Beyond Treble Damages: *Hanover Shoe* and Direct Purchaser Suits After *Comes v. Microsoft Corp.*

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ABSTRACT: In *Comes v. Microsoft*, the Iowa Supreme Court determined that the Iowa Competition Law allows indirect purchaser suits. The court, however, failed to clarify the impact of its ruling on defensive pass-on. As such, it appears that antitrust violators may be subject to sextuple damages in Iowa. While this result may have been unintended, it allows a new approach to the problems of indirect purchaser suits. The *Comes* decision, coupled with the damages provisions of Iowa Code section 553.12, grants district court judges the discretion to craft remedies that more adequately reflect the damages that antitrust violators cause. This discretion could help to strengthen the deterrent effect of the Iowa Competition Law and maximize the incentives of injured parties to exercise their rights. While this system is not a fix-all for the problems surrounding indirect purchaser suits, it allows Iowa to operate more effectively within the current system.

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I. INTRODUCTION

In *Illinois Brick Co. v. Illinois*, the United States Supreme Court ruled that indirect purchasers are not allowed to sue for antitrust injury under § 4 of the Clayton Act, a federal antitrust statute. Since that decision in 1977, states have debated about whether to give indirect purchasers the right to sue under state antitrust laws. *Comes v. Microsoft Corp.*, a 2002 decision of the Iowa Supreme Court, signaled Iowa's entrance into that debate.

In *Comes*, the Iowa Supreme Court ruled that indirect purchasers have the right to sue under the Iowa Competition Law, rejecting the rationale of the *Illinois Brick* Court. This Note focuses on how *Comes* did more than merely signal Iowa's entrance into the indirect purchaser debate; it introduced a new dimension to it. *Comes* signaled the Iowa Supreme Court's willingness to go beyond treble damages. A brief hypothetical will illustrate this aspect of *Comes*.

Imagine a manufacturer of pencils, Woodcorp. This company sells its product to Intermediary Inc., an Iowa wholesaler, at an anticompetitive price in violation of the Iowa Competition Law. As a result of this activity, Intermediary Inc. is overcharged by $250,000. Bic Sanford, the owner of an Iowa City school supply store purchases all of these pencils from Intermediary Inc., feels as though he has been injured by this overcharge, and files a lawsuit against Woodcorp in Iowa state court. At trial, Bic Sanford is successful in his claim and the jury finds Woodcorp liable for the full $250,000. The judge, pursuant to statutory authority, then trebles this amount and enters judgment against Woodcorp for $750,000.
Intermediary Inc. then brings suit against Woodcorp in Iowa state court for the same overcharge. At trial, Woodcorp argues that the previous finding of liability to Bic Sanford is a defense to this suit—it has already paid for the overcharge. The judge feels constrained by Iowa law, however, and does not accept this defense. After this second trial, the jury returns a verdict for Intermediary Inc. and awards damages of $250,000. The judge then trebles the jury’s award and enters judgment against Woodcorp for another $750,000. This brings Woodcorp’s antitrust liability up to $1,500,000 for a single overcharge of $250,000.

Could this happen? Yes. As noted above, Comes held that the Iowa Competition Law allows indirect purchasers (such as Bic Sanford) to sue for antitrust injury.\(^9\) In that decision, however, the court failed to determine whether monopolists (such as Woodcorp) could use this as a defense to suits by direct purchasers (such as Intermediary Inc.). Thus, violators of the Iowa Competition Law face the possibility of sextuple damages.\(^10\)

The lack of clarity about damages in Comes results in uncertainty for direct purchasers that want to bring suit under the Iowa Competition Law. Does defensive pass-on limit their recovery? This uncertainty seems likely to deter some plaintiffs from seeking to enforce their rights under the Iowa Competition Law—a result the Iowa Supreme Court clearly did not intend.\(^11\)

\(^9\) Comes, 646 N.W.2d at 441.

\(^10\) This result is not possible under federal law, given the Supreme Court’s ruling in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), which bars indirect purchasers from bringing suits for damages under the Clayton Act. Id. at 744-47.

\(^11\) See Comes, 646 N.W.2d at 447 (showing concern that injured parties are allowed to bring suit). In Comes, the Iowa Supreme Court held that “the Iowa Competition Law creates a cause of action for all consumers, regardless of one’s technical status as a direct or indirect
The natural solution to this uncertainty, and the possibility for sextuple damages, seems to be to allow the defensive use of pass-on. This Note argues, however, that this response may not be the optimal solution in Iowa. Given the debate over treble damages and the legitimacy of Illinois Brick, the Comes decision may actually provide a good platform to test a new approach to the "indirect purchaser problem."

In order to lay a framework for this approach, Part II of this Note gives a brief introduction to the foundations of antitrust law and provides a cursory explanation of pass-on liability and the economics involved in indirect purchaser suits. Part III discusses the relevant federal law on indirect purchaser suits and the Iowa antitrust statutes. Part IV of this Note discusses the Iowa Supreme Court's decision in Comes. Finally, Part V provides criticism of that decision and looks at the present state of antitrust law in Iowa. Particularly, Part V argues that because the court partially justified its decision on the date of the Iowa Competition Law's enactment, Iowa courts could prohibit defensive pass-on. This Note concludes by explaining the benefits of such a system and how the Iowa Competition Law gives Iowa trial courts the discretion that is necessary for this approach to be advantageous.

purchaser." Id. at 445. The court further showed concern that direct purchasers were not bringing suits. Id. at 450 ("The fact that no direct purchaser has yet sued Microsoft for antitrust violations suggests that no direct purchaser will do so."). Thus, the court concluded that "to facilitate enforcement of the policies behind the Iowa Competition Law, indirect purchasers, the real victims, must be authorized to bring a cause of action in state court." Id. This goal of enforcement is inconsistent with deterring suits by injured direct purchasers.

12. See infra note 22 (describing the debate over the appropriateness of treble damages).

13. Other courts and commentators have since questioned the Supreme Court's ruling in that case. See Bunker's Glass Co. v. Pilkington, PLC, 75 P.3d 99, 108-09 (Ariz. 2003) (discussing the inapplicability of Illinois Brick); Comes, 646 N.W.2d at 449 (stating that the policy considerations of Illinois Brick have not materialized); HOVENKAMP, supra note 8, § 16.6, at 570 (stating that there is "vehement" debate over whether the indirect purchaser rule is a good one); Jeff Patterson, Comment, Microsoft Antitrust Litigation: Illinois Brick Defeats its Intended Purpose, 5 J. SMALL & EMERGING BUS. L. 377, 397-98 (2001) (discussing flaws in Illinois Brick). See generally Kevin J. O'Connor, Is the Illinois Brick Wall Crumbling?, ANTITRUST, Summer 2001, at 34.

