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THE POWER OF THE PURCHASER: THE EFFECT OF INDIRECT PURCHASER DAMAGES SUITS ON DETERRING ANTITRUST VIOLATIONS

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I. INTRODUCTION

The Supreme Court dramatically changed the landscape of antitrust purchaser suits in 1977 when it handed down *Illinois Brick Co. v. Illinois*.[1] The landmark case limited recovery of damages in cases of supra-competitive overcharges to only those entities that had dealt directly with the monopolist or cartel responsible for the overcharge (commonly known as "direct purchasers"). If the direct purchaser raised its price in response to the monopoly price of its input, no longer could subsequent purchasers further down the line ("indirect purchasers") bring suit for damages against the originator of the monopoly overcharge. And the direct purchaser could sue for the full amount of the overcharge, even if it had effectively passed on the entire overcharge to its own customers.

The Court chose to sacrifice compensation for those who were actually injured (typically the indirect purchasers) in the name of administrative feasibility and deterrence. Reactions to the case were varied, battle lines were drawn, and the dispute as to the correct

[1] 431 U.S. 720 (1977).

result is still unresolved thirty years later. There is little controversy over which side of the debate wins arguments about compensation (the anti–*Illinois Brick* side) or administrative convenience (the pro–*Illinois Brick* side). But no one is willing to concede deterrence: each side claims its own benefits. Maybe direct purchasers have better information about whom to sue, and instilling the entire damages award with them provides the best incentive to bring suit. But maybe indirect purchasers increase antitrust violation detection rates and are willing to sue suppliers that direct purchasers aren't.

The arguments on both sides are entirely theoretical, no empirical studies having been done in the area. A number of states have nevertheless been convinced by *Illinois Brick*'s detractors—or perhaps value compensation more highly than did the Supreme Court—and amended or reinterpreted their antitrust statutes to allow indirect purchasers to sue for damages under state law. These "*Illinois Brick* repealers" provide fertile ground for determining exactly how adding indirect purchasers to the mix of potential damages litigants affects direct purchasers' incentive to sue, and thus the overall rate of deterrence.

Part II of this note discusses the background of *Illinois Brick* and the arguments on both sides of the deterrence debate. Each side has a plethora of contentions in its arsenal, and they are laid out in order to demonstrate the back-and-forth quality of the controversy, as well as the hopelessness of resolution through theoretical debate. This Part also discusses variations on *Illinois Brick* repealers. Part III of the note begins with a discussion of various patterns we might expect to see from data derived from antitrust complaints filed in New York over a nine-year period. The predicted possibilities are derived from the arguments surveyed in Part II. The note then summarizes the data that was actually collected, attempts to analyze it and show what it means for the validity of a number of the theoretical deterrence arguments, and looks briefly at shortcomings in the data collection.

II. BACKGROUND

A. Hanover Shoe

The reasoning in *Illinois Brick* is heavily dependent on a case decided nine years prior, *Hanover Shoe*.[2] *Hanover Shoe* dealt with, inter alia, the question of whether an alleged illegal monopolist could use the "passing-on" defense—a claim that the direct purchaser wasn't injured because it raised its prices in response to the monopolist's price increases, absorbing none (or at least a lesser amount) of the increased costs itself.[3] Specifically, United Shoe Machinery Corp. (United) had leased shoe machinery to Hanover Shoe, Inc. (Hanover), but refused to sell the machinery to Hanover. The district court found the lease-only arrangement to constitute unlawfully monopolistic conduct under section 2 of the Sherman Act[4] and awarded Hanover treble damages. However, United claimed

> that Hanover suffered no legally cognizable injury, contending that the illegal overcharge . . . was reflected in the price charged for shoes sold by Hanover to its customers and that Hanover, if it had bought machines at lower prices, would have charged less and made no more profit than it made by leasing.[5]

Essentially, United argued that, assuming its practices did increase Hanover's costs, Hanover simply responded by increasing the prices it charged to its own customers by exactly enough (or even by more than enough) to offset its cost increases. Hanover, then, was no worse off as a result of United's conduct, couldn't claim to be injured, and had no antitrust standing.

The Court disagreed with United, holding that the antitrust injury occurs when "the price paid by [the buyer] for materials purchased for use in his business is illegally high."[6] If Hanover was able

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[2] *See id. passim* (discussing Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968)).
[3] *See Hanover Shoe*, 392 U.S. at 487–94.
[4] 15 U.S.C. § 2 (2006).
[5] *Hanover Shoe*, 392 U.S. at 487–88.
[6] *Id.* at 489.

to profitably raise its price in response to United's own increases, it likely would have been able to profitably raise its price absent United's price increase; therefore, United would, in fact, have been eating away at Hanover's profits.[7] Recognizing the passing-on defense would have required United to demonstrate the absence of that situation, a task too complicated for the courts to adjudicate.[8]

The Court also spent a relatively insignificant portion of its opinion discussing the probable effects on deterrence of permitting United to pursue the passing-on defense. The Court suggested that "ultimate consumers," who would have suffered the injury that was passed on by direct purchasers (and possibly also by other indirect purchasers, depending on the depth of the industry structure),

> would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, 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. Treble-damage actions . . . would be substantially reduced in effectiveness.[9]

The implicit thought—soon to be made quite explicit in *Illinois Brick*—is that allowing reductions in damages because of direct-purchaser passing-on would decrease the deterrent effect of direct-purchaser suits. The indirect purchasers that do eventually suffer the balance of the overcharge would be too dispersed to have incentive to bring suit and rehabilitate the deterrence of the antitrust action.[10]

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[7] *See id.* at 493 (discussing "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"). The Court dismissed United's argument that Hanover was only able to raise its prices because Hanover's competitors were also forced by United's overcharge to raise their prices, saying that a number of factors determine where a business will set its prices. *See id.* at 492–93; *see also infra* notes 33–34 and accompanying text.

[8] *See Hanover Shoe*, 392 U.S. at 493 (calling the difficulty involved in the task "insurmountable").

[9] *Id.* at 494.

[10] *See infra* text accompanying note 20.

B. Illinois Brick

In *Illinois Brick*, the Supreme Court dealt with the flip-side of the passing-on defense: the indirect-purchaser rule.[11] As the Court noted in *Hanover Shoe*, if they had permitted the passing-on defense to be utilized by defendants, in order to ensure a return to optimal levels of deterrence, plaintiffs other than the direct purchaser would have to have been allowed to sue the monopolist for damages.[12] Since the Court declined to recognize the defense, however, the validity of indirect-purchaser suits was uncertain.

Illinois Brick was a manufacturer of concrete block that sold mainly to masonry contractors, who then used the blocks in projects they were contracted to complete.[13] The customers that commissioned those projects were thus indirect purchasers of Illinois Brick's blocks. A group of those indirect purchasers alleged that Illinois Brick had engaged in price fixing in violation of the Sherman Act.[14] Illinois Brick moved for summary judgment against the indirect purchasers, arguing that only direct purchasers could suffer antitrust injury, so the indirect purchasers lacked standing to sue.[15]

The Court began its analysis with the thought that "whatever rule is to be adopted regarding pass-on in antitrust damages actions, it must apply equally to plaintiffs and defendants."[16] A non-reciprocal application of the pass-on rule would create an unacceptable risk of multiple liability: defendants could be sued for the full amount of their

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[11] *See* Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). The Court specifically recognized that the issues are simply two sides of the same coin, indicating that since they'd decided that "a pass-on theory may not be used defensively by an antitrust violator against a direct purchaser," they then had to "decide whether that theory may be used offensively by an indirect purchaser plaintiff against an alleged violator." *Id.* at 726.

[12] *See Hanover Shoe*, 392 U.S. at 494.

[13] *Illinois Brick*, 431 U.S. at 724. Masonry contractors are typically subcontractors, so the end users are actually the third customers in the chain: Illinois Brick sells to masonry contractors, masonry contractors resell the blocks (in altered form) to general contractors, and the general contractors resell those blocks (now completed projects) to the end users. The masonry contractors are Illinois Brick's direct purchasers; the general contractors and end users are both indirect purchasers.

[14] *See* 15 U.S.C. § 1 (2006).

[15] *Illinois Brick*, 431 U.S. at 727.

[16] *Id.* at 728.

overcharges by direct purchasers, since they are unable to use the passing-on defense under *Hanover Shoe*, but then indirect purchasers could sue for additional damages depending on how much of the overcharge had been passed on to them.[17]

Furthermore, as it considered allowing both the passing-on defense and suits brought by indirect purchasers, the Court said that *Hanover Shoe*'s premise was not "ensuring that a treble-damages plaintiff is available to deprive antitrust violators of 'the fruits of their illegality.'"[18] Instead, the case stood for the proposition that the antitrust laws should be enforced "by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it."[19]

Given the Court's reading of *Hanover Shoe*, it was left with only two options: overruling the earlier case or declining to recognize indirect-purchaser suits. The former option was ruled out almost entirely on grounds of administrative feasibility.[20] But just as important to the Court's analysis was its predicted effect on the number of antitrust suits that indirect purchasers would bring as compared to direct purchasers and the subsequent detrimental effect on deterrence. The Court extensively discussed

> the reduction in the effectiveness of [antitrust] suits if brought by indirect purchasers with a smaller stake in the outcome than that of direct purchasers suing for the full amount of the overcharge. The apportionment of the recovery throughout the distribution chain would increase the overall costs of recovery . . . ; at the same time such an

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[17] *See id.* at 730 ("A one-sided application of *Hanover Shoe* substantially increases the possibility of . . . unwarranted multiple liability for the defendant . . . by presuming that one plaintiff (the direct purchaser) is entitled to full recovery while preventing the defendant from using that presumption against the other plaintiff . . . .").

[18] *Id.* at 733 (quoting Hanover Shoe Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968)).

[19] *Id.* at 735.

[20] *See id.* at 737–45 ("However appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damages suits . . . .").

