Reexamining the Role of *Illinois Brick* in Modern Antitrust Standing Analysis

Jeffrey L. Harrison  
*University of Florida Levin College of Law, harrisonj@law.ufl.edu*

Follow this and additional works at: [http://scholarship.law.ufl.edu/facultypub](http://scholarship.law.ufl.edu/facultypub)

Part of the [Antitrust and Trade Regulation Commons](http://scholarship.law.ufl.edu/facultypub)

**Recommended Citation**  
Reexamining the Role of *Illinois Brick* in Modern Antitrust Standing Analysis

Roger D. Blair*
Jeffrey L. Harrison**

_Introduction_

The Supreme Court’s 1977 decision in *Illinois Brick Co. v. Illinois* was one of several opinions of that era that defined, and ultimately limited, the scope of private enforcement of the antitrust laws. In *Illinois Brick*, the Court held that indirect purchasers of goods and services from firms engaged in price fixing may not pursue antitrust actions for damages against those firms engaged in the price fixing.

The Court’s holding in *Illinois Brick* seemed to rest on three complementary rationales. First, suits by indirect purchasers would be too unwieldy because each downstream purchaser would attempt to show the level of damage it suffered as a result of a remote price-fixing scheme. Second, the Court decided that deterrence, rather than compensation, was the primary purpose of antitrust damages. Thus, they allowed direct purchasers to collect the full amount of the overcharge, even if this exceeded the actual harm suffered by that purchaser. Finally, because the Court already had barred the use of the pass-on defense in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, the *Illinois Brick* Court reasoned that it would have to either reverse *Hanover Shoe* or prohibit the offensive use of the pass-on theory to avoid multiple liability. It opted for the latter. Consequently, direct purchasers can collect all overcharges even if those firms have passed a portion of the overcharge on to indirect purchasers. Scholars roundly debated the issue of indirect

---

* Huber Hurst Professor of Economics, The University of Florida.
** Chesterfield Smith Professor of Law, The University of Florida. We would like to thank the Warrington College of Business Administration and the College of Law at the University of Florida for financial support. We also appreciate the research efforts of William Shilling and David Cayse.

3 See *Illinois Brick*, 431 U.S. at 720. This description narrowly states the holding. Because the case actually involved price fixing, this statement is technically accurate, but it is probably also true that *Illinois Brick* bars recovery to any indirect plaintiff that seeks a measure of damages equal to a price overcharge. For example, *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), which prohibited a defense that plaintiffs had passed on a portion of the overcharge that they were claiming as damages, was a monopolization case.
4 See *Illinois Brick*, 431 U.S. at 745.
5 See id. at 746.
6 See id. at 736.
7 See id.
8 See id. at 735.
purchaser "standing" at the time of the Illinois Brick decision, but the Court's position complemented its prior holding in Hanover Shoe, which precluded defendants from lowering damages by demonstrating that direct purchasers had passed part of the overcharge on to their own customers. Illinois Brick continues to require periodic interpretations by the Supreme Court and lower courts to refine what is meant by an indirect purchaser and to define possible exceptions.

If viewed in the context of the simplest of price-fixing cases, and assuming that antitrust law is solely a matter for federal regulation, Illinois Brick makes good sense. To continue assessing Illinois Brick by reference to how it works in the bare-bones price-fixing context, however, is too narrow a view. First, the holding itself has not been confined to price-fixing cases. Second, and more importantly, since 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. A more fully developed notion of antitrust standing may render Illinois Brick expendable. Third, the Supreme Court has ruled that states may enact statutes which allow indirect purchasers to recover. As antitrust laws differ from state to state, the level of a defendant's exposure may be a function of geography rather than the extent of the competitive harm caused. Consequently, the level of deterrence varies just as fortuitously. Finally, the characterization of a case through imaginative pleading may enable a plaintiff to escape the limitation of Illinois Brick even

9 Although Illinois Brick is ultimately about "standing" in a general sense, the Supreme Court, since that decision, has developed the concept of "antitrust standing." See infra text accompanying notes 136-153.


13 See, e.g., Lucas Automotive Eng'g, Inc. v. Bridgestone/Firestone, Inc., 140 F.3d 1228, 1234 (9th Cir. 1998); Campos v. Ticketmaster Corp., 140 F.3d 1166, 1169 (8th Cir. 1998); In re Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1164 (3d Cir. 1993); Jewish Hosp. Ass'n v. Stewart Mechanical Enters., Inc., 628 F.2d 971, 973 (6th Cir. 1980).

14 See, e.g., Utilicorp, 497 U.S. at 207 (refusing to create an exception to the indirect purchaser rule to enable a customer of a public utility to sue the utility's suppliers).

15 See, e.g., Campos, 140 F.3d at 1169 (applying the test for an alleged violation of section 4 of the Clayton Act).

16 See infra text accompanying notes 136-153.

17 Under a fully developed theory of antitrust standing, it may be possible that some indirect purchasers would be entitled to damages while others would not.

When it would appear to apply. Because of these factors, it has become difficult to square *Illinois Brick* with a consistent and predictable scheme of antitrust enforcement.

This Article argues that it is time for either the Court or Congress to reexamine *Illinois Brick* for the purpose of reconciling it with more general principles of antitrust standing. The overall goals of such an endeavor would be to ensure consistent treatment of similarly situated potential plaintiffs and to rationalize private antitrust enforcement. Section II briefly reviews the history of *Illinois Brick* and Section III examines the relevant post-*Illinois Brick* developments. This discussion suggests that *Illinois Brick* is a product of antitrust happenstance and is sometimes applied inconsistently with its underlying rationales or with modern antitrust standing theory. Section III also recognizes that *Illinois Brick*'s application can vary from circuit to circuit. For example, in some circuits, *Illinois Brick* seems to be used to determine the type of damage measure that can be employed; in other circuits, it seems to be a more general standard for what kinds of plaintiffs may recover. Perhaps more importantly, *Illinois Brick*, although intended to make antitrust damage determination more manageable, actually forces plaintiffs into damage proofs that are more complex than basic overcharge calculations.

This examination sets the stage for Section IV, which analyzes a number of possible solutions to problems surrounding *Illinois Brick*. One solution would be to overturn both *Illinois Brick* and *Hanover Shoe*, thereby leaving the indirect purchaser issue to standard antitrust standing analysis. Overturning these two decisions may seem to raise some of the complexities that *Illinois Brick* sought to avoid, but this Article suggests that these complexities have been overstated, at least relative to typical damage calculations. Another solution would be to change the type of damages routinely granted in price-fixing cases. Adopting lost profits as the appropriate measure of damages for all plaintiffs would eliminate some of the problems *Illinois Brick* sought to address. Finally, a more modest response would be to redefine the limits of *Illinois Brick* in order to create greater consistency in the lower courts. The objective of this approach would be to clarify whether *Illinois Brick* determines the acceptable measure of damages in particular cases or whether it determines the types of plaintiffs who may recover damages. Admittedly, none of these solutions is entirely satisfactory, but flexibility and the consequent lack of predictability seem endemic to what is essentially "common law." Nevertheless, each of these proposals has the potential to increase the consistency of private enforcement.

---

19 For example, price fixing could also be characterized as a boycott, thus escaping *Illinois Brick*'s limitation on price-fixing suits by indirect purchasers. See *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 606 (7th Cir. 1997).

20 See infra text accompanying notes 154-211.

21 See infra text accompanying notes 167-170.
I. The Evolution of Illinois Brick

A. Early History

One can glean a greater understanding of Illinois Brick's awkward fit in current antitrust law by examining the decision's genesis. The issues of who and how much one may recover in an antitrust action arise from section 4 of the Clayton Act, the pertinent parts of which provide that "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained." Of course, antitrust scholars now know that "any person" really means "some persons" and that "damages . . . sustained" is hardly subject to concrete definition.

1. The "Reasonable Certainty" Standard

Part of the explanation for the rule of Illinois Brick can be traced to the efforts by courts, soon after passage of the Sherman Act, to continue to apply common law notions of when one was entitled to damages. One of the more important rules for the recovery of damages was that the amount of damage must be shown with "reasonable certainty." An early example of this proposition was Central Coal & Coke Co. v. Hartman, in which the plaintiff, once a participant in a price-fixing "coal club" of coal wholesalers, withdrew from the club only to find that the remaining members would not sell him coal at any price other than the fixed price available to consumers. The plaintiff could have claimed that he was the victim of a boycott or price fixing. Additionally, in theory, damages could have been defined in terms of lost profits or the overcharge. The Eighth Circuit rejected the plaintiff's damage claim for lost profits and applied reasoning common in that era in contract damages claims: "expected profits of a commercial business are too remote, speculative, and uncertain to warrant a judgment for their loss."

The attitude courts took toward antitrust claims gradually changed. Courts seemed to be swayed by the notion that a rigid approach to damages permitted "wrong-doers" to escape the consequences of their actions. Perhaps the best early example of this was Eastman Kodak Co. v. Southern Photo Materials Co. The plaintiff, Southern Photo, purchased photographic

23 See Central Coal & Coke Co. v. Hartman, 111 F. 96, 98 (8th Cir. 1901).
24 Id. at 96.
25 See id. at 97. The plaintiff could have described the conduct of the defendants as either price fixing or a group boycott—or both. Although not an indirect purchaser, if the plaintiff had been, these options might have created an avenue for avoiding Illinois Brick. See infra text accompanying notes 122-125.
26 Central Coal, 111 F. at 98. Although cited as an example of the difficulties of recovering lost profits, it is not clear that the plaintiff presented enough evidence to survive even a less exacting standard.
27 273 U.S. 359, 379 (1927). Five years earlier in Keogh v. Chicago & Northwestern Railway Co., 260 U.S. 156 (1922), the Supreme Court also considered the standard to be applied in a lost profits case involving antitrust laws and reasoned that recovery could be allowed if damages were based on "facts from which their existence is logically and legally inferable." Keogh, 260 U.S. at 158.
supplies from Kodak and sold them to consumers.\textsuperscript{28} Southern Photo claimed that Kodak had violated antitrust laws by acquiring Southern Photo's competitors and refusing to make photographic supplies available to Southern Photo at prices reflecting a dealer's discount.\textsuperscript{29} Instead, Kodak charged Southern Photo the same prices it charged in its retail stores.\textsuperscript{30}

The damage claim was for the profits lost due to Southern Photo's inability to buy Kodak's products at the discounted prices.\textsuperscript{31} In calculating damages, the plaintiff relied on a four-year period before the violation to estimate its lost sales and then subtracted its operating costs from the gross revenue it would have earned.\textsuperscript{32} The defendant, citing \textit{Hartman} for the proposition that proof of loss must be shown with reasonable certainty, argued that the damages were "purely speculative."\textsuperscript{33} The Supreme Court agreed with the Fifth Circuit that "'[d]amages are not rendered uncertain because they cannot be calculated with absolute exactness. It is sufficient if a reasonable basis of computation is afforded, although the result be only approximate.'"\textsuperscript{34} The rationale for this approach was that "a defendant whose wrongful conduct has rendered difficult the ascertainmant of the precise damages suffered . . . is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible."\textsuperscript{35} This, of course, makes sense because the wrongdoer has created the need for estimation and the resulting uncertainty.

A more liberal view is found in 1946 in \textit{Bigelow v. RKO Radio Pictures, Inc.},\textsuperscript{36} in which exhibitors of motion pictures claimed that a conspiracy among other exhibitors and distributors denied them access to films. The plaintiffs calculated damages based on lost profits caused by their competitive disadvantage relative to other theaters that had access to the films.\textsuperscript{37} The plaintiffs used two methods to calculate damages; one involved a comparison of their profits with those of a competing theater involved in the conspiracy, and the other compared their profits before the conspiracy with profits after the conspiracy.\textsuperscript{38} In neither case did the plaintiffs account for any of the fac-

\textsuperscript{28} See \textit{Eastman Kodak Co.}, 273 U.S. at 368.
\textsuperscript{29} See id. at 368-69.
\textsuperscript{30} See id. at 369.
\textsuperscript{31} See id.
\textsuperscript{32} See id. at 376.
\textsuperscript{33} See \textit{id.} at 376-78. For a modern analysis of speculative damages, see Roger D. Blair & William H. Page, "\textit{Speculative" Antitrust Damages, 70 Wash. L. Rev. 423 (1995).}
\textsuperscript{34} See \textit{Eastman Kodak Co.}, 273 U.S. at 379 (quoting \textit{Eastman Kodak Co. v. Southern Photo Materials Co.}, 295 F. 98, 102 (5th Cir. 1923), aff'd, 273 U.S. 359 (1927)).
\textsuperscript{35} \textit{Id.} For this proposition, the Court cites \textit{Hetzel v. Baltimore & Ohio Railroad}, 169 U.S. 26, 39 (1898). Whether that case stands for the proposition attributed to it by the \textit{Southern Photo} Court is not obvious. The \textit{Southern Photo} Court describes the problem of permitting the wrong-doer to escape when he or she has rendered the determination of damages more difficult. \textit{Hetzel}, on the other hand, suggests merely that "it does not come with very good grace [for a wrongdoer] to insist upon the most specific and certain proof . . . ." \textit{Hetzel}, 169 U.S. at 38-39.
\textsuperscript{36} 327 U.S. 251 (1946); \textit{see also Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969) (holding that the fact finder may award treble damages based on a reasonable inference).}
\textsuperscript{37} See \textit{Bigelow}, 327 U.S. at 257-58.
\textsuperscript{38} See \textit{id.} The yardstick and "before and after" methodologies remain mainstays of anti-
tors that could have affected profits other than the discriminatory treatment. The Supreme Court, nonetheless, ruled that although a verdict may not be based on mere speculation, a jury may make a "just and reasonable estimate."