14. The issues surrounding indirect purchaser suits have received heavy scholarly attention. Thus, it is important to address at this point what this Note will not discuss. First, this Note does not analyze the conflict between federal and state law as it relates to indirect purchaser actions. Second, this Note does not offer any insight into the problem of multi-jurisdictional consolidation of actions. This Note is not concerned with the procedural difficulties of state indirect purchaser actions, but rather with the Iowa Supreme Court's inattention to substantive issues of Iowa antitrust law and the effects that may result.
II. BACKGROUND

A. FOUNDATIONS OF ANTITRUST LAW: A (VERY) QUICK LOOK

Since 1950, when Congress codified the last of the major federal antitrust provisions, there has been considerable debate regarding the theories and policies of the doctrine. Some commentators suggest that Congress passed the antitrust laws to stop the unfair transfer of wealth from consumers to monopolists. Others argue quite strongly that "[t]he only legitimate goal of American antitrust law is the maximization of consumer welfare." Under this theory, the concern is about the dead-weight social losses of monopoly as opposed to the wealth transfer effect. Still others advocate a role that protects competitors over consumer welfare.

Despite the argument surrounding the purpose of federal antitrust law, one thing is clear: the federal antitrust laws carry severe penalties. Section 4 of the Clayton Act provides for treble damages for any person injured by violations of the antitrust laws. Thus, in an antitrust case, the jury determines actual damages without notice of the treble damages provision, and then the judge trebles that amount when entering judgment. As such,

15. See Hovenkamp, supra note 8, § 2.1, at 50 (listing when Congress passed the major antitrust laws); see also Robert H. Bork, The Antitrust Paradox: A Policy at War with Itself 19–48 (1993) (same); Congress passed the Sherman Act in 1890, the Federal Trade Commission Act and the Clayton Act in 1914, the Robinson-Patman Act in 1936, and the Celler-Kefauver Amendments to the Clayton Act in 1950. Hovenkamp, supra note 8, § 2.1, at 50.


19. See id. at 111 ("[T]he income distribution effects of economic activity should be completely excluded from the determination of the antitrust legality of the activity."). For in-depth discussion of this point of view, see id. at 107–12 (concluding that "[t]here is every reason . . . to conclude that courts should ignore income distribution in deciding antitrust cases and stick to the criteria of the consumer welfare model").

20. Sullivan & Hovenkamp, supra note 16, at 3 (explaining that the Supreme Court advocated such a role for antitrust in cases such as United States v. Von's Grocery Co., 384 U.S. 270, 275–77 (1966), and Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962)). In Brown Shoe, the Court stated that "we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned business. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets." Brown Shoe, 370 U.S. at 344. Perhaps one has heard this argument from someone who condemns retailers like Wal-Mart for ruining small town "mom and pop" stores.

recovery in antitrust cases can be very large. But why do we care about burdening antitrust violators with such large liability; do they not deserve it?

While many may have little concern for antitrust robber barons, over-deterrence is a critical problem in antitrust law. Actions that may appear to violate the antitrust laws on their face, such as extreme price reductions or product innovation, may in fact be vigorous competition. It stands to reason that if businesses face severe liability for such actions, competition may be stifled. Whatever one believes the goals of antitrust are, this concern warrants consideration.

Deterring socially beneficial behavior (such as increased innovation) may not be tolerated. Absent innovation, we would be stuck in a world of horse-drawn carriages, VHS movies, and un-sliced bread. Innovation is socially beneficial and as such, over-deterrence of competition should be a major factor in any analysis of antitrust problems. The Iowa Supreme Court’s decision in Comes v. Microsoft Corp. clearly implicates this concern. However, before an analysis of the Iowa Supreme Court’s decision, a discussion of some basic economic concepts in the context of “pass-on” is necessary.

22. For example, in Conwood Corp. v. United States Tobacco Co., 290 F.3d 768 (6th Cir. 2002), cert. denied, 537 U.S. 1148 (2003), the jury award totaled $1.05 billion. There is debate, however, as to whether treble damages are the appropriate level of damages. See Robert H. Lande, Are Antitrust “Treble” Damages Really Single Damages?, 54 OHIO Sr. LJ. 115, 118 (1993) (contending that “antitrust damages awards are approximately equal to, or less than, the actual damages caused by antitrust violations”); see also Thomas Greene, Should Congress Preempt State Indirect Purchaser Laws? Counterpoint: State Indirect Purchaser Remedies Should be Preserved, ANTITRUST, Fall/Winter 1990, at 25, 27 (stating that federal remedies do not make antitrust violations unprofitable); Herbert Hovenkamp, Treble Damages Reform, 33 ANTITRUST BULL. 233, 257 (1988) (suggesting that treble damages are too low). Professor Lande notes that treble damages may be too much in some instances, while they are appropriate for others. Lande, supra, at 115–16.

23. See Hovenkamp, supra note 8, § 17.1 (explaining the correlation between enforcement and deterrence).

24. What may appear as product design changes intended to exclude rivals may merely be technological advancement. See Cal. Computer Prods. v. IBM Corp., 613 F.2d 727, 744 (9th Cir. 1979) (explaining that Plaintiff’s claim of “technological manipulation” failed because “equivalent function at lower cost certainly represents a superior product from the buyer’s point of view”). Similarly, what appears to be anticompetitive pricing may actually be legitimate price competition. Id. (stating that “price and performance are inseparable parts of any competitive offering”).

25. This is not to say that antitrust laws should not be enforced. There is a large difference between over-deterrence and non-enforcement. While this line may not be easy to draw, a conscious awareness is very important to sound antitrust reasoning.

