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INDIRECT PURCHASER STANDING IN ANTITRUST ACTIONS: DUPLICATIVE LIABILITY IN THE ENERGY INDUSTRY

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I. INTRODUCTION

Commentators and practitioners agree that sectors of the energy industry such as natural gas pipelines will likely become increasingly enmeshed in high-stakes antitrust litigation over the next few years.[1] In two recent decisions—*Kansas v. Utilicorp United, Inc.*[2] and *California v. ARC America Corp.*[3]—the Supreme Court has raised the stakes even more in the natural gas industry (and to an extent, possibly the electric transmission industry) by creating a substantial risk that energy sellers such as producers and pipelines will pay twice—once in federal court and once in state court—if they commit an antitrust violation. With the Supreme Court recently foreclosing any hope that federal antitrust doctrine can solve this conundrum,[4] providers of energy will be forced to rely upon differing state laws for protection. This article traces the origins of this problem of duplicative antitrust exposure and concludes that existing state antitrust laws offer little comfort to those facing multiple liability.[5]

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1. *E.g.*, LaRue, *Antitrust and the Natural Gas Industry*, 11 ENERGY L.J. 37 (1990).
2. 110 S. Ct. 2807 (1990).
3. 109 S. Ct. 1661 (1989).
4. *Utilicorp*, 110 S. Ct. at 2818.
5. The issues addressed in this article may be predominantly relevant to the natural gas industry, but they also may be applicable to sectors of the electric transmission industry involved in the wholesale transmission of power.

Under federal antitrust law, the *Illinois Brick* doctrine[6] generally permits only a seller's direct customers, such as local distribution companies (LDCs), to sue the seller for illegal overcharges even when that LDC customer has recouped by passing the overcharge on to its customers—residential consumers for example. In response to this limited federal antitrust standing, many states adopted statutes that expressly grant indirect purchasers the right to sue under state antitrust laws.[7] Last year, in *ARC America*, the Court ruled that *Illinois Brick* does not preempt such state indirect purchaser statutes.[8]

After *Arc America* antitrust defendants are confronted with potential liability in both federal and state court. They face the obligation not only to pay direct purchasers three times the overcharge adjudged against them in federal court, but also to pay indirect purchasers any portion of that overcharge adjudged in state court to have been passed on to the indirect purchasers. This risk is particularly acute in the natural gas pipeline context. As indicated below, the federal and state regulatory framework of that industry generally allows a direct purchaser, such as an LDC, to pass on to residential consumers 100% of certain of the LDC's costs, thereby giving the indirect purchasers standing under state law to sue for 100% of any costs that result from a monopoly overcharge. The *Illinois Brick* doctrine, however, holds that the LDC, regardless of the economic fact of pass-on, has suffered damages and may sue under federal antitrust law for 100% of the same overcharge.

Before the Supreme Court rendered its decision in *Utilicorp* in June 1990, a potential solution lay in a narrow exception to *Illinois Brick* that the Court itself had suggested. In *Illinois Brick*, the Court had recognized that indirect purchasers might have a cause of action in lieu of direct purchasers when they bought from the direct purchasers pursuant to a preexisting cost-plus contract for a fixed quantity. Such a contract would essentially guarantee the direct purchaser a certain profit and allow it to pass on 100% of its costs to consumers without losing sales.[9] Before June 1990 some courts had held that this "cost-plus" exception encompassed the natural gas industry regulatory context of 100% pass-on.[10] These courts denied direct purchasers a federal antitrust cause of action for the overcharge and virtually eliminated the risk of an

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

7. Currently, fifteen jurisdictions have indirect purchaser statutes. *See infra* note 47. In addition, in *ARC America* the Supreme Court indicated that Colorado also had an indirect purchaser statute, 109 S. Ct. at 1663 n.3, although the basis for the Court's assertion is unclear from the text of the Colorado statute cited by the Court. *See* COLO. REV. STAT. § 6-4-106 (Supp. 1990). The American Bar Association's *ARC America* task force has suggested that, including Colorado, as many as twenty-nine other states have laws that could be construed as granting indirect purchaser standing. *See* Report of the American Bar Association's Section of Antitrust Law Task Force to Review the Supreme Court's Decision in *California v. ARC America Corp.*, 59 ANTITRUST L.J. 273, 305 (1990) [hereinafter *ARC America* Task Force]. This article does not attempt to address the differences between these indirect purchaser statutes on any matters other than the issue of duplicative liability.

8. 109 S. Ct. at 1667.

9. 431 U.S. at 720; *see also* Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 494 (1968).

10. *E.g.*, Illinois *ex rel.* Hartigan v. Panhandle Eastern Pipeline Co., 852 F.2d 891 (7th Cir.) (*en banc*), *cert. denied*, 109 S. Ct. 543 (1988).

energy seller having to pay both direct and indirect purchasers for the exact same damages.

In *Utilicorp*, however, the Court rejected the argument that the regulatory context of 100% pass-through precluded direct purchasers from suing under the federal antitrust laws.[11] The result in *Utilicorp* confirms that state courts will be a major battleground on which the natural gas pipeline industry fights its antitrust battles and that in these battles duplicative liability is a realistic probability.[12]

II. Antitrust Violations in the Natural Gas Pipeline Industry: Who Really Suffers Damage?

Antitrust claims may be brought in the energy industry in a number of contexts.[13] Not all of these contexts pose the risk of duplicative liability in state and federal court. That risk arises when the alleged damage is an antitrust overcharge that is ultimately passed on in its entirety to an indirect purchaser as a result of federal or state regulation.[14]

For example, selective discounting by pipelines pursuant to Order No. 436[15] creates the potential for price fixing. An antitrust violation would occur if two pipelines serving Wisconsin agreed not to offer discounts greater than 50%.[16] The agreement on discount rates is an illegal conspiracy to fix prices.[17] In a competitive market the pipelines might have discounted as deeply as 75-80%. The difference between a hypothetical competitive discount for transportation service and the illegally fixed discount would constitute an "overcharge" under the antitrust laws. An LDC transporting gas through the conspiring pipelines would be a direct purchaser of the price-fixed product—transportation. The LDC's transportation costs would be increased by the amount of the illegal overcharge, but because of Wisconsin regulations, the LDC would not bear this cost.

The State of Wisconsin requires each LDC in the state to include a

11. 110 S. Ct. at 2818.

12. Consequently, *Utilicorp* is likely to increase, rather than decrease, the role of states in prosecuting antitrust claims in the natural gas industry. States (and others) will bring actions under state indirect purchaser statutes and will do so in state court. *But see* Batla, *States May not Sue LDCs on Behalf of Customers*, 7 Nat. Gas 26, 27 (Sept. 1990) ("states will have to sit on the sidelines" with respect to enforcing antitrust laws against gas sellers).

13. *See* LaRue, *supra* note 1, at 40-51.

14. In this article the term "consumers" means only an LDC's residential customers. Industrial customers are often situated quite differently from residential customers with respect to bearing antitrust overcharges because they may have alternative sources of supply. *See Panhandle*, 852 F.2d at 895-96.

15. Order No. 436, 50 Fed. Reg. 42,408 (1985) (codified at scattered sections of 18 C.F.R.), *vacated and remanded*, Associated Gas Distrib. v. FERC, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988).

16. Under basic principles of antitrust law this "agreement" need not be express. An "agreement" could properly be inferred from parallel discounting by competing pipelines along with a persistent pattern of exchanges of discount and supply information between the pipelines, possibly involving affiliated marketers as the conduit for the information. *See* United States v. Container Corp. of America, 393 U.S. 333 (1969); Gainesville Utils. Dept. v. Florida Power and Light Co., 573 F.2d 292, 300-03 (5th Cir.), *cert. denied*, 439 U.S. 966 (1978).

17. *E.g.*, United States v. Gasoline Retailers Ass'n, Inc., 285 F.2d 688 (7th Cir. 1961).

Purchased Gas Adjustment Clause (PGA) in each utility's tariff.[18] The purpose of a PGA is to permit an LDC to "achieve a one-for-one recovery of its gas costs" by permitting "an automatic change in the price consumers are charged for service, without the delay and expense of a formal regulatory hearing."[19] The transportation component of the sales rate paid by the LDC for sales service and the transportation rates for transportation service are included in the PGA costs that are passed through.[20] Accordingly, a hypothetical Wisconsin LDC would, pursuant to its PGA, pass on 100% of its transportation costs, which would include 100% of the "overcharge" levied by the conspiring pipelines. By express regulatory mandate, customers of the LDC would, in essence, reimburse the LDC for the overcharge extracted by the pipelines and bear exclusively the brunt of the antitrust violation.

The fifteen jurisdictions that have indirect purchaser statutes—Alabama, California, the District of Columbia, Hawaii, Illinois, Kansas, Maine, Maryland, Michigan, Minnesota, Mississippi, New Mexico, Rhode Island, South Dakota, and Wisconsin—also have PGAs similar to the Wisconsin model discussed above.[21] In twelve of these jurisdictions—Alabama, the District of Columbia, Hawaii, Illinois, Kansas, Maine, Maryland, Minnesota, Mississippi, New Mexico, South Dakota, and Wisconsin—the PGA clauses generally permit a utility to pass through to customers all gas costs, including cost increases, without obtaining any regulatory approval.[22] In the remaining three states—California, Michigan, and Rhode Island—the passing-on of cost

18. Pub. Serv. Comm'n of Wis., *Investigation on the Commission's Motion Into the Need for Planning Review, Changes in Rate Design, Changes in Purchased Gas Adjustment Clauses, Accounting Changes, and Related Matters for Natural Gas Distribution Utilities in Wisconsin*, Docket No. 05-GI-102 (Feb. 23, 1989) (Findings of Fact, Conclusions of Law and Order).

19. *Id.* at 2.

20. *Id.* at 3. The Wisconsin PGA consists of a "number of neutral mathematical formulae whereby the gas costs are simply plugged into the [pricing] formulae and passed along to the utility's customers. *Id.* at 4-5.

21. Ala. Pub. Serv. Comm'n, Docket U-3143, (Mar. 7, 1988) (Order); D.C. Pub. Serv. Comm'n, *In the Matter of the Application of Washington Gas Light Company for Authority to Establish a Purchased Gas Adjustment Provision*, Formal Case No. 436, (Jan. 30, 1954) (Findings, Opinion and Order); HAW. REV. STAT. § 269-16 (1985); Ill. Commerce Comm'n, 83 ILL. ADMIN. CODE § 525 (General Order 212. Jan. 28, 1984) (Uniform Purchased Gas Adjustment Clause); State Corp. Comm'n of Kan., *In the Matter of a general investigation upon the Commission's own motion to establish general policies with regard to purchased natural gas, fuel for electric power generation, and purchased electric power*, Docket No. 106, 850-4, (Apr. 19, 1977) (Order); Me. Pub. Utils. Comm'n., Rule 65-407ch 43 (1985) (cost of Gas Adjustment for Gas Utilities); MD. ANN. CODE art. 78, § 54D (1988); MINN. R. 7825.2390 (1988) and Minn Pub. Utils. Comm'n, *In the Matter of The Proposed Rules Governing Automatic Adjustment of Changes, Minn. Rules, parts 7825.2390 to 7825.3000*, Docket No. G-999/R-85-789 (Mar. 7, 1989) (statement of need and reasonableness); MISS. CODE ANN. § 77-3-5 (1972); and Miss. Pub. Serv. Comm'n, *Final determination pursuant to notice of change in rates filed in this cause by Mississippi Valley Gas Company*, Docket No. U-3073 (May 6, 1976) (Order). NMPSC RULE 640 (Jan. 30, 1988) (Purchased Gas Adjustment Clauses for Gas Utilities); S.D. CODIFIED LAWS ANN. § 49-34A-25 (1983); R.I. Pub. Utils. Comm'n, *In re: Providence Gas Company Cost of Gas Adjustment Tariff*, Docket no. 1673 (Apr. 14, 1989) (Report and Order); MICH. COMP. LAWS ANN. § 460.6h (West Supp. 1990); Cal. Pub. Utils. Comm'n, *Order Instituting Investigation on the Commission's Motion into implementing a rate design for unbundled gas utility services consistent with policies adopted in Decision 86-03-057*, Decision No. 8612009 (Dec. 3, 1986) (Order) (LEXIS, Cal. Library, Capuc file).