> apportionment would reduce the benefits to each plaintiff by dividing the potential recovery among a much larger group. Added to the uncertainty of how much of an overcharge could be established at trial would be the uncertainty of how that overcharge would be apportioned among the various plaintiffs. This additional uncertainty would further reduce the incentive to sue. The combination of increasing the costs and diffusing the benefits of bringing a treble-damages action could seriously impair this important weapon of antitrust enforcement.[21]

Diffusing the benefits of bringing a successful antitrust suit among more plaintiffs, runs the Court's thought, would likewise diffuse the incentive to bring suit in the first place.

Deterrence thus takes a primary position in determining the outcome of *Illinois Brick*. Indeed, the Court had to sacrifice "recovery [for] those indirect purchasers who may have been actually injured by antitrust violations"[22] in order to achieve what it believed would be optimal deterrence. The Court 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."[23]

While the majority saw a tension between the objectives of compensating victims and deterring future antitrust violations, the dissent believed that permitting indirect purchaser actions would reconcile both goals.[24] There is little controversy in the claim that the majority sacrifices compensation, since it is apparent that direct purchasers will often "pass on the bulk of their increased costs to consumers farther along the chain of distribution."[25] More at odds with the majority's analysis is the dissent's

[21] *Id.* at 745.

[22] *Id.* at 746.

[23] *Id.* (citation and internal quotation marks omitted).

[24] *See id.* at 748–65 (Brennan, J., dissenting).

[25] *Id.* at 764. This claim, however, ignores the possibility that direct purchasers might also pass along what rewards they recoup (or can expect to recoup) from a successful antitrust suit. *See* William M. Landes & Richard A. Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of* Illinois Brick, 46 U. CHI. L. REV. 602, 605 (1979) ("The adjustments in the price of [a product] that take place in the market in response to *Illinois Brick* have the effect

claim that permitting only direct purchasers to bring suit has a negative effect on deterrence: "[D]irect purchasers who act as middlemen have little incentive to sue suppliers so long as they may pass on the bulk of the illegal overcharges to the ultimate consumers."[26] If such a lack of incentive exists, then the Court's holding isn't going to attain optimal levels of deterrence.

Having laid out the major arguments on both sides of the deterrence aspect of the indirect purchaser rule, the Supreme Court set the stage for more than thirty years of theoretical debate about whether *Illinois Brick* achieved its aim of optimally deterring future antitrust violations.

C. Analysis of Hanover Shoe and Illinois Brick

Since the decision in *Illinois Brick* was passed down, both supporters and decriers of the analysis have been extremely prolific on the issue of whether denying standing to indirect purchasers bolsters or inhibits the deterrence aims of antitrust law. Recent scholarly opinion, however, has tended toward the idea that *Illinois Brick* was wrongly decided, vainly sacrificing compensation in a failing attempt to promote deterrence.[27] Even the Antitrust Modernization Commission, which Congress established in order to suggest worthwhile reforms to antitrust law,[28] proposed legislative repeal of the decision.[29]

The most prevalent argument that deterrence suffers under an *Illinois Brick* regime revolves around direct purchasers' sub-maximal incentive to sue those from whom they purchase. There are two factors that detract from their incentive: (1) they may be able to pass on down the line of purchasers a significant portion of the illegal overcharges

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of compensating the indirect purchaser . . . for the possibility of an illegal overcharge.").

[26] *Illinois Brick*, 431 U.S. at 749.

[27] *See, e.g.*, Barak D. Richman & Christopher R. Murray, *Rebuilding* Illinois Brick*: A Functionalist Approach to the Indirect Purchaser Rule*, 81 S. CAL. L. REV. 69, 89 (2007) ("[T]he doctrine has failed to advance even the functional objectives it was designed to achieve.").

[28] *See* Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, §§ 11052–11053 (2002).

[29] *See* Antitrust Modernization Comm'n, Report and Recommendations 18 (2007), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

without hurting their overall profits, and (2) they may be wary of damaging the relationship they have formed with their supplier.[30]

The incentive for direct purchasers to sue in response to monopoly overcharges is itself derived from two sources: (1) the treble-damages award received from a successful suit, and (2) future purchases at lower, non-monopoly prices.[31] The former source is essentially a constant, since it's simply an influx of money—some might call it a "windfall."[32] The latter, however, depends largely on the direct purchaser being able to maintain its price as its costs fall (or at least for the direct purchaser to not have to decrease the price it charges by the exact amount that its costs decrease). If the only effect of the monopolist (or cartel) supplier lowering its price to competitive levels is that the direct purchaser will then have to lower its price the same amount, then the direct purchaser gains no extra profits from the lessened costs,[33] and it has no incentive to bring suit and force the monopolist to decrease its price. This situation would exist, for instance, when a monopolist supplies an input to all of the competitors in a given market with relatively inelastic demand and low profit margins. When the monopolist raises its price to monopoly levels, all of the direct purchasers must raise their prices by a

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[30] *See* Robert H. Lande, *Justice for the Forgotten: New Legislation to Protect Indirect Victims of Antitrust Violations* 2 n.7 (Univ. of Balt. Sch. of Law Legal Studies, Paper No. 2009-07, 2009), *available at* http://ssrn.com/abstract=1267202.

[31] *See* Landes & Posner, *supra* note , at 605 (analyzing a hypothetical direct purchaser's position where an antitrust recovery is possible).

[32] *E.g.*, Robert G. Harris & Lawrence A. Sullivan, *Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis*, 128 U. PA. L. REV. 269, 272 (1979) ("[T]o the extent that the direct purchaser passes the overcharge on, a damage award to it is a windfall, and some purchaser farther down the chain is left with an uncompensated loss."); William Page, Class Interpleader: The Antitrust Modernization Commission's Recommendation to Overrule *Illinois Brick* 5 (June 17, 2008) (unpublished manuscript, available at http://ssrn.com/abstract=1147200) (". . . *Illinois Brick* . . . confer[s] a windfall on direct purchasers who may have suffered only slight harm.").

[33] This characterization is overly simplistic and ignores the basic economic principal that, at a lower price, the direct purchaser should be able to sell more of its product. The direct purchaser may thus have greater overall profits, even if not greater marginal profits, when the monopolist supplier decreases its price. *See generally* Martin Hellwig, *Private Damage Claims and the Passing-On Defense in Horizontal Price-Fixing Cases: An Economist's Perspective* (Max Planck Inst. for Research on Collective Goods, Paper No. 2006/22, 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=936153. Regardless, the direct purchaser's incentive to sue is greater in situations where being freed from monopolist overcharges would allow it to increase its marginal profits.

similar amount: any lower and they lose their profit margins; any higher and they lose their customers to their competitors. If the monopolist is forced by antitrust suit to return its prices to competitive levels, the direct purchasers will be forced through competition with each other to return their own prices to competitive levels rather than keep them at the inflated price, outside of a collusive agreement.[34] There are thus some circumstances where one of the incentives for direct purchasers to bring antitrust suit against monopolist overcharges is not in play.

A more common problem may be the worry of disrupting a relationship with a supplier.[35] The direct purchaser will have a decreased incentive to bring suit if the monopolist is (a) the only supplier of the input on which the overcharge is being paid; (b) the only supplier of other inputs for which it isn't charging monopoly prices; (c) not the only supplier of inputs, but an important supplier; or (d) not the only supplier of inputs, but one with whom a long-standing relationship has developed, so the direct purchaser derives some non-price benefits from interacting with the monopolist. Legal action could result in subversive retaliation from the monopolist,[36] strained interactions between the direct purchaser and the monopolist,[37] or even financial

[34] Because this hypothetical market is inelastic, the direct purchasers don't increase their customer base significantly by charging a lower price. *But see supra* note 33.

[35] *See* Illinois Brick Co. v. Illinois, 431 U.S. 720, 746 (1977) ("We recognize that direct purchasers sometimes may refrain from bringing a treble-damages suit for fear of disrupting relations with their suppliers.").

[36] *See* Lande, *supra* note 30, at 9 ("Direct purchasers often have an ongoing relationship with the violators, who might be the sole suppliers of the products or services in question, and may be reluctant to sue out of fear of retaliation.").

[37] *See* Harris & Sullivan, *supra* note The latter, however, depends largely on the direct purchaser being able to maintain its price as its costs fall (or at least for the direct purchaser to not have to decrease the price it charges by the exact amount that its costs decrease). If the only effect of the monopolist (or cartel) supplier lowering its price to competitive levels is that the direct purchaser will then have to lower its price the same amount, then the direct purchaser gains no extra profits from the lessened costs, and it has no incentive to bring suit and force the monopolist to decrease its price. This situation would exist, for instance, when a monopolist supplies an input to all of the competitors in a given market with relatively inelastic demand and low profit margins. When the monopolist raises its price to monopoly levels, all of the direct purchasers must raise their prices by a similar amount: any lower and they lose their profit margins; any higher and they lose their customers to their competitors. If the monopolist is forced by antitrust suit to return its prices to competitive levels, the direct purchasers will be forced through competition with each other to

tribulations that negatively impact the monopolist's ability to continue to deliver the inputs—hence a lessened incentive to bring suit.

Additionally, there may be a problem with having only a single set of policemen: "Because illegal cartels and monopolists can share rents with direct purchasers without explicitly including them in an illegal conspiracy (and threaten to boycott those who bring suit) antitrust violators can manipulate the incentives of the only parties who have standing."[38] Adding another layer of policing—indirect purchasers—would make rent sharing too expensive, cutting too far into monopoly profits, to be effective (or it might just be administratively infeasible); but with only one layer to deal with, it can still be profitable for the monopolist.[39]

These conditions all decrease the likelihood that direct purchasers will bring suit. If direct purchasers are less likely to bring suit, monopolist firms are less likely to have to pay antitrust damages and so will engage in illegal monopolist behaviors at higher rates than otherwise—in short, deterrence seems to suffer by permitting only direct purchasers to sue. And the problem gains in significance if, as some claim, effective antitrust damages are too low to serve their deterrent function anyway.[40]

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return their own prices to competitive levels rather than keep them at the inflated price, outside of a collusive agreement., at 352 ("Many direct purchasers, however, are in long-term, ongoing supply relationships with a single firm (or a few) and are extremely dependent upon supplier continuity and goodwill. . . . Such a direct purchaser is highly unlikely to sue its supplier unless the relationship has been independently disrupted."); *see also* Herbert Hovenkamp, *The Rationalization of Antitrust*, 116 HARV. L. REV. 917, 941–42 (2003) (suggesting that antitrust litigation against Microsoft is an example of when direct purchasers would choose not to bring suit for fear of endangering their ability to receive products from Microsoft in the future).

