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Determining the Indirect Purchaser's Right to Sue in the Context of Regulated Utilities: *Kansas & Missouri v. Utilicorp United, Inc.*

INTRODUCTION

Two Supreme Court decisions, *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*[1] and *Illinois Brick Co. v. Illinois*,[2] are of dominating significance in federal antitrust litigation. In 1968, the Supreme Court in *Hanover Shoe* held that an antitrust violator may not defend such a suit by proving that the direct customer passed on all or part of an illegal overcharge to its own customers.[3] In *Illinois Brick*, decided in 1977, the Court held that an antitrust plaintiff may not recover an illegal overcharge passed on to the plaintiff by an intermediate firm that had in turn purchased from a cartel member.[4] Rather, only a direct purchaser from an antitrust violator can recover. Thus, the Court precluded not only the "defensive" use of passing-on in *Hanover Shoe* but also the "offensive" use of passing-on in *Illinois Brick*.

Nevertheless, the *Illinois Brick* decision expressly recognized two other situations that might constitute exceptions to the general direct purchaser rule.[5] In 1990, the Supreme Court in *Kansas v. Utilicorp United, Inc.*[6] resolved a split in the circuits[7] over one of these possible exceptions. In *Utilicorp*, the Supreme Court refused to allow an exception to the direct purchaser rule in circumstances where regulated public utilities pass

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1. 392 U.S. 481 (1968).
2. 431 U.S. 720 (1977).
3. 392 U.S. at 494.
4. 431 U.S. at 735.
5. *Id.* at 736 & n.16. *See infra* notes 30-31 and accompanying text.
6. 110 S. Ct. 2807 (1990).
7. The Seventh Circuit permitted an indirect purchaser to recover when a dealer's contract did not specify quantity in advance. *See* Illinois *ex rel.* Hartigan v. Panhandle E. Pipe Line Co., 852 F.2d 891 (7th Cir.) (en banc), *cert. denied*, 488 U.S. 986 (1988). The Tenth Circuit disagreed with the Seventh Circuit. *See In re* Wyoming Tight Sands Antitrust Cases, 866 F.2d 1286 (10th Cir. 1989), *cert. granted sub nom.* Kansas v. Kansas Power & Light Co., 110 S. Ct. 833 (1990) (an indirect purchaser of natural gas is entitled to sue for recovery of illegal overcharges covered by price fixing only when there exists a pre-existing, fixed-price, fixed-quantity contract between the direct and indirect purchaser).

on to their customers the entire amount of overcharges levied by the utilities' suppliers.

Part I of this note reviews *Hanover Shoe* and *Illinois Brick*, which provide the historical backdrop for the direct purchaser rule and the *Utilicorp* decision. Part II presents the facts of *Utilicorp*. Part III discusses the reasoning of both the majority and dissenting opinions. Finally, part IV analyzes *Utilicorp* and proposes that section 4 of the Clayton Act requires courts to recognize an exception to the direct purchaser rule when applied to regulated public utilities.

I. Historical Background

A. *The Problem of "Passing-On"*

"Passing-on" is a term used in antitrust law that describes the situation in which a manufacturer or other distributor in a vertical distribution chain violates antitrust laws by artificially raising prices through price fixing or monopolization. The resulting overcharge ripples downward, or is "passed-on" down the chain, until it reaches the ultimate consumer. The issue is whether indirect purchasers[8] have standing to recover damages for the overcharges under federal antitrust laws.

B. *Defensive Use of "Passing-On" Rejected in* Hanover Shoe

The Supreme Court in *Hanover Shoe* refused to allow antitrust defendants to use the "passing-on" theory as a valid defense.[9] The plaintiff, Hanover Shoe, leased shoe-making machinery from the defendant, United Shoe Machinery. Hanover Shoe sued United Shoe for treble damages, claiming that United Shoe had monopolized the shoe-making machinery market in violation of section 2 of the Sherman Act[10] and had artificially raised

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8. The term "indirect purchasers" refers to those who did not purchase directly from the price-fixing manufacturer or distributor.

9. *Hanover Shoe*, 392 U.S. at 488.

10. Section 2 of the Sherman Anti-Trust Act provides in full:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2 (1988).

Hanover's cost of acquiring shoe-making machinery. In defense, United Shoe argued that Hanover suffered no injury because Hanover had passed-on any illegal overcharge to its customers in the form of higher shoe prices.