26. 646 N.W.2d 440, 451 (Iowa 2002) (holding that indirect purchasers are allowed to sue under the Iowa Competition Law).
B. PASS-ON AND THE ECONOMICS OF INDIRECT PURCHASER SUITS

1. Indirect and Direct Purchasers

Indirect purchasers are those purchasers who have an intermediary between themselves and the monopolist. Stated differently, "an indirect, or downstream, purchaser is one who purchases a price-fixed product from" an intermediary. In the example presented in the introduction, Bic Sanford was an indirect purchaser because he purchased the pencils indirectly from Woodcorp, through Intermediary Inc. We, as citizens, are indirect purchasers when we go to the grocery or retail store. Hence, this is a familiar concept—it reflects a role that most of us have played our entire lives.

Direct purchasers, in contrast, are parties who purchase directly from the alleged monopolist. In the example in the introduction, Intermediary Inc. was a direct purchaser because it purchased the pencils directly from Woodcorp. Further, Bic Sanford was a direct purchaser from Intermediary Inc.

2. The Pass-On Defense

In a suit by a direct purchaser against a monopolist, the defendant-monopolist may be inclined to use what is called the "pass-on defense." This defense is a theory by which the monopolist claims that the direct purchaser's antitrust injuries were mitigated because she was able to pass on any overcharge to her customers. Assume, for example, that Woodcorp overcharged Intermediary Inc. by one dollar per unit. In theory,

29. See supra Part I (discussing this example).
30. See Hovenkamp, supra note 27, at 281 (highlighting the difference between an indirect and direct purchaser); see also Greene & Conners, supra note 28, at 833 ("A direct purchaser is one who purchases directly from a price-fixer.").
31. See supra Part I (discussing this example).
32. See supra Part I (discussing this example).
33. The pass-on defense rests on a theory of "overcharge damages" that has been denounced by prominent antitrust scholars. For a critique of this theory and its use, see supra note 8. As discussed in that footnote, while scholars may not accept the overcharge method, its use by courts is well-established.
Intermediary Inc. could pass on this cost increase to indirect purchasers in the form of higher prices. Thus, the indirect purchasers may face higher prices of up to one dollar per unit. This would be an example of a 100% pass-on. A monopolist claiming a 100% pass-on would contend that the direct purchaser had in fact suffered no antitrust injury because she had passed on any price increase to her customers and thereby recovered any loss. This would effectively end the direct purchaser’s suit against the monopolist.

One-hundred percent pass-on is not certain, however, because direct purchasers may not be able to increase the price of their product by the entire overcharge at no cost to themselves. In response to a price increase, indirect purchasers may go to another supplier. Alternatively, even if the indirect purchaser has no choice of suppliers, she may choose to avoid the overcharge by not purchasing the product at all. When applying this to the Woodcorp example, it is easy to see that customers may not be willing to pay an increased price for the pencils because there are readily available substitutes, perhaps fountain or ball-point pens.

Further affecting a direct purchaser’s ability to pass on all of an overcharge, to the extent that the demand curve for pencils is downward sloping, a direct purchaser will lose sales at any increased price. If the intermediary sets prices as a fixed percentage of its costs, the price may actually rise by an amount greater than the one dollar overcharge. This, of course, assumes that another supplier is available and that the transaction costs of finding and buying from this other supplier do not exceed the potential savings. Bic Sanford would not travel from Iowa to China, for example, in order to save ten dollars on an order. Thus, while substitution possibly affects pass-on, it does not surely do so.

This concept has to do with what economists call price elasticity of demand. See Pindyck & Rubinfeld, supra note 17, § 2.4 (explaining that price elasticity of demand is the percentage change in the quantity of a good demanded from a one-percent increase in the good’s price). For a pass-on of 100% to be possible without affecting sales, the demand for a good must be completely inelastic. This means that for any percentage change in price, the quantity demanded of a good would remain constant. A good example of inelastic goods may be heart transplants. A heart transplant is a good that people generally purchase without regard to cost (in the sense that cost does not generally impact the decision whether or not to have the surgery). As such, an increase in the price of the procedure will have no effect on the number of surgeries done. Further, if heart transplants fall in price, it is highly unlikely that people will crowd local hospitals to undergo the rigorous procedure. Infinitely elastic markets, however, have the opposite characteristics. In infinitely elastic markets, any change in the price of the good will result in an infinite change in sales. In such a market, it would not be possible for Intermediary Inc. to pass-on any overcharge without losing all of its sales. As such, it would just have to accept a lower margin on its business transactions.

A demand curve is downward sloping if an increase in price causes the demand for the product to decrease. A simple example can help illustrate this point. Imagine a pizza company that offers a price of five dollars per pizza. Given this cheap price, it is likely that there will be a high quantity of pizza demanded. Now imagine that the price per pizza increases to fifty dollars per pizza. One would expect that only die-hard pizza fans would continue to purchase pizza and that as such, the quantity of pizza demanded would fall. Thus, when the price of a good rises, the quantity demanded falls. Application of this model to antitrust reveals that it is not clear
revenue earned by charging the lower price is greater than the revenue earned by charging the higher price, the direct purchaser will have suffered a loss due to the passed-on overcharge even if it passes on the entire amount.\footnote{This is a simplistic example that does not discuss the seller's cost curves. While the seller's costs are important to this analysis in that reduced sales may not hurt the company if the marginal cost exceeds the marginal revenue on those products, this in-depth treatment is not necessary. Further, the basic premise still holds: a downward sloping demand curve complicates, to some extent, the measurement of pass-on damages when using the overcharge method.}

In addition to the complexities introduced when looking at the downward-sloping demand curve and elasticity of demand, various other factors interfere with a pure passing-on defense.\footnote{For a detailed discussion of the economics of pass-on, see generally Cooter, supra note 35; Harris & Sullivan, supra note 35; Landes & Posner, supra note 35.} Thus, while the passing-on defense has some merit under an overcharge method of measuring damages, its operation is not as simple as assuming that the direct purchaser will pass on 100% of an overcharge to its consumers without loss of profit.\footnote{See 2 AREEDA & HOVENKAMP, supra note 8, ¶ 395a (discussing the complexity of calculating the damages of indirect purchasers). But see generally Harris & Sullivan, supra note 35 (contending that 100% overcharge is likely in many cases).}

3. Offensive Pass-On

We have seen that monopolists may claim, as a defense in litigation, that direct purchasers pass on alleged overcharges to indirect purchasers. Indirect purchasers, then, may claim that they were harmed by this passed-on amount. The term "offensive pass-on" refers to this claim—where an indirect purchaser alleges antitrust injury due to overcharge passed on to it by the direct purchaser.\footnote{See 2 AREEDA & HOVENKAMP, supra note 8, ¶ 346, at 362.} The same difficulties arise with this claim, however, as with the defensive use of pass-on. How does a court calculate how much the indirect purchaser was harmed? This difficulty, and how the courts have dealt with it, is the subject of the following section.

