One More Challenge for the AMC: Repairing the Legacy of Illinois Brick

By J. Thomas Prud’homme, Jr.* & Ellen S. Cooper**

In Illinois Brick Co. v. Illinois,1 the Supreme Court erred when it held that downstream purchasers are not entitled to recover damages for injuries suffered as a result of a violation of federal antitrust law.2 Ironically, Illinois Brick was based on the Court’s earlier decision in Hanover Shoe Inc. v. United Shoe Machinery Corp.,3 where the Court had correctly held that an antitrust defendant could not avoid paying damages to a direct purchaser plaintiff because that plaintiff might have passed along overcharges to non-party indirect purchasers.4

Before and after Illinois Brick, various states adopted laws providing that indirect purchasers may recover damages for antitrust violations. In rejecting a preemption challenge to several such laws, the Supreme Court in California v. ARC America Corp.5 restored the proper relationship between antitrust victim and antitrust violator and between state and federal antitrust law by holding that Illinois Brick did not preempt state laws permitting downstream purchasers to recover.6

Implementation of state indirect purchaser laws in the almost thirty years since Illinois Brick demonstrates the error of the Court’s analysis in that decision. Moreover, parallel enforcement of state laws

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2. Id. at 745.
4. Id. at 494.
6. Id. at 105–06.
on behalf of indirect purchasers and federal law on behalf of direct purchasers has created far more complexity and costs for defendants and courts than if *Illinois Brick* had been correctly decided in the first instance.

Antitrust defendants obviously find these circumstances unsatisfying. Their *Illinois Brick* victory became pyrrhic after *ARC America*, and the Class Action Fairness Act of 20057 ("CAFA") may have actually exacerbated defendants' difficulties in some cases.8 Most antitrust defense counsel have abandoned the effort simply to legislatively repeal *ARC America*.9 Recognizing that an indirect purchaser right of action has probably been permanently established, many antitrust defense counsel now advocate federal indirect purchaser antitrust damages legislation, but believe any legislative remedy should contain at least four components: (1) federal law overruling both *Illinois Brick* and *Hanover Shoe*, (2) federal preemption of state law (i.e., overruling *ARC America*), (3) consolidation of all related actions in a single federal forum, and (4) allocation of damages among all plaintiffs (requiring defendants to pay, at most, treble damages).10

Like antitrust defense counsel, many antitrust plaintiffs' counsel believe the current system is costly, inefficient, and unnecessarily complex. However, plaintiffs' counsel typically differ with defense counsel on the appropriate solution. While some plaintiffs' counsel would agree that *Illinois Brick* ought to be legislatively repealed, they might not agree that *Hanover Shoe* should also be completely overruled, especially when direct-purchaser plaintiffs choose not to litigate. Most plaintiffs, and certainly all Attorneys General, strenuously oppose federal preemption. While some plaintiffs might disagree with the idea of consolidating all related actions in a single federal forum, CAFA has

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8. An effective strategy often employed by antitrust defendants prior to CAFA was to stay indirect purchaser state court proceedings in deference to the direct purchaser federal court proceedings. It appears that under CAFA, this may no longer be possible: state court proceedings will ordinarily be removed to federal court, where the federal judge, who is precluded by *Hanover Shoe* from allocating damages among direct and indirect purchasers as a matter of federal law, will be required to allocate damages among direct and indirect purchasers under the laws of many individual states, thus complicating and possibly delaying the federal action. Id. § 5.
rendered this opposition largely moot. Finally, many plaintiffs would argue that the antitrust penalties and treble damages provided under current federal law are typically considered a cost of doing business and do not provide sufficient deterrence. Accordingly, they would oppose allocating a single pool of up to treble damages among all plaintiffs.

Attempts to broker a compromise among these competing interests have so far failed. Indeed, satisfying all parties may be impossible. Nonetheless, reasonable people on both sides of the issue are hoping that the Antitrust Modernization Commission ("AMC" or "Commission"), as an independent, congressionally-authorized advisory body, is the right group at the right time to recommend a fair and reasonable legislative solution to the Illinois Brick problem.

Part I of this Article briefly outlines how downstream purchasers' rights to recover antitrust damages have changed over time. In Part II of this Article, the Authors write from the perspective of state antitrust enforcers and argue that the Supreme Court's decision in Illinois Brick to eliminate such a right of recovery is theoretically and demonstrably wrong and should be legislatively overruled. Part III then identifies some of the more contentious issues associated with such a legislative repeal, the resolutions that have been advocated by various interest groups, and our favored resolution of those issues.


12. See Andrew I. Gavil, Federal Judicial Power and the Challenges of Multijurisdictional Direct and Indirect Purchaser Antitrust Litigation, 69 GEO. WASH. L. REV. 860, 878-79 (2001), for a chronology of American Bar Association task forces which have attempted to address the issue.

13. The Antitrust Modernization Commission ("AMC" or "Commission") was created pursuant to the Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, §§ 11051-60, 116 Stat. 1856 (to be codified at 15 U.S.C. § 1 note). The Commission consists of twelve members, four of whom were appointed by the President, four of whom were appointed by the leadership of the Senate, and four of whom were appointed by the leadership of the House of Representatives. Id. § 11054(a). The AMC is charged by statute:

   (1) to examine whether the need exists to modernize the antitrust laws and to identify and study related issues;
   (2) to solicit views of all parties concerned with the operation of the antitrust laws;
   (3) to evaluate the advisability of proposals and current arrangements with respect to any issues so identified; and
   (4) to prepare and submit to Congress and the President a report in accordance with section 11058.

Id. § 11053. The report is to contain "a detailed statement of the findings and conclusions of the Commission, together with recommendations for legislative or administrative action the Commission considers to be appropriate." Id. § 11058.
I. Historical Perspective

In 1968 the Supreme Court decided *Hanover Shoe*.\(^{14}\) Hanover Shoe had brought a treble damages action against United Shoe, alleging that United Shoe had overcharged Hanover Shoe for certain leased equipment.\(^{15}\) United Shoe countered that Hanover Shoe had passed on any overcharges to its customers and, therefore, had not suffered cognizable damages.\(^{16}\) The Supreme Court rejected this argument, holding that defendants could not use pass-on as a defense in antitrust actions. The Court based its holding on the difficulty of calculating the amount of overcharge passed on by direct and other intermediate purchasers to the ultimate consumer,\(^{17}\) as well as the deleterious effect a pass-on defense would have on deterring future antitrust violation; since, the Court assumed, most overcharges are passed on and downstream purchasers would be less likely to enforce their antitrust rights, allowing defendants to use the pass-on defense would result in defendants paying less than the statutorily prescribed treble damages in many cases.\(^{18}\)