[38] Richman & Murray, *supra* note , at 94.

[39] *But see* Landes & Posner, *supra* note 25, at 613–14 (arguing that any benefits the monopolist could provide to the direct purchaser that would outweigh the value of bringing suit are an added cost to charging monopoly prices, and so an extra-legal deterrent to anticompetitive conduct).

[40] *See* Robert H. Lande, *Why Antitrust Damage Levels Should Be Raised*, 16 LOY. CONSUMER L. REV. 329 (2004). *But see* James R. Eiszner, *Antitrust Civil Damages Remedies: The Consumer Welfare Perspective*, 75 UMKC L. REV. 375, 396 (2006) ("[O]ver-deterrence for cartel conduct . . . seems highly likely, because direct purchasers can currently recover treble damages for cartel conduct . . . .").

An added benefit of permitting suits by indirect purchasers was hinted at above:[41] it would open up the pool of potential enforcers.[42] More potential plaintiffs means more people on the lookout for violations in the first place, and therefore more people willing and able to bring suit when a violation has been discovered. It's a simple numbers game.

There are, however, deterrence considerations that weigh in favor of giving only direct purchasers antitrust standing. Perhaps foremost among them is the notion that "direct purchasers ha[ve] superior information and incentives, and thus [are] more likely to discover and police antitrust violations."[43] Their "superior information" manifests itself insofar as they typically have a course of dealing with both the monopolist supplier and its competitors, as well as familiarity with the industry as whole (as opposed to indirect purchasers, who may know nothing at all of the intricacies of the industry producing the product they purchase),[44] and so they "are more likely to be able to determine when, for example, prices rose due to cartelization instead of higher costs."[45] Put another way, "[t]he remote purchaser may not know that a price increase to him

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[41] *See supra* text accompanying notes 38–39.

[42] *See* Richman & Murray, *supra* note , at 95; *cf.* Landes & Posner, *supra* note 25, at 612–13.

[43] Richman & Murray, *supra* note , at 93–94.

[44] *See* Landes & Posner, *supra* note 25, at 609; *see also* Harris & Sullivan, *supra* note The latter, however, depends largely on the direct purchaser being able to maintain its price as its costs fall (or at least for the direct purchaser to not have to decrease the price it charges by the exact amount that its costs decrease). If the only effect of the monopolist (or cartel) supplier lowering its price to competitive levels is that the direct purchaser will then have to lower its price the same amount, then the direct purchaser gains no extra profits from the lessened costs, and it has no incentive to bring suit and force the monopolist to decrease its price. This situation would exist, for instance, when a monopolist supplies an input to all of the competitors in a given market with relatively inelastic demand and low profit margins. When the monopolist raises its price to monopoly levels, all of the direct purchasers must raise their prices by a similar amount: any lower and they lose their profit margins; any higher and they lose their customers to their competitors. If the monopolist is forced by antitrust suit to return its prices to competitive levels, the direct purchasers will be forced through competition with each other to return their own prices to competitive levels rather than keep them at the inflated price, outside of a collusive agreement., at 352 ("[Direct purchasers] are closer to the violation and thus may be in a better position to be aware of it.").

[45] Lande, *supra* note 30, at 9.

is attributable to a price increase by a remote supplier, and even if he does know, he will find it difficult to discover the reasons for the remote supplier's price increase."[46]

Indirect purchasers face an added difficulty in determining why a remote supplier has increased its price because they must first determine *which* remote supplier increased its price:[47] most products have multiple inputs, so even assuming the indirect purchaser can safely attribute the price increase to a remote supplier rather than the direct purchaser, the direct purchaser has far better information when determining which input supplier raised its prices. The problem is exacerbated again if we assume a more complex chain of distribution than simply input supplier, manufacturer, retailer, and final consumer. If more layers are added to the chain—raw material providers, wholesalers, distributors, etc.—the indirect purchaser has to determine at which level the price increase occurred. For end users that want to bring suit, determining which of the remote suppliers is responsible for the price increase can create information costs prohibitive to getting the suit off the ground.

In contrast, under the *Illinois Brick* rule where only direct purchasers are allowed to sue, each level of the chain need only "investigate . . . the link or stage in the chain directly above him,"[48] so there are no prohibitive costs. However, if both direct and indirect purchasers are allowed to sue, since the indirect purchasers often won't have the incentive to investigate potential antitrust violations on their own, they will simply free ride on investigations conducted by direct purchasers.[49] If a direct purchaser brings suit, the costs for the indirect purchaser in determining whom to sue drop dramatically—it's simply a matter of reading the complaint.[50]

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[46] Landes & Posner, *supra* note 25, at 609.

[47] *See id.*

[48] *Id.* at 610.

[49] *See* Jonathan T. Tomlin & Dale J. Giali, *Federalism and the Indirect Purchaser Mess*, 11 GEO. MASON L. REV. 157, 170 (2002) ("[C]osts incurred in bringing suit may loom large relative to any [individual indirect purchaser's] expected benefit, diminishing any individuals' incentive to bring suit, while increasing the incentives to 'free ride' on the investments of others.").

[50] Particularly in light of the heightened pleading standards for antitrust actions recently set by the Supreme Court, the complaint is an especially useful tool in this regard. *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

But then the worry arises that, if indirect purchasers are allowed to sue, any recovery by the indirect purchasers would have to come immediately out of recovery available to direct purchasers,[51] which—as the *Hanover Shoe* Court recognized[52]—would negatively impact direct purchasers' incentive to sue.[53] The result of not allowing duplicative recovery is that "[t]he expected value of the direct purchaser's legal claim is reduced because now he is entitled to recover only (three times) the amount of the illegal overcharge that is *not* passed on,"[54] a lesser amount than otherwise, decreasing the potential economic benefits of bringing suit. Given the likelihood of free riding by indirect purchasers, direct purchasers then bear the full cost of investigation into antitrust violations but receive only a fraction of any reward from a successful suit. A classic example of an externality, we

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[51] The recovery must come out of that otherwise available to direct purchasers because of the strong interest in ensuring that the monopolist doesn't pay a higher price for its conduct than Congress has permitted. *See* Blue Shield of Va. v. McCready, 457 U.S. 465, 474 (1982) (commenting that the *Illinois Brick* Court "found unacceptable the risk of duplicative recovery").

[52] *See* Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968).

[53] *See* Comments from the Am. Antitrust Inst. Working Group on Civil Remedies to the Antitrust Modernization Comm'n Concerning the AMC's Proposal Regarding Direct and Indirect Purchaser Actions 3 (Mar. 2, 2007), *available at* http://www.antitrustinstitute.org/Archives/amc071.ashx. *But see* Harris & Sullivan, *supra* note The latter, however, depends largely on the direct purchaser being able to maintain its price as its costs fall (or at least for the direct purchaser to not have to decrease the price it charges by the exact amount that its costs decrease). If the only effect of the monopolist (or cartel) supplier lowering its price to competitive levels is that the direct purchaser will then have to lower its price the same amount, then the direct purchaser gains no extra profits from the lessened costs, and it has no incentive to bring suit and force the monopolist to decrease its price. This situation would exist, for instance, when a monopolist supplies an input to all of the competitors in a given market with relatively inelastic demand and low profit margins. When the monopolist raises its price to monopoly levels, all of the direct purchasers must raise their prices by a similar amount: any lower and they lose their profit margins; any higher and they lose their customers to their competitors. If the monopolist is forced by antitrust suit to return its prices to competitive levels, the direct purchasers will be forced through competition with each other to return their own prices to competitive levels rather than keep them at the inflated price, outside of a collusive agreement., at 351 (arguing that overruling *Illinois Brick* wouldn't significantly affect the number of direct-purchaser suits because "[i]t does not seem likely that the addition of a passing-on issue will often prove critical in the calculations [of whether to bring suit] of a potential plaintiff with real and substantial losses").

[54] Landes & Posner, *supra* note 25, at 606 (emphasis in original).

should expect sub-optimal investment in suits by direct purchasers (which would then result in fewer suits by indirect purchasers, since they can free ride on fewer direct-purchaser suits).

Landes and Posner make a further argument for the inferiority of indirect-purchaser suits as they impact deterrence: indirect purchasers will typically have small incentive to sue as individuals,[55] so the indirect-purchaser suits we do see will be class actions, where the plaintiff attorneys don't have the incentive "to press for the largest possible judgment" because "[t]heir interests may be better served by agreeing to a settlement that provides for a relatively small judgment but large attorneys' fees—a settlement result also attractive to defendants."[56] If the plaintiff attorneys' interests aren't exactly aligned with those of the plaintiff class, then settlements from indirect-purchaser suits would be smaller than settlements from direct-purchaser suits, where, presumably, the plaintiff has better oversight over, and a stronger incentive to police, the attorneys. Deterrence, then, would again be sub-optimal for two reasons: (1) smaller awards mean that indirect purchasers will have a lesser incentive to bring suit in the first place, and (2) smaller penalties will be less effective at deterring anticompetitive behavior.

The above arguments go back and forth over the ground of contention without resolving anything. The arguments are all theoretical. Without empirical evidence—some metric by which to measure deterrence—we can't know which position, if either, is correct.