The Supreme Court rejected United Shoe's "passing-on" defense. First, the Court reasoned that the plaintiff's injury occurred at the time it acquired illegally overpriced goods.[11] Any subsequent conduct of the plaintiff to try to offset that injury (by raising the price of its shoes or by decreasing other costs) was irrelevant. The Court reasoned that "[a]s long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows. At whatever price the buyer sells, the price he pays the seller remains illegally high, and his profits would be greater were his costs lower."[12]

Second, the Court stated that it would be too difficult to determine the effect of a change in the defendant's price on the plaintiff's business. The Court reasoned that even if the buyer could show that he raised his price in response to the overcharge, "there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued."[13] In addition, the difficulty of determining the effect of a price change on a company's total sales would make proving damages impossible in many situations.[14]

Finally, the Court recognized that approval of a passing-on defense would apply equally to each level of the distribution chain. The Court concluded that "those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them."[15]

The Court explicitly recognized, however, a possible exception to its preclusion of a passing-on defense by stating: "We recognize that there might be situations—for instance, when an overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been damaged—where

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11. *Hanover Shoe*, at 489.
12. *Id.*
13. *Id.* at 493.
14. *Id.* at 491-93.
15. *Id.* at 494.

considerations requiring that the passing-on defense not be permitted in this case would not be present."[16]

C. *Offensive Use of "Passing-On" Rejected in* Illinois Brick

In 1977, the Supreme Court resolved a conflict in the circuits[17] by reading *Hanover Shoe* to also preclude the "offensive" use of passing-on theory by antitrust plaintiffs. In *Illinois Brick*,[18] the State of Illinois and other municipalities as consumers brought suit for damages, claiming overcharge injury as a result of the manufacturer-defendants' alleged conspiracy to fix the price of concrete block. The plaintiff-consumers were two levels below the defendant-manufacturers in the distribution chain. Masonry contractors purchased the concrete block directly from the defendant-manufacturers and used the block to build masonry structures. General contractors incorporated those structures into entire buildings that were then sold to the plaintiffs. The plaintiffs claimed that the illegal overcharge rippled downward through the distribution chain to impact them adversely.[19]

The parties agreed that acceptance or rejection of a passing-on rule should apply equally to both plaintiffs and defendants in antitrust cases. The majority decision followed this policy of

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16. *Id.*

17. Subsequent to *Hanover Shoe* and prior to *Illinois Brick*, only one federal court of appeals had denied indirect purchasers the right to bring suit against manufacturers for antitrust violations. *See* Mangan v. American Radiator & Standard Sanitary Corp., 438 F.2d 1187 (3d Cir. 1971) (per curiam) (court is compelled to dismiss homeowners-indirect purchasers' suit unless it fits within exception to the direct purchaser rule of *Hanover Shoe*). Six of the seven federal courts of appeals that considered this issue held that indirect purchasers could recover their provable damages. *See, e.g.*, Yoder Bros., Inc. v. California-Florida Plant Corp., 537 F.2d 1347 (5th Cir. 1976) (claim alleging plant patent infringement; cross-claim alleging antitrust violations under §§ 1 and 2 of the Sherman Act), *cert. denied*, 429 U.S. 1094 (1977); *In re* Western Liquid Asphalt Cases, 487 F.2d 191 (9th Cir. 1973) (allegation of price fixing of liquid asphalt), *cert. denied sub nom.* Standard Oil Co. v. Alaska, 415 U.S. 919 (1974); Illinois v. Bristol-Myers Co., 470 F.2d 1276 (D.C. Cir. 1972) (allegation of trade restraint in sale of drugs); West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079 (2d Cir.) (allegations of antitrust law violations in sale of drugs), *cert. denied sub nom.* Cotler Drugs, Inc. v. Chas. Pfizer & Co., 404 U.S. 871 (1971).

18. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 730 (1977). Compare the differing views of *Illinois Brick* in Landes & Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick*, 46 U. CHI. L. REV. 602 (1979) (pro-*Illinois Brick*) with Harris & Sullivan, *Passing On the Monopoly Overcharge: A Comprehensive Policy Analysis*, 128 U. PA. L. REV. 269 (1979) (anti-*Illinois Brick*).