Nine years later the Court decided *Illinois Brick Co. v. Illinois*.\(^{19}\) There, the Illinois Attorney General filed suit under section 4 of the Clayton Act\(^{20}\) on behalf of a number of state and local governmental entities seeking to recover for overcharges imposed by manufacturers of concrete blocks, which had been used in the construction of public buildings.\(^{21}\) The governmental entities had not purchased the blocks directly from the manufacturer.\(^{22}\) Accordingly, *Illinois Brick* presented the question of whether a plaintiff who had not purchased directly from an antitrust violator could recover overcharges that had been passed through to it.\(^{23}\)

\(^{14}\) 392 U.S. 481 (1968).
\(^{15}\) Id. at 483–84.
\(^{16}\) Id. at 487–88.
\(^{17}\) Id. at 492–93. Professor Hovenkamp has noted that had the Court at this point recognized the fundamental difference in the nature and calculation of damages suffered by direct/intermediate purchasers and ultimate consumers, the current state of the law would be much more rational. Herbert Hovenkamp, *The Indirect-Purchaser Rules and Cost Plus Sales*, 103 HARV. L. REV., 1717, 1721–25 (1990) [hereinafter *Cost Plus*].
\(^{18}\) *Hanover Shoe*, 392 U.S. at 494.
\(^{19}\) 431 U.S. 720 (1977).
\(^{22}\) Id.
\(^{23}\) This has incorrectly been referred to as "offensive use" of pass-on (as distinguished from the defensive use of pass-on attempted by defendant in *Hanover Shoe*). Plaintiffs who do not purchase from an antitrust violator make no "use" of pass-on, offensive or
The Court held that downstream purchasers are not entitled to recover damages for injuries suffered as a result of a violation of federal antitrust law.\textsuperscript{24} As the first step in reaching this conclusion, the Court concluded that plaintiffs and defendants must be treated the same for purposes of pass-on.\textsuperscript{25} Accordingly, the Court believed it was required either to overrule \textit{Hanover Shoe}, decided a mere nine years earlier, and allow both plaintiffs and defendants to argue about the pass-on issue, or to preclude indirect purchasers from arguing that overcharges had been passed on to them.\textsuperscript{26}

Predictably, Justice White, the author of \textit{Hanover Shoe}, adhered to the reasoning of that case in denying indirect purchasers an antitrust damages remedy.\textsuperscript{27} He reiterated the difficulty of calculating pass-on damages\textsuperscript{28} and the detrimental effect that recognizing an indirect purchaser damages remedy would have on private enforcement of the antitrust laws.\textsuperscript{29} He also noted that permitting both direct and indirect

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  \item[24.] \textit{Ill. Brick}, 431 U.S. at 728.
  \item[25.] \textit{Id.} Both the plaintiffs and defendant agreed that this was the appropriate framework. \textit{Id.} at 729. The United States, as amicus curiae, argued that such symmetry was not required. \textit{Id.} Essentially every federal circuit court to have considered the issue following \textit{Hanover Shoe} had reached the same conclusion as the United States. \textit{See Illinois v. Ampress Brick Co.}, 586 F.2d 1163, 1167 (7th Cir. 1976), rev'd sub nom. \textit{Ill. Brick Co. v. Illinois}, 431 U.S. 720 (1977); In re \textit{W. Liquid Asphalt Cases}, 487 F.2d 191, 197-98 (9th Cir. 1973); West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079, 1088 (2d Cir. 1971); Armco Steel Corp. v. North Dakota, 376 F.2d 206, 210-11 & n.3 (8th Cir. 1967); S.C. Council of Milk Producers, Inc. v. Newton, 360 F.2d 414, 418 (4th Cir. 1966); Midway Enter., Inc. v. Petroleum Mktg. Corp., 375 F. Supp. 1339, 1344-45 (D. Md. 1974); \textit{see also S. Gen. Builders, Inc. v. Maule Indus. Inc.}, 1973-1 Trade Cas. (CCH), slip. op. ¶ 74,484, at 94,152 (S.D. Fla. 1972); \textit{In re Ampicillin Antitrust Litig.}, 55 F.R.D. 269, 276 (D.D.C. 1979); Iowa v. Union Asphalt & Roadoils, Inc., 281 F. Supp. 391, 401-03 (S.D. Iowa 1968), aff'd, 499 F.2d 1239 (8th Cir. 1969).
  \item[26.] \textit{Ill. Brick}, 431 U.S. at 736.
  \item[27.] \textit{Id.} at 731-48.
  \item[28.] \textit{Id.} at 731-33, 737-45.
  \item[29.] \textit{Id.} at 733-35, 745-48.
\end{itemize}
purchasers to recover antitrust damages created the possibility that antitrust defendants might have to pay multiple damages.30

The *Illinois Brick* decision was not well received by many groups, but caused particular concern to the state Attorneys General. By nullifying most consumer antitrust damages claims, the decision significantly weakened the *parens patriae* authority of the Attorneys General, which had just been recognized at the federal level in section 4C of the Hart-Scott-Rodino Antitrust Improvements Act of 1976.31 Indeed, the *Illinois Brick* decision was flatly inconsistent with the intent of the Hart-Scott-Rodino Act, at least according to one of the Act's sponsors.32

Thus, the *Illinois Brick* decision hampered the ability of the Attorneys General to invoke federal antitrust law when carrying out their core mission of protecting consumers and government agencies. Moreover, in the name of administrative efficiency, the *Illinois Brick* decision worked a significant injustice, denying recovery to downstream, or "indirect," purchasers despite the recognition that, in most circumstances, overcharges are ultimately passed on to consumers.33

To correct this injustice, the Attorneys General supported federal legislation introduced on several occasions since *Illinois Brick* that would have effectively overruled that decision.34 None of these efforts was successful.

The Attorneys General also filed amicus briefs advocating judicial limitations on the application of *Illinois Brick*. For example, states sought to expand the recognized exception to the *Illinois Brick* bar for

30. *Id.* at 730–31.
31. See S. Rep. No. 95-9345, at 16–17 (1978) (noting that the *Illinois Brick* decision "has led to a virtual nullification of *parens patriae*.").
“cost plus” contracts, when allocation of damages would be relatively simple. This effort has also been largely unsuccessful.  

Immediately after Illinois Brick, many states also began to amend state contracts by inserting clauses assigning direct purchasers’ antitrust claims to state government purchasers.36 These contractual provisions have proven of limited utility, however, in that they are procedurally difficult to enforce and, more importantly, do not provide relief to non-government consumers.