22. *See* sources cited *supra* note 20.

increases is subject to review by each state's public utility commission.[23] Commissions in these states examine whether the increased costs are prudently incurred and then authorize a 100% pass-through.[24] In such a situation the indirect purchasers may pay 100% of the overcharge.

The scenario just described would repeat itself in the context of an attempt by a pipeline to achieve a monopoly through nonprice predation such as "sham" petitioning not protected by the *Noerr-Pennington* doctrine.[25] An example of such conduct is one pipeline opposing another pipeline's application to begin serving a particular market.[26] The would-be monopolist pipeline, through sham regulatory intervention and harassment, could either create a sufficient increase in costs or cause a sufficient delay to force the potential competitor to drop its application for certification. Because of the resulting lack of competition, the would-be monopolist is left free to exercise monopoly power by, for example, refusing selective discounting. The antitrust overcharge in that event would be the same as in the previous example, and the pass-through to consumers pursuant to a PGA operates in the same manner.

State PGAs are not the only cause of potential 100% pass-on of monopoly overcharges to indirect purchasers. FERC PGAs could have the same effect. Consider a situation in which two producers agree to restrict output in order to create an artificial shortage of gas.[27] The result is higher gas prices to the markets served by those producers. A pipeline, acting in its merchant capacity, purchases the gas and sells to an LDC pursuant to a long-term firm service contract. The price at which the pipeline purchases the gas is illegally inflated due to the conspiracy between the producers.

Pursuant to the PGA in its FERC tariff, the pipeline would generally be able to pass on 100% of this overcharge to the LDC. Under section 601(c)(2) of the Natural Gas Policy Act,[28] purchased gas costs may be flowed through to the LDC under the pipeline's FERC PGA absent a showing of excessiveness "due to fraud, abuse, or similar grounds." Generally, under this standard, the FERC permits a pipeline to pass such costs through to the LDC.

23. *See* sources cited *supra* note 20.

24. *See* sources cited *supra* note 20.

25. According to the Noerr-Pennington doctrine, petitioning before governmental agencies is generally accorded immunity from the antitrust laws because it implicates first amendment rights. Eastern Railroad President's Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mineworkers v. Pennington, 381 U.S. 657 (1965). "Sham" petitioning, however, or petitioning done for the purpose of merely raising a rival's costs or denying a rival some business advantage and without the purpose of legitimately obtaining governmental relief, is actionable under the antitrust laws. *E.g.*, California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972); *In re* Burlington N., Inc., 822 F.2d 518 (5th Cir. 1987).

26. *E.g.*, Consul, Ltd. v. Transco Energy Co., 805 F.2d 490, 493 (4th Cir. 1986), *cert. denied*, 107 S. Ct. 2182 (1987) (delaying application for regulatory approval to transport a competitor's gas).

27. A "price-fixing" conspiracy could be found from the producers' inclusion in their sales contracts of identical terms, such as most favored nation clauses or uniform redesignations of cheaper section 102 gas as section 107 gas. *See, e.g.*, *In re* New Mexico Natural Gas Antitrust Litigation, 1982-1 Trade Cas. (CCH) ¶ 64,669, at 73,634 (D.N.M. 1982); Midwest Gas Users Ass'n v. FERC, 833 F.2d 341, 349 (D.C. Cir. 1987) (related case to *In re* Wyoming Tight Sands Antitrust Cases, 866 F.2d 1286 (10th Cir. 1989), *aff'd sub nom* Kansas v. Utilicorp United, Inc., 110 S. Ct. 2807 (1990)).

28. 15 U.S.C. § 3431(c)(2) (1988).

Recent cases confirm that the cost of gas to the hypothetical pipeline would be passed down the distribution chain to indirect purchasers.[29] In *Nantahala Power & Light Co. v. Thornburg*,[30] the Supreme Court held that state public utility commissions are precluded by federal law from preventing a retail electric utility distributor from passing on 100% of cost increases, so long as the cost increase has been approved by the FERC.[31] Thus, it will likely be the indirect purchasers who suffer 100% of the antitrust overcharge resulting from a producer conspiracy.

It is possible to envision any number of similar scenarios in the natural gas pipeline industry that would result in antitrust overcharges. FERC cases like *Nantahala* create additional assurance that such overcharges will likely be passed through to indirect purchasers, at least when a PGA in a FERC tariff is part of the equation. The source of the pass-through could also be state PGAs. Thus, as an economic matter, it appears that persons purchasing gas only indirectly from an antitrust violator could generally be the ones that pay 100% of the overcharge resulting from the particular antitrust violation. Indeed, even if a perfect 100% pass-through does not occur, the regulatory framework ensures that a substantial percentage of such costs will flow through to consumers. The balance of this article examines how both federal and state antitrust law deal with this economic reality and explores several problems posed by the interplay of the two legal systems.

III. Federal Antitrust Standing of Direct and Indirect Purchasers

A. Hanover Shoe: *The Pass-On Defense Prohibited*

In 1968 the Supreme Court first addressed the issue of "pass-ons" in the antitrust context in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*[32] The Court held that the policies underlying section 4 of the Clayton Act[33] prohibited defendants from raising as a defense the argument that a direct purchaser plaintiff suffered no damages when the direct purchaser had been able to pass on any alleged illegal overcharge to its customers.[34]

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29. *See* New Orleans Pub. Serv., Inc. v. New Orleans, 109 S. Ct. 2506 (1989); Mississippi Power & Light Co. v. Mississippi, 487 U.S. 354 (1988); Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 (1986); *see generally*, Hobelman, *The* Narragansett *Decision and its Aftermath*, 6 ENERGY L.J. 33 (1985); Ercolano and Lesch, Narragansett *Update: From* Washington Gas Light *to* Nantahala, 8 ENERGY L.J. 333 (1986).

30. 476 U.S. 953 (1986).

31. *Id.* at 969-70. Although *Nantahala* was an electric industry case implicating the Federal Power Act, its holding is directly applicable to the natural gas industry. FPC v. Sierra Pacific Power Co., 350 U.S. 348, 353 (1956). In either industry *Nantahala* assures that states cannot prevent electric utilities from passing through to consumers 100% of FERC-authorized commodity costs.

32. 392 U.S. 481 (1968).

33. Section 4 of the Clayton Act, 15 U.S.C. § 15(a) (1985), provides in pertinent part:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent . . . and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

34. *Hanover Shoe*, 392 U.S. at 494.

In *Hanover Shoe* a shoe manufacturer brought an antitrust action against a shoe machine manufacturer for illegal monopolization. The plaintiff leased shoe machines from the defendant at prices alleged to have been illegally inflated and used the machines to manufacture shoes that were sold to customers. The machine manufacturer, in defense, unsuccessfully argued that the shoe manufacturer had suffered no legally cognizable injury from high machine prices because the plaintiff had passed the illegal overcharge on to its shoe customers.

The Court identified two rationales for denying the pass-on defense. First, the Court emphasized proof problems. The defendant would have difficulty proving that the overcharge caused the plaintiff to raise prices in the same amount as the overcharge. Equally difficult to prove was that the plaintiff could not have either raised prices absent the overcharge or maintained the artificially inflated price had the overcharge been discontinued. Attempting to prove these "virtually unascertainable figures," the Court asserted, would transform treble-damage actions into "long and complicated proceedings involving massive evidence and complicated theories."[35]

Second, the Court focused on enforcement issues. If the pass-on defense were allowed, the only persons permitted to sue would be indirect purchasers who "would have only a tiny stake in a lawsuit" and hence little incentive to sue.[36] Consequently, the Court feared that "treble damages actions . . . would be substantially reduced in effectiveness," and antitrust violators would thereby "retain the fruits of their illegality."[37] Following *Hanover Shoe*, direct purchasers were entitled to recover the full amount of antitrust damages caused by an antitrust violation, regardless of whether they had passed on any of those damages.

Although the *Hanover Shoe* Court generally foreclosed defendants from using the pass-on theory, it noted that the pass-on defense "might" be permitted under certain limited circumstances, such as "when an overcharged buyer has a preexisting 'cost-plus' contract."[38] Consequently, lower courts continued to struggle with pass-on issues.[39] In light of the Supreme Court's refusal to recognize a pass-on defense to an action by a direct purchaser, one issue confronting the lower courts was whether an indirect purchaser should nevertheless be allowed to use pass-on theories offensively to recover the portion of an overcharge passed on to it.[40] The Supreme Court tackled this issue in *Illinois Brick*.

B. Illinois Brick: *Indirect Purchaser Standing Prohibited*

In *Illinois Brick* the Court rejected an attempt by indirect purchasers to

35. *Id.* at 493.

36. *Id.* at 494.

37. *Id.*

38. *Id.*

39. *E.g.*, *In re* Beef Indus. Antitrust Litig., 600 F.2d 1148 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980).

40. *See, e.g.*, *Illinois Brick*, 431 U.S. at 728 n.8.

use the pass-on theory as a basis for recovery.[41] The State of Illinois and local government entities brought a price-fixing action against manufacturers of concrete blocks on behalf of indirect purchasers of those blocks. The plaintiffs had purchased the blocks from masonry and general contractors that had purchased the materials directly from the defendant manufacturers. The plaintiffs contended that the manufacturers had fixed prices and that direct purchasers of the brick at the illegally inflated prices had passed this overcharge on to them. The Court held that the direct purchasers, rather than the indirect purchasers, were the only parties " 'injured in [their] business or property' " by reason of an antitrust violation under section 4 of the Clayton Act.[42]

The Court touched upon the issue of duplicative recoveries against antitrust defendants when it addressed the argument that it should allow plaintiffs, but not defendants, to use pass-on theories. The Court explained that "allowing offensive but not defensive use of pass-on would create a serious risk of multiple liability for defendants."[43] The Court reasoned that a defendant would already be paying the full amount of antitrust damages to the direct purchaser, regardless of whether there had been a pass-on. Allowing another class of plaintiffs, indirect purchasers, to claim the same damages by proving what the defendant had been barred from proving, i.e., pass-on, could force the defendant to pay the same damages twice for a single antitrust violation.[44] The Court explicitly rejected the argument that it was better to risk a defendant paying duplicative damages than it was to permit an injured party to go uncompensated, stating that "we do not find this risk acceptable."[45]

IV. Indirect Purchaser Standing Under State Law: Creating Duplicative Exposure

A source of dissatisfaction with the *Illinois Brick* rule of no indirect purchaser standing is that it is premised upon the fiction that the direct purchaser is the only injured party—even to the full extent of an overcharge that an indirect purchaser may ultimately pay.[46] Reacting to *Illinois Brick,* several states enacted legislation that granted indirect purchasers the right to sue for antitrust injuries in state court.[47] Lower courts split on whether *Illinois Brick* preempted these statutes.[48] Last year, in *ARC America*, the Supreme Court

41. *Id.* at 735.