19. *Illinois Brick*, 431 U.S. at 726-27.

symmetry. The Court reasoned that if defensive passing-on were not permitted but offensive passing-on were allowed, there would be a strong likelihood of multiple liability for defendants. The direct purchaser would presumptively be entitled to full recovery while the defendant would be prevented from using that presumption to preclude recovery of all or some of the overcharges by indirect purchasers.[20] If indirect purchasers were allowed to show that the direct purchaser did pass on the overcharge, overlapping recoveries would result. By having to pay damages to both direct and indirect purchasers, the defendant would be required to pay substantially more than the amount of the original overcharge.[21]

In *Illinois Brick*, the Court extensively analyzed the rationale behind *Hanover Shoe* and concluded that the reasons for not allowing passing-on expressed in that case were still valid. First, the Court questioned the ability of courts to conduct a complex passing-on analysis.[22] The Court reasoned that when all necessary purchaser-parties to the litigation were included to avoid multiple liability problems, the likelihood of overly complex litigation would increase and the likelihood of efficient antitrust enforcement would decrease.[23] The Court stated that permitting passing-on theories would turn treble damage actions into complex exercises in apportioning damages among all potential plaintiffs.[24] Second, the Court maintained that besides being too complex, proof of passing-on was too speculative since attempting to trace damages through each step of the distribution chain would entail massive amounts of evidence and complicated theories.[25] The Court reasoned that there were too many "ifs" involved in determining how much overcharge had been passed-on.[26] Third, the Court asserted that, in general, direct purchasers had a greater incentive to sue than indirect purchasers since indirect purchasers had only a small stake in the outcome of the litigation.[27] It reasoned that this limited interest in the outcome coupled with the added complexity of the litigation would increase the costs and speculative nature of antitrust litigation

20. *Id.* at 730.
21. *Id.* at 730-31.
22. *Id.* at 731-32.
23. *Id.* at 734-41.
24. *Id.* at 737.
25. *Id.* at 741-42.
26. *Id.*
27. *Id.* at 745.

and ultimately decrease the benefits to individual plaintiffs, severely impairing the deterrent effect of treble damage actions.[28] The Court concluded that in view of the considerations supporting the *Hanover Shoe* rule, it was "unwilling to carry the compensation principle to its logical extreme by attempting to allocate damages among all 'those within the defendant's chain of distribution' . . . ."[29]

D. Possible Exceptions to Illinois Brick

Despite generally rejecting the "passing-on" concept, the Court in both *Hanover Shoe* and *Illinois Brick* recognized possible exceptions to its conclusion. Several courts have followed the Supreme Court's suggestion and allowed the "passing-on" defense when a plaintiff purchases products pursuant to a "pre-existing cost-plus" contract.[30] In such a situation, the direct purchaser is insulated from any sales decreases and is able to pass-on the overcharge in full because its customer must buy a fixed quantity regardless of the price. In this exception, the market forces have been superseded. Since the effect of the overcharge is essentially determined in advance, no analysis of supply and demand is necessary.[31]

In reality, however, few contracts qualify for the exception of a pre-existing cost-plus contract. As a result, some lower courts have expanded this exception to include a "functional equivalent" of a cost-plus contract. Such a "functional equivalent" occurs whenever a fixed formula for pricing exists that makes reliance on general economic theory unnecessary.[32]

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28. *Id.*

29. *Id.* at 746 (quoting *id.* at 761 (Brennan, J., dissenting)).

30. *Id.* at 735-36; *Hanover Shoe*, 392 U.S. at 494. Some courts, also relying on *Illinois Brick*, have allowed indirect purchasers to bring an antitrust action when the direct purchaser is owned or controlled by the antitrust violator; Dicta in *Illinois Brick* also recognized an exception to the "passing-on" concept "where the direct purchaser is owned or controlled by its customer," 431 U.S. at 736, n.16, and the courts have extended the exception to situations in which the direct purchaser is owned or controlled by a violator; *see, e.g., In re* Chicken Antitrust Litig. Am. Poultry, 669 F.2d 228, 239 (5th Cir. 1982); Royal Printing Co. v. Kimberly-Clark Corp., 621 F.2d 323, 326 (9th Cir. 1980). The rationale of this second exception is that even if a manufacturer is sufficiently downwardly and vertically integrated, even a consumer might become a "direct" purchaser.

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

32. *See In re* Beef Indus. Antitrust Litig., 600 F.2d 1148, 1163 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980) (functional equivalent of a cost-plus contract exists whenever the impact of a price change at one level upon pricing at the next level can be determined in advance without considering supply and demand); *see also* Eastern Air

Using the "functional equivalent" rationale, the Seventh Circuit in *Illinois ex rel. Hartigan v. Panhandle Eastern Pipe Line Co.* permitted the state, in its *parens patriae*[33] capacity and on behalf of residential customers of a regulated public utility, to recover from a gas supplier even though the public utility's contract did not previously specify quantity.[34] In this case, the regulated public utility was entitled by law to pass on its higher costs to its consumers.[35] The court of appeals reasoned that this scheme acted as a substitute for the pre-existing cost-plus contract. The public utility lacked adequate incentives to sue, given its regulatory entitlement to pass on its costs and its statutory obligation to pass any damage recovery on to its consumers.[36] The Supreme Court in *Utilicorp*, however, limited such expansiveness of the pre-existing cost-plus contract exception.[37]