III. ANTITRUST INJURY: THE INDIRECT PURCHASER DOCTRINE

The previous section discussed the concepts of offensive and defensive pass-on. As discussed, these concepts may not be simple to put into practice. This section will discuss how federal law, and ultimately state law, has dealt (or not dealt) with these issues.
A. Federal Law

Federal antitrust standing under the Clayton Act extends to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." Three major cases have shaped the jurisprudence of indirect purchaser suits in the federal courts: *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, *Illinois Brick Co. v. Illinois*, and *California v. ARC America Corp.* In the first of these cases, *Hanover Shoe*, the Supreme Court took a step toward defining what parties are "injured" by antitrust violations under federal law.

1. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*

In 1968, Hanover Shoe brought suit against United Shoe, accusing it of monopolization of the shoe machinery industry in violation of § 2 of the Sherman Act. Hanover Shoe, a shoe manufacturer, based its claim upon United Shoe's sales practices, particularly its practice of "leasing and refusing to sell its more complicated and important shoe machinery." Hanover Shoe sought the price differential between its rental expenses and the expenses that it would have incurred had United Shoe been willing to sell the "more complicated and important shoe machinery." United Shoe countered, in part, by claiming that Hanover Shoe suffered no injury because the price that Hanover Shoe charged its customers would have included any such overcharge.

The Court rejected United Shoe's pass-on defense. The Court first recognized that "[a] wide range of factors influence a company's pricing policies." The Court then noted the difficulties presented by attempting to determine market conditions *ex post*, the price elasticity of demand, and the behavior absent the alleged overcharge. The Court reasoned that if the

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45. 392 U.S. 481 (1968).
48. 392 U.S. 481.
49. *Id.* at 483.
50. *Id.*
51. *Id.* at 483–84.
52. *Id.* at 487–88. This is the pass-on defense discussed in Part II.B.
53. *Hanover Shoe*, 392 U.S. at 492–95 ("We are not impressed with the argument that sound laws of economics require recognizing this defense.").
54. *Id.* at 492.
55. *Id.* at 492–93 (reasoning that a businessman would likely be unable to predict how a change in supply, the applicable economic conditions, or the labor market would have affected the price that he charged to consumers in the relevant time period).
56. *Id.* at 493. For an explanation of price elasticity of demand, see *Pindyck & Rubinfeld, supra* note 17, § 2.4.
57. *Hanover Shoe*, 392 U.S. at 493.
pass-on defense were allowed, defendants would "retain the fruits of their illegality" because individual indirect purchasers, who suffer relatively minimal losses, would have little incentive to bring suit. Thus, the antitrust remedy of treble damages would lose its deterrent effect. Hanover Shoe, then, precludes the use of the pass-on defense in federal court.

2. Illinois Brick Co. v. Illinois

The Court decided Hanover Shoe's logical corollary, Illinois Brick Co. v. Illinois, in 1977. This case involved a suit by the State of Illinois against a manufacturer and distributor of concrete block. The State did not buy the block directly from the defendant, but rather the block traveled through intermediaries. As such, this case was an attempt at using pass-on offensively; the State of Illinois depended on the theory that Illinois Brick's illegal overcharge had been passed on to it through the distribution chain. The Court thus faced the question of whether to allow offensive use of pass-on when Hanover Shoe clearly prohibited the defensive use of pass-on.

Both parties agreed that the rule regarding the use of pass-on should apply equally. The Court, however, first considered the effect of allowing offensive pass-on while maintaining the prohibition against the defensive use of pass-on. The Court noted concern with the possibility of multiple liability under such a scenario. It was clear to the Court that allowing

58. Id. at 494.
59. Id. The Court did recognize exceptions to this general bar, however, in cases where there is either a pre-existing cost-plus contract or where there is a price that must be charged by law and no differential can be proven between that price and the overcharge price. Id. In these cases, the direct purchaser is able to pass on the full amount of the overcharge. As such, the direct purchaser has no need to bring suit while the indirect purchaser (who has faced the full burden of the overcharge) does.

A cost-plus contract is "[a] contract in which payment is based on a fixed fee or a percentage added to the actual cost incurred." BLACK'S LAW DICTIONARY 260 (Abridged 7th ed. 2000). For example, a cost-plus contract in the Woodcorp example would provide that Bic Sanford would buy X pencils from Intermediary Inc. for Intermediary Inc.'s cost plus eight percent. In such a case, Bic Sanford would be required to pay an amount that reflected the increased cost or be in breach of contract. Thus, the antitrust injury is completely passed on to Bic Sanford and other buyers with cost-plus contracts.

60. See Dickson v. Microsoft Corp., 509 F.3d 193, 222 (4th Cir. 2002) (stating that Illinois Brick is the logical corollary of Hanover Shoe); In re Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 605 (7th Cir. 1997) (same).
62. Id. at 726.
63. Id.
64. Id. at 727.
65. Id. at 729–30.
parties to use pass-on offensively but not defensively would result in antitrust violators facing sextuple damages. 67

The Court then noted that the rationale supporting its Hanover Shoe decision applied equally to defensive and offensive pass-on. 68 Particularly, the Court recognized that the difficulties of ex post analysis remained. 69 The Court also declined to overrule its decision in Hanover Shoe that only direct purchasers may be injured within the meaning of § 4 of the Clayton Act. 70 Given these determinations, the Court held that federal antitrust laws prohibited the offensive use of pass-on. 71

3. State Opposition to Illinois Brick: California v. ARC America Corp.

States very clearly opposed the ruling in Illinois Brick. 72 After the Supreme Court’s decision, several states immediately passed laws allowing indirect purchasers a cause of action under state law. 73 These statutes raised federal preemption issues, however, and the government challenged them on that ground before the United States Supreme Court in California v. ARC America Corp. 74

ARC America involved claims by Alabama, Arizona, California, and Minnesota against ARC America alleging a nationwide conspiracy to fix the price of cement. 75 A number of the states based their claims on state laws allowing indirect purchaser actions. 76 As the litigation progressed, some of the major defendants in the case settled, which resulted in a settlement fund of over $32 million. 77

The Arizona District Court barred the indirect purchasers from collecting out of the fund, however, reasoning that the state statutes allowing such claims were preempted by federal law and thus could not be given

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67. Id. Assume that Woodcorp overcharged Intermediary Inc. by 100(u). Intermediary Inc. then sells the product to Bic Sanford. Intermediary Inc. brings suit against Woodcorp alleging a violation of § 2 of the Sherman Act. As Woodcorp cannot use a pass-on defense against Intermediary Inc. (due to Hanover Shoe) a court may find Woodcorp liable to Intermediary Inc. for 300(u). This is due to the treble damages provision of § 4 of the Clayton Act. 15 U.S.C. § 15 (2000). Further, Bic Sanford could bring suit against Woodcorp alleging the same injury. If the Court allowed him to use pass-on offensively, then he could also receive damages of 300(u). Thus, Woodcorp would end up paying 600(u) for one § 2 violation (300(u) to both Intermediary Inc. and Bic Sanford).