As the states attempted to limit the inequity wrought by Illinois Brick through federal legislation and litigation and through amendment of state contracts, many also tried to obtain relief through state law. This response to Illinois Brick entailed enacting state legislation that expressly permits damage recovery by downstream purchasers harmed by a violation of state antitrust law.37 Other states had preexisting antitrust statutes that have been judicially interpreted to permit recovery of antitrust damages by downstream purchasers.38 Still others have consumer protection or other laws that have been judicially interpreted to permit downstream purchasers to recover damages, including damages for violations that are functionally equivalent to antitrust violations.39 Finally, some state consumer protection and antitrust statutes permit equitable relief including disgorgement and/or restitution, which have been interpreted to permit downstream purchasers to recover for antitrust violations.40 All of these state laws have been labeled, somewhat imprecisely, “Illinois Brick repealers.”

37. One of the first states to adopt such legislation was California. The California legislation provides in relevant part that an action under the California antitrust statute “may be brought by any person who is injured in his or her business or property by reason of anything forbidden or declared unlawful by this chapter, regardless of whether such injured person dealt directly or indirectly with the defendant.” CAL. BUS. & PROF. CODE § 16750(a) (West 1997). Examples of other states with state antitrust statutes expressly rejecting Illinois Brick include Illinois, 740 ILL. COMP. STAT. ANN. 10/7-2 (West 2002), and New York, N.Y. GEN. BUS. LAW § 340(6) (McKinney 1999).
As the Attorneys General labored in the wake of *Illinois Brick* to use state law to obtain recoveries for injured consumers and state agencies, supporters of the *Illinois Brick* bar sought to invalidate these state laws, arguing that *Illinois Brick* required preemption of inconsistent state law. The Supreme Court, in an opinion again written by Justice White, unanimously rejected this argument in *ARC America Corp.*

There, the States of California, Minnesota, Alabama, and Arizona filed suit on behalf of government agencies against price-fixing cement manufacturers. Because the injured agencies had not purchased the cement directly from the price fixers, the States based their claims for damages on state antitrust statutes. In response, a class of direct purchaser plaintiffs argued that state laws permitting indirect purchasers to recover antitrust damages are inconsistent with the Clayton Act as interpreted in *Illinois Brick* and are therefore preempted. The Supreme Court, however, noted the presumption against preemption "in areas traditionally regulated by the States," stating that "[g]iven the long history of state common-law and statutory remedies against monopolies and unfair business practices, it is plain that this is an area traditionally regulated by the States." In fact, "Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies." Accordingly, the Court held the Clayton Act does not preempt state indirect purchaser laws.

Thus, for the past few decades, downstream purchasers have secured monetary recoveries for antitrust violations under state law. With that history, we should ask whether the justifications expressed in *Illinois Brick* for barring recoveries by such purchasers under federal law withstand scrutiny.

42. *Id.* at 97.
43. *Id.* at 98.
44. *Id.* at 99.
45. *Id.* at 101.
46. *Id.* (citations omitted). The Court observed:
   
   At the time of the enactment of the Sherman Act, 21 States had already adopted their own antitrust laws. . . . Moreover, the Sherman Act itself . . . "does not announce a new principle of law, but applies old and well recognized principles of the common law to the complicated jurisdiction of our State and Federal Government."

   *Id.* at n.4.
47. *Id.* at 102.
II. *Illinois Brick Has Not Aged Well*

In *Illinois Brick*, the Court upended every prior federal court of appeals decision\(^{48}\) and denied a federal antitrust remedy to millions of consumers.\(^{49}\) The decision was inconsistent with the plain language of the Clayton Act and with clear statements of congressional intent. Moreover, the Court's reasoning does not withstand scrutiny, especially in light of subsequent enforcement of state statutes permitting indirect purchaser antitrust plaintiffs to recover damages. Finally, from the defense perspective, *ARC America* has rendered *Illinois Brick* largely irrelevant, if not harmful.

A. *Illinois Brick* Was Wrongly Decided

1. **The Result Is Inconsistent with the Plain Language of and Congressional Intent Behind the Clayton Act**

   Section 4 of the Clayton Act provides that any plaintiff who is “injured in his business or property” through an antitrust violation may recover damages.\(^{50}\) It does not discriminate between direct and indirect purchasers.\(^{51}\)

   As noted by the dissent in *Illinois Brick*, if it is necessary to discriminate between direct and indirect purchasers in interpreting section 4, \[t]he legislative history . . . shows that \[the treble damages provision\] was conceived primarily as a remedy for \“(t)he people of the United States as individuals,” especially for consumers . . . . These actions were conceived primarily as “‘open(ing) the door of justice to every man, whenever he may be injured by those who violate the antitrust laws, and giv(ing) the injured party ample damages for the wrong suffered.”\(^{52}\)

   In addition,

   The . . . Hart-Scott-Rodino Antitrust Improvement Act of 1976 was expressly adopted to create “an effective mechanism to permit consumers to recover damages for conduct which is prohibited by the Sherman Act, by giving State attorneys general a cause of action (to sue as parens patriae on behalf of the States’ citizens) against anti-

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48. See supra note 25 and accompanying text.
49. Prior to *Illinois Brick*, “indirect” purchasers were plaintiffs in almost two-thirds of all private federal antitrust actions and the only plaintiffs in twenty-five percent of these cases. S. REP. No. 95-934, at 19–20 (1978).
51. See Cost Plus, supra note 17, at 1718 “On its face, the indirect-purchaser rule appears inconsistent with section four of the Clayton Act . . . . The indirect-purchaser rule potentially awards the direct purchaser *more* than three times the damages ‘by him sustained,’ while indirect purchasers receive nothing.” Id.
trust violators.” . . . The Senate Report accompanying the new Act expressly found that “(t)he economic burden of most antitrust violations is borne by the consumer in the form of higher prices for goods and services . . .” 53

Representative Rodino, one of the Act’s sponsors, stated “recoveries are authorized [under the Act] whether or not the consumers purchased directly from the price fixer, or indirectly . . .” 54

As the Illinois Brick dissent correctly noted, “It is difficult to see how Congress could have expressed itself more clearly.” 55

2. The Three Pillars of the Court’s Analysis Do Not Bear the Weight of the Result

As noted above, the Court in Illinois Brick provided three reasons for barring downstream recovery of antitrust damages: (1) the bar avoids the risk that defendants might have to pay multiple damages; (2) direct purchasers are the most efficient enforcers of the antitrust laws; and (3) pass-on damages are difficult to calculate. 56