There has been one study that hints at how *Illinois Brick* impacts deterrence. As described by Landes and Posner,

> [A] study of antitrust cases in the Southern District of New York in 1977 indicated that out of a total of 69 suits brought by purchasers, 66, or 96 percent, were direct-purchaser suits. A similar study of 197 pending cases in the Northern District of California showed that out of a total of 163 purchaser suits, 67 percent were direct-purchaser

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[55] *See* Illinois Brick Co. v. Illinois, 431 U.S. 720, 745 (1977) (acknowledging the problem of "indirect purchasers [having] a smaller stake in the outcome than that of direct purchasers"); *Hanover Shoe*, 392 U.S. at 494 ("[U]ltimate consumers . . . would have only a tiny stake in a lawsuit and little interest in attempting a class action.").

[56] Landes & Posner, *supra* note 25, at 612–13.

> suits, 23 percent were indirect-purchaser suits, and the rest involved both direct and indirect purchasers. A study of 53 pending cases in the District of Arizona revealed that out of a total of 32 purchaser suits, 81 percent were direct-purchaser suits, 3 percent were indirect, and the rest involved both direct and indirect purchasers.[57]

The study recounts the percentages of direct-purchaser suits in various districts in the year *Illinois Brick* was decided, before federal indirect-purchaser suits had yet been prohibited. The overwhelming majority of the cases were brought by direct purchasers, suggesting that disallowing indirect-purchaser suits would not have a significant impact on the total number of suits brought, so deterrence should suffer little under the indirect-purchaser rule.

The study, however, has its limitations. It only examined suits brought at a single point in time, which could present problems with random sampling. More importantly, the sampling was from the same year that *Illinois Brick* was to be decided. The very possibility of a Supreme Court decision that would remove standing from indirect purchasers surely deterred some—if not most—indirect purchasers from bringing suit that year. The same effect might even have been seen after *Hanover Shoe* was decided, if indirect purchasers anticipated a case like *Illinois Brick* being decided in the near future because the questions addressed by the two cases are so related. Additionally, because it examines only a single year, the study cannot show any interaction effects or trends: indirect-purchaser suits may, for instance, increase the number of direct-purchaser suits that would otherwise be brought because of a reverse free-riding effect.

A more appropriate study would examine the number of suits brought over a period of time. Ideally, it would also take its data from a time removed from the *Illinois Brick* and *Hanover Shoe* decisions to minimize any effects they had on plaintiffs' incentives to file suit. And it couldn't exclusively examine antitrust cases brought for violations of the federal antitrust statutes: indirect purchasers can now bring suit

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[57] *Id.* at 614 n.30 (citing *Fair and Effective Enforcement of the Antitrust Laws: Hearings on S. 1874 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess., pt. 2, at 26–31, 361–72, 375–78 (1978)).

under the federal statutes only for injunctive relief,[58] so their numbers are few. Fortunately, another set of data exists. Shortly after *Illinois Brick* was decided, states began passing what are known as "*Illinois Brick* repealers."

D. Illinois Brick Repealers

California amended its state antitrust statute in 1978, less than a year after *Illinois Brick* was decided, giving indirect purchasers an explicit damages cause of action against antitrust violators under state law.[59] A number of states followed suit,[60] while a few simply reinterpreted their existing statutes to permit such causes of action.[61] Currently, about thirty states and the District of Columbia permit indirect purchasers to bring suits for damages.[62]

The potential federalism preemption issue should have been immediately apparent,[63] but the Supreme Court didn't address it

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[58] *See, e.g.*, U.S. Gypsum Co. v. Indiana Gas Co., 350 F.3d 623, 627 (7th Cir. 2003) ("[T]he direct-purchaser doctrine does not foreclose equitable relief . . . ."); In re Warfarin Sodium Antitrust Litigation, 214 F.3d 395, 399 (3d Cir. 2000) ("Indirect purchaser status . . . is not fatal to a plaintiff's request for injunctive relief . . . .").

[59] Ronald W. Davis, *Indirect Purchaser Litigation:* ARC America*'s Chickens Come Home to Roost on the* Illinois Brick *Wall*, 65 ANTITRUST L.J. 375, 391 (1997) (citing CAL. BUS. & PROF. CODE § 16750(a) (West 1987)).

[60] For instance, Wisconsin, New Mexico, and Illinois all passed statutes in 1979 permitting damages suits by indirect purchasers. *Id.* South Dakota and the District of Columbia jumped on the bandwagon the following year. *Id.* at 392.

[61] *See, e.g.*, Comes v. Microsoft Corp., 646 N.W.2d 440 (Iowa 2002); Hyde v. Abbott Labs., Inc., 473 S.E.2d 680 (N.C. Ct. App. 1996); Blake v. Abbott Labs., Inc., No. 03A01-9509-CV-00307, 1996 Tenn. App. LEXIS 184 (Ct. App. March 27, 1996).

[62] *See* Edward D. Cavanagh, Illinois Brick*: A Look Back and a Look Ahead*, 17 LOY. CONSUMER L. REV. 1, 2 n.4 (2004) (finding thirty states that permit indirect purchaser suits); *see also* Thomas Greene, Kevin O'Connor & Robert L. Hubbard, *State Antitrust Law and Enforcement*, PRACTISING LAW INST. CORP. LAW & PRACTICE COURSE HANDBOOK SERIES, May 2001, at 1129, 1153–55 (finding thirty-four states that permit indirect purchaser suits). Because repealer statutes vary in content and wording, and judicial interpretations of those statutes may be murky, there can be debate about whether a statute actually contravenes *Illinois Brick*, hence the differing counts provided by the two sources cited in this footnote.

[63] *See generally* Tomlin & Giali, *supra* note 49 (discussing the difficulties caused by state laws allowing indirect purchasers to sue for damages while the federal law does not).

until 1989 in *California v. ARC America Corp.*[64] The parties acknowledged that "no indirect purchaser is entitled to sue for damages for a Sherman Act violation," but the question was whether that limitation "also prevent[ed] indirect purchasers from recovering damages flowing from violations of state law, despite express state statutory provisions giving such purchasers a damages cause of action."[65] The Court held that such causes of action were not preempted,[66] and in the wake of that decision *Illinois Brick* repealers proliferated.[67]

The statutes themselves come in a variety of forms, some more permissive than others. For instance, Kansas's repealer statute allows "any person who may be damaged" by a violation of the state's antitrust statute, "regardless of whether such injured person dealt directly or indirectly with the defendant," to "sue for and recover treble the damages sustained," without regard to potential duplicative recovery from the defendant.[68] Nebraska's statute similarly allows any purchaser, direct or indirect, to collect damages without heed of other suits brought against the defendant, but it limits recovery to "actual damages . . . and the costs of the suit," not treble damages.[69] In stark contrast to those statutes, Maryland only allows indirect purchaser actions if they're brought by the state attorney general, and then only if the defendant sold "any drug, medicine, cosmetic, food, food additive, or commercial feed . . . or medical device."[70] The statute also permits the defendant to make use of the passing-on defense, "in order to avoid duplicative liability."[71]

The types of *Illinois Brick* repealers are wide-ranging, and many have a variety of idiosyncratic limitations on their applicability. Choosing a state to analyze for the repealer's effect on deterrence is

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[64] 490 U.S. 93 (1989).

[65] *Id.* at 100.

[66] *See id.* at 101.

[67] Before the decision in *ARC America*, only ten states and the District of Columbia had passed repealer statutes, *see* Davis, *supra* note 59, at 391–93; by some counts, another sixteen states passed repealer statutes after the decision, and three more began permitting indirect purchaser suits by judicial decision. *See* Cavanagh, *supra* note 62, at 2 n.4.

[68] KAN. STAT. ANN. § 50-161(b)–(c) (2005).

[69] NEB. REV. STAT. ANN. § 59-821 (2005).

[70] MD. CODE ANN., HEALTH–GEN. § 21-1114 (LexisNexis 2009).

[71] *Id.*

thus no easy matter. It seems unlikely that either the Supreme Court or Congress—either of which could, theoretically at least, overturn *Illinois Brick*—would want to allow for duplicative recovery.[72] Congress decided long ago that treble damages were the appropriate penalty for antitrust violations; a functional increase on that multiplier wouldn't sit well with any authority. So the statute should keep the symmetry between *Hanover Shoe* and *Illinois Brick* in place, insofar as it should repudiate both, not simply the latter. Additionally, if any data derived from studying the statute is going to shed light on the appropriate federal treatment of indirect purchasers, the statute should mimic the federal scheme as much as possible. It therefore shouldn't limit recovery to antitrust violations in a particular industry or allow indirect purchasers to sue only through the state attorney general. And, ideally, the statute should have been passed a number of years after the decision in *Illinois Brick*—in order to be able to observe the effects of the passage of a repealer unadulterated by temporal proximity to the federal shakeup—but still long enough ago that data is available from which to extrapolate the statute's effect on deterrence.

One state's statute fits the bill: New York's. The relevant portion of the statute reads as follows:

> In any action pursuant to this section, the fact that the state, or any political subdivision or public authority of the state, or any person who has sustained damages by reason of violation of this section has not dealt directly with the defendant shall not bar or otherwise limit recovery; provided, however, that in any action 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, including but not limited to the transfer and consolidation of all related actions. 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

[72] *See* Blue Shield of Va. v. McCready, 457 U.S. 465, 474 (1982).

> to others who are themselves entitled to recover so as to avoid duplication of recovery of damages.[73]

The first sentence of section 340(6) was added to the statute at the very end of 1998.[74] It permits suits by indirect purchasers and orders courts to take steps to avoid duplication of defendants' liability. The statute was amended again the following year[75] to add the second sentence, which explicitly repudiates *Hanover Shoe* in an attempt to ensure that duplicative recovery isn't likely. The statute is thus relatively straightforward, putting no limitations on which indirect purchasers may sue, but allowing defendants to offer as a defense that the plaintiff has passed on the alleged overcharges. And the rest of the state antitrust statute replicates the federal scheme almost exactly.[76]

III. DATA AND ANALYSIS

A. Data Possibilities

The passage of a repealer statute creates a natural experiment. Before the statute is passed, the state follows the current federal regime in prohibiting both indirect-purchaser suits and the passing-on defense. After the statute is passed, the state exists under a system that critics of *Illinois Brick* have been clamoring for. Those critics' reasons for desiring the change, however, are based on theory (or a hierarchy that values compensation over deterrence); empirical data on how indirect-purchaser suits affect deterrence is not to be found in the academic literature.