2. Acceptance of the Overcharge as the Proper Measure of Damages

Although adherence to the common law requirement of "reasonable certainty" was relaxed, another equally important development also made it easier for some antitrust plaintiffs to recover. This development was the acceptance of the overcharge as the standard measure of damages in price-fixing cases. The overcharge equals the difference between the price paid and the price that would have prevailed "but for" the violation. The Supreme Court apparently first accepted and applied the overcharge measure of damages in Chattanooga Foundry & Pipe Works v. City of Atlanta. In this 1906 case, the City of Atlanta purchased cast iron water pipe for its municipal waterworks from a seller engaged in price fixing. The "damages" could hardly be expressed in terms of lost profits because a municipal waterworks does not earn profits. The Court permitted recovery for "the difference between the price paid and the market or fair price" of the pipe, that is, the difference between the price paid and the price in the absence of the conspiracy. Accordingly, "[the city] was injured in its property, at least, if not in its business of furnishing water, by being led to pay more than the worth of the pipe."

The illegal overcharge measure of damages was clearly the appropriate measure of damages in Chattanooga Foundry. In a not-for-profit undertaking, the cost of providing the service above the cost at which it could have been provided is the actual loss to the provider. In other contexts, however, the overcharge measure does not match up with any conventional measure of damages. The actual harm suffered by the buyer is the profit lost as a result of the overcharge. It is this amount—not the overcharge—that accurately

---

39 These factors would include differences in competition, differences in the costs of operation, changes in demand, changes in business conditions, and other determinants of financial success.
40 Bigelow, 327 U.S. at 264.
41 203 U.S. 390 (1906).
42 See id. at 391.
43 Id. at 396.
44 Id.
45 This is discussed more fully in footnote 48 and Section IV.B., infra.
46 A party paying a higher price for an input or a good has, in theory, three options. First, it can maintain the same resale price. If so, the party will experience a decreased profit on each unit sold. If the party chooses to continue to sell the same quantity, the lost profit and overcharge are the same, but this is an unlikely strategy. Second, the party can attempt to pass the full price increase on to its customers. As prices rise, customers will demand fewer units, and the profit that was made on those units will be lost. Third, if the party is a seller it can, and typically does, raise the price, but not by the full amount of the overcharge. The seller, therefore, loses
compensates the buyer. Moreover, the overcharge is not even equal to the unjust enrichment of the price fixers.

Consequently, following Chattanooga Foundry, courts could have restricted the overcharge measure to cases in which plaintiffs were not attempting to earn a profit and required all other plaintiffs to seek actual compensatory damages. This did not occur and both for-profit and not-for-profit price-fixing victims alike sought the overcharge measure of damages. The availability of this measure of damages was heightened, in part, because of a line of cases decided during the same period concerning the rates charged by railroads in excess of what the Interstate Commerce Commission deemed reasonable. In the leading case, Southern Pacific Co. v. Darnell-Taenzer Lumber Co.,49 shippers asked for reparations equal to the overcharge while the defendant railroads argued that the shippers had passed the overcharge on to their customers. In rejecting this form of the "pass on" defense, Justice Holmes stated that "[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step." The reasoning, he suggested, was that the legal claim accrued at the time the overcharge occurred and that the law "does not inquire into later events."51

Not only was the overcharge measure available to for-profit and not-for-profit plaintiffs, it also was not limited to conventional price-fixing cases. Especially in the period between Chattanooga Foundry and Southern Photo, it was beneficial for any plaintiff to express its damages in terms of an overcharge. For example, Straus v. Victor Talking Machine Co.,53 a 1924 case, seems to fit the fact pattern of what would be viewed, in modern times, as a "terminated dealer" case.54 Macy's, a dealer in Victor's original distribution system, purchased Victor products and resold them to the public.55 Victor decided to convert its former dealers into sales agents. Under this arrangement, the former dealers did not actually purchase and resell Victor prod-

47 It is worthwhile to note that this analysis presupposes the typical model of price fixing by sellers. Price fixing by buyers is also commonplace—for example, bid rigging at auctions—in which case, the measure would be in terms of an "undercharge." For a detailed analysis of monopsony, see Roger D. Blair & Jeffrey L. Harrison, Monopsony: Antitrust Law and Economics (1994).

48 The overcharge to the victim is equal to the quantity purchased multiplied by the difference between the price paid and the price that would have been paid in the absence of the price fixing. This is not equal to the net benefit to the price-fixing firms. Basic economic theory indicates that an increase in price will result in fewer units being sold. Thus, although the price-fixing firms receive the overcharge, it is offset to some degree by the loss in revenue from sales forgone.

49 245 U.S. 531 (1918).

50 See id. at 533.

51 Id.

52 Id. at 534. Precisely where the duty to mitigate damages would fall into this formulation is not clear. See Amanda Kay Esquibel, The Rule of Avoidable Consequences in Antitrust Cases: A Law and Economics Approach, 26 Hofstra L. Rev. 891, 911 (1998).

53 297 F. 791 (2d Cir. 1924).


55 Macy's bought and sold primarily phonograph records.
Because Macy's refused to enter into the new arrangement, Victor refused to provide additional products. Macy's remained in the retail market by obtaining Victor products through other sources, although not at the discounted price it would have enjoyed had it not been terminated as a dealer. The Second Circuit noted that "[t]he constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done." The court further noted that, historically, plaintiffs claiming damages equal to lost profits frequently failed to recover because they could not meet the "reasonable certainty" requirement. In Straus, the plaintiff attempted to avoid that problem by asking for damages equal to the difference between the price it had paid for the products after termination, and the price it would have paid had it not been terminated. In permitting what was, in effect, an overcharge theory, the court essentially accepted a justification based on proximate cause. As in Darnell-Taenzer Lumber Co., from which the Court quoted, the notion seemed to be that the harm initially suffered by the plaintiff was the increase in price. Thus, according to the Second Circuit, plaintiffs "contend . . . for a rule of damage which seeks the proximate cause of damage and the proximate result occasioned by that cause."

By the 1940s, efforts to reconcile the antitrust damage provisions with the common law requirement that lost profits be proven with "reasonable certainty" led to two outcomes: (1) the routine measure of damages in price-fixing cases was the overcharge; and (2) the standard of certainty for the amount of damages in all antitrust cases was relaxed. It is noteworthy that only the second step was necessary for the antitrust laws to overcome the "reasonable certainty" hurdle of the common law. Having taken that step, courts could have required all plaintiffs to estimate actual damages as reflected in reduced profits. In one line of cases—those dealing with price discrimination—this adjustment has occurred. Otherwise, both of these accommodations to the problem of proving damages continue to exist. Therefore, depending on the alleged violation, a plaintiff may recover either actual losses or an amount that is likely to be greatly in excess of actual losses. This creates an obvious imbalance in the incentives to bring private actions.

56 See Straus, 297 F. at 794. The purpose of the change was to enable Victor to control the resale price of its products. This was a result of Dr. Miles Medical Co. v. John D. Park & Sons, 220 U.S. 373 (1911), which held that fixing minimum resale prices was unlawful.
57 See Straus, 297 F. at 795.
58 See id. at 800-01.
59 Id. at 802.
60 See id.
61 See id. at 803.
63 See Straus, 297 F. at 803.
64 Id. The court quoted Justice Holmes for the proposition that "'[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step.'" Id. (quoting Darnell-Taenzer Lumber Co., 245 U.S. at 533).
B. Illinois Brick

The developments designed to ensure that victims of anticompetitive behavior did not go uncompensated have actually limited the extent to which some of those harmed can recover. This outcome can be traced directly to the use of the overcharge measure of damages, and the Supreme Court's decision in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*

*Hanover Shoe* was a private action in the aftermath of the well-known U.S. Justice Department action challenging United Shoe's practice of making its shoe manufacturing machinery available on a lease-only basis. Rather than asking for damages equal to lost profits, Hanover Shoe framed its damage claim in terms of an illegal overcharge. The trial court reasoned that Hanover Shoe would have purchased the machines, if permitted to do so, at a lower cost than the cost of the leases. United Shoe challenged this measure of damages by arguing that Hanover Shoe had passed the overcharge on to its own customers and, thus, suffered no injury. The Court rejected this so-called “pass-on” defense. First, the Court reasoned that recognizing such a defense would render antitrust cases far more complicated. Second, the Court feared that those who ultimately absorbed the overcharge—the consumers—would have so little at stake in the outcome of an antitrust action that a violation might go unchallenged.

---

69 See Hanover Shoe, 392 U.S. at 483-84.
70 See id. at 487.
71 See id. at 487-88.
72 See id. at 488. The Court did carve out an exception for instances in which the overcharged buyer resold under a preexisting cost-plus contract. See id. at 494; see also Herbert Hovenkamp, The Indirect-Purchaser Rule and Cost-Plus Sales, 103 Harv. L. Rev. 1717 (1990). A further exception is suggested in *Illinois Brick* for instances in which “the direct purchaser is owned or controlled by its customer.” Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 n.16 (1977).
73 See Hanover Shoe, 392 U.S. at 493.
74 See id. at 494. Interestingly, it is not entirely clear that the *Hanover Shoe* Court understood the difference between the overcharge measure of damages and lost profits. For example, at one point Justice White, for the Court, reasons that

[i]f in the face of the overcharge the buyer does nothing and absorbs the loss, he is entitled to treble damages . . . . The reason is that he has paid more than he should and his property has been illegally diminished, for had the price paid been lower his profits would have been higher.

*Id.* at 489. Similarly, “[a]s long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows. At whatever price the buyer sells, the price he pays the seller remains illegally high, and his profits would be greater were his costs lower.” *Id.* Perhaps the reasoning of the Court was that even if the buyer passes on the overcharge, there will be a lower profit. As a matter of economic theory, that is almost always the case. Furthermore, if profits are lower, the damage requirement of section 4 is arguably fulfilled. The measure of damages, however, is the overcharge. The problem with this analysis is that section 4 specifically calls for “threefold the damages . . . sustained.” 15 U.S.C. § 15(a) (1994) (emphasis added).
Illinois Brick addressed an issue complementary to that addressed in Hanover Shoe. As in Chattanooga Foundry, Illinois Brick involved purchases by a governmental entity.75 In this case, the State of Illinois claimed that it had made purchases from contractors who were customers of price-fixing manufacturers of concrete blocks.76 The issue was whether these “indirect purchasers” could collect damages under section 4 of the Clayton Act.77

Although the plaintiffs urged the Court to limit Hanover Shoe to cases in which capital goods were the price-fixed goods, the Court adopted the view that ruling in favor of indirect purchasers would require overruling Hanover Shoe.78 The Court reasoned that permitting the offensive use of a pass-on theory while not permitting a pass-on defense would subject defendants to multiple liability.79 In addition, the basic rationale—the complexity of sorting out the incidence of the overcharge—was no less compelling in the context of indirect purchasers.80

Having decided that the pass-on theory would have to apply equally to both plaintiffs and defendants, the Court held that there could be no offensive use of the theory.81 In so doing, the Court reasoned that “the use of the pass-on theories” would result in “massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge . . . .”82 These complications would follow from efforts to determine the extent of the damage at each level of the chain of distribution.83 The complexity would not be overcome by the possibility that all potential plaintiffs could be joined. In rejecting the practicality of apportioning a fixed amount of overcharge, the Court accepted the notion that, in theory, portions of the overcharge could be assigned to each level in the chain of distribution by knowing the elasticity of demand and supply at each level.84 But, to the Court, the theory did not translate into sound antitrust policy.85

Related to the apportionment problem was the Court’s view that, under a pass-on system, each plaintiff would incur greater costs in proving damages

75 See Illinois Brick, 431 U.S. at 726.
76 See id. at 726-27.
77 See id. At the time, there was a division among the circuit courts on this issue. Compare Mangano v. American Radiator & Standard Sanitary Corp., 438 F.2d 1187 (3d Cir. 1971), with In re Western Liquid Asphalt Cases, 487 F.2d 191 (9th Cir. 1973).
78 See Illinois Brick, 431 U.S. at 736.
79 See id. at 730.
80 See id. at 731-33.
81 See id. at 735. In a fashion similar to that in Hanover Shoe, the Court recognized the cost-plus exception to the rule. See id. at 736. In addition, it recognized that the exception “might” apply when “the direct purchaser is owned or controlled by its customer.” Id. at 736 n.16. For a thorough discussion of the “control exception,” see Dee-K Enterprises, Inc. v. Heveafil Sdn. Bhd., 982 F. Supp. 1138, 1152-53 (E.D. Va. 1997). See also In re Wyoming Tight Sands Antitrust Cases, 866 F.2d 1286, 1293 (10th Cir. 1989).
82 Illinois Brick, 431 U.S. at 737.
83 See id. The Court conceded that use of the theory by both defendants and plaintiffs would reduce the likelihood of multiple liability assuming that inconsistent judgments were not made. See id. at 737 n.18.
84 See id. at 741.
85 See id. at 743-45.
and the net recovery for direct and indirect purchasers would decline. This would "seriously impair this important weapon of antitrust enforcement." The Court recognized that rejection of the pass-on theory would mean that indirect victims of anticompetitive acts would go uncompensated. It also noted the likelihood that some direct purchasers would decline to bring an action against suppliers to avoid risking a disruption in their relationship with those suppliers. Still, in balancing the costs and benefits of permitting use of pass-on arguments, the Court found greater deterrence to be a more important goal than more accurate compensation.

It is useful to focus on several important aspects of Illinois Brick. For one thing, the decision accepts in a very broad sense the imprecision of the gross overcharge measure of damages. It is imprecise not simply because some portion of the overcharge is passed on, but because the overcharge always has been regarded as a measure of the defendant's gain as opposed to the plaintiff's loss (or damage). In addition, there is very little to suggest that the rationale of Illinois Brick is to be extended beyond cases involving damages calculated as overcharges. This is important because the general notion that the proof of damages is complex is accurate in a great many instances and Illinois Brick left open the issue whether the complexity rationale might be extended to define a more general concept of antitrust standing.