As to the possibility of duplicative damages, the Supreme Court effectively abandoned this justification in its ARC America decision when it upheld state antitrust laws that might require defendants to pay damages under state law, regardless of whether they would also be required to pay damages under federal antitrust law. 57 Moreover, this justification has proven, in the almost thirty years since Illinois Brick, to be entirely hypothetical. To the Authors’ knowledge, there has not been a single documented instance where a defendant has been subject to suit by direct and indirect purchasers and been required to pay more than treble damages. As one commentator has noted, “The antitrust enforcement experience in the nearly three decades since the Illinois Brick ruling suggests that the concerns about multiple liability cited by the Illinois Brick majority might be overblown.” 58

Likewise, the efficiency-of-enforcement rationale has not withstood the test of time. 59 Even assuming this rationale’s validity when

53. Id. at 756 (citations omitted).
55. Ill. Brick, 431 U.S. at 758.
56. Id. at 730–33 (majority opinion).
59. See id. at 49 (“Indirect purchaser suits have led to a modest up-tick in deterrence.”).
applied to private litigants, this justification is and always has been inapplicable to state Attorneys General acting in their *parens patriae* capacity on behalf of consumers. Under their respective state antitrust laws, most Attorneys General have pre-litigation investigative authority, usually including compulsory process for the production of documents and testimony. With this authority, the Attorneys General are at least as capable as "direct" purchasers of ferreting out antitrust violations and enforcing the antitrust laws.60

Finally, as to the difficulty of allocating damages among direct and downstream purchasers, while problems undoubtedly still remain, they are more manageable today. Advances since 1977 in data capture, storage, and manipulation, as well as in econometric modeling have made such allocation less problematic.61 Moreover, when the Supreme Court decided *Illinois Brick* in 1977, trial courts were limited in their ability to evaluate and exclude possibly dubious expert testimony. Since then, the Supreme Court has recognized that the federal district courts are qualified to evaluate expert testimony and act as gatekeepers for the admission of such testimony.62 Even assuming that insurmountable analytical difficulties for allocating damages remained in particular cases, the federal courts are now equipped to deal with them by simply excluding unreliable expert testimony.

B. State and Private Plaintiffs' Enforcement on Behalf of Indirect Purchasers Shows the Efficacy of State Indirect Purchaser Remedies and Highlights the Court's Error in *Illinois Brick*

Some recent cases highlight the success of the Attorneys General, and others, in obtaining recoveries under state law on behalf of injured downstream purchasers. These cases provide ample testimony to the effectiveness of the state-law remedy and call into question the continued viability of the Court's reasoning in *Illinois Brick*.

60. *See id.* ("[C]onsumers, at least in actions brought by state governments, are getting some compensation from antitrust violators."); *Cost Plus, supra* note 17, at 1729 (noting that "private plaintiff lawsuits that follow separately initiated government price-fixing prosecutions...account for well over one-third of private price-fixing filings...[and] independent antitrust practitioners are probably in the best position to 'detect' worthwhile private cartel cases simply by keeping up with the literature on government investigations"). Moreover, direct purchasers often have little incentive to sue their suppliers for antitrust violations. Litigation usually disrupts business operations and creates ill-will while overcharges may be passed on to downstream purchasers.

61. For example, using available data, the states have submitted damages calculations in a wide variety of pharmaceutical cases. *See, e.g.*, FTC v. Mylan Labs., Inc., 99 F. Supp. 2d 1 (D.D.C. 1999).

For instance, in *FTC v. Mylan Laboratories, Inc.* the Attorneys General of thirty-three states conducted a joint litigation with the Federal Trade Commission ("FTC"). The states represented government agencies and consumers, the majority of whom were "indirect" purchasers of the anti-anxiety drugs lorazepam and clorazepate. The FTC and states jointly settled with defendants for $100 million, to be distributed to downstream purchasing consumers and to government agencies. Under this settlement, affected consumers who submitted valid claims received compensation equal to 100% of the total value of their purchases of the relevant drugs over the relevant time period. In total, 203,471 consumer refund checks worth $42,937,014.80 were mailed for an average check value of approximately $211, although many individual consumer checks exceeded $1000.

Separate classes of non-consumer, non-government "indirect" purchasers ("third party payors") and direct purchasers filed actions in the District of Columbia District Court. The direct purchaser action was settled for $35 million, while the third party payor downstream purchaser case settled for $25 million. Some businesses opted out of the third party payor downstream purchaser settlement, and, recently, a jury awarded pre-trebled damages in excess of $12 million to four end-payor insurance companies. The cumulative amount of these settlements and verdict (assuming it is trebled) is less than treble the states' estimate of overcharge damages.

Likewise, in *In re Buspirone Antitrust Litigation*, the Attorneys General of thirty states represented consumers and state agencies, most of whom were downstream purchasers of the drug BuSpar.
Pursuant to their settlement with defendant Bristol-Myers Squibb, the Attorneys General recovered $100 million for their consumers and government agencies. Under this settlement, affected consumers who submitted valid claims received compensation equal to more than 100% of the total value of their purchases of the relevant drugs over the relevant time period. In total, over $37 million in refund checks was distributed to consumers. The minimum consumer check was $75.00, the average consumer check was $646.97, and many checks reached into the thousands of dollars.

The Buspirone litigation also involved a private class of non-consumer downstream purchasers, as well as a direct purchaser class. All of these actions were consolidated with the Attorney General action for pretrial purposes, and the settlements in all of these actions were contemporaneously negotiated. The non-consumer downstream purchasers settled for $90 million, while the direct purchasers settled for approximately $220 million. Some of the non-consumer downstream purchasers opted out of that settlement and have since settled separately for approximately $50 million. Finally, several competitors sued Bristol-Myers Squibb directly, and received approximately $60 million.

Comparing the BuSpar settlement amounts to estimated damages is difficult. The lawsuits involved two separate claimed violations, one with relatively low potential damages but a high likelihood of success, and another with very high potential for damages but a lower likelihood of success. Although the settlements do not allocate damages among the different claims, we roughly estimate that the aggregate value of all settlements (excluding the competitor claims) is less than single overcharge damages for the claim with the high damage potential, and approximately double the potential overcharge damages for the claim with the low damage potential.

73. Id.
78. Id.
Another example of the success of the Attorneys General in obtaining consumer recoveries is *State of Ohio v. Bristol-Myers Squibb Co.*, [79] in which the Attorneys General of all fifty-six states, territories, and possessions represented consumers and state agencies, most of whom were indirect purchasers of the drug Taxol. [80] Pursuant to their settlement with Bristol-Myers Squibb, the Attorneys General recovered $55 million in settlement of their consumers' and government agencies' claims. [81] Under this settlement, affected consumers who submitted valid claims received compensation equal to 100% of their estimated overcharges. [82] A total of 12,723 checks were mailed out, worth $7,242,114, for an average amount per check of $569.21. [83] In addition, Bristol-Myers Squibb is currently supplying 13,000 vials of Taxol without charge for distribution to indigent patients. [84]

Like the BuSpar case, the Taxol litigation also involved a private class of third party payor downstream purchasers and a direct purchaser class. The third party payor downstream purchasers settled for $15,185,000; the direct purchasers settled for $65,815,000. [85]

In these cases, and many more, the Attorneys General and private plaintiffs' counsel have effectively represented and obtained meaningful recoveries on behalf of indirect purchasers, despite the concerns expressed by the Court in *Illinois Brick*.