At least one reason there have been no studies on the matter is that it's difficult to measure how much of an activity is *not* occurring as a result of a change in a variable. Indeed, we can probably only estimate the number of antitrust violations based on the number of antitrust suits; any more accurate measure is unlikely to be attainable through publicly available data.

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[73] Donnelly Act, N.Y. GEN. BUS. LAW § 340(6) (McKinney 2004).

[74] Specifically, Governor Pataki signed it into law on December 23, 1998. Richard Brodsky, James Lack, Bernard Persky & Barbara Hart, *Antitrust Protections Expanded in New York*, N.Y. L.J., June 22, 1999, at 1, 5.

[75] Governor Pataki signed the amendment on April 28, 1999. *Id.*

[76] *See infra* note 100.

The other major issue with this sort of inquiry is in determining exactly what can serve to measure deterrence. Measuring anything directly—say, the total number of antitrust violations in a year—is clearly impractical and subject to varying interpretations (just what qualifies as an "antitrust violation," other than what the courts have taken the time to analyze and found in violation of antitrust statutes?). But using something too definite, like the number of antitrust suits litigated to completion where the defendant is ordered to pay treble damages, will surely leave out far too many instances of anticompetitive conduct, if for no other reason than most antitrust cases settle.[77] And if indirect purchasers are more or less likely to settle than are direct purchasers,[78] the data won't reveal accurate trends. Assuming, then, that most claims brought to court are meritorious,[79] the best discrete measurement available seems to be the number of antitrust complaints filed in a given time period.

In broad strokes, we might reasonably expect to find any of three stylized patterns in a state that has passed an *Illinois Brick* repealer.[80]

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[77] *See* John H. Shenefield, Peter E. Halle & Edward D. Cavanagh, *Antitrust*, *in* 5 BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 61:6 (Robert L. Haig ed., 2d ed. 2005) ("Few antitrust cases go to trial. Most are weeded out with dispositive motions and settlements."); *see also* WILLIAM M. HANNAY, CORPORATE COMPLIANCE SERIES: DESIGNING AN EFFECTIVE ANTITRUST COMPLIANCE PROGRAM § 1:47 (2009) (suggesting that the antitrust system "often has the effect of coercing defendants . . . to settle," because of treble damages, joint and several liability, the lack of a right of contribution from co-defendants, and plaintiffs' whipsaw tactics, leaving defendants with "no choice but to pay . . . to settle").

[78] *See* Landes & Posner, *supra* note 25, at 613 (arguing that indirect purchasers must rely on plaintiff's attorneys that are more interested in settling than are attorneys hired by direct purchasers); *see also supra* text accompanying note 56.

[79] This is, perhaps, a bit of a naïve assumption (especially when considering the claim that most antitrust cases don't make it to trial not just because of settlements, but also because of dispositive motions, Shenefield et al., *supra* note , at § 61:6), but given the practical constraints on and failings of other potential rubrics and the rules against bringing frivolous claims, *see, e.g.*, FED. R. CIV. P. 11(b), it seems like the best available method of measurement.

[80] The following analysis will make a number of assumptions simply for demonstration purposes. The graphs are merely to illustrate patterns, not magnitudes, because the exact empirics of these situations are not what is important. The analysis also puts to the side any effect on deterrence by various other factors not germane to the focus of this note. Those factors may depress or inflate the graphed rate of antitrust violations, but they wouldn't warp the actual patterns predicted. *See infra* text accompanying note 93.

First, there may be no significant change from the baseline number of complaints filed after the repealer statute is passed, but an increase in the actual number of antitrust violations. This is the model envisioned by proponents of the *Illinois Brick* system and relies on the arguments about indirect purchasers being ineffective enforcers.[81] The statute might have little effect on indirect purchasers' behavior: if it's too costly for indirect purchasers to obtain information on antitrust violations or to form class actions so that they have the collective incentive to bring suit, then indirect purchasers will bring few suits; those that they do bring will be the result of free-riding on direct purchasers' investigations. Allowing defendants to utilize the passing-on defense will decrease the incentive for direct purchasers to bring suit, however, so there should be a dip in the number of complaints they file.[82] Subsequently, as decreased levels of enforcement are recognized by potential antitrust violators, their incentive to engage in anticompetitive behaviors will increase. A rise in actual antitrust violations should be tracked by a rise in complaints filed, until approximately the same number of complaints in a given time period are filed as were filed prior to the repealer.

The average direct purchaser passes on a substantial portion of an illegal overcharge[83] and absorbs the remainder. The availability of the passing-on defense to alleged antitrust violators should then decrease direct purchasers' incentive to sue proportionately (assuming the violator typically succeeds with the defense). So after the passage of the repealer statute, direct purchaser complaints filed would drop significantly below their previous level. Antitrust violations, which were previously three times as common as antitrust complaints (assuming the treble-damages multiplier is the correct one[84]), would then increase as the market

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[81] *See supra* text accompanying notes 43–48, 56.

[82] *See supra* text accompanying notes 51–54.

[83] *See* Illinois Brick Co. v. Illinois, 431 U.S. 720, 764 (1977) ("[D]irect purchasers . . . pass on the bulk of their increased costs to consumers farther along the chain of distribution."); *see also* Daniel A. Crane, *Antitrust Modesty*, 105 MICH. L. REV. 1193, 1202–03 (2007) (suggesting that "uninjured" direct purchasers "do not absorb much or any economic loss and merely 'pass on' the overcharge to the ultimate consumers"). But—again—the pattern is what's important, not the exact magnitude of the effects.

[84] *Cf.* Mark A. Cohen & David T. Scheffman, *The Antitrust Sentencing Guideline: Is the Punishment Worth the Costs?*, 27 AM. CRIM. L. REV. 331, 348 (1989) ("[S]tudies have generally found the probability of detection [of white collar crimes] to range from

absorbed the realization that violations are less likely to elicit suit than previously. As the number of violations increased, so would the number of complaints filed (approximately one of every three new violations prompting a complaint, since we have no reason to think that detection would be affected), but from the new baseline, so the end result would be the same number of complaints, but more violations.

Indirect purchasers, under this model, although allowed to bring suit, don't have adequate incentive to overcome their informational disadvantages and transaction costs of forming class actions, so they file no unique complaints.[85] They will simply free ride on the investigative work done by direct purchasers and file complaints only after direct purchasers have done so.[86] This pattern of suit-bringing maintains the total damages that violators have to pay at three times the overcharge, so the only variable affecting the number of violations is the decreased enforcement rate.[87] See Figure 1.

one in three to one in four . . . ."). *But cf.* Peter G. Bryant & E. Woodrow Eckard, *Price Fixing: The Probability of Getting Caught*, 73 REV. ECON. & STAT. 531, 535 (1991) (estimating the probability of being federally indicted for an antitrust violation at between 13% and 17%). Also note that, even if the treble-damages multiplier is correct for deterring violations to the socially appropriate level, that doesn't necessarily mean that we detect violations at a rate of one to three: Congress might have determined that some level of anticompetitive behavior isn't worth deterring. So it's likely that antitrust violations occur more frequently than this assumption indicates.

[85] If a direct and indirect purchaser both file suit for the same violation, there is only one unique complaint.

[86] The below graph shows indirect purchasers bringing a suit every time a direct purchaser brings suit. This situation could arise only if every direct purchaser was also not the end-user. If we relax that assumption, the two lines no longer overlap, but the total number of unique complaints brought doesn't change, nor does the total dollar amount antitrust violators would be liable for, since the direct-purchaser/end-user would not be subject to the passing-on defense. The lines overlapping also assumes that the transactional costs of forming a class would not prevent any of these suits from being mounted, which we have no real reason to think would be the case.

[87] If indirect purchasers didn't bring suit at all (which might be predicted under a very strong version of this model), then violators would only have to pay damages with a decreased multiplier, further increasing the number of antitrust violations.

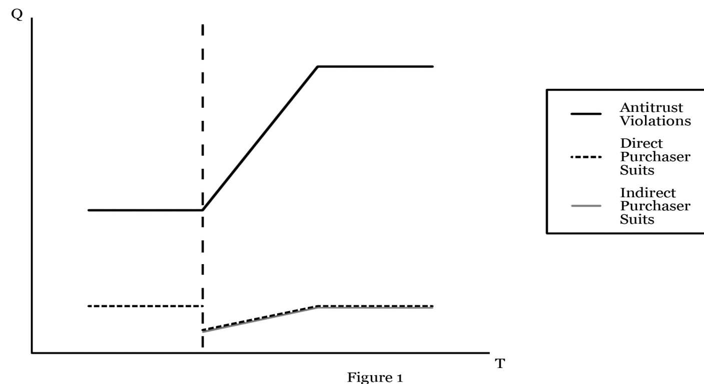

Figure 1

A second possibility is that, after passage of the statute, there would be no significant change in the number of unique complaints filed and a small rise in the number of antitrust violations. Direct purchasers' incentive to bring suit will still be diminished, but it will presumably be supplemented by the indirect purchasers, who will have independent incentive to bring suit. If indirect purchasers are equally good at detecting antitrust violations as direct purchasers (and no better),[88] and the transaction costs of bringing suit are not prohibitive, then they will bring suit at the same level that was seen before the passage of the statute. Violators, however, will be subject to a lesser total amount of liability: though it is irrelevant to the violators to whom they pay their damages, they will only have to pay indirect purchasers the portion of the overcharge that was passed on by the direct purchaser, and they will only have to pay the direct purchaser the amount of the overcharge that wasn't passed on. Only if both the indirect purchaser and the direct purchaser sue for the same violation will the violator have to pay the full treble damages. Since direct purchasers, under this model, have a lesser incentive to sue than do indirect purchasers, there will be a number of cases where violators will need to pay only a portion of the optimal fine.