II. Post-Illinois Brick Developments

Almost immediately after Illinois Brick, events began to unfold that seemed to undo whatever rationalizing effect the decision had. One of these events was the Supreme Court's approval of indirect purchaser actions under state antitrust laws. Another was an extremely broad interpretation of Illinois Brick and a narrow interpretation of its exceptions. The most important event has been the development of a comprehensive approach to antitrust standing. Finally, a number of lower court opinions have interpreted Illinois Brick in inconsistent ways.

A. State Indirect Purchaser Actions

One of the most significant events, and one having a severe derationalizing effect on antitrust enforcement, occurred in 1989 when several states brought actions similar to that in Illinois Brick. In California v. ARC America Corp., the plaintiffs—state governments—were indirect purchaser actions.

86 See id. at 744-45.
87 Id. at 745.
88 See id. at 746.
89 See id.
90 See id. at 746-47.
91 As explained in note 48, supra, the overcharge may overstate the actual gain to the defendant.
92 See infra Part III.A.
93 See infra Part III.B.
94 See infra Part III.C.
95 See infra Part III.D.
96 490 U.S. 93 (1989). For an interesting analysis of ARC America's implications, see Ror-
ers of cement. Their actions were filed not only under federal antitrust law, but under state antitrust laws that permitted indirect purchasers to recover. The issue before the Court was whether its decisions in *Hanover Shoe* and *Illinois Brick* preempted state laws permitting indirect purchasers to recover.

In an awkwardly reasoned opinion, the Court set out basic preemption doctrine, indicating that preemption could occur in this type of case only if Congress intended to occupy the field or, in instances in which Congress has not occupied the field, if the state law “actually conflicts with federal law.” At its most basic level, the case for preemption came down to whether allowing indirect purchasers to recover under state law would undermine the policies underlying *Hanover Shoe* and *Illinois Brick*. The Court considered three policies. The first “policy” was one of avoiding complicated procedures. The Court noted that recognition of indirect purchasers would not necessarily complicate matters in federal courts. Not only were state antitrust issues likely to be addressed by state courts, but if a federal court were asked to consider the state claim under pendant jurisdiction, the court could decline.

The second “policy” was not diluting the incentives of potential plaintiffs. On this issue, the Court reasoned that there would be no decreased incentive for direct purchasers to bring actions under federal antitrust laws.

The third and most difficult “policy” of *Illinois Brick* that the Court addressed was the avoidance of multiple liability. The Court’s reasoning on this point is far from convincing. In a conclusory fashion, it simply explained that in “none of [the previous direct purchaser and standing cases] did the Court identify a federal policy against States imposing liability in addition to that imposed by federal law.” This reasoning actually may be consistent with preemption doctrine, but it is inconsistent with a fair reading of the

---


97 See *ARC Am.*, 490 U.S. at 97-98.
98 See *id.* at 98.
99 See *id.* at 100. The actual litigation was precipitated by a dispute over whether the states, as indirect purchasers, had a right to part of a settlement fund. But the district court and the Ninth Circuit held that indirect purchaser plaintiffs, under *Hanover Shoe* and *Illinois Brick*, did not have a right to a share of the funds. See *In re Cement & Concrete Antitrust Litig.*, 817 F.2d 1435, 1445 (1987).
100 This was a case in which there was no express preemption by Congress. See *ARC Am.*, 440 U.S. at 100-01.
101 *Id.* at 100. In this instance, the issue concerned an area traditionally left to state regulation, and therefore, according to the Court, those arguing for preemption would be required to overcome the presumption against preemption. See *id.* at 101.
102 See *id.* at 103.
103 See *id.*
104 See *id.*
105 See *id.* at 104.
106 See *id.*. The Court also rejected an argument that the presence of indirect purchasers would mean that direct purchasers would be offered less in settlements and, therefore, were less likely to bring actions. See *id.* at 105.
107 See *id.* at 105.
108 *Id.* at 105.
base-line policy underlying *Illinois Brick*, in which the Court concluded that offensive use of the pass-on theory without defensive use would result in “duplicative recoveries” and “unwarranted multiple liability.”

The importance of *ARC America* can best be understood by focusing on the possibility that there may be an efficient level of anticompetitive activity as well as an efficient level of enforcement. Although the notion of an efficient level of anticompetitive activity may seem rather odd, it is important to remember that the line separating antitrust violations from lawful activities often is not a bright one. Thus, a firm engaging in conduct that has not been adjudicated under antitrust law risks exposure to treble damages. Moreover, the activity itself may not be the key source of uncertainty. Many arguably anticompetitive actions, whether assessed under section 1 or 2 of the Sherman Act, will not violate antitrust laws unless the firm possesses market power. The concept of market power, however, can be slippery. Notwithstanding the judicial tradition of inferring market power from market share, market power is only partially related to the firm’s market share. Not only is the requisite level of market power difficult to determine in an absolute sense, it may be that the level of market power needed to establish an antitrust violation differs with the activity involved. Even this understates the risk. When a business practice or market structure is actually litigated, the question of market power becomes an issue for a relatively unsophisticated jury to decide.

All of these factors may make it seem futile to discuss seriously the “efficient” level of enforcement and the “efficient” level of risky and, possibly, illegal behavior. Regardless of how one feels about the practicality of having useful debates on these matters before *ARC America*, the decision to permit plaintiffs to press indirect purchaser actions under state law means that a firm is, for all practical purposes, simply unable to determine the expected cost of taking any action that falls in the gray areas of antitrust.

---

109 *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 730 (1977). This is not to say that the threat of multiple liability was ever all that great or that the Court’s position on it in *Hanover Shoe* and *Illinois Brick* was well-founded.


111 For a discussion of the determinants of market power, see Landes & Posner, supra note 110.

112 The best example of this is “attempt to monopolize” under section 2 of the Sherman Act. To be guilty of an attempt, the firm must pose a dangerous probability of becoming an actual monopoly. Dangerous probability will often be related to market share, but the market share that is consistent with the creation of a dangerous probability may change with the aggressiveness of the defendant’s actions. See Sullivan & Harrison, supra note 54, at 318-22.

B. Kansas v. Utilicorp United, Inc.\textsuperscript{114}

In *Hanover Shoe* and *Illinois Brick*, the Supreme Court left open two possible ways for indirect purchasers to recover. The first is when the indirect purchaser has a preexisting cost-plus contract with the direct purchaser.\textsuperscript{115} The second possibility arises when the direct purchaser is owned or controlled by the firm fixing prices.\textsuperscript{116} Together, these exceptions suggest that indirect purchasers would have federal standing when the difficulties of apportioning the overcharge among groups would be minimal and when the direct purchaser has little motivation to bring an action.

The Court's 1990 decision in *Kansas v. Utilicorp United, Inc.* all but extinguished the possibility of a policy-based determination of other exceptions to *Illinois Brick*. In that case, the indirect purchasers were residents of Kansas and Missouri\textsuperscript{117} who claimed that they had purchased natural gas from various utilities at inflated prices.\textsuperscript{118} The prices were inflated, the indirect purchaser insisted, because a pipeline and a group of gas production companies were fixing prices.\textsuperscript{119} The direct purchaser was the utility serving customers in Kansas and Missouri.\textsuperscript{120} The defendants claimed the utility lacked standing because it passed the entire overcharge on to consumers under the rates filed with the relevant regulatory agencies.\textsuperscript{121} The District Court held that the utilities had standing while the consumers did not.\textsuperscript{122}

In a five-to-four opinion,\textsuperscript{123} the Court affirmed the lower court. In so doing, the Court responded to the argument that the utilities had what was, in effect, a cost-plus contract with the consumers in which the overcharges


\textsuperscript{116} See Jacobs, supra note 115, at 69-70; James S. Helfrich, Note, *Limiting a Regulated Pass-On Exception to Illinois Brick*, 62 St. John's L. Rev. 647, 649 (1988). The control exception makes sense because the direct purchaser is not independent and, therefore, not likely to pursue any antitrust remedy.

\textsuperscript{117} The suit was brought by the States of Kansas and Missouri as *parens patriae*. See *Utilicorp*, 497 U.S. at 204.

\textsuperscript{118} See id.

\textsuperscript{119} See id. at 207.

\textsuperscript{120} See id. at 205.

\textsuperscript{121} See id.

\textsuperscript{122} See id.

\textsuperscript{123} See id. at 206. The Court granted certiorari in order to resolve a dispute on the issue of indirect purchaser standing between the Tenth Circuit, from which this case arose, see *In re Wyoming Tight Sands Antitrust Cases*, 866 F.2d 1286 (10th Cir. 1989), and the Seventh Circuit, see *Illinois ex rel. Hartigan v. Panhandle E. Pipe Line Co.*, 852 F.2d. 891 (7th Cir. 1988) (en banc). See *Utilicorp*, 497 U.S. at 206.
Reexamining the Role of Illinois Brick appeared as part of the rate filed with the state regulatory agencies. The states conceded that even a fully passed-through overcharge would result in some damage to the utility as consumers decreased purchases in response to higher prices. Nevertheless, the states argued that the full overcharge on the quantity sold was passed on to the consumers and the apportionment problem, which Illinois Brick sought to avoid, did not exist. In response, the majority of the Court noted that the utility could be injured in ways other than a loss of business. Specifically, to determine whether the direct purchaser—the utility—suffered any damage, one would have to know whether that purchaser could have raised prices. If a direct purchaser could have, and then does, raise prices in response to a cost increase associated with price fixing, then the price fixing harms the direct purchaser by inhibiting its ability to raise prices for its own benefit. The Court also noted that a cost increase might not result in an instant increase in consumer prices, which also would complicate the apportionment problem. In effect, the apportionment process in a regulated context was unlikely to be any less complicated than in an unregulated context.

The Court also noted that any recovery granted to the utility may have to be passed on to consumers. This, according to the Court, meant that the indirect purchasers may be compensated independent of their own action for damages.

The Court then attempted to address a problem that its own analysis seemed to create: If utilities were likely to be required to pass on to consumers any antitrust recovery, what incentive would the utility have to bring an action in the first place? The Court reasoned that the utility would have to be aggressive about pressing its claim because it could not be sure that it could pass the overcharge on to its customers. Moreover, the Court noted that utilities historically had been aggressive in the enforcement of antitrust laws.

It is much easier to see Utilicorp as driven by policy as opposed to reason or even straight-forward precedent. The type of apportionment the Court

124 See Utilicorp, 497 U.S. at 217.
125 See id. at 209.
126 See id. at 208.
127 See id. at 209.
128 See id.
129 See id.
130 See id. at 210.
131 See id. at 212.
132 See id. at 211-12. This raises a rather obvious question: Why would the utility bother suing if it could not retain any of the award?
133 See id. at 214. This is somewhat curious reasoning because the overcharge already had been passed on to the consumers.
134 See id. at 215. The dissenting opinion, written by Justice White, took issue with virtually every aspect of the majority's reasoning. For example, Justice White wrote that it seemed "fanciful" to think the utility was not charging rates as high as the state would allow. Id. at 222 (White, J., dissenting). Therefore, the rate increase could be traced directly and fully to the overcharge. See id. (White, J., dissenting). The dissent also noted that the "difficult" apportioning problem identified by the majority was a common exercise in other types of antitrust actions. See id. at 223 (White, J., dissenting).
The George Washington Law Review

seemed to fear is certainly less complicated than that found in many private actions for damages. In addition, the notion that the utility charges less than regulatory officials would allow seems less likely than the opposite assumption. The general impression the opinion leaves is not that the Court has engaged in successful reasoning, but that it has set out a number of assumptions under which its holding could be reconciled with *Hanover Shoe* and *Illinois Brick.* Thus, what *Utilicorp* seems to stand for most clearly is a narrowing of the scope of antitrust plaintiffs and a broad disfavoring of actions by those who are arguably “indirectly” affected.

C. Supreme Court Development of Antitrust Standing

Soon after its decision in *Illinois Brick,* the Court decided a series of cases that addressed issues raised in its wake. In its decisions in *Blue Shield* v. *McCready* in 1982, and *Associated General Contractors, Inc. v. California State Council, Inc.* (“AGC") a year later, the Supreme Court began to articulate the basic elements of “antitrust standing.” More specifically, the Court addressed the issue of how to properly interpret the language of section 4 of the Clayton Act, which permits recovery by “any person who shall be injured.” The Court described this as an inquiry that was “analytically distinct” from that presented in *Illinois Brick.*

In *AGC,* the more important of these two cases, the Court developed a multipart test. First, the plaintiff must have suffered antitrust injury. Second, a court must weigh three factors including the remoteness of the injury, the existence of a potential plaintiff with a greater motivation to

---

135 In this respect, it reminds one of the “rational relationship” test found in equal protection analysis.
138 The Court previously had addressed the issue in a more general context in *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150 (1970), and concluded that a plaintiff had standing if there was injury in fact and the interest to be protected is “arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.” *Camp,* 397 U.S. at 153. For a good survey of antitrust standing decisions prior to 1980, see Comment, *Standing to Sue in Antitrust Cases: The Offensive Use of Passing-On,* 123 U. PA. L. REV. 976 (1975).
139 *McCready,* 457 U.S. at 472.
140 *Id.* at 476.
141 This was, in fact, a question that had been addressed by lower courts for years.
142 The facts of *McCready* are found in the text accompanying notes 248-249, *infra.*
143 See *Associated Gen. Contractors, Inc. v. California State Council, Inc.*, 459 U.S. 519, 540 (1983). In a separate but related line of cases, the Court had developed the notion of “antitrust injury.” In effect, the injured party must complain of the type of injury that the antitrust laws were designed to protect against. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). See generally Roger D. Blair & Jeffrey L. Harrison, *Rethinking Antitrust Injury,* 42 VAND. L. REV. 1539 (1989); *Page,* *supra* note 113.
Reexamining the Role of Illinois Brick

bring an action, and the complexity of the ensuing litigation should a particular plaintiff be permitted to bring an action.