42. *Id.* at 729 (quoting Clayton Act § 4, 15 U.S.C. § 15 (1988)).

43. *Id.* at 730.

44. *Id.* at 730-31.

45. *Id.* at 731 n.11.

46. *See, e.g.*, 2 P. Areeda & D. Turner, Antitrust Law § 337e, at 193-94 (1978); Staff of California Senate Committee on Judiciary, 1977-78 Regular Sess., Restraints of Trade—Standing to Sue, Assembly Bill 3222.

47. Fifteen jurisdictions have enacted indirect purchaser statutes. The thirteen jurisdictions that enacted indirect purchaser statutes after *Illinois Brick* are: 1) California; 2) the District of Columbia; 3) Hawaii; 4) Illinois; 5) Kansas; 6) Maine; 7) Maryland; 8) Michigan; 9) Minnesota; 10) New Mexico; 11) Rhode Island; 12) South Dakota; and 13) Wisconsin. Two states have indirect purchaser statutes that predate *Illinois Brick*: Alabama and Mississippi. In *ARC America* the State of Arizona contended that its antitrust statute permitted indirect purchaser standing. *ARC America*, 109 S. Ct. at 1663 n.3.

48. *Compare In re* Cement & Concrete Antitrust Litig., 817 F.2d 1435 (9th Cir. 1987), *rev'd sub nom.* California v. ARC America Corp., 109 S. Ct. 1661 (1989) (holding state indirect purchaser statute

ruled that section 4 of the Clayton Act, as construed in *Illinois Brick*, does not preempt state indirect purchaser statutes.[49]

In *ARC America* the states of Alabama, Arizona, California, and Minnesota, as indirect purchasers, brought class actions against various cement manufacturers for allegedly fixing the price of cement. The states sought to recover under both section 4 of the Clayton Act and their respective state antitrust laws which give indirect purchasers standing to sue for all overcharges passed on to them by direct purchasers. The litigation resulted in a settlement fund for the various plaintiffs. When the states sought payment for their state indirect purchaser claims out of the fund, various direct purchasers objected.

The Court analyzed the three federal antitrust policies underlying the *Illinois Brick* rule and concluded that permitting indirect purchasers to recover under the state statutes did not interfere with those policies. First, the Court concluded that state indirect purchaser statutes would not interfere with the "congressional purpose of avoiding unnecessarily complicated proceedings on federal antitrust claims" because "state statutes cannot and do not purport to affect remedies available under federal law."[50]

Second, the Court concluded that allowing state indirect purchaser claims would not reduce the incentive of the direct purchasers to bring private antitrust actions because direct purchasers' federal remedy remained unchanged.[51] Finally, although federal cases speak of an express policy condemning multiple liability under section 4 of the Clayton Act, the Court found no federal policy against states imposing liability in addition to that imposed by federal law: "ordinarily, state causes of action are not preempted solely because they impose liability over and above that authorized by federal law, and no clear purpose of Congress indicates that we should decide otherwise, in this case."[52]

In the context of antitrust standing, however, such additional liability is not created solely by the existence of different federal and state remedies. Instead, it arises because the Supreme Court has denied direct purchasers the passing-on defense. If defendants in a federal direct purchaser action could use the passing-on defense, the risk of duplicative liability to direct and indirect purchasers in federal and state court would be greatly reduced.[53]

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preempted by federal law) *with* Crown Oil Corp. v. Superior Court, 177 Cal. App. 3d 604, 223 Cal. Rptr. 164 (1986) (holding California indirect purchaser statute not preempted by federal law).

49. *ARC America*, 109 S. Ct. at 1667.

50. *Id.* at 1666. The Court predicted that "state indirect purchaser actions will not necessarily be brought in federal court" because, unlike the federal claims in *Illinois Brick* that were within the exclusive jurisdiction of the federal courts, "claims under state indirect purchaser statutes could be brought in state court, separately from federal actions brought by direct purchasers." *Id.* Moreover, the Court observed that "federal courts have the discretion to decline to exercise pendent jurisdiction over state indirect purchaser claims, even if those claims are brought in the first instance in federal court." *Id.*

51. *Id.* at 1667.

52. *Id.* (Citations omitted).

53. Nevertheless, the Supreme Court in *ARC America* evinced no concern about duplicate liability if such liability came from the interplay between federal and state law. It discerned no federal policies entitling it to interfere with such state laws. *ARC America*, 109 S. Ct. at 1666-67. *ARC America*, however, did not involve the energy industry. The Supreme Court has not yet addressed whether indirect purchaser

With the heightened attention states are paying to antitrust enforcement,[54] it seems likely that more states will now permit indirect purchaser standing and that more such cases will be brought in state court. It also may generally be true that the problems with indirect purchaser standing identified by the Court in *Illinois Brick*, such as the difficulty of proving pass-on, will keep the number of such suits manageable either by dissuading many indirect purchasers from suing under state law or by allowing defendants to prevail by proving that the indirect purchasers' damages are too speculative. In the natural gas pipeline industry, however, we have seen that the regulatory framework often creates a 100% pass-through, thereby eliminating any proof problems indirect purchasers might have. This fact makes natural gas sellers and transporters more appealing targets for indirect purchasers than potential defendants in other industries.

V. Duplicative Liability: Now That We Have It, What Can We Do About It?

After *ARC America* but before *Utilicorp*, the regulatory context of the natural gas pipeline industry actually presented an opportunity for the Court to craft an antitrust solution to the problem created by *ARC America* of duplicative liability in that industry. The source of this potential solution was the limited "cost-plus" exception to the *Illinois Brick* rule suggested by the Supreme Court.[55] *Utilicorp*, however, foreclosed this possibility. This article next examines, (1) the "cost-plus" exception, (2) the reasons that the natural gas pipeline industry looked like a prime candidate for its application, and (3) the ways in which adoption of the exception in *Utilicorp* could have ameliorated the duplicative liability problem. The article then explores how, after *Utilicorp*, flawed state solutions provide the only insulation from duplicative damages.

A. Utilicorp*: An Opportunity Lost*

1. The Cost-Plus Exception

The Court in *Illinois Brick* noted that it might allow exceptions to the direct purchaser rule in very limited circumstances. The Court echoed this in *Hanover Shoe* and stated that one such exception could be when a buyer has a preexisting, cost-plus contract with a fixed quantity provision.[56] In such a situation, the Court suggested that the reasons for the rule prohibiting pass-on theories are no longer present.[57] First, there is no longer a need to apportion damages. By contract, the direct purchaser is authorized to pass on to the indirect purchaser 100% of the illegal overcharge. Moreover, because the

standing interferes with federal energy policy that the Court has been quick to guard from state encroachment. *See supra* note 29.

54. *See generally* Farmer, *Dual Enforcement of State and Federal Antitrust Laws*, 58 ANTITRUST L.J. 197 (1989) (discussing increased role of state antitrust enforcement).

55. *Illinois Brick*, 431 U.S. at 736.

56. *Id.*

57. *Id.*; *Hanover Shoe*, 392 U.S. at 494.

contract calls for a fixed quantity, the direct purchaser loses no sales as a result of the higher price it charges. The indirect purchaser, after absorbing all of the overcharge, has suffered antitrust injury and thus has standing to sue in federal court under section 4 of the Clayton Act.

When there is a cost-plus contract, the second reason for the rule against pass-on—enhancing the plaintiffs' incentive to sue—vanishes as well. Because the indirect purchasers have absorbed all, instead of only part, of the overcharge, they have substantial incentive to sue. Accordingly, the Court indicated on several occasions that, when there is a cost-plus contract, pass-on defenses and indirect purchaser standing might be allowed,[58] and lower courts debated the scope of such an exception.[59]

2. Cost-Plus Pricing Imposed by Public Utility Regulation: The "Regulatory Cost-Plus Exception"

A central aspect of this debate in lower courts was whether the exception required a preexisting contract for a fixed term, or whether the "cost-plus" aspect was sufficient in itself.[60] This debate centered on the concept that without a fixed quantity term, the direct purchaser might still suffer damage from the antitrust violation in the form of reduced sales resulting from higher prices. Courts disagreed on whether damage to the direct purchaser independent of the 100% pass-on militated against indirect purchaser standing.

The Seventh Circuit, in *Illinois ex rel. Hartigan v. Panhandle Eastern Pipe Line Company*, held that the fixed quantity aspect was not essential to application of the exception.[61] The court applied a "regulatory cost-plus exception" and allowed an indirect purchaser suit when there was no formal cost-plus contract but cost-plus pricing was nevertheless imposed by public utility regulation.[62] As discussed in greater detail in the LaRue article,[63] the direct purchaser in *Panhandle Eastern* was Central Illinois Light Company (CILCO), a publicly regulated retail distributor of natural gas. CILCO bought natural gas from Panhandle at prices that were allegedly inflated due to antitrust violations by Panhandle. CILCO then resold the gas to its residential and industrial customers and, pursuant to state law, passed the entire overcharge on to its residential customers.

The State of Illinois, in its *parens patriae* capacity, brought a federal antitrust action against Panhandle on behalf of CILCO's customers, the indirect purchasers. The Seventh Circuit held that, when cost-plus pricing was

58. *Illinois Brick*, 431 U.S. at 736; *Hanover Shoe*, 392 U.S. at 494.

59. *See, e.g.*, *In re* Midwest Milk Monopolization Litig., 730 F.2d 528, 533 (8th Cir. 1984); Zinser v. Continental Grain Co., 660 F.2d 754 (10th Cir. 1981); Mid-West Paper Prods. Co. v. Continental Group, Inc., 596 F.2d 573 (3d Cir. 1979); Lefrak v. Arabian Am. Oil Co., 487 F. Supp. 808, 819 (E.D.N.Y. 1980); *In re* Beef Indus. Antitrust Litig., 600 F.2d 1148 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980); *In re* Mid Atl. Toyota, 516 F. Supp. 1287, 1294 (D. Md. 1981).

60. *Compare* County of Oakland v. City of Detroit, 866 F.2d 839, 849 (6th Cir. 1989) *with Panhandle*, 852 F.2d at 893.

61. 852 F.2d 891, 893 (7th Cir. 1988), *cert. denied*, 488 U.S. 986 (1988).

62. *Id.* at 896.

63. LaRue, *supra* note 1, at 44-47.

imposed by public utility regulation, the offensive use of the pass-on theory was within the scope of the cost-plus exception. Writing for the majority, Judge Posner examined both the apportionment and incentive rationales for confining the right to sue to the direct purchaser. In ruling that the case presented no apportionment problem, the court determined that CILCO, the direct purchaser, had passed on 100% of the illegal overcharge to its residential customers. Although CILCO did not have an actual cost-plus contract with its residential customers, public utility regulation in Illinois directed CILCO to pass on 100% of any increase in the price CILCO paid for gas.[64]

In addition to this regulatory requirement, the court held that CILCO had the incentive to pass on any overcharge because, as a regulated monopoly, CILCO possessed unused monopoly power. It exploited this power by passing on the entire overcharge to its residential customers. As a result of its unused monopoly power, the court reasoned, CILCO did not absorb any of the overcharge. Thus, there was no problem of apportioning damages between direct and indirect purchasers.