II. FACTS OF *Kansas v. Utilicorp United, Inc.*

In *Utilicorp*, public utility companies and the states of Kansas and Missouri, on behalf of residential customers who purchased gas from the utilities, brought actions under section 4 of the Clayton Act[38] against the gas producers and the pipeline

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Lines, Inc. v. Atlantic Richfield Co., 609 F.2d 497 (T.E.C.A. 1979) (functional equivalent of cost-plus contract must be pre-existing). *But see* Mid-West Paper Prods. Co. v. Continental Group, Inc., 596 F.2d 573 (3d Cir. 1979) (not allowing functional equivalent exception).

33. *Parens patriae*, literally "parent of the country," traditionally refers to the role of the state as sovereign and guardian of persons under a legal disability to act for themselves such as juveniles or the insane. BLACK'S LAW DICTIONARY 1114 (6th ed. 1990). *Parens patriae* has also been used to allow the state to recover damages to quasi-sovereign interests wholly apart from recoverable injuries to individuals residing within the state. These quasi-sovereign interests have included the "health, comfort, and welfare" of the people, interstate water rights, pollution-free interstate waters, protection of the air from interstate pollutants, and the general economy of the state. *Parens patriae* suits have also become a very useful tool in actions for violations of antitrust laws. *See* Simburg, *State Protection of Economy and Environment*, 6 COLUM. J.L. & SOC. PROBS. 411, 411-12 (1970).

34. *See* Illinois *ex rel.* Hartigan v. Panhandle E. Pipe Line Co., 852 F.2d 891 (7th Cir.)(en banc), *cert. denied*, 488 U.S. 986 (1988).

35. *Id.* at 895.

36. *Id.* at 895-96.

37. Kansas v. Utilicorp United, Inc., 110 S. Ct. 2807 (1990).

38. Section 4 of the Clayton Act provides in full:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall re-

company and under authority of section 4C(a)(1) of the Hart-Scott-Rodino Antitrust Improvements Act of 1976.[39] The utility companies and the states alleged that certain natural gas producers and a gas pipeline company had conspired to inflate gas prices in violation of the federal antitrust laws.

The defendant gas producers and the pipeline company asserted that the utilities lacked standing to bring such an action under section 4 of the Clayton Act. Pursuant to state and municipal regulations and tariffs filed with state regulatory agencies, the defendants alleged that the utilities had passed on all of the illegal price increase to their customers, and thus the utilities had suffered no antitrust injury.[40] The district court, however, disallowed the "passing-on" defense and interpreted Supreme Court precedents as holding that direct purchasers from antitrust violators suffered injury for purposes of section 4 of the Clayton Act to the full extent of an alleged overcharge even though the district court assumed that there had been a perfect and provable passing-on of the allegedly illegal overcharge.[41]

The states of Kansas and Missouri asserted that the direct purchaser rule is inapplicable when a utility passes on the entire amount of the overcharge to its customers pursuant to state regulations.[42] The states maintained that they could prove the passing-on of the overcharge based on periodic public filings made by Utilicorp that showed the volume and price of gas that Utilicorp sold to its consumers.[43]

The district court concluded, however, that the utility customers, as indirect purchasers, suffered no antitrust injury and therefore dismissed the states' *parens patriae* claims.[44] On the

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cover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15(a) (1988).

39. Section 4C(a)(1) of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 provides in relevant part:

> Any attorney general of a State may bring a civil action in the name of such state as parens patriae on behalf of natural persons residing in such State . . . to secure monetary relief as provided in this section for injury sustained by reason of any violation of sections 1 to 7 of this title.

15 U.S.C. § 15c(a)(1) (1988).

40. *Utilicorp*, 110 S. Ct. at 2811.

41. *In re* Wyoming Tight Sands Antitrust Cases, 695 F. Supp. 1109, 1116 (D. Kan. 1988).

