Indirect purchaser litigation under state law is increasingly common, and the cases are "frequently pursued separately rather than consolidated with other actions in a federal court proceeding."[104] To the extent that this mitigates compensation concerns, it creates concerns of duplicative litigation and liability. Direct purchasers prefer federal court, where they can recover the full overcharge; indirect purchasers prefer state court, which is their only option.[105] Wasteful litigation is bad for (almost) everyone, and efforts to ameliorate concerns of judicial waste have had limited success.[106]

D. Stare Decisis

Despite these concerns, *Hanover Shoe* and *Illinois Brick* themselves have been unequivocally reaffirmed.[107] Further, *Illinois Brick* is often cited for the proposition that stare decisis is particularly important in statutory construction.[108] Calls to overturn *Illinois Brick* will likely go unanswered. By contrast, chipping away at the edges of the rule is far more likely to produce results. For one thing, the very cases that cite *Illinois Brick* as the standard for stare decisis in statutory construction often note that this maxim is least compelling in antitrust law, which has quasi-common law features due to the Sherman Act's broad language.[109] Other commentators have noted the incongruity between modern antitrust jurisprudence and *Illinois Brick's* categorical rule.[110] Antitrust law generally,[111] and standing analysis specifically,[112] have

103 *See* Ill. Brick Co. v. Illinois, 431 U.S. 720, 739–41 (1977); *supra* note 99.

104 AMC REPORT, *supra* note 3, at 269.

105 *Id.*

106 *See id.* at 269–70 (identifying various *ad hoc* solutions to coordinate state and federal actions).

107 *See, e.g.*, Kansas v. UtiliCorp United Inc., 497 U.S. 199, 213 (1990).

108 *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 918 (2007) (Breyer, J., dissenting).

109 *See, e.g., id.* at 877 (majority opinion).

110 *See* Blair & Harrison, *supra* note 5, at 2, 17 ("[S]ince *Illinois Brick* the Supreme Court has developed a theory of antitrust standing which focuses on how remote a victim is relative to the anticompetitive action. . . . *Illinois Brick* also could have been seen as a per se application of *AGC* . . . . This appears to be the position that *Illinois Brick* now represents."); Richman & Murray, *supra* note 3, at 78.

111 *See, e.g., Leegin*, 551 U.S. at 895 (quoting Cont'l T.V., Inc. v. GTE Sylvania, 433 U.S. 36, 50 n.16 (1977)).

112 *See, e.g.*, Associated Gen. Contractors of Cal., Inc. v. Cal. Council of Carpenters, 459 U.S. 519, 520 (1983).

embraced individualized, case-by-case analyses to ensure that a rule is not inadvertently applied inconsistently with the rule's policy justifications. Modern antitrust jurisprudence is increasingly influenced by "[r]espected economic analysts,"[113] and courts are increasingly willing to conduct complex economic analysis. *Illinois Brick*'s categorical approach, founded more on aversion to economic complexity than confidence that the rule promotes wise policy,[114] stands in stark contrast to this modern antirust landscape. Recognizing a default rule that allows for exceptions in cases where the rule fails to promote legitimate policies fits far more naturally into this landscape. Given *Illinois Brick*'s tenuous policy support, exceptions are particularly appropriate. In short, stare decisis does nothing to bar chipping away at the roughest edges of a bad rule.

E. Compensation Is Misaligned

Most commentators agree that compensation was largely abandoned as an antitrust goal in *Illinois Brick*.[115] By conceding that it was "refusing to carry the compensation principle to its logical extreme,"[116] the Court was saying little more than that they would not totally abandon compensation. Given the uncertainty in calculating passed-on damages, the Court reasoned that it was not unfair to deny compensation.[117] Acknowledging that damage calculations may be difficult, however, hardly justifies assuming as a matter of law that damages are zero. The more meaningful point is that even if indirect purchasers were allowed to sue, they would face such a difficult task proving damages that few plaintiffs would ever prevail, and thus the rule does little to diminish compensation.

Under this reasoning, allowing a windfall for direct purchasers is superior to allowing indirect purchasers the opportunity to sue from both a deterrence perspective (because indirect purchasers would rarely sue, inadequately punishing violators) and a compensation perspective (because indirect purchasers would rarely collect, leaving the

113 *Leegin*, 551 U.S. at 882.

114 The Court noted the risk of a poor fit: "We recognize that direct purchasers sometimes may refrain from bringing a treble-damages suit for fear of disrupting relations with their suppliers." Ill. Brick Co. v. Illinois, 431 U.S. 720, 746 (1977).

115 *See, e.g.*, Bauer, *supra* note 16, at 443 (noting that compensation is underserved by the indirect purchaser rule); Richman & Murray, *supra* note 3, at 90–92 (titling a section, "Abandoning Compensation"); *see also* Landes & Posner, *supra* note 20, at 605 (approving of this decision and arguing that antitrust laws should be neutral towards compensation).

116 *Ill. Brick Co.*, 431 U.S. at 746.

117 *Id.*

difficult-to-prove damages in the hands of the violator rather than the direct purchaser). Changes in class action rights, a review of state court dockets, and a cursory examination of the modern economy reveal that indirect purchaser suits are not as rare as *Hanover Shoe* suggested, undercutting the first rationale.[118] *Illinois Brick* falls under the latter rationale. It did not claim that suits would be rare so much as it claimed that *collection* would be rare because damages would be hard to prove.[119] If this is so, the direct purchaser's windfall is now justified as part of a normatively superior compensation mechanism that only rarely under-compensates an indirect purchaser who would have actually collected while more effectively depriving criminals of their ill-gotten gains.

This compensation scenario inadequately accounts for a growing number of real-life situations. First, it guarantees under-compensation for indirect purchasers in all cases. Even if collection rates are low, especially for class action members who suffer minimal harm, some indirect purchasers suffer substantial harm.[120] *Illinois Brick* uniformly denies the latter group compensation along with the former. Second, to the extent that *parens patriae* actions and diminished class certification standards incentivize indirect purchaser suits where the individual harm is less substantial, direct purchaser windfalls no longer take the would-be retained fruits of illegal behavior from the violator. Rather, the windfall overcompensates one victim while another class of deserving, willing, and able litigants cries out for a remedy. Finally, the need to consider indirect purchaser compensation is especially acute when direct purchasers are benefiting in some way by not suing.[121]

While *ARC* may mitigate the harsh consequences of under-compensation, state repealer statutes provide at best inconsistent, incom-

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118 AMC REPORT, *supra* note 3, at 269 ("Indirect purchaser litigation under state law has become increasingly common, especially since the mid-1990s."). Importantly, "as multilevel supply chains become more the rule than the exception—and exposure of indirect purchasers to passed-on antitrust injury grows accordingly—the indirect purchaser rule increasingly operates to undermine compensation." Richman & Murray, *supra* note 3, at 91. As *more* layers are added to supply chains, indirect purchasers incur larger individual injuries, as well.

119 *Ill. Brick*, 431 U.S. at 746.

120 Indirect purchaser is not synonymous with consumer; retailers, wholesalers, or even higher echelons of the supply chain may be indirect purchasers of enormous quantities, suffering equally enormous injuries.