The Seventh Circuit also reasoned that CILCO had less incentive to sue than a hypothetical direct purchaser under an actual cost-plus contract because the state regulatory scheme might have forced CILCO to distribute any recovery to its customers. The court emphasized that CILCO had not filed suit until the indirect purchasers' case was well advanced and attributed CILCO's inaction to the likelihood of having "little or nothing to gain" from bringing suit.[65]

Finally, the Seventh Circuit rejected the necessity of proving a fixed quantity sales contract. That requirement, the court reasoned, only assures that there has been a 100% pass-through, and in the regulatory context, such a pass-through to residential customers is required by regulation. This requirement eliminates the need to apportion damages between the direct and indirect purchasers. In sum, because it found that the rationales for the *Illinois Brick* rule do not apply when cost-plus pricing is imposed by public utility regulation, the Seventh Circuit ruled that the residential consumers (but not industrial customers), as indirect purchasers, had standing to sue for the entire overcharge in federal court.[66] The court did, however, hold that CILCO, the direct purchaser, would have standing to sue for any sales it lost as a result of higher rates.[67]

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64. The Uniform Purchase of Gas Adjustment Clause that Illinois by statute requires CILCO to include in its contracts not only entitled but directed CILCO, if it paid Panhandle an extra penny per million cubic feet of gas, to add exactly one penny to each customer's bill for every Mcf of gas sold to that customer.

Panhandle, 852 F.2d at 896; ILL. Commerce Comm'n, 83 ILL. ADMIN. CODE § 525 (General Order 212. Jun. 28, 1984) (Uniform Purchased Gas Adjustment Clause).

65. *Panhandle*, 852 F.2d at 895. The indirect purchasers, in the person of the state attorney general, first brought suit. CILCO sued three years later. *Id.*

66. *Id.* at 897-98.

67. *Id.*

3. The Supreme Court's Rejection of the Regulatory Cost-Plus Exception in *Utilicorp*

In *Utilicorp* the Supreme Court rejected the regulatory cost-plus exception.[68] The Court did so while affirming the Tenth Circuit's decision in *In re Wyoming Tight Sands Antitrust Cases*.[69] In that litigation three public utilities filed federal antitrust actions against natural gas producers and a natural gas pipeline company alleging that the defendants illegally conspired to fix the price of natural gas. Some of the utilities resold the gas to their residential and industrial customers. The states of Kansas and Missouri, as *parens patriae*, also filed federal antitrust actions against the same defendants on behalf of residential customers who purchased natural gas from the public utilities. The pipeline company defendant asserted the pass-on defense, arguing that the public utilities had not been injured because they had passed on the illegal surcharges for natural gas to the ultimate consumer who paid the entire cost of the antitrust overcharge. The trial court barred the pipeline's use of the pass-on defense and also dismissed the *parens patriae* claims of the states.

Before the Tenth Circuit the states argued that the trial court should have applied the cost-plus exception to allow the indirect purchasers to use the pass-on theory offensively.[70] The states relied heavily upon the Seventh Circuit's decision in *Panhandle*, arguing that the comprehensive regulation of public utilities created a cost-plus pricing scheme under which the public utilities passed on 100% of the overcharge to their customers. The Tenth Circuit, however, declined to follow *Panhandle* and affirmed the district court's decision to construe the cost-plus exception narrowly.[71] The Supreme Court granted the petition for a writ of *certiorari* filed by Kansas and Missouri.[72]

The states argued to the Court that the indirect purchasers should have standing to sue because none of the rationales underlying *Hanover Shoe* or *Illinois Brick* applies in cases involving regulated public utilities and because public regulation of natural gas utilities is the equivalent of cost-plus pricing and should therefore be included within the cost-plus exception.[73]

The Court rejected these arguments. Writing for the majority, Justice Kennedy[74] first addressed whether the three rationales underlying *Illinois Brick* (difficulties of apportionment, risk of multiple recovery in light of the disallowance of the pass-on defense under *Hanover Shoe*, and diminution of incentives for private antitrust enforcement) applied in the regulated public utility context.

Regarding the states' contention that the regulatory context eliminated

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68. *Utilcorp*, 110 S. Ct. 2807 (1990).

69. 866 F.2d 1286 (10th Cir. 1989).

70. *Id.* at 1290.

71. *Id.* at 1294.

72. Kansas v. Kansas Power & Light Co., 110 S. Ct. 1519 (1990).

73. The states also argued that § 4C of the Hart-Scott-Rodino Act, 15 U.S.C. § 15c (1988), authorized them to assert claims on behalf of utility customers even if the customers had no standing themselves. *Utilicorp*, 110 S. Ct. at 2818. The Supreme Court disagreed. *Id.*

74. Joining Justice Kennedy in the majority opinion were Chief Justice Rehnquist and Justices Stevens, O'Connor, and Scalia.

any need to apportion the overcharge between direct and indirect purchasers, the Court opined that the states had oversimplified the apportionment problem. First, even if a utility had passed on the entire overcharge, the Court reasoned that the utility could nevertheless be injured. If the utility could have raised prices before the overcharge, but after the overcharge it could not raise prices above the price that included the overcharge, it would have lost the profits it could have gained from the price increase. Consequently, the Court held that, to show that a direct purchaser had not been injured by an overcharge, "the indirect purchaser would have to prove . . . that the direct purchaser could not have raised its rates prior to the overcharge."[75]

Moreover, the Court said, "state regulation does not simplify the problem . . . [of apportionment] but instead imparts an additional level of complexity."[76] Thus, to decide whether a utility was injured by an overcharge,

> a court would have to consider not only the extent to which market conditions would have allowed the utility to raise its rates prior to the overcharge, as in the case of an unregulated business, but also what the state regulators would have allowed. In particular . . . a court would have to determine that the State's regulatory schemes would have barred any rate increase except for the amount reflected by cost increases. Proof of this complex preliminary issue . . . would turn upon the intricacies of state law.[77]

The Court noted that the certified question on appeal did not indicate whether the utilities could have raised prices prior to the overcharge. The court concluded,

> [t]o the extent that the [utility] could have . . . gained permission to raise its rates in the absence of an overcharge, at least some portion of the overcharge is being borne by it. . . Because of this potential injury the [utility] must remain in the suit. If we were to add indirect purchasers to the action, we would have to devise an apportionment formula. This is the very complexity that *Hanover Shoe* and *Illinois Brick* sought to avoid.[78]

The states' second "oversimplification" identified by the Court regarding the apportionment problem was that the timing of a utility passing on an overcharge could result in an injury to the utility. The Court observed that delays in the passing-on process might result in the utility absorbing part of the overcharge until it could eventually pass on the entire amount. The Court concluded that it could not deprive the utility of its standing to sue when it could not conclusively determine that the utility had passed on the entire overcharge to its customers.

Aside from the complications of apportionment, the Court speculated that, although it was denying injured consumers a right to compensation in the courts, public utility regulation might compensate injured residential gas consumers if state regulators required the utilities to flow litigation proceeds back to ratepayers through reduced rates.[79] The Court concluded that "creating an exception to allow apportionment in violation of *Illinois Brick* would

75. *Utilicorp*, 110 S. Ct. at 2813.
76. *Id.*
77. *Id.*
78. *Id.* at 2814.
79. *Id.* at 2814-15.

make little sense when, in light of all its difficulty, its practical significance is so diminished."[80]

Turning to the second rationale underlying *Hanover Shoe* and *Illinois Brick*, the Court found that the direct purchaser rule effectively eliminates multiple recoveries. In response to the states' argument that no multiple liability would occur if both direct and indirect purchasers had standing because they would be suing for different damages, the Court conceded that having all classes of plaintiffs litigate in a single forum might reduce the risk of multiple liability but concluded that "the reduction comes at too great a cost."[81] The Court reiterated the position expressed in *Illinois Brick* that " 'even if ways could be found to bring all potential plaintiffs together in one huge action, the complexity thereby introduced into treble-damages proceedings argues strongly for retaining the *Hanover Shoe* rule.' "[82]

The Court also ruled that, in the context of a public utility, direct purchasers had adequate incentive to sue to ensure vigorous enforcement of the antitrust laws. The Court suggested that utilities had sufficient incentive to assert claims under section 4 of the Clayton Act for fear that otherwise "regulators [would] not allow them to shift known and avoidable overcharges on to their customers."[83] Moreover, even if state regulators required a utility to reimburse its customers with recovered overcharges, the Court suggested that a victorious utility would have to pay only the actual overcharge to its customers leaving two-thirds of its recovery from the litigation for itself. As further proof of the utilities' incentive to sue, the Court noted the established history of diligent antitrust enforcement by public utilities. Finally, the Court observed that investor-owned utilities had incentive to sue in order to protect their markets.

Thus, the Court concluded that all three rationales elucidated in *Illinois Brick* survived in the context of public utility regulation. The Court was undeterred by the fact that the rationales underlying *Hanover Shoe* and *Illinois Brick* would "not apply with equal force in all cases."[84] The Court concluded that, even if any economic assumptions underlying the *Illinois Brick* rule could be disproved in a specific case, the "possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule."[85]

The states also argued that public utility regulation was within the cost-plus exception. The Court dismissed this argument with the observation that the utility did not sell gas to residential consumers under a preexisting cost-plus contract for a fixed quantity. The Court did not even acknowledge the lower court debate about the importance of the Court's reference in *Illinois Brick* to the concept of a fixed quantity contract. Instead, the Court ended this debate by holding, without explanation, that a fixed quantity was necessary to the exception. It ruled, "[W]e might allow indirect purchasers to sue

80. *Id.* at 2815.
81. *Id.*
82. *Id.* (citing *Illinois Brick*, 431 U.S. at 731 n.11).
83. *Id.* at 2816.
84. *Id.* at 2817.
85. *Id.*

only when, by hypothesis, the direct purchaser will bear no portion of the overcharge and otherwise suffer no injury."[86] Because residential consumers of natural gas rarely contract for a fixed quantity,[87] *Utilicorp* effectively bars passing-on defenses and indirect purchaser standing in natural gas pipeline antitrust cases under federal law.

Utilicorp increases the probability that the natural gas pipeline industry is on a collision course with state indirect purchaser statutes. Before focusing on such state statutes and their provisions designed to prevent duplicative damages, it is worth making two final observations about *Utilicorp*. First, the case seems wrongly decided. The Court's assertion that a utility might be bearing part of an overcharge if deprived of a right to raise prices[88] seems incorrect because the Court appeared to be concerned about a possible injury separate and apart from paying an illegal overcharge. As Justice White pointed out in dissent, courts in antitrust cases frequently must separate price increases caused by anticompetitive acts from price increases caused by market forces.[89] Justice White is also persuasive in arguing that this is a problem of causation that courts deal with routinely and not the more intractable problem of apportioning an overcharge between direct and indirect purchasers. The Seventh Circuit, per Judge Posner in *Panhandle*, seems to have analyzed the issue correctly by suggesting that direct purchasers who had passed on an overcharge could nevertheless recover for damages different from payment of an overcharge such as sales lost due to higher prices resulting from the overcharge.[90]

Likewise, the Court overemphasized "time lags" between the increase in an LDC's costs and the rise in consumer rates. The Court was concerned that such time lags could cause a utility to absorb some of the overcharge. In fact, many states with PGAs ultimately reconcile the cost-shifting that occurs during such delays. In Illinois, for example, the state administrative code requires utilities to file a monthly report that specifies the difference between the utility's gas cost and the gas rates it charges to customers.[91] This procedure leads to a refund to customers:

> That balance (known as the "reconciliation balance") is refunded to the consumer when the utility has charged too much and is recovered by the facility when it charged too little . . . . *This ensures that the actual cost of gas is passed on penny for penny to the consumer.*[92]

Such reconciliation balances raise a substantial question about whether "time lags" are likely to cause the direct purchaser to absorb any part of the overcharge more than temporarily.