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80. *Id.* at 1.
83. Plaintiff States' Report on Consumer Claims, State Agency and Attorneys Fees Distributions and Claims Administration Expenses at 2, Ohio v. Bristol-Myers Squibb Co., 02-cv-01080 (D.D.C. Mar. 24, 2005). State agencies received $37.5 million. *Id.* The balance of the consumer portion of the settlement will be distributed *cy pres* to benefit cancer patients and their families. *Id.* at 3.
C. Use of State Indirect Purchaser Remedies Under ARC America Renders Illinois Brick Largely Moot as an Effective Defense, Regardless of Whether It Was Correctly Decided

As the immediately preceding discussion illustrates, the states (and many plaintiffs' counsel) make every effort to coordinate and streamline indirect purchaser actions. The vast majority of actions brought by Attorneys General on behalf of downstream purchasers are brought in a coordinated fashion, on behalf of consumers in more than one state. Most of these cases are brought in federal court via a single complaint, with multiple state-law supplemental claims. Many of these cases have been consolidated with class actions and in each such case, the Attorneys General have successfully coordinated their case prosecution with class counsel to avoid duplication and inconsistent representation.

Nevertheless, the dual remedy regime created by the interaction of Illinois Brick, ARC America, and state indirect purchaser laws creates at least potential, and often real substantive and procedural difficulties for defendants. It is indeed ironic that having won a significant victory in Illinois Brick, defendants' plight is now worse under ARC America. Defendants now may have to litigate difficult pass-on issues, possibly in multiple state courts. Furthermore, defendants not only face the possibility of multiple damages, they face the possibility of having such damages assessed in multiple state courts on behalf of indirect purchasers, while being precluded from arguing pass-on in federal court actions brought by direct purchasers.


88. See Gavil, supra note 12, at 876–77 (noting that “[f]ollowing the initiation of the government’s prosecution of Microsoft in May 1998, Microsoft faced sixty-four follow-on federal antitrust actions, and 117 state court actions . . . .”); Cost Plus, supra note 17, at 1719 (“state and federal antitrust systems render the rationales of Illinois Brick practically meaningless, because ‘duplicative’ recovery will exist and pass-on will have to be established in litigation . . . .”).

89. It bears repeating that while defendants face the theoretical possibility of multiple damages, defense counsel have so far failed to document a single case where a defendant has actually paid greater than treble damages when being sued by both direct and indirect purchasers.
III. So What Is the Answer?

The AMC should recommend to Congress both substantive and procedural changes to address the problems created by *Illinois Brick*. Substantively, it should recommend that Congress overrule *Illinois Brick* and provide a federal remedy for downstream purchasers. At the same time, the AMC should recommend that Congress retain a modified version of *Hanover Shoe* to prevent defendants from using pass-on to absent plaintiffs as a defense to damages. As a final substantive matter, the AMC should recommend that Congress not preempt state laws that currently provide for recovery by indirect purchasers.

Procedurally, much of Congress's work has already been done with the adoption of CAFA. Nonetheless, the AMC should recommend that Congress overrule the Supreme Court's *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach* decision, thereby permitting consolidation of multidistrict cases for all purposes, including trial. Finally, the AMC should recommend the adoption of a three-phase trial (liability, damages, and damage allocation) in antitrust cases involving plaintiffs at multiple levels of distribution.

A. Substantive Recommendations

1. Overrule *Illinois Brick*

The *Illinois Brick* decision is inconsistent with the text of section 4 of the Clayton Act, which provides that any plaintiff who is "injured in his business or property" through an antitrust violation may recover damages. It is also inconsistent with express congressional intent in enacting the Hart-Scott-Rodino Antitrust Improvements Act of 1976. The *Illinois Brick* decision is quite simply an expression of that Supreme Court majority's empirically unsupported theory of how best to maximize deterrence and judicial economy, at the expense of the clear text and legislative history of the Clayton Act, both of which focus on compensating antitrust victims.

92. 15 U.S.C. § 15(c); *see supra* Part II.A.1.
93. Although it has long been a rule in antitrust cases that damages may not be based on mere speculation, a jury may make a "just and reasonable estimate." The rationale for the more relaxed standard is that ascertainment of the precise damages is often difficult as a result of the defendant's illegal conduct. Thus, plaintiffs should continue to benefit from the leeway established in *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265–66 (1946), and other cases permitting reasonable inferences in establishing damages, and damages should be awarded to the plaintiff actually "injured in his business or property" within the mean-
As has been shown above, each of the three pillars of the Court’s *Illinois Brick* analysis is either incorrect or irrelevant in light of the continued viability of indirect purchaser remedies under state law.\(^{94}\) Moreover, as virtually every commentator on the subject has noted, the dual federal/state enforcement system created by *Illinois Brick* and *ARC America* is extremely inefficient and costly to defendants, courts, and, in many cases, plaintiffs.\(^{95}\) While CAFA may have ameliorated some of the procedural difficulties created by the dual enforcement system,\(^{96}\) it does not address all of them and may actually have made things more difficult for some defendants in some situations.\(^{97}\)

Something needs to be done. At the most basic level, Congress has two choices: overrule *Illinois Brick* or overrule *ARC America*. In other words, Congress can either provide a federal right of recovery to indirect purchasers, or completely preclude indirect purchasers from recovering under both federal and state law.

A number of factors favor the former course. First, and most importantly, *Illinois Brick* was incorrectly decided. As noted above, the Court created three justifications for its rule without any empirical support whatsoever. Subsequent experience with state indirect purchaser actions has not substantiated the concerns underlying the Court’s analysis.

Of equal importance, *ARC America* was correctly decided. Our forefathers assumed that the states would take primary responsibility for economic regulation and legislation relating to the welfare of their citizens.\(^{98}\) The states have a long history of enacting and enforcing antitrust laws. Congress originally adopted the Sherman Act to supplement twenty-one pre-existing state antitrust statutes.\(^{99}\) Congress today should be hesitant to preempt the states from carrying out these traditional activities, especially where, as here, there is no evidence to show that the states are abusing their authority or having any adverse effect on business and commerce. Indeed, any adverse effects created by the inconsistency between federal and state law in the present context were created by *Illinois Brick*.