68. Ill. Brick, 431 U.S. at 731-35.
69. Id. at 731-32.
70. Id. at 729.
71. Id. at 731-47.
72. See O’Connor, supra note 13, at 34 (stating that forty-seven states and the United States filed amici curiae briefs in support of the plaintiff in Illinois Brick).
73. Id. at 34-35.
74. 490 U.S. 93, 100 (1989).
75. Id. at 97.
76. Id. at 97-98
77. Id. at 98-99.
effect. On appeal, the Ninth Circuit upheld this decision. The Ninth Circuit held that allowing indirect purchaser suits under state law would conflict with *Illinois Brick* and undermine its three policies. The Ninth Circuit thus held that federal law preempted state statutes that allowed indirect purchaser suits.

The Supreme Court heard the appeal from this decision in 1989 and received amicus curiae briefs from thirty-five states advocating reversal of the Ninth Circuit's decision—another example of the states' strong opposition to *Illinois Brick*. The Supreme Court granted certiorari to decide whether the rule of *Illinois Brick* prevented indirect purchasers from recovering damages based upon state antitrust laws that expressly gave them the right to use offensive pass-on. The Court held that it did not, reasoning that its interpretation of federal antitrust statutes need not govern state antitrust statutes:

It is one thing to consider the congressional policies identified in *Illinois Brick* and *Hanover Shoe* in defining what sort of recovery federal antitrust law authorizes; it is something altogether different, and in our view inappropriate, to consider them as defining what federal law allows States to do under their own antitrust law.

Further, the Court stated that "nothing in *Illinois Brick* suggests that it would be contrary to congressional purposes for States to allow indirect purchasers to recover under their own antitrust laws." With this decision, it became clear that states have the authority to grant indirect purchasers a cause of action under state law for state antitrust violations. As discussed earlier, however, parties can use neither offensive nor defensive pass-on under the Clayton Act.

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78. Id. at 99.
79. *ARC Am. Corp.*, 490 U.S. at 99 (citing *In re Cement & Concrete Antitrust Litig.*, 817 F.2d 1435 (9th Cir. 1987)).
80. *Cement & Concrete Antitrust Litig.*, 817 F.2d at 1445. The three *Illinois Brick* policies were identified as: (1) multiple liability; (2) complexity of litigation; and (3) incentive to sue. *ARC Am. Co.*, 490 U.S. at 99.
81. *Cement & Concrete Antitrust Litig.*, 817 F.2d at 1447 ("We hold that the state law claims in this case based on indirect purchases of cement that do not fall within any exception to the rule of *Illinois Brick* are preempted . . . .").
82. *ARC Am. Corp.*, 490 U.S. at 95. Included among these briefs was one from Iowa's Attorney General, Tom Miller.
83. Id. at 100.
84. Id. at 101.
85. Id. at 103.
86. Id.
87. See supra Part III.A.1-2 (discussing the Supreme Court's rulings that prohibited the use of offensive and defensive pass-on under the Clayton Act).
B. IOWA LAW

While many states responded to *Illinois Brick* and *ARC America* by implementing statutes that expressly authorize indirect purchasers to sue for antitrust damages, Iowa did not follow this lead. Instead, Iowa continued to use the Iowa Competition Law, which was enacted two months prior to the arguments in *Illinois Brick*. The Iowa Competition Law's prohibitions essentially mirror those found in federal antitrust statutes.

Iowa Code section 553.12 provides the statutory authority for suits under the Iowa Competition Law. Notably, this section does not expressly allow indirect purchaser suits. Further, Iowa Code section 553.2 states that the Iowa Competition Law should be construed in harmony with the federal laws. Importantly, however, this section provides that "[t]his construction..."

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88. O'Connor, *supra* note 13, at 34–35 (stating that in 2001, nineteen states, the District of Columbia, and Puerto Rico had statutes that permitted actions by or on behalf of indirect purchasers).

89. IOWA CODE § 553.1-18 (2003). It is important to note, however, that in 2001, there was a House Study Bill in Iowa that attempted to change IOWA CODE § 553.12. H.S.B. 93, 79th Gen. Assem., 1st Sess. (Iowa 2001). This Bill would have expressly allowed for indirect purchaser suits.


91. Iowa Code section 553.4 provides that "[a] contract, combination, or conspiracy between two or more persons shall not restrain or monopolize trade or commerce in a relevant market." IOWA CODE § 553.4 (2003). This section closely parallels § 1 of the Sherman Act, which prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1 (2000).

92. IOWA CODE § 553.12 (2003) (limiting potential claimants to "a person who is injured or threatened with injury by conduct prohibited under this chapter"). Iowa Code section 553.3 defines the term "person" as "a natural person, estate, trust, enterprise or government agency." Id. § 553.3.

93. Cf. MICH. COMP. LAWS § 445.778 (2001) (allowing an action by those "injured directly or indirectly"); MINN. STAT. § 325B.57 (2004) (stating that damages are available to "[a]ny person, any governmental body, or the state of Minnesota or any of its subdivisions or agencies, injured directly or indirectly" (emphasis added)); R.I. GEN. LAWS § 6-36-12(g) (2001) ("[T]he fact that a person or public body has not dealt directly with the defendant shall not bar or otherwise limit recovery.").

94. IOWA CODE § 553.2 (2003). Iowa Code section 553.2 provides:

This chapter shall be construed to complement and be harmonized with the applied laws of the United States which have the same or similar purpose as this
shall not be made in such a way as to constitute a delegation of state authority to federal government. 95. 