Although Illinois Brick is viewed as analytically distinct from the AGC test and is expressly invoked to support only the last of these three factors, it is hard not to see the policies of Illinois Brick throughout AGC. For example, Illinois Brick stressed not just the complexity issue, but also the problem of deterrence. Indeed, the closeness of the opinions might best be assessed by asking what the analysis in Illinois Brick might have looked like had it been issued after AGC's more general standing guidelines had been established. Almost certainly, the Court would have regarded Illinois Brick as an ordinary standing case and noted the remoteness of indirect purchasers, the complexity of the damage calculation, and the presence of potential plaintiffs—the masons who purchased the concrete blocks directly from the manufacturers—who would be motivated to bring an action.

Given that the Court did not fold Illinois Brick into a general antitrust standing analysis, it left open a number of possible interpretations of Illinois Brick. First, Illinois Brick could have simply stood for the definition of damages. Under this interpretation, Illinois Brick would have answered the question, “what is the appropriate measure of damages in price-fixing cases?” Measure is emphasized because the decision does not adopt actual harm as the measure of damages, but adopts a surrogate—the full overcharge.

Second, Illinois Brick also could have been seen as a per se application of AGC. As with its substantive antitrust law counterparts, it could have been viewed as standing for the proposition that when a plaintiff is an indirect purchaser, the step-by-step analysis of AGC can be dispensed with because indirect purchasers almost always will fail the standing test. This appears to be the position that Illinois Brick now represents.

Third, as will be discussed in greater detail below, Illinois Brick could have been interpreted in a way that would have assisted in rationalizing the system of antitrust plaintiffs and deterrence. Under this interpretation, it is not obvious that every indirect purchaser would be denied standing. For example, in Illinois Brick itself, the Court concedes that some direct purchasers

---

145 See id. at 542. This issue could be put in terms of whether a violation would go undetected should a specific plaintiff be denied standing.

146 See id. at 543-44. The Court cited Illinois Brick as supporting the last of these factors. See id. at 545.

147 It may be important in this regard to distinguish between antitrust injury, which is now part of an antitrust standing analysis, and being an indirect purchaser. Plaintiffs who fail the standing test because they have not suffered an antitrust injury have not incurred the types of harm that the antitrust laws were designed to prevent. Even if they have suffered antitrust injury and have cleared the other hurdles as well, as indirect purchasers they are still disqualified.


149 It seems likely that indirect purchasers would satisfy the antitrust injury part of the test as the overcharge eventually passed on to them, which is certainly the type of harm the antitrust laws were designed to prevent.

150 At least one court has suggested that Illinois Brick-type plaintiffs may still be eligible for a recovery if they recharacterize the offense as something other than price fixing. See In re Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 606 (7th Cir. 1997).
may not be motivated to bring an antitrust action against a supplier. In addition, there are cases beyond those involving preexisting cost-plus contracts in which the determination of the damages would not be unduly complicated.

As with so much of the happenstance that seems to explain *Illinois Brick*, the fact that it preceded *McCreary* and *AGC* by a few years may have been critical in its result. More directly, it is not clear that the application of antitrust standing principles developed after *Illinois Brick* would have resulted in what is essentially a per se approach to barring actions by indirect purchasers. Instead, the Court may have opted for a case-by-case analysis that applies the policies of *AGC* to each set of indirect purchasers. Indeed, under standing doctrine, as opposed to *Illinois Brick*, the indirect purchasers in *Utilicorp* may have fared differently. Moreover, as will be discussed below, *Illinois Brick*, as applied, seems to block certain types of plaintiffs who are not more remotely affected than other plaintiffs who do have standing.

**D. Expanding and Contracting Illinois Brick**

Even though it is, in effect, a per se standing rule, it is not clear how broadly *Illinois Brick* is intended to apply. More specifically, can it block actions by plaintiffs who, though indirectly affected, might pass muster under conventional standing analysis? Also, can a plaintiff avoid *Illinois Brick* by taking care not to characterize its claim as price fixing? Both the elasticity and limitations of *Illinois Brick* have been demonstrated by five recent cases.

These cases inform us, depending on one’s point of view, of the potential dangers or promise of that opinion, and assist us in determining what might be done to bring *Illinois Brick* into a more coherent model of antitrust enforcement.

**I. Lucas Automotive Engineering v. Bridgestone/Firestone, Inc.**

Perhaps the simplest expression of a possible extension of *Illinois Brick* is found in *Lucas Automotive Engineering, Inc. v. Bridgestone/Firestone, Inc.*, in which a distributor of vintage automobile tires challenged the acquisition by its competition of an exclusive license to manufacture Firestone vintage tires. The Ninth Circuit first applied an ordinary standing analysis, as discussed above, and determined that the plaintiff did not have standing,

---

151 See *Illinois Brick*, 431 U.S. at 746 (noting that purchasers might be concerned about “disrupting relations with a supplier”).

152 See supra discussion accompanying notes 67-91.

153 For a case that views *AGC* as controlling the application of *Illinois Brick*, see *In re Lower Lake Erie Iron Ore Antitrust Litigation*, 998 F.2d 1144, 1164 (3d Cir. 1993).

154 See *Lucas Automotive Eng’g, Inc. v. Bridgestone/Firestone, Inc.*, 140 F.3d 1228 (9th Cir. 1998); *Campos v. Ticketmaster Corp.*, 140 F.3d 1166 (8th Cir. 1998); *Sports Racing Servs., Inc. v. Sport Car Club of America, Inc.*, 131 F.3d 874 (10th Cir. 1997); *In re Brand Name Prescription Drugs Litig.*, 123 F.3d 599 (7th Cir. 1997); *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144 (3d Cir. 1993).

155 140 F.3d at 1228.

156 See id. at 1231.
as a competitor, to bring an action for damages on the basis of a possibly illegal acquisition.157

The plaintiff also argued that it was now in the position of a consumer because it would have to purchase some brands of tires from the competing distributor.158 The court observed that, since the acquisition, the plaintiff had not actually purchased tires from its rival, but had purchased them from a supplier who had, in turn, used the defendant as its supplier.159 In effect, the plaintiff was an indirect purchaser. Noting that the fundamental basis for the holding in Illinois Brick was to avoid the problem of apportioning overcharges,160 the court then held that the plaintiff could not bring an action for damages resulting from the licensing agreement.161 In effect, the fact that the substantive violation was not price fixing was of no consequence. On the other hand, the fact that the plaintiff was indirectly affected did not bar an action by the plaintiff as an indirect purchaser for injunctive relief in the form of divestiture.162

2. In re Brand Name Prescription Drug Litigation

Lucas Automotive is somewhat difficult, but not impossible, to square with the reasoning of Judge Posner in In re Brand Name Prescription Drugs Antitrust Litigation163 ("BNPD"). In that case, retailers of brand name prescription drugs claimed that manufacturers and wholesalers had conspired with one another to deny retailers discounts available to favored customers, including HMOs and mail order pharmacies.164 The trial court ruled that there was insufficient evidence to support a finding that a conspiracy existed between manufacturers and wholesalers, which meant that the wholesalers were direct purchasers from the manufacturers and the retailers were indirect purchasers.165 Despite this conclusion, however, the trial court went on to hold that the retailers fit within the "control" exception to Illinois Brick.166

The Seventh Circuit reversed both holdings, finding sufficient evidence for the plaintiffs to survive summary judgment on the issue of the existence of a conspiracy.167 Consequently, the exception to Illinois Brick, on which the lower court had relied and which Judge Posner found unpersuasive, was unnecessary. Beyond that, however, Judge Posner opined that even if it were

157 See id. at 1232-33. Specifically, the court reasoned that the plaintiff failed the "antitrust injury" element of the standing analysis. See id. at 1233.
158 See id. at 1233.
159 See id.
160 See id. ("The indirect purchaser rule serves to avoid the complications of apportioning overcharges between direct and indirect purchasers and to eliminate multiple recoveries.").
161 See id. at 1234.
162 See id. at 1234-35. As a competitor, however, the plaintiff did not have standing to bring an action for divestiture.
163 123 F.3d 599 (7th Cir. 1997).
164 See id. at 602-03. In the class action, the retailers pursued this as a price-fixing claim for damages. See id. Another theory was a violation of the Robinson-Patman Act, which would have obviated the need for an Illinois Brick analysis. See id. at 604.
165 See id. at 604.
166 See id. at 605-06.
167 See id. at 616.
found that the manufacturers and wholesalers had not conspired, *Illinois Brick* might not bar a recovery:

We can imagine the present case reconfigured in a way that might take it out of the orbit of [*Illinois Brick and Hanover Shoe*] . . . . A number of pharmacies have tried to improve their bargaining position vis-a-vis the drug manufacturers by forming buying groups . . . . The manufacturers have been steadfast in refusing to grant discounts to such groups. If this refusal, taking as it does the form of a refusal to enter into direct contractual relations with certain retailers, such as the manufacturers have with their favored customers, were successfully challenged as a boycott the *Illinois Brick* rule, which is a rule concerning overcharges, would fall away. The plaintiffs would be permitted to prove up whatever damages they could show had flowed from the boycott, provided they weren't seeking to recover overcharges, for that would entail the very incidence analysis that *Illinois Brick* bars.¹⁶⁸

In many respects, Judge Posner's suggestion points out the inconsistency of *Illinois Brick*. First, the plaintiffs would be required to rely on the boycott theory only if they were found to be indirect purchasers. Then, presumably they would be required to demonstrate not the overcharge, but evidently the lost profits incurred due to the boycott. Because the refusal to grant discounts was the basis of the claim and lost profits would have to flow from not being granted these discounts, a logical requirement for calculating damages would be to determine what the discounts would have been.¹⁶⁹ In essence, Judge Posner falls prey to the practical fallacy inherent in *Illinois Brick*;¹⁷⁰ the first step in determining the damages that Judge Posner suggests are available requires the plaintiffs to conduct a basic overcharge analysis.

Moreover, Judge Posner does not say that reshaping the theory of liability somehow transforms the plaintiffs into something other than indirect purchasers.¹⁷¹ Judge Posner's language can be contrasted with that of Judge O'Scannlain in *Lucas Automotive*. According to Judge O'Scannlain, "the Supreme Court has held that an indirect or remote purchaser lacks standing to seek damages relief against the manufacturer for alleged violations of federal antitrust laws."¹⁷² In effect, Judge O'Scannlain seems to view *Illinois Brick* as a standing opinion. Judge Posner, in contrast, seems to view the application of *Illinois Brick* as connected specifically to one's theory of liability and measure of damages. To grasp this inconsistency, one must consider how the outcomes of the two cases might have been different had the circuits

---

¹⁶⁸ Id. at 606 (internal citations omitted).
¹⁶⁹ Estimating lost profits any other way would be very difficult because many variables would have to be considered.
¹⁷⁰ See discussion infra Section 4.B.
¹⁷¹ In the brand name prescription drug industry, manufacturers often negotiate directly with indirect purchasers, who then purchase the drug from wholesalers. Wholesalers then get "charge backs" from manufacturers for sales made at manufacturer negotiated prices. See *BNPD*, 123 F.3d at 607.
¹⁷² See *Lucas Automotive Eng'g, Inc. v. Bridgestone/Firestone, Inc.*, 140 F.3d 1228, 1233 (9th Cir. 1998) (citing *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 728-29 (1977)).
been reversed. On the one hand, Judge O'Scannlain may well have decided that the drug retailers, were they determined to be indirect purchasers, did not have standing. On the other hand, Judge Posner may have ruled that an indirect purchaser who challenges a licensing agreement and can demonstrate damages other than an overcharge may seek relief.

In terms of consistency with *Illinois Brick*, Judge O'Scannlain's position seems to be the better reasoned of the two. *Illinois Brick*'s central teaching is that attempting to apportion overcharges must be avoided.\(^{173}\) Any action by an indirect purchaser is likely to begin with the question of what the price would have been to the buyer in the absence of the violation and how much of that overcharge was passed on to the plaintiff's customers.

Although Judge Scannlain's opinion may be more consistent with *Illinois Brick*'s underlying rationales, Judge Posner's opinion may be superior from a policy standpoint. In *BNPD*, the direct purchasers had not pursued whatever possible claims they might have had against the manufacturers, perhaps because their dependence on the manufacturers discouraged them from bringing a private action. Indeed, one of the dangers recognized by the *Illinois Brick* Court—a fear or lack of incentive on the part of direct purchasers to bring an action—may have occurred.\(^{174}\) Thus, Judge Posner left open a possible avenue for private action by indirect purchasers.

3. Campos v. Ticketmaster Corp.

A third case that adds another dimension to both the dangers and the potential of *Illinois Brick* is *Campos v. Ticketmaster Corp.*\(^ {175}\) In *Campos*, a proposed class of ticket purchasers sued Ticketmaster, a ticket distribution service.\(^ {176}\) Ticketmaster had long-term exclusive contracts with most concert promoters.\(^ {177}\) As a consequence, a venue wishing to host an event typically had to use Ticketmaster to distribute its tickets. This monopoly power, according to the plaintiffs, permitted Ticketmaster to charge them excessive amounts in the form of service charges.\(^ {178}\)

The Eighth Circuit held that *Illinois Brick* barred the action by the ticket purchasers. The court seemed to broaden *Illinois Brick* significantly by citing it as standing for the proposition that "[a]n indirect purchaser is one who bears some portion of a monopoly overcharge only by virtue of an antecedent transaction between the monopolist and another, independent purchaser."\(^ {179}\) In *Campos*, the "antecedent transaction" was the initial contract between Ticketmaster and the venue. Because this transaction determined from whom the plaintiffs would purchase tickets, the plaintiffs were rendered indirect purchasers.\(^ {180}\)

\(^{173}\) See *Illinois Brick*, 431 U.S. at 737.