121 Direct purchasers often have compelling reasons not to sue, which defendants are aware of and can exploit. Cutting a troublesome wholesaler out of the supply chain sends a signal to would-be plaintiffs that treble damage actions may not be worth it.

plete, and inefficient compensation. As much as thirty percent of the nation lives in states without indirect purchaser remedies.[122] Where remedies are recognized, they are very likely to create duplicative litigation and may lead to duplicative liability. Moreover, Congress already created a *nationwide* compensatory regime under the Clayton Act, and the concerns leading the Court to downplay the importance of this policy are quickly vanishing.

Overall, *Illinois Brick*'s policy rationales provide minimal support for the indirect purchaser rule. To be certain, the rule does preserve the direct purchaser's undiluted award, incentivizing private enforcement. By contrast, though *Illinois Brick* prevents duplicative liability at the federal level, it creates additional liability that would be avoided if indirect purchasers could be joined in a single action. Similarly, *Illinois Brick* avoids some of the complex apportionment calculations it hoped to avoid but does not do so completely. Further, *Illinois Brick* and *ARC* combine to waste judicial resources. Even the principles of stare decisis no longer justify *Illinois Brick* to the extent they once did. Finally, compensation, which was concededly neglected in *Illinois Brick*, is even more underserved today than it was at *Illinois Brick*'s inception.

III. THE NEED FOR BROADER EXCEPTIONS

Despite this largely negative policy record, *Illinois Brick* is plausibly defensible to the extent that it (1) avoids difficult damage apportionment based on passing-on theories, (2) promotes deterrence by preserving the damage award for the direct purchaser, and (3) diminishes the risk of duplicative liability (i.e., prevents it at the federal level without simply pushing the risk to state courts). By every other policy measure, denying recovery to indirect purchasers in federal court is worse than granting it would have been. Recognizing these failings, others have demanded: "Your Honor, Tear Down This *Illinois Brick* Wall!"[123] Rather than tearing down the wall, a more realistic approach involves chipping away at it by expanding exceptions to allow indirect purchasers to sue more frequently. By targeting situations where the policy weaknesses discussed above are most acute, indirect purchasers can and should be successful in seeking recovery.

122 AMC REPORT, *supra* note 3, at 269.

123 Karon, *supra* note 7, at 1351. *See also* AMC REPORT, *supra* note 3 (calling for repeal of *Hanover Shoe* and *Illinois Brick* with dissenters largely calling for preemption of state repealer statutes); AREEDA & HOVENKAMP, *supra* note 3, ¶ 346i (critiquing the rule); Blair & Harrison, *supra* note 5 (same); Harris & Sullivan, *supra* note 51 (same); Richman & Murray, *supra* note 3 (same).

Exceptions can be granted without running afoul of precedent if (1) complicated apportionment is unnecessary, which may be the case even if the direct and indirect purchasers recover so long as they are not both claiming the same overcharge damages; or (2) the direct purchaser is barred from re-litigation *or* is unlikely to sue. If either of these conditions is satisfied, dilution is not a concern and duplicative recovery is either impossible or unlikely. Scholarly disagreement notwithstanding, the Supreme Court announced that condition one is non-negotiable. Some courts misapply the condition, however, failing to recognize exceptions even where damages do not implicate forbidden apportionment. Other courts are unduly restrictive regarding the second condition, granting exceptions only where the direct purchaser is legally prohibited from suing. Given *Illinois Brick*'s policy record, clinging tightly to the rule does a disservice to the very policies the rule was designed to serve. This Part identifies the most prominent ways in which indirect purchasers can satisfy these conditions.

A. The "Cost-Plus" Exception

Hanover Shoe and *Illinois Brick* recognized two exceptions explicitly, each allowing indirect purchaser suits only where calculating the passed-on portion of an overcharge is unnecessary.[124] The first exception applies where the indirect purchaser commits in advance of the overcharge to purchase a fixed quantity of goods at cost, plus a predetermined markup (hence the name, "cost plus"). Here, apportionment is unnecessary and duplicative recovery is impossible because the direct purchaser is unharmed; it sells the same quantity at the same profit margin as before the overcharge.[125] In *Kansas v. UtiliCorp United Inc.*,[126] the Supreme Court made clear that this exception only applies if quantity is fixed. It is not enough to show that the direct purchaser raised its price, dollar-for-dollar, in response to an overcharge from its supplier. Holding that consumers of natural gas are not "proper plaintiff[s] . . . when the lawsuit already includes as plaintiffs those public utilities who paid the inflated prices upon direct purchase . . . and who subsequently passed on most or all of the price increase,"[127] the Court reaffirmed *Illinois Brick*[128] and showed that exceptions would fail if they require difficult apportionment.

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124 *See Ill. Brick*, 431 U.S. at 736 n.16.

125 AREEDA & HOVENKAMP, *supra* note 3, ¶ 346e.

126 497 U.S. 199 (1990).

127 *Id.* at 206.

128 *Id.* at 204 ("[W]e hold that only the utility has the cause of action because it alone has suffered injury within the meaning of [Clayton] § 4.").

Plaintiffs argued that apportionment was unnecessary because the direct purchasers passed on the entire overcharge dollar-for-dollar by increasing price. The direct purchaser's decision to increase price does not mean it suffered no harm, however. At increased prices, consumers demand less, decreasing the utilities' sales volume.[129] To calculate the direct purchaser's harm, the parties would have to determine how the overcharge affected the direct purchaser's pricing decision and how much of the overcharge damages were retained as opposed to passed on. This is the exact calculation (apportionment of the damages when an overcharge increases the direct purchaser's input costs, causing the direct purchaser to raise its price to indirect purchasers) that *Illinois Brick* concluded was insurmountably difficult.[130] Similarly, apportionment would make direct purchasers less likely to sue in the future, which *Illinois Brick* and *Hanover Shoe* forbid. Granting an indirect purchaser award without diluting the direct purchaser's award entails duplicative liability, another of *Illinois Brick's* concerns. Thus, *UtiliCorp* implicated the exact policy concerns underlying the indirect purchaser rule, and "[a]lthough the rationales of *Hanover Shoe* and *Illinois Brick* may not apply with equal force in all instances, [the Court held that] it [is] inconsistent with precedent and imprudent in any event to create an exception" here.[131]

UtiliCorp was a weak case for creating an exception, and its holding is not surprising. This in no way suggests that the Court would not create exceptions where the rationales of *Hanover Shoe* and *Illinois Brick* apply with less force. To the contrary, "[i]f [the Court] were convinced that indirect suits would secure [vigorous enforcement of antitrust laws] better in cases involving utilities, the argument to interpret § 4 to create the exception sought by the petitioners might be stronger."[132] The plaintiffs attempted to make the strongest argument an indirect purchaser can muster in favor of an exception, show-

129 *Id.* at 218.

130 *Id.* at 209.

131 *Id.* at 214, 216.