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

43. *Id.*

44. *In re* Wyoming Tight Sands Antitrust Cases, 695 F. Supp. at 1118.

states' interlocutory appeal, the Tenth Circuit Court of Appeals affirmed the dismissals, holding that an indirect purchaser of natural gas is entitled to sue for recovery of an illegal overcharge covered by price fixing only when the direct purchasers—the utilities, in this case—have a pre-existing cost-plus contract with the indirect purchasers, the utilities' customers.[45]

Basing its decision on the rationale of *Hanover Shoe* and *Illinois Brick*, the Supreme Court affirmed the decision of the Tenth Circuit. By so doing, the Supreme Court resolved a split in the circuits regarding whether the ability of public utilities to pass on costs calls for an exception to the direct purchaser rule of *Illinois Brick*. In an opinion by Justice Kennedy, the Court refused, by a 5-4 vote, to fashion an exception to the judicially recognized restriction on suits by indirect purchasers in the context of regulated public utilities passing-on to customers the entire amount of an overcharge.[46]

The Court held that when the utility's suppliers violate the antitrust laws by overcharging the utility for natural gas, and the utility passes on the overcharge to its customers, only the utility has suffered antitrust injury within the meaning of section 4 of the Clayton Act.[47] Therefore, only the public utility has a cause of action. The dissent, however, deemed it "inappropriate" to deny antitrust standing to customers of a regulated public utility since the plain language of section 4 of the Clayton Act reflects an " 'expansive remedial purpose.' "[48]

III. Reasoning of *Utilicorp*

In refusing to create an exception to the direct purchaser rule established in *Illinois Brick* for regulated public utilities, the Supreme Court stated that the purpose of this rule is to avoid the complications of apportioning damages between direct and indirect purchasers, even though the utilities passed on the entire overcharge to their customers pursuant to state regulations or tariffs filed with a utility commission.[49] The Court reasoned that the purpose of avoiding the complications of appor-

45. *In re* Wyoming Tight Sands Antitrust Cases, 866 F.2d 1286 (10th Cir. 1989), *cert. granted sub nom.* Kansas v. Kansas Power & Light Co., 110 S. Ct. 833 (1990).

46. *Utilicorp*, 110 S. Ct. at 2812-13.

47. *Id.* at 2812.

48. *Id.* at 2818-19 (White, J., dissenting) (quoting Blue Shield of Va. v. McCready, 457 U.S. 465, 472 (1982) (citation omitted)).

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

tioning damages is applicable in a case involving a regulated utility because the utility remains an injured party and must remain in the suit to the extent the utility might have been able to raise its rates even in the absence of increased costs. The Court also noted that the utility may be injured because the passing-on process may take time.[50]

The majority recognized that allowing both the direct and indirect purchasers to bring a single lawsuit might reduce the risk of multiple recovery that the direct purchaser rule was intended to eliminate. However, the majority reasoned that this potential reduction would come at too great a cost in complexity of litigation.[51] The Court reasoned that the case already involved numerous utilities operating in several states under federal, state, and municipal regulation.[52] Therefore, the Court concluded that even if all potential plaintiffs could be brought together in one action, the complexity of apportioning recovery among all potential plaintiffs would add new dimensions of complexity to treble damages proceedings and would seriously undermine their effectiveness.[53]

Next, the Court concluded that an exception to the direct purchaser rule would not increase the vigor of antitrust enforcement.[54] The Court reasoned that utilities do not lack incentive to prosecute section 4 actions and in fact have a record of vigorous antitrust enforcement, whereas utility customers may lack the ability to detect improper pricing by suppliers.[55]

Finally, the Court concluded that the possible exception to the *Illinois Brick* rule when an indirect purchaser buys under a pre-existing cost-plus contract would not apply in this case because utility customers made no commitment to purchase any particular quantity. In addition, the utility had no guarantee of a particular profit.[56]

Justice White, dissenting, reasoned that since the courts below assumed that there had been a perfect and provable passing-on of the allegedly illegal overcharge, the issue should be decided on that basis.[57] Justice White concluded that when the

50. *Id.* at 2813-14.
51. *Id.* at 2815.
52. *Id.*
53. *Id.*
54. *Id.* at 2815-17.
55. *Id.*
56. *Id.* at 2817-18.
57. *Id.* at 2819-20 (White, J., dissenting).

facts clearly show that the entire overcharge is passed-on to the customer, the extent of the injury to these indirect purchasers can easily be determined by examining their utility bills.[58] In addition, White argued that the problem of separating the price increase attributable to anticompetitive conduct from the price increase attributable to legitimate factors is not peculiar to indirect purchaser suits.[59]

The dissent also maintained that granting standing to consumers would enhance enforcement of the antitrust laws.[60] Since the pass-on of the overcharge in this case was complete and easily demonstrated, consumers would likely bring suit.[61] Furthermore, the dissent reasoned that if consumers are denied standing, the antitrust laws may not be enforced because the utility lacks incentive to seek recovery of the overcharge that it has already passed on.[62]

IV. Analysis of *Utilicorp*

A. *The Direct Purchaser Rule and Legislative Intent*

The direct purchaser rule articulated in *Illinois Brick* appears inconsistent with the express language of section 4 of the Clayton Act. A literal reading of section 4 conveys the impression that Congress conferred a broad grant of standing upon treble damage claimants. By its terms, an allegation of an antitrust violation by a defendant, an injury to a plaintiff, and a putative causal relationship between the two would seem to constitute a viable cause of action.