\(^{174}\) See id. at 746.

\(^{175}\) 170 F.3d 1166 (8th Cir. 1998).

\(^{176}\) See id. at 1168.

\(^{177}\) See id.

\(^{178}\) See id. at 1169.

\(^{179}\) Id. (emphasis added).

\(^{180}\) See id. at 1171. In other words, the monopolist (Ticketmaster) sold its services to the direct purchaser (the venue) which then hosted the event for the indirect purchasers (the concert
To reach this conclusion, the Eighth Circuit reasoned that the ticket price and the service charge were both parts of an overall price of admission.181 Presumably, this price was set at a profit-maximizing level and, if Ticketmaster or some other distributor were not involved, this price was the price the venue itself would have charged.182 In effect, the service charge was a charge incurred—in the form of an allowance—by the venue itself for the services of Ticketmaster.183

The reasoning of the Eighth Circuit has some appeal from the standpoint of economic theory, but it is not clear that the opinion is consistent with Illinois Brick. Essentially, the court reasoned that there is a single profit-maximizing price for the tickets, and the fact that the venue allowed another party to capture a portion of that price meant that the party paying that specific portion was an indirect purchaser.184 One problem with this theory is that the price charged in the form of service fees by Ticketmaster may not be the same as that charged by the venue if it sold the tickets directly. Specifically, the court does not seem to understand the problem of successive monopoly. The venue owner has some amount of market power that it can exploit by raising ticket prices above competitive levels. Due to Ticketmaster’s exclusive contracts with promoters, the venue must distribute its tickets through Ticketmaster, creating a second layer of market power that Ticketmaster can exploit by raising its fees for ticket distribution services. The Campos plaintiffs complained about the noncompetitive price charged by Ticketmaster for distribution services. As a result, these customers are direct purchasers of the distribution service and would not fail an Illinois Brick test.

Another problem with this decision is that it is not clear how broadly the court’s analysis extends. For example, according to the court, organizations such as Ticketmaster “‘compete to secure contracts with venues and event promoters for the right to sell tickets.’”185 If one focuses on the notion of a “right,” the logical extension of the court’s reasoning would seem to be that anyone who makes purchases from a party who has bought marketing or production rights from a third party is an indirect purchaser. In all instances, the seller of the right could have combined the necessary inputs and sold them for the profit-maximizing price. For example, suppose that a producer licenses production technology from a licensor of intellectual property. In principle, according to Campos, the producer’s customers would be indirect purchasers because the licensor could have produced the good and sold it directly to those customers. This cannot make sense as a means of identifying indirect purchasers.

---

181 See id.
182 See id. at 1172.
183 See id.
184 See id.
185 Id. at 1171 (quoting Note, Beyond Economic Theory: A Model for Analyzing the Antitrust Implications of Exclusive Dealing Arrangements, 45 DUKE L.J. 1009, 1015 (1996)).
Put more in terms of *Illinois Brick*, the issue becomes one of identifying the apportionment problem that is the central concern of that case. In *Campos*, plaintiffs allege that, but for Ticketmaster's monopoly power, they would have paid lower service charges. In other words, if distribution rights had been shared among several firms, the plaintiffs would have paid less. The issue is hardly one of apportionment, but is simply one of determining what the price would have been in the absence of Ticketmaster's alleged violation. The proper analysis for a standing determination, therefore, would be under *AGC*, not *Illinois Brick*.

4. In re Lower Lake Erie Iron Ore Antitrust Litigation

*Campos* seems to contrast sharply with the Third Circuit's decision in *In re Lower Lake Erie Iron Ore Antitrust Litigation*, which involved an action by steel producers against railroads that allegedly had limited the development of less expensive means of transporting ore. In effect, because of the railroads' control of off-loading equipment, the steel companies were limited to the use of shippers that could use that equipment. The producers claimed that, if the alternative means of transportation had been permitted to develop, they would have paid less for transportation. Clearly, actual and potential providers of alternative means of transportation felt the direct impact of the railroads' actions. The plaintiffs calculated the damages as the difference between what they were paying for transportation to existing shippers and what they would have paid had new technologies been permitted to develop.

The Third Circuit relied on *AGC* in finding that *Illinois Brick* was not a bar to recovery. The court conceded that the steel companies were "in a sense, indirect purchasers," and addressed whether its reasoning was inconsistent with *Illinois Brick*. According to the court, the fact that plaintiffs paid "overcharges" to third parties did not mean they were excluded under *Illinois Brick*. Under its *AGC* analysis, the court focused on the fact that the actions by the railroads had a direct impact on the steel customers. In fact, the steel transport industry existed exclusively for the use of steel producers. The court also noted that the type of injury the plaintiffs sought to avoid was the type the antitrust laws were designed to prevent. Finally, the court addressed the problem of duplicative recovery by indicating that,

---

186 See id. at 1169.
187 The lower court had applied a standing analysis and held that plaintiffs did not have standing even if they were direct purchasers. Arguably, this decision is incorrect. Clearly, plaintiffs suffered antitrust injury—price of service exceeded a "but for" price. In addition, they were not "remote" victims, and the damage calculations were no more complex than many others.
188 998 F.2d 1144 (3d Cir. 1993).
189 See id. at 1152-53.
190 See id. at 1154.
191 See id.
192 See id. at 1171.
193 Id. at 1168.
194 See id.
195 See id.
196 See id.
although the steel companies were asking for overcharge-type damages, the vessel and dock companies (the direct victims) from whom they purchased services and who were also plaintiffs were measuring damages in terms of lost profits.197


One more case sheds additional light on the problems of interpreting Illinois Brick. In Sports Racing Services v. Sport Car Club of America, Inc.198 ("SRS"), one of the plaintiffs participated in sports car races organized and sanctioned by the defendant.199 The defendant also sold the only cars and parts that were permitted to be used in the sanctioned races.200 The defendant did not sell its cars and parts directly to participants, but through distributors.201 The plaintiff charged that the defendant was engaged in illegal monopolization of the specified cars and parts markets and tying.202

The Tenth Circuit began its analysis with the statement that "[t]he Supreme Court has consistently held that only direct purchasers suffer injury within the meaning of § 4 of the Clayton Act."203 The court then held that the plaintiff lacked standing to bring a monopolization claim204 because it was an indirect purchaser of the racing cars and parts.205 Under the tying claim, the court identified the tying “product” as “racing services” and identified the tied product as the cars and parts that were required to compete in the races.206 Even though the plaintiff was an indirect purchaser in the tied product market the court ruled that the plaintiff did have standing.207 In thinking about the court’s conclusion, it is important to remember that the monopolized market under the theory of monopolization was the same as the tied product market in the tying claim. In other words, the alleged underlying anticompetitive aim was the same—the exertion of market power in the cars and parts market. Yet, standing hinged on neither the underlying competitive harm nor the type of damages requested, but on the classification of the violation.

In some respects, the Tenth Circuit’s opinion is similar to Judge Posner’s in BNPD because characterization was the key even though the substance of the defendant’s actions was no different. Nevertheless, the opinion can be distinguished from Judge Posner’s because changing the way the offense was

197 See id. at 1169. The Third Circuit made an effort to explain Lower Lake Erie in McCarthy v. Recordex Service, Inc., 80 F.3d 842 (3d Cir. 1996) (holding that even though hospital patients are “indirect purchasers,” they have standing to seek injunctive relief against a copy service with exclusive rights to photocopy patients’ medical records).
198 131 F.3d 874 (10th Cir. 1997).
199 See id. at 878.
200 See id.
201 See id.
202 See id. at 879.
203 Id.
204 See id. The market subject to monopolization consisted of a specific type of racing car and parts. See id.
205 See id. at 884.
206 See id. at 886-87.
207 See id. at 887.
framed did not necessarily change the way the damages were calculated.\textsuperscript{208} Instead, the pivotal factor in \textit{SRS} was the "label" placed on the violation.

Perhaps most interesting was the Tenth Circuit's own change in analytical approach. In the context of monopolization, the court adopted the per se standing rule by reasoning that indirect purchasers do not have standing.\textsuperscript{209} When reviewing the tying claim, however, it adopted a more pragmatic view. The court reasoned that \textit{Illinois Brick} could be interpreted as selecting the "best" plaintiff between the direct and indirect purchaser.\textsuperscript{210} In the case of an indirect purchaser of a tied item, the court held that the direct purchaser was merely a conduit and the "best" plaintiff was the indirect purchaser.\textsuperscript{211} This approach, although invoking the authority of \textit{Illinois Brick}, is in substance closer to a direct application of \textit{AGC} because the analysis is devoted to the relative merits of various potential plaintiffs.

\subsection*{E. Summary}

The above analysis suggests that \textit{Illinois Brick} is the odd culmination of an extended effort to reduce the barriers to antitrust recoveries. Although \textit{Illinois Brick} may have dealt effectively with problems that existed when it was decided, subsequent events have exposed numerous inconsistencies. The most obvious inconsistency is that one of the pillars of \textit{Illinois Brick}—avoidance of multiple liability—was undermined by \textit{ARC America}, which cleared the way for indirect purchaser suits in state courts. Even this, however, understates the problem. \textit{Illinois Brick} has not been undermined in a consistent or uniform sense. Instead, the level of private antitrust enforcement depends on the geographic location of the suit. One might argue that this is hardly the problem of \textit{Illinois Brick} itself. But the problem of differing levels of liability that depend on geographic location can be traced to the premise of that opinion. The primary issue faced by the \textit{Illinois Brick} Court was how it should deal with the offensive use of pass-on theories given that it had decided against defensive uses of those theories in \textit{Hanover Shoe}.\textsuperscript{212} The Court could have overruled \textit{Hanover Shoe} and permitted both offensive and defensive use of the pass-on theory, or it could have narrowed \textit{Hanover Shoe} to capital goods.\textsuperscript{213} In either case, defensive use of the pass-on theory would have decreased the likelihood of multiple liability. Thus, although it most likely did not conceive of the issue in these terms, the \textit{Illinois Brick} Court opted for simplicity in the federal courts at the expense of potentially exposing defendants to multiple liability through state court actions.

The uncertainty that \textit{Illinois Brick} now creates for defendants is duplicated for plaintiffs in two complementary ways. The first deals with the level

\footnotesize{
\textsuperscript{208} Judge Posner suggested that the indirect purchasers could have used a different theory of liability as long as they did not ultimately base damages on an overcharge theory. \textit{See In re Brand Name Prescription Litigation}, 123 F.3d 599, 606 (7th Cir. 1997). In \textit{SRS}, however, the damage calculation was not part of the court's analysis. \textit{See SRS}, 131 F.3d at 890.

\textsuperscript{209} \textit{See SRS}, 131 F.3d at 884.

\textsuperscript{210} \textit{See id.} at 889.

\textsuperscript{211} \textit{See id.}


\textsuperscript{213} \textit{See id.} at 736.}
of enforcement and the second with the likelihood of compensation. First, under current law, plaintiffs may fall under the general standing guidelines of AGC or the specific standards of Illinois Brick. Illinois Brick is framed in terms of indirect purchasers\(^{214}\) while AGC uses the notion of remoteness.\(^{215}\) But the general concerns of both cases are the same with respect to finding the plaintiff or plaintiffs who will aggressively enforce the antitrust laws for the right reasons.\(^{216}\) In a number of cases involving price fixing, the plaintiffs most likely to pursue an antitrust claim may be indirect purchasers who conceivably could have standing under AGC, but are denied the opportunity to recover as indirect purchasers under Illinois Brick. What this means is that the level of private enforcement may vary depending on the type of antitrust offense alleged. Ironically, a lower level of enforcement is likely to take place when the practice—price fixing—is the most pernicious.

Second, from the perspective of compensating plaintiffs, Illinois Brick creates a situation in which plaintiffs’ recovery is not based on whether a firm has violated antitrust laws or injured the plaintiffs, but on the nature of the violation. But even this understates the artificiality of what separates those who have standing and those who lack it. As BNPD and SRS illustrate, standing may hinge merely on how the activity is characterized.\(^{217}\) In practice, this will result in strained efforts to pigeonhole business conduct to evade the dictates of Illinois Brick.

A rational system of private enforcement would be one that does not vary by the type of violation, jurisdiction, or the nature of the plaintiff. This is not to suggest that it is possible to determine a single level of enforcement. But three goals stand out. First, firms engaged in obviously anticompetitive activity should face generally the same level of exposure. This is not the case now. Take, for example, the case of price fixing by firms dealing with relatively weak buyers. The risk of suit by the direct purchasers is low, and the risk of suit by an indirect purchaser is nonexistent unless a state permits it. Second, firms acting within the gray areas of antitrust law should be able to draw some general conclusions of likely exposure. Finally, plaintiffs should not be differentiated based on the type of violation lending to their injury or the skill of their attorneys in pleading around the indirect purchaser problem.

### III. Rationalizing Illinois Brick

Identifying the inconsistencies and uncertainty created by Illinois Brick and subsequent decisions and statutes is a much easier undertaking than formulating practical solutions. Nevertheless, this Article identifies three possi-
ble solutions. The first would be to overturn both *Hanover Shoe* and *Illinois Brick* and leave all issues of whether to recognize specific plaintiffs and particular types of damages to general standing requirements and the antitrust injury doctrine. This approach would retain the overcharge measure of damages.