At the time of the statute's passage, complaints by direct purchasers will decrease in proportion to the amount of the overcharge they pass on.[89] Indirect-purchaser suits will be seen at the same level

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[88] *But see supra* text accompanying notes 43–48.

[89] In all likelihood, the drop under this model wouldn't track exactly to the percentage of the overcharge passed on. There would be some reverse of the free-riding

as direct-purchaser suits before the statute was passed because they are, by hypothesis, equally good at detection as direct purchasers and have adequate incentive to bring every suit they detect. However, the average antitrust violation will no longer be subject to treble damages. Only violations where both indirect and direct purchasers sue will be subject to treble damages; the remainder of the violations, where only the indirect purchaser sues, will face an effective multiplier that is contingent on the amount of the overcharge passed on. This multiplier will be less than three unless the entire overcharge was passed on. The expected multiplier, then, is less than the pre-statute expected multiplier. With lower expected damages, we should see an increase in the number of antitrust violations, with corresponding increases in the number of complaints from both indirect and direct purchasers. See Figure 2.

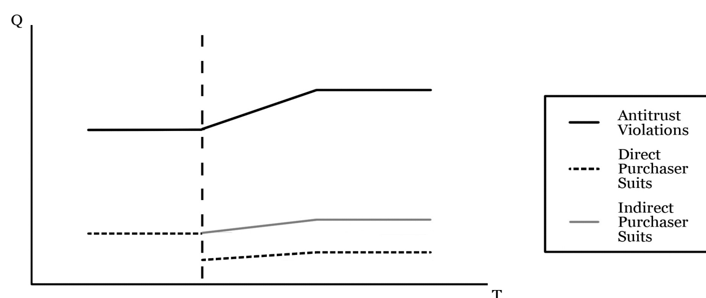

Figure 2

Third, there could be a spike in the number of unique complaints brought after passage of the statute, followed by a decrease in antitrust violations, and then an attendant drop and leveling off in the number of complaints filed. There would be some interaction between the decreased incentive of direct purchasers to sue and the flood of new potential plaintiffs, but the latter would offset the former, and the total number of complaints filed would increase. This situation depends critically on direct purchasers

situation seen in the first model, where investigations conducted by indirect purchasers would decrease the costs of bringing suit for direct purchasers. The result would be that, even though fewer damages could be claimed by direct purchasers, they would also face fewer costs in pursuing those suits, so some cases would be brought that wouldn't have been brought if the direct purchaser had had to bear the full cost.

currently not bringing suit because they don't want to disrupt relationships with suppliers,[90] a factor that wouldn't influence indirect purchasers' decisions to bring suit. So, although damages levels wouldn't increase in a given case (because of the statutory provisions against duplicative damages), the rate of enforcement would increase.[91] If it increased enough to offset the decreased expected damages multiplier, then the number of antitrust violations would decrease, which in turn would push back down the number of complaints brought.

Assume that direct purchasers don't pursue at least some violations not because they are unable to detect them, but rather because they fear disrupting their relationships with their suppliers. Indirect purchasers will bring suit in those situations where direct purchasers wouldn't have, so total enforcement increases (even though direct purchasers' rate of enforcement has decreased[92]). Because the rate of enforcement has increased, antitrust violations themselves would decrease, if they were still subject to the treble-damages expected multiplier. However, treble damages will be levied only when both direct and indirect purchaser sue; the majority of violations will be subject to a lesser multiplier, dependent on the amount of the overcharge passed on. The expected damages multiplier is thus less than three. But the increase in enforcement should offset the decrease in the expected multiplier, decreasing overall antitrust violations from their pre-statute level, which will be followed by fewer complaints from both direct and indirect purchasers. There will still be more antitrust complaints than before the passage of the statute, and there will also be fewer antitrust violations. See Figure 3.

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[90] *See supra* text accompanying notes –37.

[91] *See supra* text accompanying note 42.

[92] Again, the decrease in direct purchaser suits won't be in exact proportion to the amount of the overcharge they pass on. *See supra* note 89. And, once indirect purchasers have already brought suit against direct purchasers' suppliers, direct purchasers' worries about causing undue strain on their relationships may be obviated, or at least overcome by the decreased investment required to bring suit. These factors could increase direct purchaser enforcement and thus decrease antitrust violations.

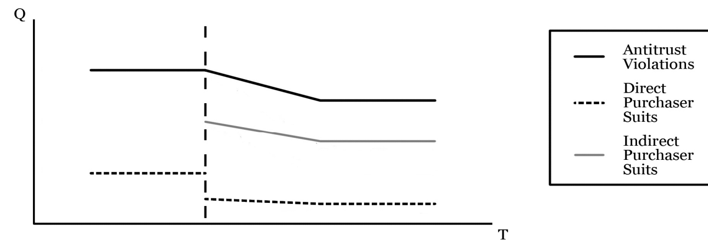

Figure 3

The models depicted above have value insofar as they can show us general patterns to watch for in the data, but it is doubtful that the data will closely resemble any of the models other than in a broad sense. Each model takes a fairly strong stance on how direct and indirect purchasers will respond to a repealer statute, and it wouldn't be surprising if reality were less extreme than any of the models.

It's also unlikely that violations and complaints would be static in the pre-statute period: as businesses proliferate, communication (and thus coordination) becomes easier, and government resources strain to pursue and investigate all antitrust violations,[93] we should expect antitrust violations and complaints to increase in quantity. So even if there are positive deterrence effects from repealer statutes—which would, as per the third model, decrease the number of complaints over time—the number of complaints filed might nevertheless continue to increase for other reasons, as if Figure 3 were tilted upward at a 45-degree angle.

Other limitations on the models include the assumption that treble damages are the correct damages for deterrence optimization, the models' failure to take into account the reverse free-riding effect and the influence of indirect-purchaser suits on direct purchasers' relationships with their suppliers, and the models' ignoring the effect of government- and competitor-brought suits on antitrust violations.

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[93] *See* Harry First, *Delivering Remedies: The Role of the States in Antitrust Enforcement*, 69 GEO. WASH. L. REV. 1004, 1028 (2000–01) ("No one could say that the states (or the federal government, for that matter) have adequate resources for antitrust enforcement. By any measure, the resources for government antitrust enforcement are small in relation to the size of the economy and the scope of transactions being undertaken today.").

B. Direct- and Indirect-Purchaser Complaint Data

Data was collected from all antitrust complaints filed in any federal or state court in New York from 2000 to 2008.[94] In that time, a total of 458 complaints were filed in New York courts alleging a violation of one of the federal antitrust statutes[95] or the Donnelly Act,[96] New York's antitrust statute. Counting multiple complaints that alleged the same violation as a single complaint[97] decreases the total to 249. Of those 249, 138 suits (55.4%) were brought by direct purchasers or indirect purchasers—most of the remainder (102, 41.0%) were brought by competitors, though a few (9, 3.6%) were brought by attorneys general. Direct purchasers were involved in most of the suits alleging overcharges—specifically, 112 (81.1%) of them. Indirect purchasers were involved in 26 (18.8%) suits over the time range. However, only 19 (13.8%) of the suits were brought under section 340(6) of the Donnelly Act the indirect-purchaser statute; five of the others were brought under federal statutes asking for injunctive relief, and one was brought under state competition law separate from the Donnelly Act. This data is summarized in Table 1.

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[94] Ideally the data would have proceeded from December 23, 1998 onward, but data services only guarantee a complete collection of New York complaints from 2000 onward.

[95] *E.g.*, Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (2006); Clayton Act, 15 U.S.C. §§ 12–27 (2006).

[96] N.Y. GEN. BUS. LAW § 340(5) (McKinney 2004).

[97] This process is necessary when trying to determine deterrence effects because complaints that are duplicative of one another do not increase the total liability the antitrust violator faces. For instance, in 2005, in four months' time sixteen direct purchaser class action complaints were lodged against Visa USA, Inc. for charging supra-competitive fees to retailers for accepting the Visa charge card. Over six months in 2006, thirty-nine direct purchaser class action suits were brought against British Airways PLC for charging supra-competitive rates on freight and passenger shipping. For the purposes of the data, we can collapse each of these series of complaints into just one complaint; the point is only that the antitrust violation was caught by direct purchasers, not that it was caught thirty-nine times. But it is relevant that it was direct purchasers rather than indirect purchasers that brought suit in these instances. When both direct and indirect purchasers brought suit for the same violation, two complaints were counted, one for direct and one for indirect.

Table 1
Aggregate Complaint Data

Total	Total (Duplicates Eliminated)	Direct or Indirect Purchasers	Direct Purchasers	Indirect Purchasers	Indirect Purchasers Under § 340(6)	Competitors	Attorneys General
458	249	138 (55.4%)	112 (81.1%)	26 (18.8%)	19 (13.8%)	102 (41.0%)	9 (3.6%)

The most relevant data comes from the "duplicates eliminated" category, the total number of direct- and indirect-purchaser suits, direct-purchaser suits individually, and indirect-purchaser suits brought under section 340(6) of the Donnelly Act. All of these categories exhibited an upward trend: generally, more suits were filed in each subsequent year than had been filed the previous year. Suits brought by indirect or direct purchasers also made up a bigger percentage of all complaints filed as time passed, and suits brought by direct purchasers alone made up a larger proportion of the former category over time. There wasn't much variance in the number of indirect-purchaser suits brought from year to year, so—because of the increasing number of direct-purchaser suits—they gradually accounted for a smaller percentage of the total number of suits brought by direct or indirect purchasers. See Table 2 and Figure 4.