Specific features of section 4 also evidence that Congress intended a broad grant of standing. First, section 4 entitles *any* person injured by an antitrust violation to treble damages *by him sustained.*[63] The direct purchaser rule potentially awards the direct purchaser more than three time the damages "by him sustained," while indirect purchasers receive nothing. Second, potential barriers to the assertion of treble damage claims are minimized by the absence of any "amount in controversy" requirement and by the provision for recovery of the costs of suit.

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58. *Id.* at 2820.
59. *Id.* at 2820-21.
60. *Id.* at 2821.
61. *Id.*
62. *Id.*
63. 15 U.S.C. § 15(a) (1988) (emphasis added).

Because these two features facilitate the institution of suit and because of the provision for treble damages, section 4 logically represents an inducement to pursue legal redress for injuries which result from antitrust violations.[64] These features, together with the broad language of the Act, appear to conflict with a narrow judicial interpretation of treble damage standing. By disallowing consumers who are directly injured from asserting their claims, the Court has permitted an evident injury to remain unremedied.

Furthermore, prohibiting down-chain purchasers from suing frustrates a significant movement in antitrust enforcement that has been growing for some time. Perhaps the most compelling evidence of congressional policy in favor of consumer standing is the Hart-Scott-Rodino Antitrust Act of 1976.[65] In this Act, Congress sought to foster and encourage state attorneys general to sue in *parens patriae* on behalf of all natural persons within state borders who have been injured by antitrust violations.[66] Although a "natural person" may be a purchaser who has dealt directly with an antitrust violator, in many cases the "natural person" is an indirect purchaser who has dealt with some other party in the chain of distribution.

The increasing aggressiveness of states' attorneys general in antitrust suits is one of the most encouraging signs for the free enterprise system. If Congress is serious about deterring monopoly pricing (and nothing indicates that Congress is not) it is certainly counterproductive for courts to designate the purchaser likely to have the least incentive to sue as the only possible private attorney general.

On its face, the *Illinois Brick* decision appears to deny the indirect purchaser the right to sue under section 4 of the Clayton Act. In reality, however, the Court specifically denied that they were discussing a standing question, and consequently did not hold that indirect purchasers do not have standing to sue. In fact, the majority in *Illinois Brick* acknowledged the ordinary consumer's legal interest and remedy under section 4 by explicitly recognizing possible exceptions to the direct purchaser

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64. Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 318 (1965); Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 567-68 (1951); Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 751-52 (1947).

65. 15 U.S.C. §§ 15c-15h (1988).

66. 15 U.S.C. § 15c(a)(1) (1988).

rule.[67] What the *Illinois Brick* Court effectively held was that the interest of direct purchasers in compensation and the judicial interest in the effective administration of the antitrust laws are more important than the indirect purchasers' interest in compensation. Under the rationale of *Illinois Brick*, indirect purchasers should not be allowed to recover if there are problems of apportionment, complexity of litigation, lack of incentive by indirect purchasers to sue, and if the direct purchaser has an incentive to internalize at least a part of the increased costs.

The following analysis shows that the Court's concerns in *Illinois Brick* with allowing indirect purchasers to bring suit are largely unfounded when regulated public utilities pass on the entire amount of the overcharge by an antitrust violator pursuant to state regulation. Therefore, absent the policy concerns of assuring compensation to direct purchasers and of effective judicial administration, residential customers should be allowed to recover damages. In the context of a regulated public utility, the clear congressional language of the Clayton Act and the Hart-Scott-Rodino Antitrust Act of 1976 should not be restricted.

B. Regulated Utilities: An Exception to the Direct Purchaser Rule?

The majority in *Utilicorp* reasons that since utility customers make no commitment to purchase any particular quantity, they do not fall within the strict definition of a cost-plus contract. Therefore, they are denied standing to sue under the preexisting cost-plus contract exception. Such a bright-line distinction ignores economic practicalities.

Although the amount of gas purchased by a customer is not fixed in his contract with the utility, the special character of a public utility eliminates the problem of apportionment of overcharge damages for two reasons. First, the retail distribution of natural gas through a grid of pipes to the customer's home is a natural monopoly.[68] If residential gas rates are lower because of regulation than they would be in an unregulated market, the implication is that there exists an unused monopoly power in that market. Therefore, in the absence of regulation, a gas utility

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67. *See supra* notes 30-31.