132 *Id.* This counsels against over-reading the Court's statement that, "[We do not intend to] 'carve out exceptions to the [direct purchaser] rule . . . ' [by] classifying various market situations according to the amount of pass-on likely to be involved . . . ." Rather, the Court does not intend to do so only when this "would inject the same 'massive evidence and complicated theories'" as *Hanover Shoe* sought to avoid. *Id.* at 216–17 (quoting Ill. Brick Co. v. Illinois, 431 U.S. 720, 744–45 (1977)). Ability to pass an overcharge on is only one of many factors demonstrating that a direct purchaser is unlikely to sue. A host of other factors make an indirect purchaser unlikely to sue, and so long as these are not premised on the ability to pass on an overcharge, they will be considered, just as the Court considered the plaintiff's argument here.

ing that the direct purchaser is unlikely to sue. Plaintiffs, however, did not convince the Court on "this critical part of the case."[133] First and most obviously, the direct purchasers were already involved in the suit, and utilities historically have been diligent enforcers. They were also absorbing some of the overcharge, giving ample incentive to sue regardless of damages. Finally, there was no evidence that the regulators would have required disbursement of the punitive (trebled) portion of any award, making a possible judgment quite enticing even if no harm occurred.[134]

UtiliCorp is the only Supreme Court case to address *Illinois Brick* exceptions, and it limited the cost-plus exception—the only exception at issue in that case—to situations in which "market forces are suspended" by operation of a cost-plus price *and* fixed quantity contract.[135] More broadly, the decision clarifies the type of apportionment to be avoided: upstream action causing an overcharge leading to increased input costs that a direct purchaser partially passes on. Critically, *UtiliCorp* opens the door for broader exceptions where deterrence would be better served by indirect purchaser suits, provided theories of passing-on are not the basis for this assertion. For example, if the direct purchaser is barred by the statute of limitations from suing, indirect purchasers have a colorable argument to bring the treble damage action. Since the direct purchaser cannot sue, there is no need to worry about diluting its damage award; apportionment will be unnecessary as only downstream consumers have a right to collect; and without the indirect purchaser's suit, deterrence will be underserved. Given that the policy support for *Illinois Brick* is tenuous at best, it is better to liberally deviate from the rule rather than rigidly applying the rule unless it is legally certain to be wrong. There is little reason to cling so tightly to a weakly supported rule.

B. The Indirect Purchaser "Control Exception"

Illinois Brick identified "another example where market forces might be suspended,"[136] making apportionment of the overcharge

133 *Id.* at 214 (noting that even though regulators may require the utilities to give a portion of any damage award they receive to customers, the utility has ample reason to sue).

134 *Id.*

135 *See* AMERICAN BAR ASSOCIATION, INDIRECT PURCHASER LITIGATION HANDBOOK 16 (2007) [hereinafter HANDBOOK] (concluding that very few plaintiffs utilize the exception because the bar is so high); *see also* Illinois v. Panhandle E. Pipe Line Co., 935 F.2d 1469, 1478–79 (7th Cir. 1991) (ruling that the cost-plus exception was not satisfied even though plaintiffs could demonstrate complete passing-on).

136 Ill. Brick Co. v. Illinois, 431 U.S. 720, 736 n.16 (1977).

unnecessary. If the direct purchaser is owned or controlled by its *customers* (indirect purchasers) then "the direct purchaser and the indirect purchaser are a single entity that bears the entire overcharge."[137] This situation satisfies the conditions for finding an exception. First, the indirect purchaser's damage theory does not depend on claiming a *portion* of an overcharge passed through the direct purchaser to the indirect purchaser. Instead, the indirect purchaser claims the entire overcharge on behalf of the single entity.[138] As a result, the damage award is preserved as an undiluted incentive in the hands of the most likely enforcer (in this case, whichever part of the single entity the entity itself chooses). Finally, *res judicata* prevents duplicative recovery by barring all but the first suit brought by the single entity.[139]

A variation of this exception which crystallizes the exact policy concerns to be avoided arises when the direct purchaser is an employee, purchasing agent, or service provider for the indirect purchaser.[140] Here, the apportionment problem in *UtiliCorp* (an upstream overcharge causing the direct purchaser to pass on a portion of its increased costs) is not implicated. As an easy example, consider an employee who directly purchases overcharged tools and is later reimbursed fully by his employer, the indirect purchaser. The employee, unlike the utility, does not require additional compensation because the tools he bought are more expensive; he expects dollar-for-dollar reimbursement, thus passing the entire overcharge to the employer and retaining no independent harm. Where the utility loses profits if it does not extract more money from the indirect purchaser (which causes additional harm from decreased sales volume), employees, purchasing agents, and financial service providers do not

137 AREEDA & HOVENKAMP, *supra* note 3, ¶ 346f.

138 In other contexts, litigation over how much control is necessary to constitute a single entity is more common. Here, this is less important because even without complete ownership, the apportionment can be worked out internally.

139 *See* AREEDA & HOVENKAMP, *supra* note 3, ¶ 346f (calling the prospect of a second suit unlikely and unproblematic; *res judicata* will bar the second suit); *see also* J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1543–44 (3d Cir. 1990) (recognizing that the "single entity" exception applies with equal force to sister-corporations).

140 *See* XI JOSEPH P. BAUER, *Kinter* Federal Antitrust Law §78.8, at 79–81 (1998); *see also* Doe v. Ariz. Hosp. & Healthcare Ass'n, 2009 WL 1423378, at *8 (D. Ariz. 2009) (holding that temporary nurses working for an agency were direct "victims" of the agreement by hospitals to depress wages because nurses worked in and were sometimes paid directly by hospitals); *In re* Mercedes-Benz Antitrust Litig., 157 F. Supp. 2d 355, 366 (D.N.J. 2001) (holding that leasing vehicle through a credit corporation did not make purchasers of automobiles "indirect purchasers"); *In re* Toilet Seat Antitrust Litig., 1977 WL 1453 at *2 (E.D. Mich. 1977) (holding that using the services of purchasing agent did not make the principal an indirect purchaser).

see an input price increase because of an overcharge in the item to be purchased. For the latter group, as prices rise, demand for their services may become more acute (benefiting them), or decreased demand for the product could decrease demand for their services (harming them). Even if there is harm, however, it is not based on passing an overcharge, but rather it is based on the decreased spending power of the indirect purchaser (who, for example, no longer can afford to pay its employee at all), a wholly different and separable injury from the one suffered by way of the original overcharge itself.

The direct purchaser's damages may be difficult to calculate, but they are not difficult to calculate in the way *Illinois Brick* forbids.[141] Dilution and duplicative recovery are impossible since the damages are wholly separable. Finally, deterrence might be totally undermined without this exception. Direct purchasers could be denied standing because of the tenuousness of their injury, in which case there would be no private enforcer.[142] In this situation, the case for an exception is particularly strong.

C. The Coconspirator Exception

A more contentious exception applies when the direct purchaser is complicit with the upstream antitrust violator. Under this "coconspirator" exception "the indirect purchaser might still be allowed to maintain an action—in part because the first transaction should not be treated as a true sale and thus the plaintiff could reasonably be considered to be the 'direct purchaser,' and also in part because these situations are less likely to implicate the policies underlying *Illinois Brick*."[143] Without an exception, *Illinois Brick* would be absurd as applied. The rule would entrust the only private enforcement action to one of the very parties needing to be deterred. Moreover, violators

141 McCarthy v. Recordex Serv., Inc., 80 F.3d 842, 852–54 (3d Cir. 1996), presents a close case between the employee example and the utility example. Attorneys purchased overcharged copying services which they billed to clients. Holding that the attorneys were neither employees nor *purchasing* agents, but rather independent contractor-agents, the court refused to apply the "agency exception." As with the utility and unlike the typical purchasing agent, the attorneys' input costs increased, directly prompting an increase in prices for the services they provide. Thus, demand for their services decreased as a direct result of their passing on an overcharge. Apportioning the attorney's harm from the client's portion involves the exact calculations *UtiliCorp*, following *Hanover Shoe* and *Illinois Brick*, condemned.