A second possibility would be to allow all parties to recover their actual damages. Typically, this would be in the form of lost profits, but in the case of final users, including consumers, damages would continue to be the overcharge or a portion of it. The requirement that actual damages be shown would seem to be responsive to the fear of multiple liability as expressed by the *Illinois Brick* Court. It might also appear that this measure of damages would avoid the difficult process of tracing a fixed overcharge through a stream of purchasers. This is not the case, however, because most efforts to determine the lost profits of an indirect purchaser will necessitate a determination of the extent to which the increased prices affected the indirect purchaser. This simply means the lost profit measure is no worse than the overcharge measure on this score. At the same time, it is nevertheless a more precise measure of damages.

The third possibility would be to narrow *Illinois Brick* so that it applies only in suits for overcharge damages by indirect purchasers. This approach would prevent extended applications of *Illinois Brick*, such as that found in *Campos*, but would leave open the possibility that some indirect purchasers might recast their theories of liability to overcome *Illinois Brick*. Although this creates something of an inconsistency, the availability of more than one theory to plaintiffs may simply be an unavoidable consequence of the fact that antitrust violations can be characterized differently and courts will determine whether a plaintiff has been harmed depending on how the violation is characterized.

A. Overturning *Illinois Brick* and *Hanover Shoe*

The elimination of *Illinois Brick* and *Hanover Shoe* would leave the treatment of indirect purchasers to be determined under *AGC* and other standing decisions. The chief advantage of such an approach is that it would blunt the impact of *ARC America*. For example, defendants would be permitted to use a pass-on theory to reduce damages to the extent that an overcharge was passed on to indirect purchasers. Those defendants would remain liable in federal courts to indirect purchasers who could satisfy the requirements of *AGC*. In addition, whether successfully employing a pass-on defense or not, some defendants would remain liable to indirect purchasers in states with *Illinois Brick* legislation. Most importantly, defendants would be far less vulnerable to different antitrust exposure depending on the geographic location of the offense.

---

218 Clearly, in cases of purchases by municipalities, the proper damages measure would still be the overcharge.

219 Some indirect purchasers would have a choice of federal or state court just as antitrust plaintiffs do, for the most part, today. They would not, however, be able to recover in both state and federal court for the same damages.
Overturning *Illinois Brick* and *Hanover Shoe* would not, however, automatically erase all inconsistencies. An indirect purchaser applying federal law would be required to satisfy the standing requirements of *AGC*, but a plaintiff relying on state legislation permitting indirect purchaser action would likely have a lower burden. The significance of this possible discrepancy would depend largely on the likelihood that courts would interpret *AGC* as permitting actions by indirect purchasers. This is not a simple analysis because *AGC* not only assumes that suits by indirect purchasers are prohibited, it actually relies on *Illinois Brick*. Still, it does appear that many indirect purchasers in price-fixing cases would pass the tests of *AGC*.

When examining indirect purchasers under the *AGC* analysis, two related factors stand out. First, as noted earlier, *AGC* adopts antitrust injury as part of an overall standing analysis.\(^{220}\) Indirect purchasers almost certainly would pass this portion of an *AGC* analysis.

Second, *AGC* is, as a factual matter, a complex case. The plaintiff was a labor union claiming it was damaged by contractors who were coercing employers to hire only non-union labor.\(^{221}\) Because of this factual wrinkle, the Court’s reasoning supporting the necessity of limiting the scope of eligible plaintiffs has a great deal of appeal. Specifically, the Court noted the difficulty of determining whether or not the union was injured and whether or not the market was rendered less competitive by the contractors’ attempts to discourage the use of union labor.\(^{222}\) Moreover, the plaintiff made no allegation “that output ha[d] been curtailed or prices enhanced.”\(^{223}\)

In the context of indirect purchasers, no such complexity exists. Indirect purchasers are made worse off by paying higher prices than they otherwise would pay. Whether they are final users or resellers, the injury is one readily recognized by the antitrust laws. Indeed, the majority of cases in which the *AGC* test would be applied to indirect purchasers involves an offense—prices fixing—that is unlawful per se. Thus, the proper perspective is one that replaces the complicated facts of *AGC* with the simple facts of a standard indirect purchaser case.

In this context, we can focus on the three most important factors recognized by the *AGC* Court. First, the Court notes its concerns about the complexity of attempting to apportion damages.\(^{224}\) Second, the Court describes an interest in avoiding duplicative recoveries.\(^{225}\) Finally, the Court reasoned that “[t]he existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party . . . to perform the office of a private attorney general.”\(^{226}\) This last hurdle is the most challenging for indirect purchasers.

\(^{220}\) See *AGC*, 459 U.S. at 544.

\(^{221}\) See id. at 520-21.

\(^{222}\) See id. at 539. According to the Court, “the Union was neither a consumer nor a competitor in the market in which trade was restrained.” *Id.*

\(^{223}\) *Id.* at 539 n.40.

\(^{224}\) See *id.* at 544-45.

\(^{225}\) See *id.* at 543-44.

\(^{226}\) *Id.* at 542.
1. The Complexity of Apportioning Damages

The significance of the difficulties associated with damage apportionment can be greatly overdrawn. In fact, one wonders just how much actual conviction lies behind the Court's position. First, the difficult part of the apportioning process is determining the "but for" price for the indirect purchasers. In other words, what price would these purchasers have paid "but for" the price fixing? Although difficult at times, the process is far from impossible and, in many circumstances, plaintiffs are likely to be able to satisfy the relatively relaxed standards for proving antitrust damages.\(^{227}\)

To understand why, it is important to distinguish between proving damages and "apportioning." If a group of manufacturers were to fix prices on goods sold to fabricators who sell to distributors who sell to retailers who sell to consumers, estimating the amount passed on at each stage would be a daunting task. An indirect purchaser, however, need not do this. An indirect purchaser must estimate only the "but for" price that it should have paid, which is a far less exacting exercise than apportioning the overcharge throughout the entire chain of distribution.

To be sure, estimating the requisite "but for" price at the consumer stage, in this example, would not be easy because a great number of factors may affect that price.\(^{228}\) Still, any general fear of the difficulties indirect purchasers may experience in calculating the "but for" price to determine the overcharge can be overstated. A determination of a "but for" price already is required in a great number of instances. For example, Judge Posner's opinion in *BNPD* closes the door on indirect purchasers attempting to show overcharge damages and opens the door to proof of lost profits.\(^{229}\) The problem is that indirect purchasers almost certainly begin the process of calculating lost profits with a determination of the price they would have been charged "but for" the price fixing.

Not only is the determination of damages as much of a dilemma as the *AGC* Court would suppose, but the Court itself has shown less concern with the problem of complexity than its opinions in *Illinois Brick* and *AGC* suggest. First, as a general matter, lost profits is the measure of damages in most antitrust cases.\(^{230}\) The use of lost profits necessitates a determination of the "but for" price whether the violation is tying, a group boycott, a refusal to deal, or monopolization. In fact, the determination of a "but for" price by indirect purchasers in price-fixing cases may be even simpler than in many other instances because the violation itself directly affects price in an obvious way. In the case of other violations, the impact on price is less obvious.

\(^{227}\) See supra text accompanying notes 22-66.

\(^{228}\) For an argument in favor of estimating overcharges for indirect purchasers, see Harris & Sullivan, supra note 10; Elmer J. Schaefer, *Passing-on Theory in Antitrust Treble Damage Actions: An Economic and Legal Analysis*, 16 WM. & MARY L. REV. 883, 885-86 (1975).

\(^{229}\) See supra text accompanying notes 163-168.

\(^{230}\) For example, in all cases involving exclusion (or foreclosure), the damage is lost profit on lost sales. This follows because the lost profits due to exclusion involve the following computation: price but for the exclusion times the quantity that would have been sold less the incremental costs of making those sales.
Second, and more specifically, the Supreme Court’s concern about complexity is, to some extent, belied by its actions in other instances. For example, in *J. Truett Payne Co. v. Chrysler Motors Corp.*, the Court considered the application of so-called “automatic damages” in a Robinson-Patman Act claim. Automatic damages would be the difference between what the disfavored firm paid for the goods and the price it would have paid in the absence of discrimination multiplied by the number of units purchased. The Court rejected the use of an automatic overcharge in favor of lost profits. This lost profits measure, however, requires the disfavored firm to determine the price it would have paid “but for” the discrimination. The firm then must determine how much of this “overcharge” would have been passed on to customers and how much the “overcharge” ultimately would impact profit. It is difficult to square this assignment to plaintiffs in Robinson-Patman Act cases with the Court’s efforts to avoid complexity and apportionment in *AGC* and *Illinois Brick*. More important, perhaps, is that the ultimate decision of whether a specific damage calculation has become too speculative would continue to lie within the purview of the trial court. Even under the relatively lax antitrust standards, a court can refuse to allow the matter to proceed to the trier of fact if the damage calculations are deemed speculative.

2. Avoiding Multiple Liability

The second of the three problems facing an indirect purchaser trying to satisfy the standards of *AGC* is probably the easiest with which to dispense. The Court initially announced its concern about multiple liability in *Illinois Brick*. In that context, a concern about multiple liability made a great deal of sense because the Court already had ruled out the defensive use of pass-on theories in *Hanover Shoe*. In short, the threat of multiple liability was a real one given that the defendants could not off-set the amount by which direct purchasers passed overcharges on to their buyers. By overruling both *Illinois Brick* and *Hanover Shoe*, the threat of multiple liability largely would be eliminated.

233 See *J. Truett Payne*, 451 U.S. at 560.
234 See id. at 561-62.
235 See id. at 562.
236 See id. at 564-65.
237 The one consistent feature of these decisions—and several others of their era—is decreasing the level of private antitrust enforcement.
238 Damage calculations are speculative due to a failure of proof. See Blair & Page, supra note 33, at 426.
241 See id. at 729.
To some extent, however, the risk of multiple liability begs the issue. The concept of "multiple liability" suggests some benchmark level of liability. Yet, as indicated in the discussion above, lost profits and overcharges are different measures of damages.²⁴² In addition, the overcharge is not equal to the plaintiff's losses nor the defendant's gain.²⁴³ Moreover, it is, at best, unusual to argue against multiple liability when the statutory scheme requires treble damages.

Finally, the threats of both allocative complexity and multiply liability are overstated when one actually understands the full strategic implications of overturning Illinois Brick and Hanover Shoe. Without those cases, a defendant would be permitted to demonstrate the amount that plaintiff had passed on to indirect purchasers. By doing so, the defendant makes the suit by indirect purchasers simpler because the evidence provided by the defendant in the direct purchaser's action could be used by the plaintiff in the indirect purchaser action. In such a scenario, there would appear to be a risk that a defendant who fails to establish the existence of the pass-on in the direct purchaser actions would be vulnerable to duplicative recovery by an indirect purchaser.²⁴⁴ In this instance, however, the defendant will avoid duplicative recovery because she will have the evidence offered by the plaintiff proving that it did not pass the overcharge through to indirect purchasers. Finally, it is possible as a procedural matter to join the various plaintiffs in order to remove all possibility of multiple liability. This, of course, would be somewhat chaotic if there were a great number of indirect purchasers.²⁴⁵

3. Allowing Potential Plaintiffs with More Direct Interests to Pursue the Antitrust Claim

This leaves the question of how indirect purchasers would be affected by the Court's admonition that the presence of potential plaintiffs who might be more directly affected "diminishes" the justification for permitting more remotely affected parties to bring an action.²⁴⁶ The AGC Court's direction here is not stated in absolute terms. Thus, the questions for indirect purchasers may be how much the justification is diminished. It is difficult to consider such a question in a vacuum. For practical purposes, however, the issue can be addressed by asking whether indirect purchasers like those in Illinois

²⁴² See infra text accompanying notes 269-274.

²⁴³ See supra note 48.

²⁴⁴ There is also a possibility of incomplete recovery. For example, suppose cement manufacturers collude on the price charged to ready-mix concrete companies. The ready-mix dealers sue and recover a portion of the overcharge. The masonry contractor absorbs part of the overcharge and also sues. The homeowner who buys the concrete sidewalk may be deemed too remote and denied standing. In that case, the full overcharge will not be recovered. This, of course, will weaken the deterrent effect of the private enforcement provision.

²⁴⁵ The device of interpleader would seem to be useful as a means of avoiding this problem. This possibility is discussed by the Illinois Brick Court and rejected primarily due to practical problems. See Illinois Brick, 431 U.S. at 738 & n.19.

Brick are more like the union in AGC or more like the plaintiff in Blue Shield v. McCready, the Court's other major antitrust standing decision.

In McCready, the plaintiff's employer supplied medical insurance as part of her compensation. By virtue of an agreement between Blue Cross and the psychiatrists, the plan purchased by her employer did not provide coverage for psychotherapy offered by psychologists unless they were working with a psychiatrist. The employee, McCready, claimed that the exclusion of psychologists violated the Sherman Act. The Court held that McCready had antitrust standing to pursue her claims.

It is important to note that the direct purchaser in McCready was her employer, or perhaps even Blue Cross. McCready, in effect, indirectly "purchased" the insurance coverage by exchanging her labor for her employer's compensation package. This suggests that McCready stands for the proposition that at least some indirect purchasers have antitrust standing.

In comparing the position of the plaintiff in McCready with that of the union in AGC two factors stand out. First, as the Court correctly notes in AGC, it is not clear whether and how the union's interests would be served by greater competition in the market for labor. This factor, more than any other, would seem to diminish the justification for permitting the union to pursue its antitrust action. By comparison, McCready would benefit from competition in the form of lower prices and higher quality services.