68. Omega Satellite Prods. Co. v. City of Indianapolis, 694 F.2d 119, 123, 126 (7th Cir. 1982).

would charge a monopoly price. As the majority reasoned in *Panhandle Eastern*, "[t]he significance of the regulatory setting is that if regulation keeps a utility's rates below what it would like to charge, the utility will raise those rates by the full amount allowed by the regulatory commission . . . ."[69] An unregulated firm, however, would not raise the rates by the full amount since an unregulated profit maximizer will realize its best interest is to internalize a part of any cost increase that it experiences in the absence of a fixed quantity contract.[70] Thus, in the context of an unregulated firm, the problem of apportioning the overcharge would emerge.[71]

Second, residential customers have no viable alternatives to natural gas, at least in the short term. Therefore, the utility company can maximize profits by allowing its rates to rise in proportion to the gas supplier's alleged overcharge. Regulation and the absence of competition allows the utility company to pass the overcharge on to the consumer. Accordingly, rate regulation requires the utility to keep rates at a level where the demand for its gas is inelastic. Therefore, in the case of cost-plus contractual provisions required by public utility regulation, the reference to fixed quantity in *Illinois Brick* should not be construed as stating an independent requirement of the cost-plus exception because the quantity is essentially fixed as a result of an inelastic demand curve.

C. The Complexity of Apportioning Damages

One of the Court's arguments for not allowing an exception to the direct purchaser rule in *Utilicorp* is that allowing for indirect purchasers to bring suit would result in complications of apportioning damages.[72] An analysis of the facts of this case undermines this concern. The residential customers were not seeking damages for gas they did not buy. As the dissent made clear, the damages for the gas they did buy can simply be determined from reading their utility bills which reveal the amount of gas they purchased at a price that includes the amount of the illegal overcharge passed on to them.[73] Even though allowing the pre-

69. Illinois *ex rel.* Hartigan v. Panhandle E. Pipe Line Co., 852 F.2d 891, 896 (7th Cir.)(en banc), *cert. denied*, 488 U.S. 986 (1988).

70. *Id.*

71. *See infra* notes 72-74 and accompanying text.

72. *See supra* notes 49-50 and accompanying text.

73. *Utilicorp*, 110 S. Ct. at 2820 (White, J. dissenting).

existing cost-plus exception to be expansive enough to include regulated utilities would result in both the utility company and customers being plaintiffs since both would have standing to sue the antitrust violator, each set of plaintiffs would be suing with respect to different sales. No duplication of recoveries would result in such cases because the residential consumers would recover damages that the utility passed on entirely. Even if the utility were able to raise its rates in the absence of increased costs, which is doubtful given its monopolistic and regulatory nature,[74] the utility would recover damages resulting from the reduction in gas sales that it experienced.

For example, in *Utilicorp*, Utilicorp United suffered no "overcharge" injuries since the entire amount of the overcharge was passed on to the residential customers. Utilicorp United experienced no loss from a smaller markup because it passed on the entire amount of the overcharge pursuant to state regulation. Rather, if Utilicorp United experienced any loss at all, which again is unlikely at least in the short term based on demand inelasticity, this loss would be a loss resulting from less gas being sold—a loss in volume. Therefore, the utility's action would not be based on a monopoly overcharge, but rather, it would be based on the lost profits resulting from the reduction in gas sales that it experienced.

Attempting to determine the amount of the utility's lost profits, though not an apportionment problem, nevertheless would be a complex inquiry. However, if the entire amount of the overcharge is passed on under conditions of an inelastic demand curve, the need for such a complicated inquiry would be negated because there would be no resulting loss in sales on the part of the utility.

This makes the problem of apportionment of damages in *Utilicorp* unrelated to the question presented in *Hanover Shoe* and *Illinois Brick*. In *Hanover Shoe* and *Illinois Brick* there existed no cost-plus contract nor regulation requiring the passing-on of the overcharge. Rather, the Court in those cases was concerned with the situation in which the direct-purchasing dealer suffers injury from an overcharge because it can exact a smaller markup on each unit sold. When there is no cost-plus contract, the direct purchaser may not pass on the entire amount of the

74. *See supra* notes 68-71 and accompanying text.

overcharge because it might be more profitable to internalize the increased costs in order to keep volume purchased higher.

Therefore, while the fixed-quantity requirement of a cost-plus contract can be criticized generally because there is no duplication of recoveries based on the "overcharge" injuries, there is still the difficulty of determining the loss in sales experienced by the direct purchaser. However, when a regulated public utility passes on the entire amount of the overcharge and demand is inelastic, the fixed-quantity requirement of a cost-plus contract is meaningless since there is no resulting loss in sales.