Table 2
Complaint Data Broken Down by Year

	Total (Duplicates Eliminated)[98]	Direct or Indirect Purchasers[99]	Direct Purchasers	Indirect Purchasers Under § 340(6)
2000	17	7 (41.2%)	7 (100%)	0 (0%)
2001	8	3 (37.5%)	2 (66.7%)	1 (33.3%)
2002	18	12 (66.7%)	7 (58.3%)	5 (41.7%)
2003	18	10 (55.6%)	9 (90.0%)	1 (10.0%)
2004	21	7 (33.3%)	6 (85.7%)	1 (14.3%)
2005	33	16 (48.5%)	14 (87.5%)	2 (12.5%)
2006	47	25 (53.2%)	20 (80.0%)	5 (20.0%)
2007	49	30 (61.2%)	26 (86.7%)	4 (13.3%)
2008	38	21 (55.2%)	21 (100%)	0 (0%)
Total	249	131 (52.6%)	112 (85.5%)	19 14.5%)

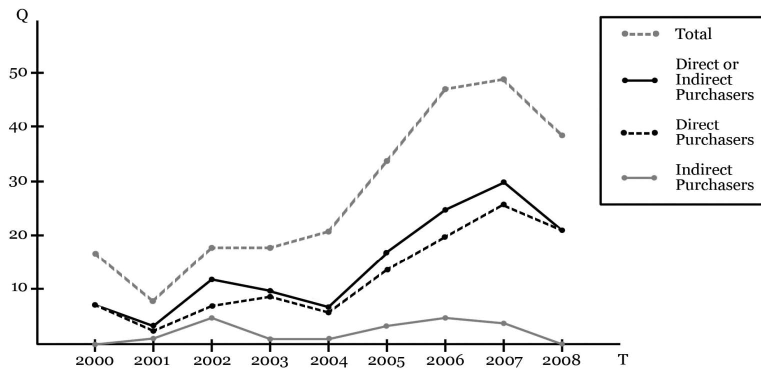

Figure 4

[98] If duplicate complaints spanned multiple years, the complaint was tallied only in the earliest year in which a complaint for that particular violation was filed.

[99] As opposed to the data in Table 1, this column only includes indirect purchasers under the Donnelly Act, not indirect purchasers under federal statutes, which accounts for the slight differences from the earlier numbers.

If we look only at complaints alleging violations of the state antitrust law,[100] the disparity between direct- and indirect-purchaser complaints diminishes, but it still exists. Like with the data that includes federal direct-purchaser suits, direct-purchaser complaints grew as a proportion of the total number of complaints over time, while indirect-purchaser complaints—by virtue of their smaller variation in number—decreased as a percentage of the total. See Table 3 and Figure 5.

Table 3
State Complaint Data Broken Down by Year

	2000	2001	2002	2003	2004	2005	2006	2007	2008
Direct or Indirect Purchasers	1	2	6	3	4	8	11	14	4
Direct Purchasers	1 (100%)	1 (50%)	1 (16.7%)	2 (66.7%)	3 (75.0%)	6 (75.0%)	6 (54.5%)	10 (71.4%)	4 (100%)
Indirect Purchasers	0 (0.0%)	1 (50.0%)	5 (83.3%)	1 (33.3%)	1 (25.0%)	2 (25.0%)	5 (45.5%)	4 (28.6%)	0 (0.0%)

[100] This data is not necessary for purposes of comparison, so it is included simply for purposes of thoroughness. The Donnelly Act is broadly phrased, *see* N.Y. GEN. BUS. LAW § 340, and appears to cover the same ground that the federal antitrust acts do. *See* Ortho Diagnostic Sys., Inc. v. Abbott Labs, Inc., 920 F. Supp. 455, 474 (S.D.N.Y. 1996) ("As the Donnelly Act is coextensive with the Sherman Act, defendant is entitled to summary judgment dismissing the Donnelly Act claims corresponding to the dismissed federal antitrust claims."); *see also* Venture Tech., Inc. v. Nat'l Fuel Gas Co., 685 F.2d 41, 42 n.1 (2d Cir. 1982) ("The Donnelly Act was modeled after the Sherman Act . . . . Although our discussion speaks only in terms of the plaintiff's Sherman Act claims, it is applicable as well to the plaintiff's claim under the Donnelly Act."). So if a direct purchaser could sue under a federal act, an indirect purchaser would likely have a valid claim under the Donnelly Act. This claim is supported by the four instances of both direct and indirect purchasers suing for the same violation but not in the same complaint: in each of those instances, the direct purchaser brought suit under a federal act, but not the Donnelly Act; the indirect purchaser, by necessity, brought suit under the Donnelly Act.

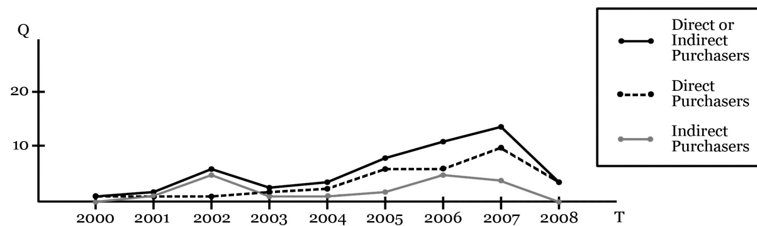

Figure 5

C. Data Analysis

The data does not conform precisely to any of the predictive models: there is no situation where indirect purchasers were predicted to bring fewer suits than direct purchasers. The disparity can be explained away, at least in part, by one of the models' assumptions: direct purchasers were never also end users. In the models, direct purchasers always resold to indirect purchasers, so that both had the opportunity to bring suit against the antitrust violator.

Although no data was collected on how often direct purchasers were also the end users, it seems unlikely that that situation would actually have accounted for a significant portion of the direct-purchaser suits.[101] Whether or not the direct purchaser was a corporate entity can serve as a rough proxy for whether it was an end user: presumably most (if not all) of the things purchased by a business are factored into the price it charges for its own product. Since 60 (53.6%) of the 112 direct-purchaser complaints were filed by corporate entities, we should expect at least that many indirect-purchaser complaints,[102] but there were only

[101] Many complaints don't indicate if the direct purchaser was also the end user, making collection of that information difficult. It seems unlikely that there are many instances where the end user and direct purchaser are the same entity, given "the rise of the multilayered supply chain." Richman & Murray, *supra* note , at 91. As these "multilevel supply chains become more the rule than the exception," we'll see relatively fewer and fewer instances of direct purchasers also being end users. *Id.*

[102] We could really expect more than sixty indirect-purchaser complaints, since doubtless some of the non-corporate direct purchasers were also selling a product, the price of which was affected by the alleged antitrust violation. Furthermore, the third model predicted that indirect purchasers would be willing to bring suit when direct purchasers are not, which should further boost the number of indirect-purchaser complaints. But—as discussed below, *see infra* text accompanying notes

19 indirect-purchaser complaints filed in the same period, and only 9 (47.4%) of them alleged a violation also alleged by a direct purchaser.[103]

The remaining disparity suggests that, if—as proponents of *Illinois Brick* repealers argue[104]—direct purchasers don't sue certain antitrust violators for fear of disrupting relationships with them but indirect purchasers would sue those violators, whatever deterrence is gained from that fact probably does not offset the loss of deterrence from decreased direct-purchaser incentive as a result of repudiating the *Hanover Shoe* rule.[105] That is, assuming that allowing violators to assert the passing-on defense decreases the level of direct-purchaser suits and that direct purchasers pass on, on average, 18.8% of the overcharge or more,[106] then the added indirect-purchaser suits don't offset the lost direct-purchaser suits.

Additionally, the theory that indirect purchasers free ride on direct-purchaser suits is disproven, or at least shown to be more limited than the models assumed it was.[107] Including the six instances of direct and indirect purchasers jointly filing a complaint, there were a total of nine instances of both direct and indirect purchasers bringing suit for the same antitrust violation—which accounts for only 13.0%

107–111—the transaction costs of indirect-purchaser suits may prevent them from getting off the ground even when information costs are minimal.

[103] *See infra* text accompanying notes 112–114.

[104] *See supra* text accompanying notes 35–39.

[105] *See supra* text accompanying notes 53–54.

[106] If direct purchasers pass on only 18.8% of the overcharge, then allowing violators to assert the passing-on defense should decrease direct purchasers' incentive to sue by a corresponding 18.8%. The 112 direct-purchaser complaints account for 81.2% of the total complaints brought by direct or indirect purchasers, so direct purchasers would have brought 138 suits if their incentive to do so hadn't been 18.8% lower than otherwise. Note that if direct purchasers actually pass on more of the overcharge to their purchasers—which seems reasonable, given that doing otherwise cuts into the direct purchaser's profits, *see* Crane, *supra* note 83, at 1202–03—the effect is even greater, and allowing indirect-purchaser suits and the passing-on defense probably resulted in far more than just twenty-six direct-purchaser complaints not being brought over the time period.

[107] *But see* Amended Complaint at 1–2, Ho v. Visa USA, Inc., 787 N.Y.S.2d 677 (N.Y. Sup. Ct. 2002) (No. 112316/00) (indicating that the indirect purchasers filed their complaint only after "[s]uit ha[d] been commenced by [direct purchasers] on behalf of themselves").

of the total direct- and indirect-purchaser complaints.[108] The small number of complaints filed by both types of purchasers has three possible explanations. First, as proponents of the *Illinois Brick* rule contend,[109] it may be inefficient for individual indirect purchasers to mount a suit, and the transaction costs of assembling a class to bring suit could be prohibitive, even when most of the information costs have already been borne by the direct purchaser. Second, indirect purchasers may tend to wait to bring suit until after they have seen how the direct purchasers fared.[110] This explanation could interact with the first, insofar as indirect purchasers may not know if bringing suit would be cost effective until they see how much of the overcharge the direct purchaser is able to recover. The second explanation, however, is unsatisfactory: given New York's four-year statute of limitations on antitrust claims,[111] we should expect a number of indirect-purchaser actions within approximately four years of direct purchasers' complaints. The sample extends over a long enough range where such an effect could be seen, but it did not manifest, which suggests that the first explanation carries more force. Third, direct purchasers may only bring suit in cases where they believe that the antitrust violator will be unable to make use of the passing-on defense. If the violator can't show the defense, it seems likely that indirect purchasers will also be unable to show that they were the victims of a passed-on overcharge, so won't be able to recover and thus have no incentive to bring suit.