\(^{94}\) See supra Part II.A.1.
\(^{95}\) See supra Part II.C.
\(^{96}\) See infra Part III.B.1.
\(^{97}\) See supra note 8 and accompanying text.
\(^{99}\) See id.
Finally, overruling *Illinois Brick* would not "open the floodgates" by allowing even the most remote of indirect purchasers to recover. Other doctrines of federal antitrust law, such as antitrust injury and standing, prevent many injured plaintiffs from recovering damages. Under these doctrines, unlike the near absolute rule of *Illinois Brick*, courts are permitted to weigh such factors as the nature of the plaintiff's injury and the relationship between the specific injury and the alleged antitrust violation.\(^{100}\) Thus, even in the absence of *Illinois Brick*, courts would still retain the necessary power to reject claims that are inherently speculative. Downstream purchasers with non-speculative claims, however, could recover.

2. Retain *Hanover Shoe* as to Any Level of Distribution That Does Not Sue

The *Illinois Brick* decision is probably best understood as an attempt to comply with the old adage that "what's good for the [defendant] goose is good for the [plaintiff] gander." This rule of symmetry is not legally required, nor is it necessarily good law or policy.\(^{101}\) Accordingly, it does not necessarily follow that if Congress overrules *Illinois Brick* it should also overrule *Hanover Shoe* in its entirety.

Of course, if Congress overrules *Illinois Brick* and adopts procedural reforms that result in the consolidation of most direct and indirect purchaser lawsuits in federal court, the federal courts will necessarily be involved in allocating damages among plaintiffs from various levels of distribution that file suit. Under these circumstances, *Hanover Shoe* is likely to be largely irrelevant, since the real fight between the defendants and the plaintiffs will be over the total amount of damages; defendants will likely not care how such damages, once awarded, are ultimately divided among the plaintiffs.

However, *Hanover Shoe*'s rule against defensive use of pass-on remains relevant when not all classes of plaintiffs sue. Allowing antitrust violators to argue pass-on where not all classes of plaintiff sue allows the violators to keep all or part of their ill-gotten gains, thereby minimizing deterrence. Full deterrence requires that *Hanover Shoe* be retained for these situations.

Of course, it could be argued that the proposed rule would encourage potential plaintiffs to sit on their rights, waiting for a determination of liability before filing suit and demanding their fair share.

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101. See, e.g., Cost Plus, supra note 17; Cavanaugh, supra note 58, at 43–44.
Two examples come to mind. First, a potential plaintiff or class of plaintiffs not represented by an existing class could wait out the judgment before filing suit. However, as the *Illinois Brick* dissent correctly points out, this is an unlikely scenario, given "[t]he extended nature of antitrust actions . . . combine[d] with the short four year statute of limitations . . .".102 Moreover, defendants do not actually pay greater than treble damages when subjected to multiple layers of liability today. Therefore, the extremely remote possibility of multiple damages under this scenario does not warrant rejection of the proposal. Second, a putative class member, say a large direct purchaser, such as a health insurer in a drug case, might opt-out of a class settlement, hoping to get a better deal for itself. Here, the statute of limitations would not have run against the opt-out during the pendency of the action. Thus, this scenario could occur relatively frequently. In this circumstance, a rule mandating, consistent with the minimum requirements of due process, that such an opt-out quickly decide (e.g., within sixty days) whether to file suit seems reasonable. Such a suit would have to be filed in the court before which the consolidated related cases were already pending.

3. No Preemption

The state Attorneys General unanimously oppose preemption of state antitrust laws, including *Illinois Brick* repealers.103 Almost every state has an antitrust law of general applicability; every state has some type of antitrust law.104 In fact, twenty one states had enacted antitrust statutes before the Sherman Act was passed in 1890.105 While state statutes differ, many are interpreted in conformity with federal antitrust law. The majority give some deference to federal court interpretations of federal law. As chief law officers of their states, the Attorneys General are the primary enforcers of their states’ antitrust laws. The Attorneys General also represent the consumers within their states, either as *parens patriae* or as its functional equivalent under state law.106 The Attorneys General also may bring proprietary actions on behalf of governmental entities to recover overcharges either in state

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or federal court. Because approximately 75% of all purchases by local governments and state agencies are made though "indirect" distribution channels, state Illinois Brick repealers can have a significant impact on state coffers.

The Attorneys General have stated their belief that "the erosion of state sovereignty is inimical to the basic principles of federalism that inhere in our Constitution." The Attorneys General, therefore, oppose "federal preemption of any state antitrust statutes, including indirect purchaser statutes, or other limitation of state antitrust authority, as such preemption or limitation would impair enforcement of the antitrust laws, harm consumers, and harm free competition."

History supports the position of the Attorneys General on preemption. As a result of our system of federalism, the state "laboratories of democracy" have in many instances ultimately influenced debate on federal policy. The current debate over the status of "indirect" purchasers is but one example. Other current examples include the treatment of resale price maintenance and the balance between economic efficiencies and consumer price effects in analyzing mergers. As one commentator concluded in an article on antitrust federalism:

> Federalism allows for the experimentation, the successes, and the failures needed to find the best approach for a given time and a given market. It reminds legislators, courts and scholars that, on many key issues, reasonable minds may differ and that, because society has conflicting and overlapping desires, there may not be one single answer.

In the present situation, states have developed a full panoply of downstream purchaser remedies, all of which recognize the fundamental injustice of Illinois Brick. Some provide for single damages; others for treble damages. Some incorporate Hanover Shoe.
others do not.\textsuperscript{117} Some allow only the state Attorney General to bring an action;\textsuperscript{118} others allow any downstream purchaser to do so.\textsuperscript{119} Some liberally allow class actions,\textsuperscript{120} while others view class action certification skeptically or do not permit class actions at all.\textsuperscript{121} Finally, some states have repealed \textit{Illinois Brick} only as to governmental plaintiffs.\textsuperscript{122} Each of these state legislative solutions to a federal law injustice succeeds in addressing the problems created by \textit{Illinois Brick} without succumbing to the insurmountable complexities forecast by the Supreme Court. Further, these alternatives offer an array of models for Congress today.