142 AREEDA & HOVENKAMP, *supra* note 3, ¶ 346j (arguing that *AGC* might block standing). Note that even if the direct purchaser has standing, it is legally precluded from suing for the overcharge because it did not pay any portion of the overcharge.

143 *See* BAUER, *supra* note 140, at 85.

could insulate themselves from liability by paying-off direct purchasers who participate in the conspiracy and punishing those who do not, leaving indirect purchasers uncompensated and antitrust violators undeterred.

Arising in a variety of factual scenarios, the coconspirator exception has received wide support[144] with inconsistent application. In the easiest cases, the direct purchaser conspires with the upstream purchaser to fix resale prices. Essentially, the indirect purchaser is not really an indirect purchaser at all, and apportionment is wholly avoided if *Illinois Brick* "allocates to the first non-conspirator in the distribution chain the right to collect 100% of the damages" for an overcharge.[145] There is no concern of the direct purchaser subsequently suing after the damages have been so allocated, and "if a conspirator defects and sues its former comrade, that snitch would come to own the right to damages, but [the direct purchaser co-conspirators] did not change sides and align themselves as plaintiffs. Thus our [indirect purchasers] are entitled to collect damages . . . ."[146] Some courts categorically declare *Illinois Brick* inapplicable where vertical conspiracies are *alleged*, which goes further than the previous example where the direct purchasers were named co-defendants.[147] Courts are confident that the direct purchaser will not sue based on its alleged involvement in the scheme. More importantly, a direct purchaser

> . . .challenging resale price maintenance imposed on itself would not base its damages on an "overcharge" at all. Its action is not based on a higher product price to itself, but rather on the constraint on its resale price; its damages would be for lost profits resulting from the reduced volume of sales. . . . Lost profits dam-

144 *See, e.g.*, HANDBOOK, *supra* note 135, at 21, 23 (noting that at least seven circuits have explicitly recognized it and none have rejected it). The First Circuit has recognized the exception since the Handbook was published. *See In re* New Motor Vehicles Canadian Exp. Antitrust Litig., 533 F.3d 1, 6 (1st Cir. 2008).

145 Paper Sys. Inc. v. Nippon Paper Indus. Co., 281 F.3d 629, 632 (7th Cir. 2002).

146 *Id.*

147 *See* Arizona v. Shamrock Foods Co., 729 F.2d 1208, 1212 (9th Cir. 1984) (citing Fontana Aviation, Inc. v. Cessna Aircraft Co., 617 F.2d 478 (7th Cir. 1980)) (holding that where consumers changed their theory of liability from a wholesale price fixing scheme to a horizontal conspiracy among retailers, *Illinois Brick* is no bar, and even if a vertical conspiracy were involved, *Illinois Brick* would be no bar); Lowell v. Am. Cyanamid Co., 177 F.3d 1228, 1230 (11th Cir. 1999) (holding that *Illinois Brick* does not apply to vertical price fixing cases where the direct purchaser is *alleged* to have participated).

> ages for the intermediary and overcharge damages for the consumer are not in any way duplicative.[148]

Consequently, the direct purchaser is unlikely to sue, and if the scheme is actually a vertical price fix, the direct purchaser is also unable to sue for *overcharge* damages.[149] Apportionment, dilution, and duplicative recovery are all avoided, and deterrence would be completely undermined without the exception.

Courts are concerned, however, that what the indirect purchaser alleges to be a vertical conspiracy may ultimately be provable as a horizontal scheme above the direct purchaser's level, in which case the indirect purchaser's initial recovery would have no estoppel effect on the direct purchaser, leading to a risk of duplicative liability.[150] There are a wide variety of solutions to this problem, and courts should allow indirect purchaser plaintiffs to assert *any* of them to show that the direct purchaser is either unlikely or unable to sue, rather than relying only on estoppel produced by joinder. The latter approach often does far more to ensure that *no one* will sue than to ensure that *two people* will not sue, a result completely at odds with the intent behind *Hanover Shoe* and *Illinois Brick*. Instead, courts should liberally grant the coconspirator exception where the plaintiffs can show, by any method, that direct purchaser suits are either unlikely or legally foreclosed.[151]

One way to ensure that the upstream defendant will not be subject to multiple liability is to simply require the indirect purchaser to

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148 AREEDA & HOVENKAMP, *supra* note 3, ¶ 346h; *see also Lowell*, 177 F.3d at 1231 (quoting the quoted passage to support its holding).

149 *See also* BAUER, *supra* note 140, at 80 ("[T]he indirect purchaser limitation only applies to overcharges which might be passed on through the chain of distribution. Thus, it has been held that the doctrine does not foreclose an action for discriminatory pricing by the seller to plaintiff's supplier, where no overcharge was involved.").

150 *See In re* Midwest Milk Monopolization Litig., 730 F.2d 528, 531 (8th Cir. 1984) (rejecting the coconspirator exception unless the direct purchaser is joined as a co-defendant, especially where defendant was accused of horizontal and vertical restraints). *But see Shamrock Foods Co.*, 729 F.2d at 1212 (holding that where the direct purchaser settled on one theory of damages, the indirect purchasers are allowed to recover on an alternate theory of damages that would not duplicate the direct purchaser's settlement award).

151 Thoroughly considering exceptions does nothing to dilute direct purchaser awards. Where the direct purchaser has already sued, the indirect purchaser will obviously fail to convince a court that the direct purchaser is unlikely to sue, unless the suit was initiated purely to defeat an exception. If the indirect purchaser sues first and prevails, future direct purchasers are, if anything, more motivated to sue quickly to avoid losing a treble damage award to an indirect purchaser.

sue the direct purchaser instead of the upstream violator.[152] Rather than formulating this as mandatory, this should be one of many permissible ways in which an indirect purchaser can satisfy a court that *Illinois Brick* is inapplicable. If it is mandatory, the violator can insulate itself from liability by creating an underfunded shell subsidiary to function as the direct purchaser which will ultimately be judgment proof. Alternately, the direct purchaser may simply be judgment proof, or the plaintiff may have evidence that makes it easier to attack one potential defendant rather than another. Artificially limiting exceptions allows violators to evade liability and unnecessarily limits indirect purchasers' ability to recover.

Other courts require that the coconspirator be joined before recognizing the exception.[153] While joining the direct purchaser as a codefendant is *one* way to ensure that duplicative liability will not ensue, it is by no means the only way, making categorical rejection of the coconspirator exception absent direct purchaser joinder unduly restrictive and dangerous.[154] Applying this condition rigidly allows direct purchasers to escape liability. Consider the case of *Midwest Milk*,[155] where the court was properly concerned about duplicative liability given allegations of both vertical and horizontal conspiracies—the context in which a direct purchaser-coconspirator is most likely to subsequently sue the upstream violator. The direct purchaser was not named as a codefendant, so the court refused to grant an excep-

152 Mid-west Paper Prods. Co. v. Cont'l Grp., Inc. 596 F.2d 573, 588 (3d Cir. 1979) (recognizing that a control exception may exist in some contexts, but in this case, since the coconspirator-subsidiary could be sued directly, there was no possibility of avoiding liability by creation of a subsidiary).