The Court also appeared overly concerned with conceiving any possible injury that the direct purchaser might suffer. This concern may have been

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86. *Id.* at 2818.

87. *Panhandle*, 852 F.2d at 895 ("[I]t would be absurd for consumers to commit to a fixed quantity; their need for gas varies with the weather!").

88. *Utilicorp*, 110 S. Ct. at 2813.

89. *Id.* at 2820.

90. *Panhandle*, 852 F.2d at 897 (and cases cited).

91. ILL. Commerce Comm'n, 83 ILL. ADMIN. CODE § 525.10(d) (General Order 212. Jun. 28, 1984) (Uniform Purchased Gas Adjustment Clause).

92. Brief for State of Illinois as Amicus Curiae 9, *Utilicorp*, 110 S. Ct. 2807 (emphasis added).

borne out of a misapprehension that the cost-plus exception requires a preexisting fixed quantity term. It is true that, in its discussion in *Illinois Brick* about the cost-plus exception, the Court referred to the concept of a fixed quantity term and also noted that such a term insulates direct purchasers from any injury different from bearing an overcharge, such as lost sales due to higher prices caused by the overcharge.[93] In his *Utilicorp* dissent, however, Justice White, who authored the Court's opinions in *Hanover Shoe*, *Illinois Brick*, and *ARC America*, emphasized that the fixed quantity term is merely an example of when a pass-on is easily provable.[94] The fact that such a fixed quantity term may also have the effect of preventing any other type of injury to the direct purchaser is not relevant to whether there has in fact been "a perfect and provable" pass-on.[95] Consequently, it seems that the Court in *Utilicorp* endowed the fixed quantity term concept with too much significance in ruling that indirect purchaser standing is barred whenever a direct purchaser suffers any type of injury regardless of whether the overcharge has been passed on in its entirety.

The second observation about *Utilicorp* is that a side effect of the decision is that the Court failed to avail itself of the opportunity to provide a solution to the problem of duplicative liability in state and federal court. To illustrate the salutary effect that the opposite result would have had, consider the hypothetical in section II of this article concerning pipelines conspiring to fix discount rates.[96] The direct purchaser, i.e., the LDC, is now the only party with standing to sue for the overcharge in federal court. Conversely, the LDC's customers do not have standing to sue under federal law, but they do have standing to sue for 100% of the exact same overcharge under a state indirect purchaser statute. If both classes of plaintiffs are successful at trial, the utility will recover under federal law the entire overcharge and the utility's customers will recover the same overcharge under state law, resulting in duplicative liability.

In contrast, if the Court had approved a regulatory cost-plus exception in cases of 100% pass-on (common to the natural gas pipeline industry), only indirect purchasers would have had standing under federal law to sue for the overcharge. Consequently, no risk of duplicative liability to direct purchasers would exist in federal court. The direct purchasers, however, could elect to sue under state law instead, or both the direct and indirect purchasers could sue in state court. In either case, elimination of the risk of duplicative liability would depend upon state law following federal law in denying the direct purchaser standing to sue.

In eight of the fifteen jurisdictions with indirect purchaser statutes, the state antitrust statute requires that state antitrust law be construed in conformity with federal antitrust law when the wording or purpose of the state

93. *Illinois Brick*, 431 U.S. at 736.

94. *Utilcorp*, 110 S. Ct. at 2821 (White, J., dissenting).

95. *Id.*; *ARC America*, 109 S. Ct. at 1666 n.6 (Under *Illinois Brick* "indirect purchasers might bring suit in cases in which it would be easy to prove the extent to which the overcharge was passed on to them.")

96. *See supra* notes 15-20 and accompanying text.

and federal statutes is identical or similar.[97] In two other states, this same rule of construction has been adopted by the courts.[98] Approval of indirect purchaser standing in *Utilicorp* would have brought federal and state law into harmony on the issue of standing, at least in the context of regulatory cost-plus pricing. There would then have been an established jurisprudential basis in at least ten states for a state court to follow federal law in barring a direct purchaser action in that context. The pipeline defendant would no longer face the possibility of paying to direct purchasers the damages it would pay to indirect purchasers. By choosing the opposite path, however, the Supreme Court in *Utilicorp* missed an opportunity to reduce the risk of duplicative liability in the context of pass-ons sanctioned by regulation.

B. State Law Solutions to the Problem of Duplicative Liability

The problem of duplicative recovery arises from the newly sanctioned right of indirect purchasers to pursue antitrust damages under state law while direct purchasers have the right to pursue the same damages under federal law.[99] Currently, fifteen jurisdictions have enacted indirect purchaser statutes.[100] Given the increased role states are demanding in antitrust enforcement, one can reasonably expect more states to enact similar statutes, thereby making a wave of indirect purchaser suits a real possibility.[101]

Nine of the current indirect purchaser statutes contain provisions that seek to prevent duplication of damages.[102] Six do not purport to protect anti-

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97. The eight jurisdictions are: the District of Columbia, Hawaii, Illinois, Maryland, Michigan, New Mexico, Rhode Island, and South Dakota. The statutory provision is mandatory in five states (Hawaii, HAW. REV. STAT. § 480-3 (Supp. 1989); Illinois, ILL. REV. STAT. Ch. 38 para. 60-11 (1988); Michigan, MICH. COMP. LAWS ANN. § 445.784(2) (West 1989); New Mexico, N.M. STAT. ANN. § 57-1-15 (1987); and Rhode Island, R.I. GEN. LAWS § 6-36-2(3) (1985)), and is discretionary in three jurisdictions (the District of Columbia, D.C. CODE ANN. § 28-4515 (1981); Maryland, MD. COM. LAW CODE ANN. § 11-202 (1990); and South Dakota, S.D. CODIFIED LAWS ANN. § 37-1-22 (1986)).

98. In Minnesota and Wisconsin the common law approves the uniform construction of state and federal law, but does not specify whether such authority is mandatory or discretionary. *See* Keating v. Phillip Morris, Inc., 417 N.W.2d 132, 136 (Minn. Ct. App. 1987) (and cases cited); City of Madison v. Hyland, Hall and Company, 73 Wis.2d 364, 243 N.W.2d 422, 428, *appeal dismissed*, 429 U.S. 953 (1976). In California the California Supreme Court recently noted that although judicial interpretations of federal antitrust law are "helpful" in interpreting that state's antitrust statute, it is not "directly probative" of the intent behind the statute. California *ex rel.* Van de Kamp v. Texaco, Inc., 46 Cal.3d 1147, 1165 (1988). The authors could find no authority regarding how the remaining four states, Alabama, Kansas, Maine, and Mississippi, address the issue of uniform construction of state law with federal law.

99. This article assumes that state and federal courts both would find liability and in the same amount. It does not address the issue of potential inconsistent determinations.

100. The fifteen indirect purchaser statutes are: ALA. CODE § 6-5-60(a) (1975); CAL. BUS. & PROF. CODE § 16750(a) (West Supp. 1990); D.C. CODE ANN. § 28-4509(a) (1981); HAW. REV. STAT. § 480-14(c) (Supp. 1989); ILL. REV. STAT. ch. 38, para. 60-7(2) (1988); KAN. STAT. ANN. § 50-801(b) (Supp. 1988); ME. REV. STAT. ANN. tit. 10 § 1104(1) (Supp. 1989); MD. COM. LAW CODE ANN. § 11-209 (1990); MICH. COMP. LAWS ANN. § 445.778 (1989); MINN. STAT. § 325D.57 (1990); MISS. CODE ANN. § 75-21-9 (1972); N.M. STAT. ANN § 57-1-3A (1987); R.I. GEN. LAWS § 6-36-12(g) (1985); S.D. CODIFIED LAWS § 37-1-33 (1986); WIS. STAT. § 133.18 (1987-88).

101. *See supra* note 54.

102. The nine jurisdictions statutes containing provisions designed to prevent the duplication of damages are: 1) HAW. REV. STAT. § 480-13(c)(2)-(7) (Supp. 1989); 2) ILL. REV. STAT., ch. 38, para. 60-7(2) (1988); 3) MD. COM. LAW CODE ANN. § 11-209(b)(2)(ii) (1988); 4) MINN. STAT. § 325D.57 (1988); 5)

trust defendants from duplicative liability.[103] Methods of preventing duplicative liability include pass-on defenses, apportionment of damages, delay of disbursement of damages, transfer and consolidation of cases, exclusions from damage awards, and general powers to avoid duplicate liability. Although these provisions appear to offer antitrust defendants some protection against multiple recoveries, many appear to be effective only in limited circumstances. This article will next examine existing state devices for preventing duplicative liability to determine whether they provide antitrust defendants any meaningful protection against multiple liability.

1. Pass-on Defenses

Four jurisdictions with indirect purchaser statutes expressly sanction the pass-on defense: the District of Columbia,[104] Hawaii,[105] Maryland,[106] and New Mexico.[107] In general, antitrust defendants would use a pass-on defense only against direct purchasers.[108] The very existence of these pass-on defenses, however, makes it unlikely that direct purchasers would ever pursue an antitrust remedy under state law. At the outset, then, it appears that a

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N.M. STAT. ANN § 57-1-3(c) (1987); 6) R.I. GEN. LAWS § 6-36-12(a) (1985); 7) S.D. CODIFIED LAWS § 37-1-33 (1986); 8) WIS. STAT. ANN. § 133.18(1) (1987-1988); and 9) D.C. CODE § 28-4509(b),(c) (1981).

103. The six states in which the indirect purchaser statutes contain no antiduplication provisions are: 1) Alabama; 2) California; 3) Kansas; 4) Maine; 5) Michigan; and 6) Mississippi.

104. The District of Columbia statute provides:

> In actions where both direct and indirect purchasers are involved, a defendant shall be entitled to prove as a partial or complete defense to a claim for damages that the illegal overcharge has been passed on to others who are themselves entitled to recover so as to avoid duplication of recovery of damages.

D.C. CODE § 28-4509(b) (1981).

105. The Hawaii statute provides:

> In class actions or de facto class actions where both direct and indirect purchasers are involved, or where more than one class of indirect purchasers are involved, a defendant shall be entitled to prove as a partial or complete defense to a claim for compensatory damages that the illegal overcharge has been passed on or passed back to others who are themselves entitled to recover so as to avoid the duplication of recovery of compensatory damages . . . .

HAW. REV. STAT. § 480-13(c)(2) (Supp. 1989).

106. The Maryland statute provides:

> In any action under this subsection, any defendant, as a partial or complete defense against a damage claim, may, in order to avoid duplicative liability, prove that all or any part of an alleged overcharge was ultimately passed on to the United States, the State, or any political subdivision organized under the authority of this State, by a purchaser or seller in the chain of manufacture, production, or distribution who paid an alleged overcharge.

MD. COM. LAW CODE ANN. § 11-209(b)(2)(ii) (1990).

107. The New Mexico statute provides:

> In any action under this section, any defendant, as a partial or complete defense against a damage claim, may, in order to avoid duplicative liability, be entitled to prove that the plaintiff purchaser or seller in the chain of manufacture, production, or distribution who paid any overcharge or received any underpayment, passed on all or any part of such overcharge or underpayment to another purchaser or seller in such chain.

N.M. STAT. ANN. § 57-1-3(C) (1987).

108. Because these states permit indirect purchasers to sue and do not have a policy against apportioning how much of an overcharge was borne by the direct and indirect purchasers, a state pass on defense could be used to reduce a defendant's damages even when less than 100% of the overcharge is proved to have been passed on.

pass-on defense in a state statute allowing indirect purchasers to sue would not protect antitrust defendants against claims by indirect purchasers, which is the focus of this article.