Regardless of which explanation is correct, the free-riding effect is still minimal, at best—so the majority of the complaints filed by indirect purchasers may have been due either to superior information on the part of the indirect purchaser or an unwillingness on the part of the direct purchaser to bring suit. Ten (52.6%) of the 19 indirect-purchaser suits did not have a direct-purchaser counterpart, and another two (10.5%) were filed before the earliest direct-purchaser suit

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[108] Nine instances of both direct and indirect purchasers filing complaints count as eighteen individual complaints.

[109] *See supra* notes 55–56 and accompanying text.

[110] Waiting would give them better information about chances of success, and they might benefit from estoppel. *See* Clayton Act, 15 U.S.C. § 16 (2006) (making a final judgment in a civil antitrust suit "prima facie evidence . . . as to all matters respecting which said judgment . . . would be an estoppel as between the parties thereto").

[111] *See* N.Y. GEN. BUS. LAW § 340(5) (McKinney 1999).

alleging the same violation.[112] Much of the literature on the subject accedes that direct purchasers universally have better information about overcharges than do indirect purchasers,[113] so it seems more likely that the lack of free-riding is supportive of direct purchasers being aware of overcharges but reluctant to bring suit against their suppliers. The data does not speak to which of these explanations, if any, is correct. Regardless, as discussed above,[114] even if direct purchasers wouldn't have brought these particular complaints in the absence of indirect-purchaser suits, it's still unlikely that the deterrent effect of indirect purchasers being allowed to sue offsets the general loss of direct purchasers' incentive to bring suit.

Perhaps the last interesting thing to note from the data is that indirect-purchaser suits became a less significant proportion of the total number of direct- and indirect-purchaser complaints filed in a year over the data range. Indirect-purchaser suits

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[112] These two instances were very close in time to the direct purchasers' filings, however—eight days apart in one case and just over a month in the other. It's possible that the indirect purchasers heard of the actions being prepared by the direct purchasers before suit was actually filed and simply managed to craft complaints first. In short, we can't tell if these are instances of free-riding suits on the part of the direct purchasers or on the part of the indirect purchasers.

[113] *See, e.g.*, Landes & Posner, *supra* note 25, at 609–10; Richman & Murray, *supra* note , at 93–94; Lande, *supra* note 30, at 9; Harris & Sullivan, *supra* note The latter, however, depends largely on the direct purchaser being able to maintain its price as its costs fall (or at least for the direct purchaser to not have to decrease the price it charges by the exact amount that its costs decrease). If the only effect of the monopolist (or cartel) supplier lowering its price to competitive levels is that the direct purchaser will then have to lower its price the same amount, then the direct purchaser gains no extra profits from the lessened costs, and it has no incentive to bring suit and force the monopolist to decrease its price. This situation would exist, for instance, when a monopolist supplies an input to all of the competitors in a given market with relatively inelastic demand and low profit margins. When the monopolist raises its price to monopoly levels, all of the direct purchasers must raise their prices by a similar amount: any lower and they lose their profit margins; any higher and they lose their customers to their competitors. If the monopolist is forced by antitrust suit to return its prices to competitive levels, the direct purchasers will be forced through competition with each other to return their own prices to competitive levels rather than keep them at the inflated price, outside of a collusive agreement., at 352. Indeed, it just seems unlikely that, for example, purchasers of Fleurchem's artificial flavoring would be able to divine that a price increase in the chemicals was due to a supra-competitive charge on air cargo rates by British Airways. *See* Complaint, Fleurchem, Inc. v. British Airways (E.D.N.Y. 2006) (No. 06 Civ. 0706).

[114] *See supra* note 106 and accompanying text.

started in 2001 at 33.3% of the total and dropped to 13.3% in 2007,[115] which was complemented by direct-purchaser suits' rise from 66.7% to 86.7%. These changes suggest that indirect-purchaser suits are becoming a less effective deterrence mechanism over time. If total antitrust violations are growing (hinted at by the fact that the total number of antitrust complaints grew over the period), we should expect both direct- and indirect-purchaser suits to keep pace, and there's no reason to believe that they should grow at different rates. What we see, though, is an effective shrinking of indirect-purchaser complaints. The shrinkage could be the result of a disproportionate number of indirect-purchaser suits being filed at a time close to the passage of the *Illinois Brick* repealer;[116] a realization over time that indirect-purchaser suits aren't cost-effective, as suits were dismissed or awards came back smaller than anticipated; or simply statistical variation because of the small sample size.

D. Where to Go from Here

Although the data collected for this note is instructive, some missing pieces could significantly strengthen the conclusions to be drawn. Foremost, it would have been helpful to have complete and accurate data that extended to December 23, 1998, the date on which New York's *Illinois Brick* repealer was enacted.[117] Not only would such information have presented a more complete picture simply by virtue of extending the time period of available data, it also would have enabled a more accurate comparison to the predictive models. In the models, the major shifts in direct and indirect purchaser behavior occur in the time period immediately after the passage of the repealer statute. Because the instant set of data is lacking that crucial first year, it's possible that the data trends reflect only where the complaint levels have settled, and they don't actually show what effects the repealer had on the rate of filing.

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[115] Since no indirect purchaser suits were brought in 2000 or in 2008, those years are dropped from this analysis.

[116] This possibility is essentially refuted by the fact that no indirect-purchaser complaints were filed in 2000, but data from 1999 would shed more light on the matter.

[117] Brodsky, et al , *supra* note , at 5.

Along those same lines, data that extended for several years prior to the amendment of the Donnelly Act would have been especially elucidative. The models all make the reasonable assumption that allowance of a passing-on defense will decrease the number of complaints filed by direct purchasers. Such a claim, while theoretically well grounded, cannot be proven empirically without a baseline of direct-purchaser complaints pre-passage of an *Illinois Brick* repealer to compare post-passage complaint levels to. While we can make assumptions about how much of an overcharge the average direct purchaser passes on, and therefore how many more direct-purchaser complaints would be brought under an *Illinois Brick* regime than under a system that had repealed *Illinois Brick*,[118] we cannot say with absolute certainty that indirect purchasers have failed to fill the void in terms of bringing unique complaints without that baseline data.

Baseline data would also provide better ground for knowing at what rate the number of antitrust violations is increasing. While we can measure that growth to some extent with post-repealer data, because of the interaction effects between direct-purchaser suits and indirect-purchaser suits,[119] the data may be misleading. At the very least, baseline data would enable us to see if direct-purchaser suits grew at a slower or faster rate (or the same rate) after the passage of the statute as before, which would in itself be good evidence of any effect on deterrence.

Lastly, the sample size could be larger—not just to cover more years, but also to account for more states. There could be some problems expanding a future study to include more states because of the timing issues—data from different states shouldn't be compared by year, but rather by year in relation to when the state's *Illinois Brick* repealer was passed—and difficulty finding repealers that have similar enough phrasing and judicial interpretations to plausibly have the same effects on filing rates. But those difficulties are by

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[118] And even these assumptions are shaky to some extent because of the possibility of effects caused by the introduction of indirect-purchaser suits. *See supra* notes 89, 92.

[119] Although the data did not reflect much of one, there could be an unobserved free-rider effect. There's also the omnipresent possibility that allowing the passing-on defense decreases the number of direct-purchaser suits that would otherwise be brought.

no means insurmountable, and the resultant data would provide a clearer picture of how indirect-purchaser suits affect deterrence.

IV. CONCLUSION

Although the collected data was not as complete as it could have been, it still shows us a fair amount about the theoretical arguments regarding *Illinois Brick*'s effect on deterrence.

The fact that few suits were filed by both direct and indirect purchasers alleging the same antitrust violation demonstrates that there is only a minimal free-riding effect in either direction. Because direct-purchaser actions were so much more numerous than were actions brought by indirect purchasers, the lack of free-riding suggests that the transaction costs of collective action are extremely prohibitive, or perhaps that it is difficult to conclusively show that a monopoly overcharge has been passed on to indirect purchasers in cases where a direct purchaser is willing to bring suit.

If the former explanation is correct, it is unlikely that indirect purchasers bring enough suits to make up for the negative incentive the passing-on defense provides to direct purchasers. If the latter is the correct one, allowing indirect-purchaser suits may have little impact on direct-purchaser behavior, but indirect purchasers would seem to be identifying unique antitrust violations that direct purchasers were either unaware of or simply reluctant to sue for. Alternatively, allowing direct-purchaser suits may dramatically affect direct-purchaser behavior: direct purchasers may no longer bring suits where they engaged in significant passing on (or, at least, where such passing on can be proven). And if indirect purchasers have worse information than do direct purchasers about antitrust overcharges, a likely possibility, it is doubtful that indirect purchasers pick up the slack in bringing suits for all of those violations that direct purchasers have decided—in light of the *Illinois Brick* repealer—not to sue for.

Whatever effect indirect-purchaser suits are actually having, it seems to be diminishing over time. The number of direct-purchaser complaints in a given year grew tremendously over the period studied, while indirect-purchaser complaints showed little variation. The upshot may be that, even if indirect-purchaser suits do

have an effect—positive or negative—on deterrence, the actual rate at which they bring suit is so small that the effect is de minimis.

Given that the data lends itself more toward suggesting that indirect-purchaser suits have a negative overall effect on deterrence than a positive one, and that—even if there is a positive effect—it's minimal at best, state repealer statutes are poor policy. The Supreme Court prioritized deterrence over compensation in *Illinois Brick*, and repealer statutes undo that prioritization. The result is a significant chance of undermining deterrence to make only insignificant compensation gains, given that indirect-purchaser complaints constitute such a small proportion of all antitrust purchaser suits.