Preemption would affect more than state antitrust laws. The paths around \textit{Illinois Brick} are not limited to state antitrust law claims. As can be seen in Judge Hogan's opinion in \textit{Mylan}, explicit "repealers" of \textit{Illinois Brick} are only a part of the mix of statutes and decisional law.\textsuperscript{123} Many state antitrust remedies for downstream purchasers rest upon judicial constructions of the state antitrust act.\textsuperscript{124} Often the state enacted its law much earlier than the Supreme Court's decision in \textit{Illinois Brick}.\textsuperscript{125} Other states rest their downstream purchaser claims on equitable remedies like restitution and disgorgement.\textsuperscript{126} Finally, many claims do not even reside in antitrust. Many states recognize price-fixing and other antitrust violations as violations of their consumer protection laws or Unfair and Deceptive Trade Practices Acts ("Little FTC Acts").\textsuperscript{127} Preemption of these non-antitrust laws would be particularly inappropriate and almost certainly would have broad, unintended consequences in other areas of law.

Preemption of state law would interfere with traditional state functions. Attorneys General bring enforcement actions on behalf of the state in state court. Restitution is part of traditional Attorney General enforcement authority. States' ability to seek restitution on behalf

\begin{itemize}
\item \textsuperscript{117} See, e.g., Wi. Stat. Ann. § 133.18 (1)(a) (West 2001).
\item \textsuperscript{118} See, e.g., Or. Rev. Stat. § 646.775(1)(a) (2003).
\item \textsuperscript{120} See, e.g., D.C. Code Ann. § 28-4508(c) (LexisNexis 2001).
\item \textsuperscript{121} See, e.g., In re Relafen Antitrust Litig., 221 F.R.D. 260, 280–82 (D. Mass. 2004).
\item \textsuperscript{122} See, e.g., Colo. Rev. Stat. Ann. § 6-4-111(2) (West 2005).
\item \textsuperscript{123} In re Lorazepam & Clorazepate Antitrust Litig., 205 F.R.D. 369, 386–87 (D.D.C. 2002).
\item \textsuperscript{125} See, e.g., Ala. Code § 6-5-60 (1993).
\item \textsuperscript{126} See, e.g., Mack v. Bristol-Myers Squibb, 673 So. 2d 100 (Fla. Dist. Ct. App. 1996).
\item \textsuperscript{127} See, e.g., Ciardi v. F. Hoffman-LaRoche, Ltd., 762 N.E.2d 303, 306–10 (Mass. 2002).
\end{itemize}
of citizens injured by violations of state law should not be abridged. Similarly, Attorneys General bring actions in state court as *parens patriae* on behalf of the citizens of their states. Their right to do so, which may be codified in state constitutions, may accrue by reason of common law, or may be granted by the state legislation, should not be preempted.

If a meaningful federal remedy for downstream purchasers is enacted, disputes will naturally migrate toward federal court. First, by aggregating claims in federal court, plaintiffs can achieve efficiencies necessary for effective prosecution of claims. Second, by relying on a federal remedy, plaintiffs from all states can receive uniform recoveries, especially in negotiated settlements. Third, because so many state claims are interpreted with some degree of deference to federal law, the existence of an effective federal remedy for downstream purchasers will ultimately moderate differences in state law. Finally, as a practical matter, most antitrust class actions will end up in federal court anyway under CAFA. Any lingering ambiguity in this regard should be addressed by Congress when and if it provides a federal indirect purchaser right of action. Practically speaking, a plaintiff would need to have a very good reason indeed to rely on state law in a multi-party, multi-district federal antitrust litigation, assuming federal law provides an adequate remedy.

If the federal remedy is indeed adequate, it will be used in the large, multi-district cases, especially in light of the practical loss of the state forum for large national class actions under CAFA. If, however, Congress fails to adopt a federal remedy that fairly compensates consumers for their losses, plaintiffs, particularly state Attorneys General

128. See, e.g., Gavil, *supra* note 12, at 871 (Prior to *Illinois Brick*, “the trend was pronounced toward bringing more and more private treble damage actions to federal court even when state antitrust or related claims were also being asserted.”).


131. Judges in federal actions involving multiple pendent state antitrust claims have expressed concern regarding the manageability of such litigation. In at least one such case, the court expressly recognized that “state law claims have the potential to complicate the jury instructions and the findings of fact that the jury will be asked to make . . . .” *In re Disposable Contact Lens Antitrust Litig.*, MDL 1030, at 2 (M.D. Fla. Mar. 20, 2001) (order). This concern resulted in plaintiffs, who were seeking to rely on supplemental state antitrust claims, stipulating prior to trial that such claims “would not present additional questions of fact for the jury, raise any additional essential elements of any claim, or involve higher standards of proof than the federal antitrust claims.” *Id.*
who are entrusted with protection of consumers, will seek state remedies. The Attorneys General should retain the ability to defend those consumers against activity that illegally extracts money from them. Plaintiffs rightly fear giving up a proven state remedy in return for a federal remedy of questionable value.

Finally, any state's legislature may opt to eliminate its *Illinois Brick* repealer. It should be left to the states to determine whether their consumers have been accorded a reasonably meaningful federal remedy for claims that consumers otherwise might pursue under state law. Federal preemption of state remedies may make the system of antitrust enforcement less complex, but the resulting tidiness comes at the price of impairing the system of federalism that is fundamental to our national structure.

B. Procedural Recommendations

Any legislative revision of federal indirect purchaser law should include procedural changes to make antitrust actions involving indirect purchasers more efficient and less costly. It is worth noting, however, that the current situation is not as dire as some would have us think.

1. Consolidation of Related Cases: Class Action Fairness Act

CAFA\(^{132}\) permits aggregating the amount in controversy and significantly relaxes diversity standards. Thus, in cases with national or international corporate defendants, the federal courts will likely have at least discretionary jurisdiction. In fact, CAFA has already resulted in the removal of a significant number of state law indirect purchaser actions from state court to federal court.\(^{133}\) Once removed, these cases have been transferred by the Multidistrict Litigation Panel ("MDL Panel") to a single court and consolidated for pretrial purposes.\(^{134}\) Thus, it appears that CAFA has addressed in large part the procedural concern that defendants have been required to litigate in multiple state and federal forums.\(^{135}\)

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135. The Class Action Fairness Act does not apply to the *parens patriae* actions of the state Attorneys General. In debating Senator Pryor's amendment to S. 5, an amendment
However, CAFA is not the entire answer. Removal under CAFA and/or transfer/consolidation under the MDL Panel leaves two critical issues unresolved.

First, as the defendants in the DRAM and Hydrogen Peroxide cases are discovering, mere consolidation of the direct and indirect purchaser cases into a single forum does not significantly reduce the complexity of their litigation. The parties and court are now required to consider all federal and state claims simultaneously, in contrast with some prior cases, where consideration of state law issues was either avoided or stayed pending outcome of the federal action. For CAFA to provide real relief, removal and consolidation under CAFA must be accompanied by the provision of a federal right of action for indirect purchasers.