The Iowa Competition Law also provides a statutory scheme for damages that is different than the mandatory treble damages provided for under § 4 of the Clayton Act. Iowa Code section 553.12(2) only requires an award of actual damages. Iowa courts have discretion, however, to award "exemplary damages" that do not exceed twice the actual damages if the defendant’s conduct was "willful or flagrant." 96. Thus, if a court exercises its discretion to its fullest extent, it will award the equivalent of treble damages. Given the ability to reach such a result, Iowa law allows for the same level of damages as federal law, but also allows judges much more discretion in awarding them.

While there are great similarities between the substantive provisions of federal antitrust law and the Iowa Competition Law, it was unclear whether Iowa barred indirect purchaser suits until Comes v. Microsoft Corp. 97

IV. COMES V. MICROSOFT CORP.

Comes began with a relatively mundane transaction: the purchase of a computer. 98. Joe Comes purchased his computer through Gateway with Windows 98 pre-installed on it. 99. He later brought suit against Microsoft Corp. alleging that Microsoft violated the Iowa Competition Law by illegally maintaining and using a monopoly. 100. In doing so, Comes claimed Microsoft injured him (an indirect purchaser) by charging Gateway an increased price for the Windows 98 operating system 101 — a classic use of offensive pass-on. 102

Microsoft filed a motion to dismiss the complaint arguing that federal law controlled the Iowa Competition Law—thus barring indirect purchaser suits. The district court agreed and held that the Iowa Competition Law chapter. This construction shall not be made in such a way as to constitute a delegation of state authority to the federal government, but shall be made to achieve uniform application of the state and federal laws prohibiting restraints of economic activity and monopolistic practices.

Id. 95. Id. This provision is referred to as the "non-delegation" clause.
96. Id. § 553.12(3). The court cannot impose exemplary damages on the state, however.
Id. 97. 646 N.W.2d 440 (Iowa 2002). While there had been no judicial comment on this question, the Iowa legislature had offered its insight. See H.S.B. 93, 79th Gen. Assem., 1st Sess. (Iowa 2001) (stating that "[c]urrent law allows only those who purchase directly from an alleged antitrust violator to recover damages").
98. Comes, 646 N.W.2d at 441.
99. Id.
100. Id. at 442.
101. Id.
102. See supra Part II.B.3 (discussing the concept of offensive pass-on).
barred indirect purchasers from bringing suit. The Supreme Court of Iowa heard an appeal of this decision to determine whether the Iowa Competition Law would be interpreted to follow Illinois Brick—and thus bar indirect purchaser actions. Under a facial reading of the statute, the supreme court found no explicit limitation on indirect purchaser suits in the Iowa Code, concluding that "the Iowa Competition Law creates a cause of action for all consumers, regardless of one's technical status as a direct or indirect purchaser." Reaching this conclusion, however, forced the court to determine the effect of the harmonization provision contained in section 553.2.

In addressing this provision, the court stated that the statute does not require "Iowa courts to interpret the Iowa Competition Law the same way federal courts have interpreted federal law." In fact, the section specifically provides that "[t]his construction shall not be made in such a way as to constitute a delegation of state authority to the federal government." The court also noted that "because Illinois Brick was a decision construing only federal antitrust law, it did not define the connection, if any, between federal and state antitrust laws." Given that the court did not feel bound by Illinois Brick, it then focused on encouraging the "uniform application of the state and federal laws prohibiting monopolistic practices." In doing this, the court focused on the general purpose of state and federal antitrust laws rather than on the limited issue of indirect purchaser suits. The purpose of these laws, as the court defined it, was not to determine access to the courts for certain classes of individuals, but rather to provide consistent standards for businesses so that they know what conduct is prohibited.

Following this logic, the court reasoned that granting indirect purchasers access to the Iowa courts is not in conflict with federal law and

103. Comes, 646 N.W.2d at 442.
104. Id.
105. Id. at 445 (emphasis added). But see infra note 121 (explaining that the Iowa legislature felt that the Iowa Competition Law did not provide for indirect purchaser suits).
106. See supra note 94 (providing the text of this statute).
107. Comes, 646 N.W.2d at 446.
108. Id. (citing IOWA CODE § 553.2).
109. Id.
110. Id. This goal was driven by Iowa Code section 553.2, which provides that the construction of the harmonization statute "shall be made to achieve uniform application of the state and federal laws prohibiting restraints of economic activity and monopolistic practices." IOWA CODE § 553.2 (2003).
111. Comes, 646 N.W.2d at 446.
112. Id.
113. Id.
consequently is not in violation of the harmonization provision. The court unequivocally stated that anyone injured by a violation of the state's antitrust laws should have the right to bring suit and that a contrary opinion would "overwhelmingly defeat the purpose of the Iowa Competition Law." Through this reasoning, the court was able to allow indirect purchaser suits in Iowa while remaining true to the harmonization provision of section 553.2.

The court went on to give one final justification for its holding. This "final consideration" raised (and left unresolved) issues of importance in Iowa antitrust law. The court reasoned that in order to give meaning to the legislature's purpose for enacting the Iowa Competition Law, it was obliged to take into account the state of the law at the time of the statute's enactment. The court recognized that the Iowa Competition Law was passed before the Supreme Court's decision in *Illinois Brick.* As such, "[w]hen the Iowa legislature enacted the Iowa Competition Law, it did so considering the federal law prior to *Illinois Brick* which allowed indirect purchasers to bring antitrust suits." Therefore, the court reasoned, the status of federal law when the Iowa Competition Law was enacted supported its interpretation of the legislature's intent and further justified its ultimate conclusion that indirect purchasers could sue under Iowa law.

The court next minimized the policy concerns underlying *Illinois Brick* as they related to state courts. It then concluded by reasserting its position that "[n]othing in the Iowa Competition Law or in federal antitrust law

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114. *Id.* at 447 ("The United States Supreme Court has held that two statutes, both of which prohibit anticompetitive conduct, are not inconsistent merely because one allows indirect purchasers to sue for damages while the other does not.").

115. *Id.* ("Consumers in this state are best protected by permitting all injured purchasers to bring suit against those who violate our antitrust laws.").

116. *Comes,* 646 N.W. 2d at 447.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 448.