153 *See* Link v. Mercedes-Benz of N. Am., Inc., 788 F.2d 918, 932 (3d Cir. 1986) (citing numerous cases in which *Illinois Brick* had barred recovery even where vertical conspiracies were alleged absent joinder); *see also In re* New Motor Vehicles Canadian Exp. Antitrust Litig., 533 F.3d 1, 3–4 (1st Cir. 2008) (same); Paper Sys. Inc. v. Nippon Paper Indus. Co., 281 F.3d 629, 631–32 (7th Cir. 2002) (applying the coconspirator exception where the direct purchaser and upstream suppliers were named as codefendants); *In re* Midwest Milk Litig., 730 F.2d 528, 531 (8th Cir. 1984) (citing *In re* Coordinated Pretrial Proceedings in Petrol. Prods. Antitrust Litig., 691 F.2d 1335, 1342 (9th Cir. 1982)) (requiring that direct purchasers be named as codefendants to avoid duplicative liability).

154 *See, e.g.*, Campos v. Ticketmaster Corp., 140 F.3d 1166, 1171 n.4 (8th Cir. 1998). This case involved hundreds of direct purchaser-venues scattered across the nation. *Id.* at 1168–69. Joining these scattered parties as codefendants would have been incredibly difficult, adding substantially to indirect purchaser litigation costs and probably foreclosing suit by the most likely enforcer. *See* AREEDA & HOVENKAMP, *supra* note 3, ¶ 346h. This case has been widely criticized for a variety of reasons, making it a prototypical example of when *not* to adhere to rigid rules.

155 730 F.2d 528 (8th Cir. 1984).

tion.[156] Plaintiffs countered that the statute of limitations had run, making it impossible for direct purchasers to sue and therefore unnecessary that they be joined.[157] The court rejected this claim without explanation, leaving no private enforcers.[158]

Consequently, future indirect purchasers who patiently endure antitrust harm while the supposedly more effective enforcer fails to act cannot sue even the day before the statute of limitations runs so long as there is *any* possibility that a horizontal conspiracy may subsequently (in the next day?) be alleged. This would presumably hold even if the indirect purchaser files suit on condition that direct purchaser suits filed before the statute of limitations has run must be allowed to proceed first. The result is that *no one* is left to sue, promoting the exact opposite result *Illinois Brick* ostensibly intended.[159]

Another error made by courts that rigidly apply *Illinois Brick* occurs when a direct and indirect purchaser both seek recovery for separable damages. In *Link* and *Howard Hess Dental Laboratories, Inc. v. Dentsply International, Inc.*,[160] for example, the courts could have assuaged concerns about duplicative liability by identifying the exact damages each party sought rather than requiring joinder, which served no additional purpose.[161] In both cases, the manufacturer "forced" an exclusive dealing arrangement on the wholesaler. Indirect purchaser claims based on an overcharge resulting from the manufacturer's ability to increase the price for its own products to the wholesalers should be dismissed. The indirect purchasers also lost the ability to purchase the products that would have been sold by the manufacturer's competitors to the wholesalers absent the agreement. Calculating the harm caused by this lost opportunity does *not* apportion passed-on overcharges, and thus is not barred by *Illinois Brick*.[162] Consequently, even if the indirect purchaser recovered for these damages *and* the direct purchaser subsequently recovered by showing it lost profits as a result of lost sales volume in more cheaply acquired parts, the recovery would *not* be duplicative, as the harm was suffered

156 *Id.* at 531.

157 *Id.* at 532.

158 *Id.*

159 In *Midwest Milk*, there were other plaintiffs, but that is no guarantee that the portion of the damages attributable to the direct purchaser and dismissed plaintiff would ever be recovered. *See id.* at 533.

160 424 F.3d 363 (3d Cir. 2005).

161 *See id.* at 381; Link v. Mercedes-Benz N. Am., Inc., 788 F.2d 918, 929 (3d Cir. 1986).

162 No other parties at the manufacturer's level were mentioned. *Howard Hess Dental*, 424 F.3d at 381; *Link*, 788 F.2d at 929.

by both, not passed from one to the next.[163] Areeda and Hovenkamp discuss this error in *Howard Hess Dental* in great detail:

> The court also concluded that the [indirect purchasers] could not recover damages for lost profits that they might have made had they been able to sell the [products] of rivals but for the exclusive dealing. . . . [T]his confuses two different situations . . . . In this case . . . the impact of the exclusive dealing was to deny the plaintiffs the right to sell the products of *the defendant's rivals.* This loss in no way relates to the overcharge damages and would not constitute duplicative recovery.
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> [I]n [*Howard Hess Dental*] the claim was exclusive dealing. . . . *Any overcharge measure of damages would not provide any compensation at all for the loss of . . . sales of the rivals' products.*[164]

Applied in every case, denial of indirect purchaser recovery could immunize violators from liability for at least a portion of the damages they cause. Requiring joinder of the coconspirator exacerbates this possibility, immunizing some defendants unnecessarily who arrange vertical conspiracies and provide direct purchasers with sufficient benefit from the conspiracy (by giving favorable deals or rebates, for example) to convince them not to sue.[165]

These misapplications of *Illinois Brick* flow from treating *Illinois Brick* as a standing rule, which leads some commentators to erroneously see damage theories as distinctions without a difference.[166] *Illinois Brick* is a theory of damages, not a standing rule,[167] and if indirect purchasers are *categorically* denied standing rather than possibly pre-

163 *See Link*, 788 F.2d at 932 n.12.

164 AREEDA & HOVENKAMP, *supra* note 3, ¶ 346h (second emphasis added).

165 *Lowell v. Am. Cyanamid Co.*, 177 F.3d 1228 (11th Cir. 1999), correctly recognizes this and asserts that in vertical conspiracy cases the direct purchaser is never entitled to a portion of the overcharge, and the coconspirator exception should therefore apply regardless of joinder. *Id.* at 1231. *Midwest Milk* required joinder given its concern that the agreement may have actually been horizontal, in which case the direct purchaser would have been overcharged. *See Midwest Milk*, 730 F.2d at 531. The court in *Link* should have applied *Lowell*'s rule but instead applied *Midwest Milk*'s even though there was no risk of re-characterizing the agreement as horizontal. *Link*, 788 F.2d at 933.

166 *See* Blair & Harrison, *supra* note 5, at 20–21 (noting that Judge Posner sees the rule as a theory of damages whereas Judge O'Scannlain sees the rule as a standing limitation).