2. Overrule Lexecon

Second, under the Supreme Court’s ruling in Lexecon, cases transferred and consolidated for pretrial purposes by the MDL Panel cannot be tried together in the transferee court. Under Lexecon, defendants who go to trial lose much of the benefit gained with CAFA. For the procedural benefits of CAFA to be fully realized, Congress should overrule Lexecon and permit the transferee court to retain transferred cases for trial.

that would have explicitly excluded actions brought by the state Attorneys General on behalf of their citizens, Senator Cornyn of Texas stated:
I think it is very plain that no power of the State attorney general is impeded by virtue of S. 5, or will be once it is signed into law. . . . [C]learly, when State law and the State Constitution specifically provide for the right of an attorney general, a State attorney general, to sue on behalf of his State’s citizens, then this bill, when made a law, will not in any way impede that endeavor.

151 CONG. REC. S1149, S1162 (daily ed. Feb. 9, 2005) (statement of Sen. Cornyn). In addition, Senator Salazar of Colorado stated, “It is important for us to make sure as this legislation is being considered that we all understand that it is going to have no impact on the powers and duties of the attorneys general.” Id. (statement of Sen. Salazar) Nevertheless, the beneficial parens patriae provisions of Hart-Scott-Rodino make federal court an attractive forum for multistate downstream purchaser cases and, as noted above, this is the forum the states have typically chosen in multistate cases.

139. Id. at 28.
140. Of course, “[d]iscretion would have to be built into any proposal to accommodate [concerns about prejudice and the convenience of parties] to ensure that any reversal of Lexecon is not read as a mandatory process lacking in the flexibility of prior practice.” Gavil, supra note 12, at 896.
3. Calculation and Allocation of Damages

Assuming the above procedural recommendations are in place and there is a single consolidated federal action involving all defendants and all plaintiffs at all levels of distribution, the question remains of how to structure the calculation and allocation of damages.

Some commentators have forcefully argued that optimal deterrence requires defendants to face the prospect of paying more than treble damages. Accordingly, these commentators approve of the current damage calculation regime, where defendants in many cases face at least the theoretical prospect of paying more than the treble damages authorized under the Clayton Act.

However, any change to the federal indirect purchaser rule will necessarily change the way antitrust damages are calculated and allocated. If Congress recognizes a federal damages remedy for indirect purchasers, federal courts will no longer be precluded from allocating damages among direct and indirect purchasers; they will be required to do so, at least where both groups have filed suit. Likewise, with CAFA, indirect purchaser plaintiffs are much less likely to have their cases (and damages) decided in state court by a judge who is only dimly aware of the existence of a federal direct purchaser action. If one court will in most cases be determining the amount and the allocation of damages, how should that court make those determinations?

In its 2001 report, the ABA Antitrust Section’s Task Force on the Federal Antitrust Agencies suggested that lawsuits involving direct and indirect purchasers be divided into three phases: (1) liability; (2) determination of total damages; and (3) allocation of damages among claimants. Defendants would be involved in the first two phases, but not the third. Respected commentators have recommended this approach, which has the benefit of being relatively efficient for all

141. See, e.g., Lande, supra note 11, at 171-73.
142. There is no empirical support for the proposition that defendants actually do pay more than treble damages. See, e.g., id.
143. But see Gavil, supra note 12, at 899-900 (suggesting retaining state court control over calculation and allocation of damages in some situations).
parties and of removing defendants from damages allocation, a process about which they may have little evidence and less interest.\textsuperscript{146}

This proposal should not be implemented so as to entirely eliminate the possibility of “double recovery.” In other words, under this proposal, it should be possible that in a particular case, calculation of damages under a pendent state law claim, in addition to calculation of damages under the federal claim, could result in a “phase 2” determination that defendants are required to pay more than treble damages.\textsuperscript{147} This should be an acceptable risk for defendants, given the significant cost reductions and efficiencies inherent in the rest of these recommendations. Moreover, this is a necessary risk if the states’ sovereign interests are to be recognized. As discussed above,\textsuperscript{148} states should remain free to determine for themselves the optimal level of antitrust deterrence necessary to protect their citizens. Furthermore, as a practical matter, the risk of multiple damages is probably minimal. A single court with all the plaintiffs, defendants, and claims in front of it is unlikely to award extra damages under state law unless a particular state law is very clear that it contemplates and expects such “extra” damages. Congress could, without unreasonably imposing on state sovereignty, require that any states intending to award extra damages must amend their statutes to affirmatively say so.

**Conclusion**

In *Illinois Brick*, the Supreme Court used faulty reasoning to reach the wrong result: denial of an antitrust remedy to most ultimate consumers of price-fixed goods. Indirect purchaser plaintiffs’ use of state law to recover antitrust damages in the nearly three decades since *Illinois Brick* has demonstrated the reasonable workability of the indirect

\textsuperscript{146} This approach arguably uses the “wrong” measure of damages for direct/intermediate purchasers. Professor Hovenkamp has forcefully argued that the fundamental problem with both *Hanover Shoe* and *Illinois Brick* is that they buy into the erroneous notion that it is necessary for courts to allocate damages among direct and indirect purchasers by determining the pass-on of overcharges, when the correct measure of damages for direct and intermediate purchasers is lost profits, with overcharge being the correct measure only for ultimate consumers. *Cost Plus*, *supra* note 17, at 1721–25. Because the case law since *Hanover Shoe* uses overcharges as a proxy for damages, this approach uses the same measure.

\textsuperscript{147} *See* Gavil, *supra* note 12, at 899–900 (“[A] state might well conclude that in cases of widespread consumer injury, cumulative state and federal damages may serve important deterrent purposes.”) Of course, this would not be the case with some states, such as Texas, which expressly provide that recoveries under federal law will be offset against recoveries under the state antitrust statute. *See* TEX. BUS. & COMM. CODE ANN. §15.21(a)(2) (Vernon 2006).

\textsuperscript{148} *See supra* Part III.A.3.
purchaser remedy. Moreover, the procedural difficulties created by the differing federal and state standards for antitrust recovery have brought many, if not most, plaintiff and defense counsel to the same conclusion: the system is broken and needs to be fixed.

The Antitrust Modernization Commission is in a position to recommend to Congress the necessary repairs. These recommendations should include: (1) overruling *Illinois Brick* to permit recovery of antitrust damages by indirect purchasers, (2) retaining *Hanover Shoe*’s limitation on defensive use of pass-on as to any absent classes of plaintiffs, (3) not preempting state antitrust and other related laws, (4) overruling *Lexecon* to permit consolidation of related cases for purposes of trial, and (5) adopting a “three phase” trial in actions involving more than one class of plaintiffs. Only with changes such as these can Congress restore the proper focus of the antitrust laws to consumer welfare.