121. *Comes,* 646 N.W.2d at 448. Apparently the court was not aware of, or did not feel compelled to address, the 2001 House Study Bill of the Iowa legislature that stated that "[c]urrent law allows only those who purchase directly from an alleged antitrust violator to recover damages." H.S.B. 93, 79th Gen. Assem., 1st Sess. (Iowa 2001). Whether this legislative interpretation of its own statute would have been convincing to the court is uncertain because reference to it does not appear in the case. While this Note is not directed at critiquing the ultimate holding in *Comes,* one can make a compelling argument that the court erred when ascertaining the intent of the Iowa legislature in enacting the Iowa Competition Law. *See Comes,* 646 N.W.2d at 451-54 (Cady, J., dissenting) (noting great concern about the majority's analysis of the legislature's intent).

122. *See Comes,* 646 N.W.2d at 449-51 ("The *Illinois Brick* court was primarily concerned with policy considerations which have not materialized as it envisioned actions in state court.").
requires us to find [that] indirect purchasers may not maintain an antitrust action in Iowa state courts.\textsuperscript{125}

V. BEYOND COMES

Having looked at the Comes decision, this section will discuss some specific effects of that decision on Iowa antitrust law. Parts A and B discuss an apparent omission by the court in its analysis and how parties in antitrust cases can argue the consequences of that omission. Parts C and D discuss how a somewhat unique system may benefit Iowa. Finally, Part E cautions other states not to make the Comes error.

A. THE FORGOTTEN CASE: HANOVER SHOE

The Iowa Supreme Court failed to address one important element of antitrust law in Comes. While focusing on Illinois Brick, the court neglected Hanover Shoe and its implications. The court simply never addressed defensive pass-on and its role within the Iowa Competition Law. This lack of direction leaves direct purchasers that want to bring suit in Iowa in the perilous position of being unable to evaluate their potential recovery due to uncertainty as to what extent a potential defendant may be liable. By introducing this uncertainty, the Iowa Supreme Court has made it more costly,\textsuperscript{124} and hence less attractive, for direct purchasers to enforce their rights in Iowa.

Why did the court ignore such an important issue in Comes? One possibility is that the court failed to address defensive pass-on because it was so narrowly focused on the case at hand.\textsuperscript{125} For instance, the court based its decision to shift the incentive to sue onto indirect purchasers on the statement that "[c]learly, direct purchasers such as Dell, Compaq, Gateway, and IBM have not sued Microsoft for antitrust infringements.... The fact

\textsuperscript{123. \textit{Id.} at 451.}

\textsuperscript{124. The uncertainty surrounding defensive pass-on may raise the cost of bringing suit in many ways. First, it may require more money to be spent on legal research into the issue. It will also require more time by trained attorneys in arguing this point before courts. In addition, there is more risk to bringing suit, and this risk can be translated into cost. Quite simply, if direct purchasers are unsure of whether they can recover damages unhindered by defensive pass-on, the expected return of the suit must be discounted by this uncertainty. This lowers the anticipated return from suit and hence makes it less attractive to bring suit.}

\textsuperscript{125. It is plausible that the court knew that it was indicating that the Iowa Competition Law did not allow defensive pass-on. In the absence of a specific statutory provision against multiple liability, the court may have felt that such a result was appropriate. It is also possible that the court did not address defensive pass-on because such a discussion could be classified as mere dicta. This would be a strong argument for a proponent of defensive pass-on.}

It is this author's conclusion, however, that defensive pass-on is so inextricably intertwined with indirect purchaser suits that the court would have felt compelled to address it if it had thought of the issue. Indeed, as Illinois Brick, Hanover Shoe, and their progeny have shown, these concepts are so tied together that a discussion of one necessitates discussion of the other.
that no direct purchaser has yet sued Microsoft for antitrust violations suggests that no direct purchaser will do so.\textsuperscript{126} While it may be true in this case, or even this type of case,\textsuperscript{127} that direct purchasers are unlikely to sue their suppliers,\textsuperscript{128} it was rather shortsighted for the court to halt its analysis there. The court did not go as far as to say that no direct purchasers will ever sue a monopolist in Iowa. How then will the court respond to claims of defensive pass-on in these situations?

B. \textsc{There is Support in Comes for a Prohibition of Defensive Pass-on}

In light of the relationship between \textit{Hanover Shoe} and \textit{Illinois Brick}, the logical corollary to \textit{Comes} would seem to be the granting of the use of defensive pass-on.\textsuperscript{129} However, as discussed above, the \textit{Comes} court never took this step. It never determined whether Iowa law allowed the use of defensive pass-on. An advocate for defensive pass-on could surely argue that the relationship between \textit{Hanover Shoe} and \textit{Illinois Brick} naturally extends to \textit{Comes}. As such, the argument would go, Iowa law allows the use of pass-on defensively.

A strong argument can be made, however, that \textit{Comes} signaled the opposite—that the Iowa Competition Law prohibits defensive pass-on. As discussed in Part IV, the court reasoned that the Iowa Competition Law incorporated the state of federal law as it stood at the time of its adoption, prior to \textit{Illinois Brick}.\textsuperscript{130} What the court failed to note, however, was that federal law also \textit{prohibited} defensive pass-on at that time. \textit{Hanover Shoe}, decided in 1968, effectively cut off such use.\textsuperscript{131} Arguably then, the Iowa Competition

\begin{itemize}
\item \textsuperscript{126} \textit{Comes}, 646 N.W.2d at 450.
\item \textsuperscript{127} The type of case referred to is one where the direct purchasers are so economically reliant upon their relationship with the monopolist that they are unable to bring suit against the monopolist. While it may seem that this would be the case in any situation with a monopolist, it does not necessarily follow. There may be instances where a direct purchaser can shift its product line to exclude the product and thus is not worried about the loss of the relationship. This does not appear to be true in the Microsoft cases, however, because companies such as Dell and Gateway offer such a limited service—computers and computer services. As such, they seem unable to shift their product line away from Microsoft and thus have a significant interest in not upsetting the relationship. See id. ("[D]irect purchasers likely will not enforce antitrust laws out of fear of retaliation by their suppliers, such as Microsoft—the sole supplier of a popular operating system."). Thus, it seems highly unlikely that Gateway will ever sue Microsoft for antitrust violations.
\item \textsuperscript{128} Even the \textit{Illinois Brick} court recognized this danger, stating that "[w]e recognize that direct purchasers sometimes may refrain from bringing a treble-damages suit for fear of disrupting relations with their suppliers." Ill. Brick Co. v. Illinois, 431 U.S. 720, 746 (1977).
\item \textsuperscript{129} This is essentially the mirror image of the relationship between \textit{Hanover Shoe} and \textit{Illinois Brick}.
\item \textsuperscript{130} \textit{Comes}, 646 N.W.2d at 447 ("Because Iowa took its cues from federal law in creating our state antitrust statute, the federal law before \textit{Illinois Brick} is instructive.").
\item \textsuperscript{131} See supra Part III.A.1.
\end{itemize}
Law incorporated the prohibition of *Hanover Shoe*. Under this reading of *Comes*, Iowa law would now allow offensive, but not defensive, pass-on.