167 *Illinois Brick* explicitly stated that "direct purchasers [are] injured to the full extent of the overcharge paid by them." Ill. Brick Co. v. Illinois, 431 U.S. 720, 746 (1977). *AGC* is the appropriate standing test, and it is quite different from *Illinois Brick.* Moreover, if *Illinois Brick* were a standing rule, it would not allow suits for injunctions, but being a damage theory, such suits are approved in every circuit to address the issue. *See* Areeda & Hovenkamp, *supra* note 3, ¶ 346d.

vailing based on *AGC*—which is the general antitrust standing test—or prevailing where their damage theory is distinct from the direct purchaser's, then an indirect purchaser may be dismissed where the indirect purchaser has suffered damages that will never be remedied, even if the direct purchaser sues.[168]

Yet another possible mechanism to assuage concerns that granting indirect purchaser remedies will lead to duplicative liability if the direct purchaser subsequently sues is *in pari delicto*—an equitable defense against parties who attempt to sue for damages that they had a role in causing.[169] If an indirect purchaser seeking overcharge damages can allege sufficient facts to show that the direct purchaser will be barred from suing the same defendant due to its "involve[ment] in a conspiracy at a requisite level," a court may be satisfied that even if the direct purchaser sues, the defendant has an adequate defense against duplicative liability.[170] In *Howard Hess Dental v. Dentsply*, the court notes that "every Court of Appeals that has decided the issue" has recognized the doctrine.[171] The court hesitated to fully support the doctrine, however, noting that when the Supreme Court was faced with a choice between deterrence and equities, it sided with deterrence.[172]

Counter-intuitively, *in pari delicto* is a *pro-deterrent* defense in this context. Unless defendants can use the defense as a shield against future duplicative liability, courts in the first case which has already been brought will be forced to dismiss in favor of a future action which may never come. Courts should not fear awarding indirect purchaser damages on the assumption that the defense will prevent duplicative liability: if a court awards damages on this basis, while not bound by the decision, future courts would almost certainly respect

168 *See* Seth E. Miller, Comment, *Seeing Over the Brick Wall: Limiting the* Illinois Brick *Indirect Purchaser Rule and Looking at Antitrust Standing in* Campos v. Ticketmaster Corp. *Through a New Lens*, 32 FLA. ST. U. L. REV. 197, 221–22 (2004) (criticizing Posner as providing "a detour around the indirect purchaser doctrine" that "require[s] courts to take part in a similar, and sometimes difficult, damage calculation"). Like Blair & Harrison, Miller is pointing out the inconsistencies in *Illinois Brick*, a critique which is well-taken. So long as *Illinois Brick* remains good law, however, it is critical that courts honestly apply the law to minimize the damage it does to antitrust victims.

169 *See, e.g.*, Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc., 424 F.3d 363, 381 n.17, 382 (3d Cir. 2005). Other courts have termed this the "complete involvement defenses." *See* Wallach v. Eaton Corp., 2011 WL 4527313 (D. Del. 2011) (denying defendant's motion to dismiss despite plaintiff's position as indirect purchaser, recognizing the complete involvement defense).

170 *Howard Hess Dental*, 424 F.3d at 382.

171 *Id.* (noting that at least four circuits have recognized the defense).

172 *Id.* at 382–83.

that decision by denying direct purchaser recovery. With deterrence already assured by the indirect purchaser's suit, the only concern is equities, and since *in pari delicto* operated to subject the defendant to liability in the first place, it would be extremely inequitable to deny the defense and allow duplicative recovery. This has an additional deterrent benefit; it encourages direct purchasers to quickly bring enforcement actions against upstream violators. Whoever sues first has deterrence on their side, and the Court has already announced that *in pari delicto* will not bar suits that decrease deterrence; thus if the direct purchaser hopes to avoid an *in pari delicto* defense against its claim, the smart move is to sue early, which may be the only way to avoid the defense with dirty hands. If direct purchasers wait, however, and an indirect purchaser recovers, then equities and deterrence fall against the late-arriving direct purchaser.[173]

Ultimately, it is difficult to argue that *Illinois Brick*, a rule designed to promote deterrence, would truly countenance placing the *only* deterrent cause of action in the hands of a coconspirator. Courts recognize this in principle, but they refuse to grant the exception if there is a slight chance of duplicative liability, even if there is far greater chance of no liability.[174] They are correct to seek assurances that the alleged coconspirator is truly involved, rather than a slow-to-enforce victim. But there is no need to require absolute certainty. Even if the direct purchaser does choose to sue—which is unlikely given the high probability that doing so will expose its own misdeeds—the results of duplicative liability are minimal. The direct purchaser's incentive to enforce has, if anything, increased, and apportionment need not be done (the indirect purchaser can collect the entire award). The only remaining concern is duplicative liability, which can be completely avoided using any of the mechanisms discussed. If *any* of these apply, the coconspirator exception should be granted. Even if none does, a small chance of duplicative liability should not outweigh a far greater chance of no liability.

Some courts dangerously suggest that refusing to grant indirect purchaser exceptions absent legal certainty of avoiding duplicative liability actually promotes deterrence. *Howard Hess Dental* provides a clear example:

> *Illinois Brick*'s third policy concern—risk of inefficient enforcement . . .—cuts against the unlimited exception [where an exception is granted even if the direct purchaser is not legally barred from bringing subsequent action]. . . . Under the unlimited excep-

173 *See id.* at 383.

174 *Midwest Milk* is perhaps the clearest example of this.

> tion . . . their recovery would be diluted and their incentive to sue would decrease.[175]

It is unclear why this would necessarily dilute the direct purchaser's incentive to sue. It is just as likely that whoever recovers would receive the full award to avoid apportionment concerns. Even assuming that the indirect purchaser's award would be carved out of the direct purchaser's award, the court's argument rests on the unsupportable assumption that the direct purchaser, a coconspirator in an illegal act, is the most efficient enforcer.[176] Common sense should suffice to disprove that notion: an illegal gambler makes for an unreliable legal enforcer against his bookmaker. Once the plaintiff shows that the direct purchasers are sufficiently involved to make them *either* unlikely *or* unable to sue, using the mechanisms here or others that may persuade the court,[177] there is little reason to fear duplicative liability. A slight chance of multiple liability pales in comparison to the alternative: no liability. In *ARC*,[178] the Court held that creating a slight risk of duplicative liability in order to promote deterrence and compensation was consistent with Congress's broader purposes and did nothing to undermine congressional intent. The exact same argument supports broad recognition of the coconspirator exception.

D. The Defendant Control Exception

Where the defendant owns or controls the direct purchaser,[179] exceptions are even more necessary: "[T]o conclude otherwise would

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175 *Howard Hess Dental*, 424 F.3d at 381.

176 If we assume *Illinois Brick* was generally correct, then direct purchasers might have, for example, a thirty percent chance of suing while indirect purchasers have only a fifteen percent chance. If the direct purchaser's desire to hide its role in the conspiracy decreases its chance of suing to ten percent (which seems high, but any number below fifteen percent proves the point), discussion of diluting that award becomes irrelevant, and greater harm is done to enforcement by denying the indirect purchaser a remedy than by diluting the direct purchaser's award.

177 Since duplicative liability is the defendant's concern, another plausible possibility involves allowing the indirect purchaser to sue if it alleges the direct purchaser was a coconspirator and requiring the defendant to join the direct purchaser as a necessary party.

178 *See supra* Part II.B.