D. Information and the Direct Purchaser's Incentive to Sue

The Court's next argument is that an exception to the direct purchaser rule should not be allowed in utility cases because utility customers may lack the ability to detect improper pricing by suppliers.[75] The Court essentially adopted the position of Professor Landes and Judge Posner. Landes and Posner maintain that the direct purchaser is the most efficient enforcer of the antitrust laws and should be assigned exclusive enforcement rights.[76] Landes and Posner reason that because the direct purchaser deals directly with the antitrust violator, such a purchaser is in a better position to detect a conspiracy.[77]

Opposing Landes and Posner are Professors Harris and Sullivan.[78] Harris and Sullivan thus contend that preclusion of suits by indirect purchasers will actually prevent effective antitrust enforcement because direct purchasers rarely have incentive to sue.[79] Harris and Sullivan argue that direct purchasers are likely to lack an incentive to sue because of the ongoing relationship that is often present between the direct purchaser and the potential defendant.[80] Harris and Sullivan reason that direct purchasers do not want to risk termination by their suppliers.[81] In addition, direct purchasers suffer little actual harm, especially when they pass on all or substantially all of the overcharge.[82]

In analyzing these arguments, the reasoning of Harris and

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75. *See supra* notes 54-55 and accompanying text.
76. Landes & Posner, *supra* note 18, at 608.
77. *Id.* at 609.
78. *See* Harris & Sullivan, *supra* note 18.
79. *Id.* at 349-54.
80. *Id.* at 351-52.
81. *Id.* at 352.
82. *Id.* at 351.

Sullivan seems most persuasive, especially in the context of regulated public utilities. So long as demand is inelastic and the utilities are allowed to pass on the entire amount of the overcharge, there is little incentive for them to bring suit against the supplier.

The Landes and Posner model, on the other hand, appears to suggest that since direct purchasers are the most efficient antitrust enforcers, they actively investigate possible antitrust violations. Not many antitrust violations are discovered this way. Most evidence of antitrust violations is uncovered by attorneys who seek to collect their fees from defendants in an amount not governed by the size of the damage award.[83]

Nevertheless, direct purchasers may, in fact, be in a somewhat better position to detect antitrust violations than indirect purchasers because of their direct contact with the antitrust violator. However, there is no apparent reason for thinking that direct purchasers' detection abilities are so superior that courts should grant them a monopoly in standing to sue for antitrust enforcement. The direct purchaser rule has the opposite effect and actually weakens the incentives of ultimate consumers to detect violations, for such a rule denies consumers the right to recover damages. As a result, though a majority of the Court in both *Illinois Brick* and *Utilicorp* views the direct purchaser rule as a means of preserving vigorous antitrust enforcement, the rule itself may actually be a cause of consumers' disinterest in seeking antitrust enforcement.

V. Conclusion

The Supreme Court in *Utilicorp* was given the chance to establish a clear exception to the "direct purchaser" rule of *Illinois Brick* and to follow the express language of section 4 of the Clayton Act that allows private plaintiffs to receive treble damages in antitrust claims. However, the Supreme Court refused to allow an exception to the direct purchaser rule in the case of regulated public utilities passing-on overcharges to their customers.

The problem of apportioning overcharge damages is largely

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83. *See, e.g.*, United States Football League v. National Football League, 842 F.2d 1335 (2d Cir. 1988) (affirming the award of attorneys' fees in excess of five million dollars even though the plaintiffs recovered only nominal damages of one dollar before trebling), *cert. denied*, 110 S. Ct. 1116 (1990).

unfounded in the public utility context given that it operates as a natural monopoly and is subject to regulatory controls. In addition, reaffirming the *Illinois Brick* rule in *Utilicorp* not only denies consumers their rights to recover damages, but it also is counterproductive to the goal of deterring monopoly pricing since it takes away the indirect purchasers' incentive to uncover antitrust violations. Finally, as a result of the *Utilicorp* decision, when a regulated public utility passes on all of its overcharges to its customers, the damage award is given to the party who has suffered little or no overcharge injury, while it is denied to the party who actually was injured. By maintaining and reaffirming this direct purchaser distinction, the Court in *Utilicorp* has refused to compensate injured consumers, many of whom may not be able to bear the burden of the increased cost.

Therefore, based on the lack of difficulties in apportioning damages, the direct purchaser's lack of incentive to sue, and the profit maximization incentive of the regulated utility to pass on overcharges, the pre-existing cost-plus contract exception should also include regulated public utilities. Allowing indirect purchasers to bring suit in this context would conform to the express language of section 4 of the Clayton Act and would further the underlying principles articulated in *Illinois Brick*.

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