The pass-on defense does have one salutary effect with respect to state indirect purchaser actions—they can prevent triplicative liability. Recall the example of a natural gas producer price-fixing conspiracy discussed earlier. A pipeline acting in its merchant function would have a cause of action against the producers under federal law, and in fifteen states, an LDC purchasing from the pipeline would have a state indirect purchaser action against the producer as well. Under the indirect purchaser statutes, however, the LDC's customers would also have standing to sue the producers. This creates the risk that the producers would refund the overcharge three times, plus whatever penal component, such as treble damages, each jurisdiction provided. The producers, however, could invoke the passing-on defense to defeat the LDC's claim for the illegal overcharge.[109] Thus, the passing-on defenses appear to offer a bulwark against triplicative liability.

The risk of triplicative damages remains in the eleven indirect purchaser states that do not statutorily provide for a pass-on defense. Nevertheless, nothing in the statutes of those states indicates that the respective state legislatures intended to foreclose use of that defense. Consequently, a powerful argument can be made that the courts of those states should—indeed must—recognize the defense.

The policy reasons for denying a pass-on defense—difficulty of apportioning damages and weakening private enforcement because indirect purchasers have less incentive to sue—were covered exhaustively by the Court in *Hanover Shoe*. Those have no application when the legislature has already rejected them by allowing indirect purchaser suits. In an action brought by indirect purchasers, proof of apportionment will already have been presented as part of the plaintiffs *prima facie* case. Therefore, allowing the pass-on defense will not complicate trial. Moreover, pass-on defenses strengthen the incentive of indirect purchasers to sue, which is what the legislature has already decided it wants. Absent express legislative disapproval of the defense, it would be unsound antitrust policy and unfair judicial policy for an indirect purchaser state to deny a pass-on defense.

2. Apportionment of Damages

The Hawaii[110] and District of Columbia[111] statutes provide the court

109. Moreover, if the LDC and consumers sued in different courts within the same state, other devices to prevent duplication of damages discussed later in this article, such as transfer and consolidation provisions, could ensure that all indirect purchaser claims were before the same court to permit effective use of the pass-on defense in the manner just described.

110. The Hawaii statute provides:

> In any lawsuit or lawsuits in which claims are asserted by both direct purchasers and indirect purchasers, the court is authorized to exercise its discretion in the apportionment of damages, and in the transfer and consolidation of cases to avoid the duplication of the recovery of damages and the multiplicity of suits, and in other respects to obtain substantial fairness . . . .

HAW. REV. STAT. § 480-13(c)(5) (Supp. 1989).

111. The District of Columbia statutes provides: "In any case in which claims are asserted by both

with discretion to apportion damages in order to avoid duplicative liability.[112] How this power prevents duplicative liability is unclear, given that the essence of an indirect purchaser action is apportionment of an overcharge between direct and indirect purchasers.

More likely, this power might prevent duplication of damages that could result from a jury improperly apportioning damages, but it would not prevent duplicative liability in state and federal court. For example, the court could take from the jury the issue of the percentage of an overcharge that was passed on, thereby limiting the jury's role to determining the total amount of the overcharge. The court could also modify the jury's verdict on damages. But a court can only apportion damages among the parties that are before it. Thus, as a practical matter, a court's power to apportion damages does not protect defendants against multiple liability when the direct purchaser sues in federal court (as is most likely) and the indirect purchasers sue in state court.

3. Delay of Disbursement of Damages

The Hawaii statute authorizes only the attorney general to bring a class action on behalf of indirect purchasers.[113] When the attorney general brings such an action and a direct purchaser has not yet sued in a non-Hawaii court, the Hawaii court is required to delay disbursement of any damages recovered by judgment or through settlement: 1) until a direct purchaser's action in a non-Hawaii court is brought and resolved or, if no direct purchaser files an action, until the statute of limitations has run on such an action by a direct purchaser or 2) "in such manner that will minimize duplication of damages to the extent reasonable and practicable, avoid multiplicity of suit and obtain substantial fairness . . . ."[114] The syntax of the statute is not a model of clarity, and it is unclear how mere delay of disbursement of damages, by itself, would prevent duplicative liability.

The Hawaii delay provision, however, must be read in conjunction with the section of the Hawaii statute granting general powers to avoid duplication of damages when a direct purchaser action is already pending in a non-Hawaii court.[115] The Hawaii legislature may have intended that the delay create an opportunity for the court to exercise those general powers by assuring that the Hawaii court will not disburse damages until it is also statutorily authorized to exercise its general powers to avoid duplication of damages, i.e., until a non-Hawaii action is pending.

Unlike the mandatory delay provision in Hawaii, the District of Columbia delay provision is discretionary and does not expressly address when there

direct purchasers and indirect purchasers, the court may transfer and consolidated cases, apportion damages and delay disbursement of damages to avoid multiplicity of suits and duplication of recovery of damages, and to obtain substantial fairness." D.C. CODE § 28-4509(c) (1981).

112. As a practical matter, the natural gas industry is not very likely to be affected directly by statutes in Hawaii. Nevertheless, in light of the fact that more states may be adopting indirect purchaser statutes, it is important to note the strengths and weaknesses of various antiduplication devices, some of which are showcased in the Hawaii statute.

113. HAW. REV. STAT. § 480-14(c) (Supp. 1989).

114. HAW. REV. STAT. § 480-13(c)(7) (Supp. 1989).

115. *Id.* § 480-13(c)(6).

is a direct purchaser action in a non-District Court.[116] Moreover, the District of Columbia statute does not expressly provide for general powers to avoid duplicative liability. Thus, the District's statute is of little practical utility in the setting discussed in this article.

4. Transfer and Consolidation

The statutes of Hawaii,[117] Illinois,[118] South Dakota,[119] and the District of Columbia[120] provide that the courts of those jurisdictions are authorized to transfer and consolidate cases to avoid the duplication of damages. The transfer and consolidation provisions are mandatory in Illinois and South Dakota but are discretionary in Hawaii and the District of Columbia. Although transfer and consolidation could protect a defendant from duplicative liability from claims brought in different courts within the same state, no procedural device exists that would transfer or consolidate cases from state to federal court, or vice versa.[121] Consequently, transfer and consolidation provisions fail to prevent duplicative liability when direct purchasers sue in federal court and indirect purchasers sue in state court.[122]

5. Exclusions From Damage Awards

Rhode Island grants only the state attorney general, as *parens patriae*, the

116. The District of Columbia statute provides: "In any case in which claims are asserted by both direct purchasers and indirect purchasers, the court may . . . delay disbursement of damages to avoid multiplicity of suits and duplication of recovery of damages, and to obtain substantial fairness." D.C. CODE ANN. § 28-4509(c) (1981).

117. The Hawaii statute provides:

> In any lawsuit or lawsuits in which claims are asserted by both direct purchasers and indirect purchasers, the court is authorized to exercise its discretion in the apportionment of damages, and in the transfer and consolidation of cases to avoid the duplication of the recovery of damages and the multiplicity of suits, and in other respects to obtain substantial fairness.

HAW. REV. STAT. § 480-13(c)(5) (Supp. 1989).

118. The Illinois statute provides: "[I]n any case in which claims are asserted against a defendant by both direct and indirect purchasers, the court shall take all steps necessary to avoid duplicate liability for the same injury including transfer and consolidation of all actions." ILL. REV. STAT. ch. 38, para. 60-7(2) (Supp. 1990).

119. The South Dakota statute provides: "[I]n any case in which claims are asserted against a defendant by both direct and indirect purchasers the court shall take all steps necessary to avoid duplicate liability for the same injury including transfer and consolidation of all actions." S.D. CODIFIED LAWS § 37-1-33 (1986).

120. The District of Columbia statute provides: "In any case in which claims are asserted by both direct purchasers and indirect purchasers, the court may transfer and consolidate cases, apportion damages and delay disbursement of damages to avoid multiplicity of suits and duplication of recovery of damages, and to obtain substantial fairness." D.C. CODE ANN. § 28-4509(c) (1981).

121. Unless removal were available, a defendant in state court could not transfer a state indirect purchaser action into federal court. Conversely, even if some procedural mechanism could be devised for transferring a federal claim to state court, a state court could not exercise jurisdiction over a federal antitrust claim because federal courts have exclusive jurisdiction over those claims. *ARC America*, 109 S. Ct. at 1666.

122. It also is unlikely that a federal court would abstain from proceeding with a federal antitrust action in deference to a state antitrust action. *See* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976) ("Abstention from the exercise of federal jurisdiction is the exception, not the rule."); Knudsen Corp. v. Nevada State Dairy Comm'n, 676 F.2d 374 (9th Cir. 1982).

right to sue on behalf of indirect purchasers.[123] Section 6-36-12(g) of the Rhode Island antitrust statute gives indirect purchasers standing to sue and contains the following provision:

> In any action under this section the fact that a person or public body has not dealt directly with the defendant shall not bar or otherwise limit recovery. Provided, however, That the court shall exclude from the amount of monetary relief awarded in such action any amount of monetary relief which duplicates amounts which have been awarded for the same injury. . . .[124]

This mandatory exclusion of a duplicative recovery, at first glance, suggests that any damages already paid to a direct purchaser in federal court should be excluded from damages awarded to an indirect purchaser in state court.[125] However, the duplicate awards that should be excluded under the quoted provision are most likely not awards to direct purchasers. Rather, the statute is referring only to awards recovered by other indirect purchasers in the class upon whose behalf the attorney general has sued, but who opted to bring their own lawsuits and therefore should not be part of the "class."[126] In this vein, the Rhode Island statute also authorizes exclusion from damages of amounts allocable to persons who, pursuant to a procedure provided for in the statute, opted not to participate in any recovery from the attorney general's lawsuit.

The most compelling argument, however, for excluding damages paid to the direct purchaser from the award to the indirect purchasers is that such an exclusion would eviscerate the remedy given to indirect purchasers by the legislature. In the context of 100% pass-on, such an exclusion would deprive the indirect purchaser of any recovery. Consequently, it is unlikely that a state court would exclude damages in that manner, leaving unsolved the problem of duplicative damages in state and federal court.[127]

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123. R.I. GEN. LAWS § 6-36-12 (1985).

124. *Id.*

125. Such an argument would require the phrase "same injury" to include the concept of a single overcharge to a direct purchaser that is then passed on to the indirect purchaser who is the plaintiff in state court. *See infra* note 135.

126. Several textual matters support this interpretation. First, the Rhode Island statute contains another, virtually identical, exclusion of damages provision, but it is not limited to indirect purchaser actions. *Compare* R.I. GEN. LAWS § 6-36-12(a) (1985) *with* R.I. GEN. LAWS § 6-36-12(g) (1985). Second, both provisions appear to be based on the exclusion of damages provision in section 4C of the Clayton Act. 15 U.S.C. § 15c (1988). Section 4C gives state attorney generals standing to sue as *parens patriae* under federal antitrust law (but on behalf of direct purchasers only, *Utilicorp*, 110 S. Ct. at 2818) and, in § 4C(a), provides generally for exclusion of damages allocable to individuals in the class represented in a *parens patriae* proceeding who opted out by either previously suing on their own or following an opt out procedure. 15 U.S.C. § 15c (a)(1) (1988). The purpose of § 4C(a) of the Clayton Act is to protect a potential claimant's interest in prosecuting his own action and to protect the right of a defendant to avoid duplicative liability to members of the same class of plaintiffs represented by the state when there are opt-outs or opt-out actions. *See* H.R. REP. No. 94-499-Part I, 94th Cong., 1st Sess., *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 2572, 2578-82. The virtual identity in language between the Rhode Island provisions and § 4C of the Clayton Act supports the argument that a Rhode Island court is to exclude only damages awarded "opt-out" indirect purchasers and is not authorized to exclude a direct purchaser's recovery from that of the indirect purchasers. *See also* CAL. BUS. & PROF. CODE § 16760 (West Supp. 1990) (similar to § 4C of the Clayton Act). 1987 Cal. Stat. ch. 865 amended § 16760 to harmonize "state and federal damage provisions with respect to parens patriae actions brought by the Attorney General or district attorneys."