179 This is a different version of the control exception discussed above where the direct and indirect purchaser form a single entity. *See supra* Part III.B (discussing an exception where the direct purchaser is owned or controlled by its "customers"); *see also In re* Chicken Antitrust Litig., 669 F.2d 228, 229 (5th Cir. 1982) (recognizing the exception); *In re* Mid-Atl. Toyota Antitrust Litig., 516 F. Supp. 1287, 1292 (D. Md. 1981) (recognizing that it is the "unanimous view" of lower courts to grant this exception); *In re* Sugar Indus. Antitrust Litig., 579 F.2d 13, 18–19 (3d Cir. 1978) (recogniz-

effectively insulate the parent from liability through the . . . creation of, and sales to, a subsidiary."[180] Many of the factors supporting a coconspirator exception militate in favor of this form of the control exception, most notably, the small risk of duplicative liability offset by the larger risk of no liability. Some courts, most prominently the Ninth Circuit, have recognized that a slight risk of duplicative recovery is a small price to pay for better enforcement. After authorizing indirect purchaser recovery, the court wrote:

> [There is] some small chance that such a subsidiary or division might wish to sue. . . . The parent might be under government pressure or discover that the conspiracy is not sufficiently profitable; and if a subsidiary has outside shareholders, a derivative suit might be a possibility. . . . [M]ultiple liability might lurk.
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> [T]he chance of a direct-purchaser suit is so small, [that] the correspondingly small risk of multiple recovery does not disturb us. *This is especially so when our only alternative is to effectively immunize the transactions here from private antitrust liability.*[181]

Every rationale for *Illinois Brick* vanishes if the direct purchaser is sufficiently owned or controlled by the violator: apportionment is irrelevant when direct purchasers are unwilling to sue (or if courts accept a small risk of duplicative liability);[182] dilution is irrelevant for the same reasons discussed above;[183] deterrence will be underserved unless the only likely plaintiffs, indirect purchasers, are allowed to sue; and compensation to indirect purchasers is underserved. By contrast, the *only* adverse consequence of granting an indirect award is creating a slight risk of duplicative liability, and *Royal Printing* explains why this is acceptable, making the control exception fertile ground for expansion.

Yet many courts reach the opposite conclusion, narrowing the exception based on misstated policy implications. *Howard Hess Dental* is again a good example. The plaintiffs argued that the defendant

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ing the exception); Mid-West Paper Prods. Co. v. Cont'l Grp., Inc., 596 F.2d 573, 578 n.8 (3d Cir. 1979) (same); AREEDA & HOVENKAMP, *supra* note 3, ¶ 346f (citing Royal Printing Co. v. Kimberly-Clark Corp., 621 F.2d 323, 326 (9th Cir. 1980)) (same).

180 BAUER, *supra* note 140, at 80 (citing *Sugar Industries*, 579 F.2d at 16–19).

181 *Royal Printing*, 621 F.2d at 326 (emphasis added) (footnote omitted).

182 As *Royal Printing* noted, the indirect purchaser "cannot sue . . . only for the portion of the overcharge that was passed on to it. . . . The only alternatives are to allow [it] to sue_._._. for the entire amount of the overcharge . . . or not to allow [it] to sue. [The latter] would be intolerable." *Id.* at 327.

183 *See supra* note 173 and accompanying text.

exerted "virtual control over its . . . dealers."[184] In response, the court states, "We have applied the control exception only when the initial seller owned the direct purchaser."[185] This cuts the exception in half by removing the word "control" from the equation.[186] Before rejecting the exception based purely on plaintiff's lack of ownership, the court recognizes that other decisions, such as *Jewish Hospital Ass'n of Louisville, Kentucky, Inc. v. Stewart Mechanical Enterprises Inc.*,[187] have expanded the exception "beyond a parent-subsidiary relationship," to cases where there is a "'functional economic or other unity between the direct purchaser and . . . the defendant . . . [such] that there effectively has been only one sale.'"[188] The court then lists as possible signs of control, "interlocking directorates, minority stock ownership, loan agreements that subject the wholesalers to manufacturers' operating control, [or] trust agreements.'"[189]

In applying this standard, the court states, "Nothing about [the defendant's] 'control' over its dealers would *prevent* the dealers from suing . . . thus creating a *risk* of duplicative liability[.]"[190] As with the coconspirator exception, *Howard Hess Dental* follows many courts in requiring plaintiffs to show that the direct purchaser is *prevented* from suing to completely eliminate even a risk of duplicative liability.[191] The court offers no explanation for rejecting the logic of *Royal Printing*. Further, the court assumes that apportionment, rather than duplicative liability, would be the only way to allow indirect purchaser recovery, which is not the case.[192] Worst of all, the court states, "[P]ermitting Plaintiffs to sue for damages could potentially lead to

184 Howard Hess Dental Lab., Inc. v. Dentsply Int'l. Inc., 424 F.3d 363, 371 (3d Cir. 2005).

185 *Id.* (citing *Sugar Industries*, 579 F.2d at 18–19, n.8).

186 *But see* Fisher v. Wattles, 639 F. Supp. 7, 9 (M.D. Pa. 1985) (arguing that the case cited in *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 n.16 (1977) to support the control exception, *Perkins v. Standard Oil Co.*, 395 U.S. 642, 648 (1969), involved control by way of majority stock ownership, thus limiting the "control exception" to this context).

187 628 F.2d 971 (6th Cir. 1980).

188 *Howard Hess Dental*, 424 F.3d at 372 (quoting *Jewish Hosp.*, 628 F.2d at 975 (6th Cir. 1980)).

189 *Id.* (alteration in original) (citing *In re* Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 605 (7th Cir. 1997)).

190 *Id.* (emphases added).

191 The court was correct in this case because the direct purchasers were already involved in the litigation, making this a poor case for an exception. Nevertheless, the court's overly-broad language provides dangerous precedent.

192 *Compare Howard Hess Dental*, 424 F.3d at 372, *with supra* note 181 (recognizing that apportionment can and probably should be avoided, accepting duplicative recovery instead).

inefficient enforcement . . . because . . . recovery . . . would be diluted . . . thereby decreasing the dealers' incentive to sue."[193] As with the coconspirator exception, this ignores the obvious. When an upstream defendant effectively controls the direct purchaser, the indirect purchaser is a far more likely enforcer, and if this is true, then preserving the award for the direct purchaser reduces enforcement by eliminating a more likely enforcer. Far worse than dilution, misapplication of *Illinois Brick* risks complete immunization. If there is a high probability, rather than a legal certainty, that *Illinois Brick* might in fact, if not in law, immunize violators, the purposes of antitrust law align to compel an exception.

Illinois Brick recognized an ownership or control exception, and cases like *Howard Hess Dental*, *Fisher*, and *Jewish Hospital* essentially condense the exception to cover ownership. The control necessary to completely undermine *Illinois Brick* can be exerted in many ways other than ownership, however. *Royal Printing* recognized that "[e]ven if the pricing decisions of such a subsidiary . . . are necessarily determined by market forces, *its litigation decisions* will usually be subject to parental control."[194] When litigation decisions are controlled, the defendant is effectively immunized. In other cases, control over price is enough to justify an exception, as in *Howard Hess Dental*:

> [T]he relevant control here is the control of resale *prices*, not control of the intermediaries' other operations. . . . [C]ontrol could mean something other than ownership. The issue is computation of pass-on, which is not necessary when the upstream firm controls the intermediaries' prices.[195]

In other words, if prices are sufficiently controlled, the indirect purchaser's damage theory may escape the reach of *Illinois Brick*. Thus, control justifying an exception appears in varied contexts and is not easily amenable to categorical rules. Applying rigid restrictions before granting exceptions may cause courts to miss which control is really relevant to the plaintiff's claim. Courts should instead focus on the policy implications of allowing the exception rather than attempting to fit unique cases into prearranged categories.