In addition, the "diminished justification" analysis of AGC can be read as requiring a comparison of the remotely affected party with more directly affected parties. In other words, the issue may be viewed in terms of each party's relative aggressiveness in acting as a private attorney general. In this context, one might ask how did McCready compare with other potential plaintiffs in her case relative to how the union in AGC compared with other potential plaintiffs in that case? In McCready, two other groups of possible plaintiffs had an interest in pressing an antitrust claim. The first was psychologists who were, in effect, the subject of a boycott by Blue Cross and the psychiatrists. These psychologists would seem to be the most directly affected group. The second was McCready's employer, who purchased the insurance tainted by anticompetitive action. The employer would have an interest in getting the lowest price for the greatest array of services for its payment. In AGC, on the other hand, the obvious alternative plaintiffs

\[\text{References}\]

248 See id. at 467-68.
249 See id. at 468.
250 See id. at 469-70.
251 See id. at 485.
252 To the extent that Blue Cross previously agreed on the reimbursements to be paid providers for various services, Blue Cross actually is buying the services for its subscribers.
254 See id. at 542.
255 A third possible group was Blue Cross, which may have found that the psychiatrists demanded exclusivity to be included on the list of providers.
would be contractors who would like to hire non-union labor without fear of economic consequence.256

This analysis suggests that McCready and the union were both indirectly affected. The cases are different, however, with respect to the nature of this indirect link. McCready received a “product,” essentially passed on intact, that had been affected by anticompetitive behavior, and the direct purchaser may or may not have been more motivated to bring an antitrust action.257 The direct purchaser’s motivation could well depend, as the Court has noted, on the ability of the direct purchaser to pass the overcharge along and its unwillingness to bring an action against suppliers it may have to depend on in the future.258 On the other hand, the directly affected parties in AGC were hardly simple conduits of a product.259 Rather, it was these parties to whom coercion was directly applied in order to affect their actions in the market.

This distinction between AGC and McCready suggests two points. First, the remoteness issue in AGC is relatively obvious and, consequently, AGC is not very helpful when it comes to the more borderline cases involving indirect purchasers. Second, the cases together indicate that the difference between direct and indirect purchasers is a matter of degree while the difference between an indirect purchaser and other indirectly affected parties is a difference in kind. Comparing the relative levels motivating direct and indirect purchasers to act as private attorneys general is an empirical question that courts seem unlikely to be able to answer. Thus, under AGC and in a judicial world without Illinois Brick and Hanover Shoe, both direct and indirect purchasers should be presumed to have standing.260 On the other hand, standing decisions resting on differences in the kind of impact are the sort courts are better able and expected to make.261

4. Benefits of Barring Some Indirect Purchaser Claims

This is not to suggest that all the arguments against barring indirect purchaser actions are unimportant. No doubt, overturning Illinois Brick and Hanover Shoe would result in more antitrust claims by indirectly affected parties.262 For example, suppose a manufacturer of building materials purchases sand and sells some of it to toy manufacturers, who then package it and sell it for use in sand boxes that are purchased by childcare centers. Would the individual who makes use of and pays for the services of the childcare center be permitted to bring an action if the producers of sand allegedly were engaged in price fixing? Without Illinois Brick, there would not be a

256 See AGC, 459 U.S. at 541.
258 Of course, what is passed on in McCready is a lower quality product, but this should not alter the analysis.
259 See AGC, 459 U.S. at 539.
260 Remotely affected indirect purchasers, as explained below, may fail the AGC test.
261 There would continue to be, however, difficult standing decisions in a great variety of other cases.
262 One should not overstate the increase, however, because a number of states already permit indirect purchaser actions.
"bright line" answer to this. Nevertheless, under the analysis of AGC, it is a virtual certainty that the parents would not have antitrust standing.

The increase in antitrust claims, in general, may not be as great as one would initially expect. Several states already permit actions by indirect purchasers. In addition, as matters now stand, a plaintiff or class of indirect plaintiffs may have to bring an action in several different states. With indirect purchaser access to federal courts, there could be a single action. If all the relevant parties could be joined in a single action, the costs of litigation actually might decrease. In addition, by allowing indirect purchasers access to federal courts, antitrust would regain some of the enforcement lost when ARC America was decided.

B. Lost Profits as a Uniform Measure of Damages

1. Lost Profits and the Overcharge Measure of Damages

Overruling Hanover Shoe and Illinois Brick would not only allow indirect purchasers to recover the portion of the illegal overcharge that is passed on, it also would make it more likely that all plaintiffs could recover actual damages. Allowing injured parties to collect actual damages is consistent with the language of the Clayton Act, which makes a remedy available to "any person who shall be injured in his business or property" and sets that remedy at "threefold the damages by him sustained." For consumers, the damages sustained would be the difference between the price actually paid and the price that would have been paid "but for" the conspiracy. It does not matter whether these consumers were direct or indirect purchasers; their damages would be captured by the overcharge that they experienced.

Businesses, however, make purchases to produce goods and services that are subsequently resold. As a result, these firms may pass on some or all of the overcharge. Consequently, the damages sustained are captured appropriately by their lost profits. Part of the appeal of the lost profits measure of damages is supplied by the Clayton Act, which provides a right of recovery to "any person who shall be injured in his business or property." Injury to a business results in reduced profits. Part of the appeal also stems from the fact that the overcharge as a measure of damages is not precisely the same as the lost profit. Moreover, the overcharge does not even deviate from actual damages in any predictable direction or by any consistent amount.

The explanation is actually rather simple. Consider what happens to competitive firms that are overcharged by a price-fixing cartel. Suppose that each unit of the firms' competitively produced output requires one unit of the cartel's input. The collusive increase in the price of that input will cause the

---

263 For an excellent analysis of state indirect purchaser suits, see Page, supra note 113.
265 In most circumstances, there are welfare losses—that is, damages—suffered by consumers who are priced out of the market. These damages would be extraordinarily difficult to measure and typically are not cognizable. See Roger D. Blair & David L. Kaserman, Antitrust Economics 78 (1985).
266 For an analysis of lost profits, see Harrison, supra note 38.
firms' cost of production per unit to increase by the amount of the overcharge. The effect of the overcharge on the victims' profits will depend upon what happens to the output price, which is governed by supply and demand conditions.

At one extreme, suppose that demand is perfectly elastic, meaning that any effort to raise price will be futile. The affected firms will find it optimal to reduce their output. As a consequence, not only will these firms be paying more for the input, but as their output decreases, they likely will produce that output in an inefficient manner. More technically, the cost increase is compounded by the unexploited economies of scale that result in the short run. As a result, the lost profits will exceed the overcharge. In this instance, the overcharge undercompensates the victim.

At the other extreme, suppose that demand is perfectly inelastic. In other words, buyers do not respond to price increases. Consequently, the competitive price of the victims' output will rise by the full amount of the overcharge. The firms will continue to produce the original output without losing any profit. In effect, there is no injury, and the damages sustained are zero. The overcharge clearly overstates the lost profits because there were no lost profits. The victims continue to earn a competitive return on their investment. In this instance, the overcharge overcompensates the "victim."

These results are easy to demonstrate. In Figure 1, the competitive firm initially had average and marginal cost curves of \( AC_1 \) and \( MC_1 \), respectively. At a competitive price of \( P_1 \), the firm maximized its profit by producing where price was equal to marginal cost, i.e., at a quantity of \( Q_1 \). As Figure 1 reveals, the competitive firm sold \( Q_1 \) at the competitive price and earned a competitive return in doing so. Although price equals average cost at \( Q_1 \) and the firm's profits are zero, the firm still earns a competitive return on its investment because that is part of the cost. In other words, the average cost curve has embedded within it a competitive return. The influence of the cartel overcharge is to shift the average and marginal cost curves from \( AC_1 \) and \( MC_1 \) to \( AC_2 \) and \( MC_2 \), respectively. If the price does not rise at all, the competitive firm in Figure 2 will respond to the higher cost of producing that quantity where \( MC_2 \) equals \( P_1 \), i.e., it will produce \( Q_2 \). Now, the firm's lost profit will be equal to the loss that it experiences, which equals \( (AC_1 - P_1)Q_2 \). The overcharge, however, is equal to the increase in average cost times the quantity purchased, which equals \( (AC_2 - AC_1)Q_2 \). One can see by inspecting Figure 1 that the lost profit exceeds the overcharge, which is what we claimed in the text.

These results are also relatively easy to show. Figure 2 is precisely the same as Figure 1 except that price has now risen to \( P_2 \). Consequently, the competitive firm will continue to produce \( Q_2 \) because the new marginal cost \( (MC_2) \) equals the new price \( (P_2) \) at a quantity of \( Q_2 \). In this case, the overcharge equals the difference between \( AC_1 \) and \( AC_2 \) times the quantity, which
We have analyzed the polar cases. If demand is perfectly elastic, price does not rise and lost profits clearly exceed the overcharge. If demand is perfectly inelastic, price rises by the full amount of the overcharge, but profits are unaffected. The overcharge measure of damages is inadequate in one case while it is excessive in the other. Admittedly, demand is not apt to be perfectly elastic or perfectly inelastic, but the fact remains that the overcharge measure is an inexact proxy for the actual damages, which are the lost profits. This analysis suggests that much of the judicial hand wringing about multiple liability and the allocation problem is misplaced. After all, the measure of damage adopted—the overcharge—was never equal to the damages suffered by most victims, nor, as illustrated earlier, was it even equal to the ill-gotten gains of the price fixers.

2. Problems in Estimating Lost Profit

A complete examination of the difficulties in estimating lost profits will take us too far afield, but a few observations are in order. First, one must recognize that lost profits are equal to the difference between the profits actually earned and the profits that would have been earned "but for" the antitrust violation. Because one must estimate what might have been, an inevitable imprecision accompanies this exercise. The Supreme Court has expressed a tolerance for this imprecision: "[I]t will be enough if the evidence shows the extent of the damages as a matter of just and reasonable inference." The inevitable uncertainty associated with estimation and inference has been recognized for well over half a century: "[t]he rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount." In other words, the plaintiff's burden is to "make a just and reasonable estimate of the damage based on relevant data."

\[ (AC_2 - AC_1)Q_1 \]

But there is no lost profit because the new price fully covers the increased costs. All of the overcharge was passed on to the customers of the overcharged producers.

---

271 If demand is highly elastic, we will observe results similar to those in Figure 1. If demand is highly inelastic, we will get results similar to those in Figure 2. It is highly improbable that the demand elasticity will be such that the overcharge will precisely equal the lost profit.

272 See supra note 48.


274 Id. at 562.

Second, a reasonable inference differs from mere speculation. Admissible damage estimates must be more than a stab in the dark. Damage estimates will be deemed insufficient as a matter of law, and therefore inadmissible, if are a product of mere speculation and guesswork.\textsuperscript{276} Because juries cannot be asked to speculate, insufficient damage evidence cannot be put before the jury.\textsuperscript{277}

One also should recognize that these difficulties of estimating lost profits are no worse than those associated with estimating an overcharge. For the latter, one must establish the price actually paid, which is usually available from normal business records. This actual price is compared to the price that would have been paid “but for” the price fixing. The “but for” price is the price that unimpeded forces of supply and demand would have produced. Consequently, one must control for a variety of economic and demographic factors that influence supply and demand. This effort is not apt to be completely successful and, therefore, some degree of imprecision will infect the estimation of the “but for” price.

3. Avoiding the Speculative Label

To avoid having a damage estimate characterized as speculative, certain steps must be taken. For one thing, a plaintiff claiming lost profits during the damage period should have a history of profitable operations in the past. In estimating what the profits would have been “but for” the antitrust violation, the plaintiff must consider other factors that would have influenced the profits during the damage period. Some factors—growth, enhanced efficiencies, reduction in competition—may have caused profits to rise, while other factors—increased costs, increased competition, regulatory changes—may have caused profits to fall. Accounting for every potential influence may not be possible, but the most important components should be examined.\textsuperscript{278}

4. Lost Profits and Deterrence

The most glaring weakness of relying on lost profits as the appropriate measure of damages is the reduced deterrent effect that may result. Take, for example, the recent litigation concerning the lysine cartel. Lysine is essential to animal nutrition and is used as an additive in animal feed.\textsuperscript{279} Archer Daniels Midland and other producers fixed the price of lysine, thereby overcharging feed suppliers.\textsuperscript{280} The overcharged direct buyer clearly would have standing to sue for the lost profits that resulted. The price of the feed to the farmer would reflect the higher cost of the lysine, thereby reducing the farmer’s profits. In principle, these losses should be recoverable, but in prac-

\textsuperscript{276} See Home Placement Servs., Inc. v. Providence Journal Co., 819 F.2d 1199, 1205 (1st Cir. 1987) (finding that lost profit damages are inappropriate where the plaintiff has introduced no evidence tending to establish comparability between its own business and other companies engaged in similar business pursuits).

\textsuperscript{277} See id. at 1208-09 (explaining that triers of fact must have sufficient evidence to make reasonable inferences, and may not speculate on appropriate damage awards).

\textsuperscript{278} For an extended examination of speculative damages, see Blair & Page, supra note 33.


\textsuperscript{280} See id.
tice, such recovery may be problematic due to issues of standing. Presumably, the price of the animals will be higher due to the higher feed price, which was due to the higher lysine price. These higher prices will reduce the profits of the meat packer. Again, these losses should be recoverable in principle, but are problematic in practice. Similar fates await the distributor, the retailer, and finally the consumer. To the extent that standing rules preclude recovery by some of those who have suffered lost profits, compensation will be inadequate and the deterrent effect of section 4 of the Clayton Act will be reduced.