127. The Wisconsin antitrust statute also mentions exclusion of damages. That provision, however,

6. General Powers to Avoid Duplicative Liability

The indirect purchaser provisions in the antitrust statutes of Hawaii,[128] Illinois,[129] Minnesota,[130] and South Dakota[131] grant to their respective courts general powers to avoid duplicative liability that might result from indirect purchaser standing. Illinois and South Dakota courts must exercise these powers while courts in Hawaii and Minnesota have discretion to do so.[132]

a. Can These Powers Work When There Are Suits in Federal and State Court?

The central question regarding these general antiduplication powers is whether they address the situation in which the direct purchaser sues in federal court and the indirect purchasers sue in state court. The Hawaii statute expressly covers that situation:

> In any case in which claims are being asserted by a part of the claimants in a court of this State and another part of claimants in a court other than of this State, where the claims arise out of same or overlapping transaction or transactions, the court is authorized to take all steps reasonable and necessary to avoid duplication of recovery of damages and multiplicity of suits, and in other respects, to obtain substantial fairness . . . .[133]

The Illinois and South Dakota statutes are silent on this issue, but antitrust defendants can make a strong textual argument that these statutes are also designed to address a direct purchaser suit in a nonstate court. The Illinois statute, which has only minor differences from the South Dakota statute, provides,

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addresses excluding any damages recoverable under a separate section of the statute and appears to be unrelated to duplicative liability arising from indirect purchaser standing.

128. The Hawaii statute provides:

> In any case in which claims are being asserted by a part of the claimants in a court of this State and another part of the claimants in a court other than of this State, where the claims arise out of same or overlapping transaction or transactions, the court is authorized to take all steps reasonable and necessary to avoid duplication of recovery of damages and multiplicity of suits, and in other respects, to obtain substantial fairness.

HAW. REV. STAT. § 480-13(c)(6) (Supp. 1989).

129. The Illinois statute provides: "[I]n any case in which claims are asserted against a defendant by direct and indirect purchaser, the court shall take all steps necessary to avoid duplicate liability for the same injury including transfer and consolidation of all actions." ILL. REV. STAT. ch. 38, para. 60-7(2) (1988).

130. The Minnesota statute provides: "In any subsequent action arising from the same conduct, the court may take any steps necessary to avoid duplicative recovery against a defendant." MINN. STAT. § 325D.57 (1988).

131. The South Dakota statute provides: "[I]n any case in which claims are asserted against a defendant by direct and indirect purchasers the court shall take all steps necessary to avoid duplicate liability for the same injury including transfer and consolidation of all actions." S.D. CODIFIED LAWS ANN. § 37-1-33 (1986).

132. The Minnesota statute provides its courts with discretion to take unspecified steps to avoid duplicative recovery, but this power appears exercisable only "in any subsequent action arising from the same conduct" challenged in a *previous* treble damages action under Minnesota law. MINN. STAT. § 325D.57 (1988). Consequently, it seems that the Minnesota statute does not address the issue presented in this article.

133. HAW. REV. STAT. § 480-13(c)(6) (1989).

> No provision of this Act shall deny any person who is an indirect purchaser the right to sue for damages. Provided, however, that in any case in which claims are asserted against a defendant by both direct and indirect purchasers, the court shall take all steps necessary to avoid duplicate liability for the same injury including transfer and consolidation of all actions. Provided further that no person other than the Attorney General of this State shall be authorized to maintain a class action in any court of this State for indirect purchasers asserting claims under this Act.[134]

The two phrases that are key to the argument an antitrust defendant would make are "in any case" and "for the same injury." At first glance, "in any case" appears to limit the application of these statutes to the situation in which direct and indirect purchasers sue in one action in state court. Each statute, however, notes that the devices available to the state court include the "transfer and consolidation of all actions." By their plain terms, then, the statutes recognize that the word "case" includes multiple "actions," so that the phrase "in any case" can be read more broadly to mean "in any situation." There is nothing else in the statutes to preclude their application when one of the multiple actions contemplated by the statute is in a nonstate court.

With respect to whether a direct purchaser action in state court would be a suit "for the same injury" as an indirect purchaser state court action, the defendant would argue that an indirect purchaser action is for payment of the same overcharge that has been passed on by the direct purchaser.[135] There is no intervening violation of law by the direct purchaser. Therefore, both the direct and indirect purchasers have suffered the "same injury"—payment of the same overcharge—in an antitrust sense, even though the extent to which each was injured depends on the percentage of the overcharge that the direct purchaser passed on. When 100% has been passed on, the direct and indirect purchasers would be suing for exactly the "same injury."

b. Adjustment of Damages

Assuming that state courts can use the general powers to prevent duplicative damages when there are parallel federal and state court actions, it remains unclear what devices the state courts have available to them to prevent duplicative liability. Theoretically, a state court could adjust the indirect purchasers' damages after considering the damages awarded to the direct purchaser in

134. ILL. REV. STAT. ch. 38, para. 60-7(2) (1988); S.D. CODIFIED LAWS ANN. § 37-1-33 (1986).

135. The concept of antitrust injury bolsters the direct purchaser's argument in this regard. Antitrust injury is injury that flows from the anticompetitive effects of the defendant's conduct. Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477, 489 (1977). An antitrust plaintiff must show that its claimed injury "fall[s] within the rationale for imposing antitrust liability in the first place." P. Areeda, 7 *Antitrust Law.* ¶ 1640c, at 444 (1989). A monopoly overcharge is a single antitrust injury. When the overcharge is passed on, there is still only one injury to competition—the monopoly overcharge—and its amount is fixed at the direct purchaser level. The indirect purchaser's claim "fall[s] within the rationale for imposing antitrust liability in the first place" only because its injury—a portion (or all) of the monopoly overcharge—is subsumed within the injury sustained at the direct purchaser level, i.e., the total amount of the overcharge. Consequently, the direct and indirect purchasers' injuries are the "same" because they are part of the exact same antitrust injury. The fact that different persons bear a percentage of that injury does not change the fact that there has been only one injury to competition, which is the predicate for any recovery by either direct or indirect purchasers.

federal court. It is difficult, however, to conceive of how the indirect purchasers' damages could be adjusted without denying those plaintiffs the remedy given them under state law.

Under *Illinois Brick*, the direct purchaser is entitled to recover 100% of the overcharge in federal court even though it may have actually passed on all of the overcharge to the indirect purchasers. In such a situation, only if the state court awarded the indirect purchasers nothing would an adjustment protect defendants from double liability. Such a result would totally undermine indirect purchaser standing. At best, an adjustment could avoid inconsistent damage awards by, for example, taking the amount of damages a defendant had to pay in federal court to the direct purchaser and establishing it as a ceiling on the amount of damages the defendant would have to pay indirect purchasers in state court.

c. Joinder of the Direct Purchaser Based on Unjust Enrichment

One device at the disposal of the state courts is joining the direct purchaser in the indirect purchaser action. For instance, the California antitrust statute expressly provides,

> Whenever it appears to the court before which any proceedings under this chapter are pending that the ends of justice require that other parties shall be brought before the court, the court may cause them to be made parties defendant and summoned, whether or not they reside in the county where such action is pending.[136]

Even absent a specific reference in a state statute to joinder, however, general powers to prevent duplicative damages surely would be broad enough to include such a procedural device.

When the direct purchaser has obtained a judgment in federal court and the indirect purchasers sue in state court, it would be an appropriate exercise of these general powers for the state court to permit either the indirect purchaser or the defendant to join the direct purchaser based on a cause of action for restitution.[137] The theory of recovery would be that the direct purchaser (an LDC, for example) will enjoy unjust enrichment at the expense of the indirect purchaser plaintiffs (residential consumers, for example) unless it is required to repay the overcharge that it passed on to the indirect purchasers.

In this example, the LDC will have charged and received from the resi-

136. CAL. BUS. & PROF. CODE § 16751 (West 1987).

137. Such a claim would be in the nature of an action for money had and received, which lies whenever a person "has received, or obtained the possession of the money of another, which he ought in equity and good conscience to pay over." Klass v. Twin City Fed. Sav. and Loan Ass'n, 190 N.W.2d 493, 494-95 (Minn. 1971); *accord*, United States v. Jefferson Elec. Mfg. Co., 291 U.S. 386, 402-03 (1934); DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 4.2, at 236 (1973); 58 C.J.S.2d *Money Received* § 1 (1948). Although state laws differ on the precise scope of the cause of action, a claim for money had and received generally can be brought when retention by a person of money received from different sources would constitute unjust enrichment in the form of double payment. *E.g.*, *Klass*, 190 N.W.2d at 495 (lessee recovered amount paid to lessor for real estate taxes after lessor received reimbursement of tax amount in condemnation award); 4 PALMER, THE LAW OF RESTITUTION § 21.5 (1978) (cases cited); 58 C.J.S. *Money Received* § 11 (1948) (cases cited).

dential consumers 100% of the overcharge by virtue of a pass on, and it also will have recovered in its federal antitrust action the same amount of that overcharge from the defendant (a pipeline, for example), which latter amount would be trebled. Because it has been made whole by the pipeline defendant, the LDC cannot "in good conscience" retain the overcharge paid to it by the residential consumers.[138] The state court could then require that the direct purchaser LDC pay the amount of the overcharge to the residential consumers and that the defendant pipeline pay nothing in the form of compensatory damages.[139]

If (as seems likely) the indirect purchasers do not pursue this unjust enrichment claim against the LDC, then the defendant pipeline should have standing to join the LDC. As just discussed, the indirect purchasers have a cause of action against the direct purchaser LDC. If the pipeline pays the indirect purchasers the amount of the overcharge as damages under state antitrust law, it is essentially paying money that the LDC owes to the indirect purchasers. Under common law principles of subrogation, the defendant is allowed to "stand in the shoes" of the indirect purchasers with respect to that indebtedness and can sue the direct purchaser for restitution.[140]

This unjust enrichment solution to duplicative liability could be more beneficial to natural gas industry defendants than other defendants. The retention of the overcharge by the LDC in the hypothetical is unjust because the LDC has been paid twice for the same expense. Depending upon the law of the jurisdiction giving the remedy, to establish a right to restitution, the consumers might have to show that the damages awarded to the LDC in federal court constitute repayment of the "same" expense for which the residential consumers have paid.[141] Otherwise, the LDC could argue that it has not been paid twice and that any windfall has nothing to do with the residential consumers' payments to it. The fact of 100% pass-on mandated by regulation, however, provides a ready and accurate means of "linking" the payment of the overcharge by the residential consumers to the LDC and to the LDC's damage award in federal court—it is the same overcharge. Such clear tracing might not be possible absent 100% regulatory pass-through.

The direct purchaser probably would oppose joinder based on this unjust

138. *See supra* note 136.

139. The defendant pipeline could be required to pay attorneys' fees for both the direct and indirect purchasers. Although this would mean that the pipeline would not be in the exact position in which it would have been absent the state indirect purchaser action, in context this seems a small price to pay for eliminating the larger problem of duplicative liability.