In *Kloth v. Microsoft Corp.*,[196] for example, the court stated, "This exception . . . appl[ies] only when the . . . defendant has either 'functional unity' with the [direct purchasers] or sufficient ownership . . .

193 *Howard Hess Dental*, 424 F.3d at 372.

194 *Royal Printing Co. v. Kimberly-Clark Corp.*, 621 F.2d 323, 326 (9th Cir. 1980) (emphasis added) (footnote omitted).

195 AREEDA & HOVENKAMP, *supra* note 3, ¶ 346h.

196 444 F.3d 312 (4th Cir. 2006).

or control . . . to set prices[.]"[197] *Royal Printing* notes the importance of control over litigation decisions, which is the most relevant control when deciding who the superior enforcer is. Litigation decisions, in turn, can be controlled by many factors other than ownership or those listed in *Howard Hess Dental*,[198] including "fear of disrupting relations with their suppliers."[199]

De facto control over litigation decisions does just as much to undermine *Illinois Brick* as does parental control over the same decisions. The existence of violator control over the relevant decisions undermines the rule; it makes no difference how the violator exerts that control. If suing a supplier is tantamount to economic suicide, the direct purchaser cannot and should not be trusted with the sole private cause of action, and if common sense does not compel this conclusion, the absence of direct purchasers in the Microsoft antitrust actions throughout the last decade provides ample evidence.[200] Thus, *Kloth* counsels violators to use strong-arm tactics and economic pressure points against direct purchasers to force them not to sue. This creates de facto immunity because this kind of control is sufficient to persuade a direct purchaser not to sue but insufficient under *Kloth* to create an exception.

Preventing a small risk of duplicative liability[201] does not justify creating a large risk of immunity. Throughout the coconspirator and control exception cases, the true concern appears to be that courts will misjudge when the exceptions should apply, and their response is simply to hold that it virtually never applies. Here is where these courts err. The consequences of misjudgment, measured against the purposes of antitrust law, pale in comparison to the consequences of leaving the only action to a party who will never sue. If the latter

197 *Id.* at 321.

198 *See supra* note 189 and accompanying text.

199 Ill. Brick Co. v. Illinois, 431 U.S. 720, 746 (1977) (citing *In re* W. Liquid Asphalt Cases, 487 F.2d 191, 198 (9th Cir. 1973)).

200 *See* Patterson, *supra* note 4, 378–82 (2001) ("Microsoft's direct purchasers (e.g., IBM, Compaq, CompUSA, and Dell) are conspicuously absent from court dockets. . . . Microsoft exerts incredible control over Windows' use. . . . [D]irect purchasers are unlikely to bring antitrust damage suits because no commercially viable alternative to the Windows OS exist[s]. . . . [Companies] like Compaq and IBM, who rely on Windows . . . acquiesce to Microsoft's strong-arm tactics because they fear suing their sole source for operating systems. . . . [C]ompanies that have chosen not to acquiesce have incurred financial injuries.").

201 This assumes one would choose duplicative liability over apportionment. Apportionment would probably be superior to allowing violators to effectively immunize themselves, though this is a closer call given the dilutive effect of apportionment on incentives to sue.

occurs, there is a guarantee of under-enforcement and under-compensation—undermining both of the twin aims of antitrust law. As it stands now, a miniscule risk of a lesser concern trumps a far greater risk of a far greater concern. If *ARC* made clear that risk of duplicative liability is an acceptable cost to promote these twin aims in some circumstances, surely this situation is just such a circumstance.

Freeman v. San Diego Ass'n of Realtors,[202] offers support for expanding exceptions in a new way. The court writes, "Indirect purchasers can sue for damages if there is *no realistic possibility* that the direct purchaser will sue."[203] A no-realistic-possibility standard would bring back the deterrent effect *Illinois Brick* originally sought to produce, recognizing that direct purchasers are not always the most likely enforcers, even if they are not legally precluded from suing. It remains an open question how far courts may stray from the legally-prohibited standard when applying the no-realistic-possibility standard,[204] but this language at least opens the door for indirect purchaser suits in cases where there would otherwise be very little hope of deterrence or compensation by any other means. Defining the outer boundaries of this approach can be left for another time, but for now, there is a great need for this kind of broad, flexible language allowing courts the freedom to ensure that *Illinois Brick* does not stand as an obstacle to its own purposes.

CONCLUSION

Antitrust laws were created for two basic purposes: to deter antitrust violations and to compensate antitrust victims. *Illinois Brick* denied compensation to indirect purchasers ostensibly in an effort (1) to promote deterrence by preserving an undiluted damage award for the most likely enforcer, (2) to avoid complicating already complex antitrust litigation with insurmountably difficult apportionment calculations, and (3) to avoid duplicative liability. The rule announced in *Illinois Brick* was flawed from the outset by essentially rejecting one of the twin aims of antitrust law. As for the other, though it claimed to

202 322 F.3d 1133 (9th Cir.), *cert. denied*, 540 U.S. 940 (2003).

203 *Id.* at 1145–46 (emphasis added).

204 *Id.* at 1146. Under the facts of *Freeman*, the exception could have been granted based on control of the board of directors, essentially an ownership issue. In *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042 (9th Cir. 2008), the Ninth Circuit recognized the validity of *Freeman* but denied the exception because "appellants failed to allege any facts establishing that there is no realistic possibility [the direct purchaser] will not sue." *Id.* at 1050. *See also* AREEDA & HOVENKAMP, *supra* note 3, ¶ 346f ("[T]he exception that the Ninth Circuit purported to recognize is not yet one acknowledged by the Supreme Court.").

promote this goal, it could have done more by allowing asymmetrical theories of passed on overcharge damages, preserving the direct purchaser's incentive while allowing indirect purchaser suits if those plaintiffs were willing to take on complex litigation. It is questionable whether *Illinois Brick* was even correct in declaring direct purchasers to be more likely enforcers in the general case. Subsequent developments weakened this already unstable foundation, cast doubt on the validity of fears of complex apportionment, and showed that the concerns *Illinois Brick* sought to avoid are both overstated and exacerbated by the rule itself.

Left with at best weak policy support, lower courts should listen attentively to indirect purchasers seeking exceptions to the rule in cases where the rule's policy support evaporates. Instead, many courts apply rigid conditions that allow exceptions only if plaintiffs happen to meet certain criteria that are poor metrics of the rule's success in promoting its policy goals. Ultimately, a rule justified in part by its deterrent merits often bars the most efficient enforcer from suing, unless that enforcer can prove to a legal certainty that it is the only enforcer, and in some cases even that is not enough. Fortunately, some courts have taken a more flexible approach, recognizing that the policy concerns raised in *Illinois Brick* can be addressed by a variety of mechanisms that do not lend themselves to rigid categorization or application. Continuing to chip away at the *Illinois Brick* wall when plaintiffs can show—not necessarily to a legal certainty but to a high probability—that the rule's own policies are substantially undermined is increasingly important as deterrence and compensation are increasingly undermined in other ways.