C. Refining Illinois Brick

The most modest of the three proposals is to retain Illinois Brick, but to refine it in a way that would permit consistent interpretations. The problem now is that Illinois Brick interpretations have shifted from time to time, making it difficult to identify a single underlying principle. The principle tension seems to be whether Illinois Brick is mainly about avoiding the complexity of damage claims based on an overcharge or is to be regarded as a per se application of AGC by barring claims by indirect purchasers. The cases discussed earlier—Lucas Automotive, BNPD, Campos, Lower Lake Erie, and SRS—are indicative of the problems of applying Illinois Brick in a consistent fashion. In Lucas Automotive, the Ninth Circuit seemed to perceive Illinois Brick as ultimately a standing decision. According to that court, "an indirect purchaser . . . lacks standing." In other words, indirect purchasers are too remote (a standing concept) to recover under the antitrust laws. In BNPD, however, Judge Posner seemed to interpret Illinois Brick as driven primarily by concerns about damage apportionment, suggesting that the plaintiffs reframe their theory of liability to avoid relying on an over-

---

281 The problem is even more complicated when restaurants buy the meat and prepare it for consumers.

282 Obviously, in light of ARC America, complete consistency is impossible.

283 One area in which there is relative clarity concerns actions for injunctive relief. Illinois Brick and its predecessor, Hanover Shoe, concerned actions for damages related to an overcharge. This left open the question of whether Illinois Brick applies to indirect purchasers who ask for injunctive relief in overcharge cases. The answer to this question has generally been no, see, e.g., Campos v. Ticketmaster, 140 F.3d 1166 (8th Cir. 1998); Labrador, Inc. v. IAMS Co., 105 F.3d 665 (9th Cir. 1996); Mid-West Paper Prods. Co. v. Continental Group, 596 F.2d 573 (3d Cir. 1979), which makes a great deal of sense if one views Illinois Brick strictly from a pragmatic point of view. A court's decision concerning injunctive relief does not raise the issues of multiple liability or damage apportionment. In these instances, Illinois Brick clearly stands for a rule concerning the remedy sought. If courts had adopted the view that indirect purchasers lack standing, even injunctive relief would be ruled out. It seems possible, in theory, that an indirect purchaser asking for injunctive relief could satisfy Illinois Brick and still not satisfy the requirements of AGC. For example, although there is no apportionment problem, one might apply the "diminished justification" rationale of AGC as a means of barring an indirect purchaser's action for an injunction.

284 See supra text accompanying notes 154-207.

285 See supra text accompanying notes 155-211.

286 See supra text accompanying notes 155-162.

287 Lucas Automotive Eng'g, Inc. v. Bridgestone/Firestone, Inc., 140 F.3d 1228, 1233 (9th Cir. 1998).
charge measure of damages. In fact, both BNPD and SRS suggest that a plaintiff's right to relief hinges more on the plaintiff's proper labeling of the defendant's conduct than it does on the defendant's conduct, the competitive impact of that conduct, or the injury to the plaintiff.

Campos shares some features with both Lucas Automotive and BNPD. As in Lucas, the analysis of the Eighth Circuit in Campos centers around the positioning or remoteness of the plaintiff vis-a-vis the defendant. Accordingly, the plaintiff had been affected by an "antecedent transaction." Evidently, this is something different than an actual sale and subsequent resale of an item—thus, an issue of remoteness, albeit somewhat vaguer than that in Lucas Automotive. On the other hand, because the damages claimed were part of what the court viewed as a monopoly overcharge, elements of BNPD are present as well. Finally, the Third Circuit in Lower Lake Erie premised its holding on the observation that "[a]lthough [defendant] suggests that indirect purchaser status is the death knell of plaintiff's claim, this conclusion is not supported by the current law." It then proceeded to decide the Illinois Brick issue on the basis of what was essentially an AGC analysis.

The point to be stressed here is not that these opinions are internally inconsistent, nor that the outcomes, considered individually, are necessarily poor ones. Instead, the point is that a general rule of what Illinois Brick stands for, which can be applied in a sensible way from case to case, is lacking. This is not to say that it is a simple matter to determine an ideal application of Illinois Brick. In fact, there is probably no consensus on what single interpretation of Illinois Brick would yield an optimal level of antitrust enforcement. Instead, as with so many issues in law, the challenge is to find an application that minimizes ambiguities and the potential for inconsistencies. Thus, the best interpretation of Illinois Brick simply may be one that is the least susceptible to misinterpretation by lower courts. A firm, albeit imperfect, rule that is subject to limited interpretation is likely to be an important step in the evolution of a more rational system of enforcement. Just as clear property rules facilitate mutually advantageous exchanges, clear legal rules make for focused and rational judicial decision-making. The possibilities range from a very broad application of Illinois Brick to a very narrow one. For reasons set out below, the narrowest application may hold the greatest potential for consistency from plaintiff to plaintiff and court to court.

---

288 See In re Brand Name Prescription Litigation, 123 F.3d 599, 606 (7th Cir. 1997).
290 See Campos v. Ticketmaster Corp., 140 F.3d 1166, 1169-71 (8th Cir. 1998).
291 Id. at 1169.
292 In re Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1168 (3d Cir. 1993).
293 See id. at 1164-71.
294 Although to some extent they are.
295 One possibility that is related to the proposal discussed in the previous section is to interpret Illinois Brick as prohibiting indirect purchasers from asking for damages equal to a passed-on overcharge. This proposal results in the desired consistency, however, only if both direct and indirect purchasers are limited to lost profits. Otherwise, there is a possibility of multiple liability. As noted earlier, the passed-on overcharge would still be in order for consumers.
1. A Broad Application of Illinois Brick

A broad and relatively simple application of *Illinois Brick* would bar all suits by all indirect purchasers. In other words, indirect purchasers would be eliminated regardless of how those purchasers framed their complaints. This interpretation is consistent with the view that *Illinois Brick* identifies a sub-class of victims who automatically fail the test of AGC. Such a rule, broadly applied, would eliminate plaintiffs similar to the plaintiff in *SRS*, who had indirectly purchased a tied item.\(^\text{296}\) The rule also would eliminate plaintiffs such as those in *Lower Lake Erie*, who claimed the railroads inhibited the development of cheaper means of transporting ore.\(^\text{297}\) More importantly, the plaintiffs, such as those in *BNPD*, would not be able to bring their action in any form once they were identified as indirect purchasers.\(^\text{298}\) Finally, holdings like that in *Campos* and *Lucas* would likely stand.\(^\text{299}\)

The complete elimination of indirect purchasers holds some promise for consistent results because it would eliminate the ability of some plaintiffs to recharacterize their actions to avoid *Illinois Brick*.\(^\text{300}\) In addition, one can argue that, when an indirect purchaser is involved, there is by definition another more directly affected plaintiff who could pursue the antitrust claim. Although such an approach may provide something of a “bright line,” there are limitations. For example, as *Campos* illustrates, it is not always a simple matter to determine when a purchaser is *indirect* or when the purchaser is *remotely* affected.\(^\text{301}\) This may lead to inconsistent results between similarly remote plaintiffs. A comparison of the plaintiff in *McCready* with the purchasers in *Illinois Brick* makes this clear.\(^\text{302}\) Thus, a general rule barring indirect purchasers is not a rule that treats similarly remote victims alike, but one that discriminates among remote purchasers on the basis of the formalistic nature of a relationship that, in and of itself, has no substantive antitrust importance.

In addition, a broader application of *Illinois Brick* would increase one of the dangers that the Court recognized when it decided that case—direct purchasers may not be highly motivated to bring an antitrust action against an important supplier.\(^\text{303}\) *SRS* probably represents a good example of this, as does *BNPD*.\(^\text{304}\) This problem could be mitigated to some extent by a fuller development of the “control” exception of *Illinois Brick*.\(^\text{305}\)

\(^{296}\) See supra text accompanying notes 198-211.
\(^{297}\) See supra text accompanying notes 188-197.
\(^{298}\) See supra text accompanying notes 163-174.
\(^{299}\) See supra text accompanying notes 155-162, 175-187.
\(^{300}\) See, e.g., In re Brand Name Prescription Litigation, 123 F.3d 599 (7th Cir. 1997).
\(^{301}\) See supra text accompanying notes 155-162.
\(^{302}\) See discussion supra notes 247-263.
\(^{304}\) In *BNPD*, the direct purchasers were wholesalers that acted primarily as conduits for the major drug producers. See *BNPD*, 123 F.3d at 603.
\(^{305}\) See discussion supra note 81.
2. Middle Ground Application of Illinois Brick

A middle position would be one based on a rigid interpretation of Illinois Brick that includes a set of clearly defined exceptions beyond the cost-plus and "control" exceptions. For example, one such exception would permit SRS-type plaintiffs—indirect purchasers from a firm engaged in tying—to bring an action. The rationale would be that the direct purchaser is only a conduit and that the supplier is actually applying coercion to the indirect purchaser, not the direct purchaser. In addition, absent the threat of action by the indirect purchaser, the only potential plaintiffs would be the foreclosed sellers of the tied good.

In a sense, though, this exception provides insight into the difficulty of creating exceptions and addressing the questions that the exceptions raise. For example, the universal rule would eliminate plaintiffs who claim to be indirectly affected by monopolization or attempts to monopolize. Two inconsistencies stand out. First, monopolization and attempts to monopolize claims often rely on variations on the leverage theory underlying tying claims. Thus, a rigid application of the exception would mean that a firm requiring resellers to carry its brand exclusively would not be answerable to the customers who purchase from the coerced resellers. Second, it is far from obvious that direct purchasers from firms engaged in monopolizing efforts are uniformly more inclined to bring antitrust actions against their suppliers than indirect victims of price fixing or tying. In short, an exception for those indirectly affected by tying lacks substantive integrity because it distinguishes plaintiffs on the basis of form only.

3. A Narrow Application of Illinois Brick

A final approach, and the one that may be the least imperfect, is to narrow Illinois Brick strictly to its facts. Thus, Illinois Brick would come into play only when (1) the plaintiffs are indirect purchasers, (2) a product actually passes through a direct purchaser to the indirect purchaser, and (3) the offense is price fixing. All other plaintiffs would be required to clear the hurdles of AGC. This relatively objective checklist would mean that the mischief resulting from Illinois Brick would largely be eliminated. Courts, plain-

---

306 Even those plaintiffs qualifying for an exception would have to pass the AGC tests to have antitrust standing. An issue left open would be whether a purchaser from the direct victim of a tying arrangement would fit within the exception. For example, a buyer of shoes from a shoemaker who is a direct victim of a tying arrangement may pay more than he or she would in the absence of tying. Whether or not Illinois Brick would bar this type of plaintiff is irrelevant because the suit almost certainly would be barred by AGC.

307 A possible way to this outcome would be to apply the "control" exception of Illinois Brick to instances in which the direct purchaser is simply a conduit for the tied product.

308 Interestingly, Hanover Shoe, the case leading to Illinois Brick, dealt with monopolization, many aspects of which involved the use of leverage.

309 Monopolization and tying both rely on the "use" of market power. Compare United States v. Griffith, 334 U.S. 100, 106-07 (1948) (concluding that the use of monopoly power, even if lawfully acquired, in unfair competitive practices, is unlawful), with Jefferson Parish Hosp. Dist. v. Hyde, 466 U.S. 2 (1984) (explaining that the existence of tied products requires an examination of how its use affects the markets and is not per se illegal).
tiffs, and defendants would devote far fewer resources to the question of whether *Illinois Brick* applies in particular instances.

Admittedly, this solution is subject to many of the same criticisms as the previous suggestions. For example, it is arbitrary in that policies underlying *Illinois Brick* would support limiting suits by plaintiffs beyond the indirect purchasers identified here. In addition, this narrow application would do little to resolve the inconsistency between those indirect purchasers who can reframe their claims as a boycott and those who can not. Although this inconsistency can be limited by the proper application of the more general standing requirements of *AGC*, such a limitation would not fully address the problem. Still, as imperfect as it is, a firm *Illinois Brick* rule would allow litigants to focus on a narrow scope of issues and would permit the evolution of a more rational system of antitrust enforcement.

**Conclusion**

The Supreme Court's decision in *Illinois Brick* is obsolete. It was necessary when it was decided because of the development of the overcharge measure of damages in private antitrust actions and the Court's decision in *Hanover Shoe*. Unfortunately, whatever rationalizing effect *Illinois Brick* had was quickly and severely undercut by *ARC America*. In addition, almost immediately after *Illinois Brick*, the Supreme Court began to develop more general guidelines that address the broader *Illinois Brick* problem—what private parties have standing to enforce the antitrust laws. Had this later development come before *Illinois Brick*, it is questionable whether *Illinois Brick* would have been necessary. Even if the *Illinois Brick* issue had been addressed under the antitrust standards developed in *McCready* and *AGC*, it is not clear that a per se rule blocking suits by indirect purchasers would have developed. Instead, issues of remoteness, multiple liability, and damage calculation could have been assessed on a case-by-case basis.

Today, *Illinois Brick* and more general standards for antitrust standing operate simultaneously, resulting in a derationalization of the system of private enforcement. The ability of a plaintiff to bring a claim can turn on the way the plaintiff frames her complaint. It also can turn on whether the plaintiff is viewed as being indirectly affected (an *Illinois Brick* term) or remotely affected (an *AGC* term). Finally, a plaintiff's ability to sue can depend on how broadly or narrowly a court chooses to interpret what it means to be an "indirect" purchaser.

This Article has offered a number of solutions to this inconsistency. First, both *Illinois Brick* and *Hanover Shoe* could be overturned and the issue of indirect purchaser standing assessed under general antitrust standing guidelines. Second, if actual damages were adopted as the routine measure of recovery in antitrust cases, not only would recoveries be more in line with actual damages, but some of the issues *Illinois Brick* sought to address would become less important. Finally, *Illinois Brick* could be retained, but clarified in such a way that inconsistencies from circuit to circuit would be reduced.

We cannot report that any one of these proposals will fully rationalize the system of private enforcement. Part of the problem is that the Supreme
Court in *ARC America* has held that states may, in effect, maintain their own antitrust regimes. These statutory schemes vary from state to state, and when combined with federal antitrust law, they make for what amounts to a broad spectrum of antitrust law that varies by jurisdiction. Thus, no single action by the Supreme Court is capable of achieving consistency. There is, however, utility in creating consistency at least with respect to what the federal law says about private enforcement of those laws. Any of the proposals would seem to further that end.