140. *See* DOBBS, *supra* note 137, § 4.3, at 250-51 (when a person pays a creditor on the debt of another "for some good reason," that person is substituted for the creditor and can assert the creditor's rights against the debtor). Subrogation is often challenged on the basis that the payor of the debt did so officiously. *Id.* In the example regarding the pipeline in the text, however, the payment is pursuant to a judgment and is not officious. *See* RESTATEMENT OF RESTITUTION § 162 comment b; Natural Gas Pipeline Co. v. Harrington, 246 F.2d 915, 919-21 (5th Cir. 1957) (payments pursuant to orders of state regulatory body not voluntary), *cert. denied*, 356 U.S. 957 (1958).

141. *See, e.g.*, *Jefferson Elec. Mfg. Co.*, 291 U.S. at 402-406 (in action to recover tax refund of allegedly unconstitutional sales tax, seller taxpayer could not recover for itself if its accounting records showed tax had been passed on to its customers); PALMER, *supra* note 137, §§ 2.14-.17 (discussing tracing and equitable remedies).

enrichment theory. It could argue that such joinder would interfere with the direct purchasers' federal antitrust remedy and thus should be preempted under *ARC America*. The direct purchaser would argue that federal law, as reaffirmed in *Utilicorp*, gives the direct purchaser the right to recover three times the overcharge from the defendant. Any state procedure depriving the direct purchaser of any part of its federal court recovery would be preempted by virtue of the Supreme Court's reasoning in *ARC America*. The procedure would directly "affect remedies available under federal law"[142] and would stand " 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' "[143]

Joinder based on unjust enrichment, however, does not interfere with the federal treble damage remedy. The direct purchaser is not turning over any of its federal court recovery but instead is disgorging a payment received as a result of the transaction between it and the indirect purchasers. That transaction would not be the subject of any federal antitrust action. Moreover, although federal antitrust law gives the direct purchaser the right to receive three times the overcharge, in the context of 100% pass-on, a direct purchaser that has prevailed in federal court has actually received four times the overcharge: once in the form of a pass-on to the indirect purchasers plus three times from the defendant.

Federal law, as stated in *Hanover Shoe* and *Illinois Brick*, permits the direct purchaser to retain this windfall but does not require that the direct purchaser retain it. The federal prohibition on use of pass-ons is not premised on the notion that direct purchasers need a windfall to have incentive to sue. Indeed, the Supreme Court was satisfied that the right to recover three times actual damages gave direct purchasers adequate motivation to enforce the antitrust laws.[144] Consequently, disgorgement of the overcharge would not interfere with the federal antitrust remedy, especially when the direct purchaser has already recovered the overcharge in federal court.[145]

The unjust enrichment theory, however, has its limits. It only relieves the defendant from paying, in state court, actual compensatory damages in the amount of the overcharge. Consequently, the theory eliminates any duplicative liability in a jurisdiction such as Hawaii, which permits indirect purchasers to collect only compensatory, not treble, damages.[146]

If the state requires the defendant to pay treble damages, however, the restitution theory would not reimburse the defendant for the trebled portion of the overcharge. In contrast to compensatory damages, the punitive components of the federal and state damages awards are not "duplicative" because

142. *ARC America*, 109 S. Ct. at 1666.

143. *Id.* at 1665 (citations omitted).

144. *Illinois Brick*, 431 U.S. at 733-35; *see Utilicorp*, 110 S. Ct. at 2816.

145. If the direct purchaser has either sued but not yet recovered, or not yet sued, joinder should still be permitted under the same principles. To be effective in preventing duplicative recovery in that situation, however, joinder would have to be used in concert with a state court delay in the disbursement of damages. As discussed, Hawaii and the District of Columbia have expressly adopted a delay procedure, but once again, general antiduplication powers should be broad enough to encompass a judicially-crafted delay mechanism.

146. HAW. REV. STAT. § 480-13 (a)(1) (Supp. 1989).

they can properly be viewed as fines imposed by each sovereign for a violation of the laws of each.[147] Consequently, that component does not embody any "duplicative" unjust enrichment of the direct purchaser that should be disgorged.[148] Moreover, as discussed, a procedure for preventing duplicative damages that cuts into the trebled award to the direct purchaser would directly conflict with the federal antitrust remedy and would likely be preempted by federal law. Thus, joining the direct purchaser would only reduce the amount paid by the defendant to five, instead of six, times the actual overcharge.

Nevertheless, imposing a penalty of five or six times actual damages for each antitrust violation raises the question of whether such a penalty is effective and wise antitrust policy.[149] A less severe result might obtain if states permitted indirect purchasers to recover treble damages against the defendant only if a direct purchaser either does not bring suit in federal court or does not recover. Both the compensatory and deterrence purposes of antitrust damages would still be accomplished. A state could compensate the victims of a violation of the laws of the state and rely upon a treble damages award in federal court to discourage future violations.[150] If no treble damages are awarded in federal court, then the state's own treble damage provision would become effective and serve the state's interest in deterrence. To work properly, this procedure would require a delay in disbursement of state damages until a federal action has ended or the federal limitations period has run.

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147. *Cf.* Heath v. Alabama, 474 U.S. 82, 88-89 (1985) (no double jeopardy when both state and federal sovereigns punish same conduct).

148. In a different context, however, one federal district court has found that a defendant is denied due process when it is required to pay punitive damages to successive litigants in cases arising out of a single course of conduct. *See* Juzwin v. Amtorg Trading Corp., 705 F. Supp. 1053, 1060-64, *vacated regarding procedure for implementing ruling*, 718 F. Supp. 1233, 1234 (D. N.J. 1989). *But see* Jackson v. Johns-Mansville Sales Corp., 781 F.2d 394, 401-07 (5th Cir. 1986).

149. Antitrust damages are generally seen as having two purposes: deterrence of future violations and compensation of victims for a past violation. *See, e.g.*, R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 221-27 (1976). Antitrust policy should strive to strike an appropriate balance between the two because excessive penalties create an incentive to overenforce the law, which wastes resources in addition to discouraging lawful conduct. *See* POSNER, *supra*, at 227. Indeed, for those very reasons the Supreme Court has, in the criminal antitrust context, cautioned against overdeterrence of violations of the antitrust laws. United States v. United States Gypsum Co., 438 U.S. 422, 440-42 (1978). State indirect purchaser statutes emphasize compensation and, by creating the risk of duplicative recovery, they also may create the risk of overdeterrence of antitrust violations. *See ARC America* Task Force, *supra* note 7, at 285-87. It is arguable whether a multiple of five, six, or more of actual damages is any more of an *over* deterrent than treble damages. *Id.* at 286-87. But the larger damage multiplier at least has the potential to be a greater *deterrent* of antitrust violations than treble damages, raising the spectre of overdeterrence.

150. There has even been frequent congressional debate over whether the treble damage remedy is too severe. *See* Note, *Indirect Purchaser Suits Under State Antitrust Laws: A Detour Around the* Illinois Brick *Wall*, 34 STAN. L. REV. 203, 210 & n.32 (1981). The *Gypsum* Court best expressed the concern with overdeterrence when it wrote that "[t]he behavior proscribed by the Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct." *Gypsum*, 438 U.S. at 440-42. The Court cautioned that "overdeterrence" would cause businessmen to shun "salutary and procompetitive conduct lying close to the borderline of impermissible conduct." *Id.*

d. Attempts at Joinder to Avoid Duplicative Liability

The authors of this article found one reported case, *Union Carbide v. Superior Court*,[151] addressing the question of joinder in the context of a direct purchaser suit in federal court and an indirect purchaser suit in state court. In *Union Carbide*, indirect purchasers sued industrial gas manufacturers in state court. The defendants sought to require the plaintiffs to join as necessary parties both the defendants' direct customers, who had filed parallel litigation in federal court, and the defendants' intermediate customers, who could sue in state court. The defendants moved to dismiss on the ground that the plaintiffs had failed to join these necessary parties.

The California Supreme Court affirmed the denial of the defendants' motion. The court based its ruling entirely on an interpretation of the joinder rules in section 389 of the California Code of Civil Procedure and not on the joinder provisions in section 16751 of the Business and Professions Code (quoted above), which were not at issue in the case. The court ruled that, with respect to the direct purchasers and their parallel federal action, there was no substantial risk of multiple liability because pass-on would not be an issue in the federal litigation, while it would be a central issue in the state case.[152] The court therefore seems to have confused the concept of multiple liability with the concept of inconsistent determinations.[153] With respect to the intermediate purchasers, the court ruled that there was no evidence at that time that they intended to file indirect purchaser actions in state court, so requiring joinder of them would be premature.[154]

The *Union Carbide* majority opinion prompted a dissent that pointed out the dangers of duplicative liability.[155] It should be noted that the plaintiffs in *Union Carbide*, although they opposed joinder, attempted to argue that procedural devices would prevent duplicative recovery.[156] The dissent, however, questioned whether "simple procedural devices" other than joinder "may be inapplicable where the federal and state systems interact."[157]

In any event, because it was premised upon a confusion between he concepts of inconsistent determinations and duplicative liability, *Union Carbide* should not be precedent in a state that has specifically recognized the potential problem with duplicative liability and authorized its courts to take preventive action.[158] By combining joinder with disbursement delays and, when appropriate, pass-on defenses, a state court might ameliorate some of the harshest duplicative liability. Unfortunately, the vast majority of indirect purchaser

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151. 679 P.2d 14 (Cal. 1984).
152. *Id.* at 23.
153. *Id.* at 31 (dissent) (majority criticized for focusing only on issue of inconsistent determinations).
154. *Id.* at 23-24.
155. *Id.* at 26-35.
156. *Id.* at 31.
157. *Id.* at 31-32.
158. It is unclear whether *Union Carbide* has any application to an interpretation of § 16751.

statutes do not offer the opportunity for such creative and aggressive judicial solutions but leave the problem of duplicative liability largely unsolved.

VI. Conclusion

Because the regulatory framework of the natural gas pipeline industry generally sanctions and fosters 100% pass-ons, indirect purchasers such as consumers are likely to bear 100% of an antitrust overcharge. The Supreme Court in *Utilicorp,* however, rejected this view of the natural gas industry by denying indirect purchasers' standing to sue under federal law for antitrust violations. At first blush, the *Utilicorp* result might please gas sellers and transporters because it appears to reduce the number of potential plaintiffs. But when viewed in concert with *Arc America* and the growing activism of states in antitrust enforcement, the *Utilicorp* result is ominous. It places the interstate natural gas pipeline industry at the mercy of state law and confronts it squarely with the substantial risk of duplicative liability despite the efforts of some states to address that danger.

No specific device for preventing damages seems to provide full protection against duplicative liability. The grant to a state court of general powers to prevent duplicative liability offers the most hope because it gives the court considerable flexibility. This article has suggested the seeds of a potential solution—joinder of the direct purchaser in state court based on unjust enrichment—that might especially benefit energy industry defendants because of the 100% pass-on regulatory context. The proposed solution, however, is obviously sketchy and applied to pristine, hypothetical facts. Moreover, the gas industry regulatory framework, at both the state and federal levels, could conceivably erect considerable road blocks to its effective operation.

On a broader level, and perhaps more problematic, is the fact that not every state with an indirect purchaser statute gives its courts general remedial authority to address the problem of duplicative recovery. Such concerns serve only to highlight the problem of duplicative liability now that the Supreme Court has relegated antitrust defendants to seeking refuge from duplicative liability under untested and vastly different state laws.