Further strengthening a conclusion that *Comes* supports a prohibition of defensive pass-on, the court recognized the possibility of multiple damages, but continued in its decision undeterred. The court first cited legislation in other states that avoids similar concerns. The court, for example, cited an Illinois law that provided that "the court shall take all steps necessary to avoid duplicative liability for the same injury." Many states that allow indirect purchaser suits take this approach. Without explanation, the court did not opine that such laws were necessary in Iowa. Rather, the court again focused on the limited factual circumstances before it and determined that multiple liability was not a concern. It is unclear whether this was due to mere oversight or if it was a conscious judicial decision. Either way, there is now an arguable void in Iowa antitrust law.

To the extent that the court did show concern for multiple liability, it was only in the context of federal recovery coupled with state recovery—not duplicative state recovery. The court simply did not show concern about the potential for sextuple damages resulting from this inconsistent application of pass-on liability in Iowa. The court did note, however, that the district courts "are fully capable of ensuring antitrust defendants are not forced to pay more in damages than amounts to which the injured parties are entitled." Quite significantly, this statement does not mandate that district courts limit damages to treble the overcharge. Rather, it evidences an extreme confidence in district court judges' abilities to apportion damages and to determine the amount of damages that injured parties are entitled to. Thus, a district court could determine that the injured parties are entitled to the multiple damages that may result from an inconsistent application of pass-on liability.

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132. *Comes*, 646 N.W.2d at 449 ("However, given the facts of the case before us, the concern of multiple liability is unfounded.").

133. *Id.* at 449 n.11.

134. *Id.* (citing 740 ILL. COMP. STAT. ANN. 10/7(2) (West 1997)). The court also noted a South Dakota law that stated that "the court may take any steps necessary to avoid duplicative recovery." *Id.* (citing S.D. CODIFIED LAWS § 37-1-38 (enacted in 1980)).


137. *Id.* at 450 ("Even assuming such danger of multiple liability exists, there is no federal policy against states imposing liability in addition to that imposed under federal law.").

138. *Id.* at 449–50 (emphasis added).

139. "Multiple damages" would occur when both direct and indirect purchasers recovered the same part of the overcharge. An example of this would be where an indirect purchaser proves that he was injured by a 100% pass-on and recovers treble damages under parts one and
While this interpretation of the *Comes* decision seems perhaps unfair at first, such a system is not without support. In fact, the dissent in *Illinois Brick* commented on this approach. Adoption of this interpretation of *Comes*, however, will likely require that courts be convinced that there are benefits to such a system.

C. **Allowing Offensive Pass-On but Not Defensive Pass-On Has Benefits**

While a system allowing offensive but not defensive pass-on may have benefits, this system is not optimal. Numerous commentators have discussed the severe problems with *Illinois Brick* and its progeny. *Comes* did not solve any of these fundamental problems with the doctrine. Time has shown, however, that change in the doctrine is not occurring, or is doing so very slowly. Thus, states must work within this system for the time being. While we cannot yet make lemonade from *Illinois Brick*'s lemons, we can improve our current situation.

One benefit of the interpretation of *Comes* that is advocated here is that it helps to eliminate one incentive for direct purchasers to forum shop. Under the current system, direct purchasers can sue in federal court and are

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two of section 553.12 of the Iowa Code. Subsequently, a direct purchaser could bring suit unhindered by defensive pass-on. The court in that case could also treble the damages, thus bringing the damages tally up to six times the amount of the overcharge.

140. *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 753 (1977) (Brennan, J., dissenting). In his dissent, Justice Brennan clearly stated his belief that the rule regarding pass-on need not apply consistently to offensive and defensive use. Brennan stated that:

> Despite the superficial appeal of the argument that *Hanover Shoe* should be applied "consistently," thus precluding plaintiffs and defendants alike from proving that increased costs were passed along the chain of distribution, there are sound reasons for treating offensive and defensive passing-on cases differently. The interests at stake in "offensive" passing-on cases, where the indirect purchasers sue for damages for their injuries, are simply not the same as the interests at stake in the *Hanover Shoe*, or "defensive" passing-on situation. There is no danger in this case, for example, as there was in *Hanover Shoe*, that the defendant will escape liability and frustrate the objectives of the treble-damages action. Rather, the same policies of insuring the continued effectiveness of the treble-damages action and preventing wrongdoers from retaining the spoils of their misdeeds favor allowing indirect purchasers to prove that overcharges were passed on to them. *Hanover Shoe* thus can and should be limited to cases of defensive assertion of the passing-on defense to antitrust liability, where direct and indirect purchasers are not parties in the same action.

141. See sources cited supra note 135 (offering but a glimpse into the scholarship confronting the law surrounding indirect purchaser suits).

142. The proper analysis of the system advocated by this Note is not to compare it to an optimal solution to the indirect purchaser problem. Rather, this Note's proposal must be analyzed against the status quo. Against this backdrop, it does offer advantages. While we wait for further reform, the system advocated by this Note offers something more than what we have now.
not subject to the pass-on defense. This action is logical—it maximizes their recovery potential. Indirect purchasers, then, bring suit where they can—state court. In that forum, indirect purchasers who can prove a 100% pass-on can recover treble the overcharge as well. As such, the "system" already allows multiple damages. What the Comes decision adds is that it reduces the incentive for direct purchasers to turn to federal court. If they are not limited by defensive pass-on in state court, then potential recovery should not influence the potential plaintiff's choice of forum. This reduction in forum shopping, alone, is a positive effect of the Comes decision.

Going further, this may also reduce duplicative court expenses. If direct and indirect purchasers join their actions in state court, the burden on the courts is reduced. If direct and indirect purchasers can proceed in the same action, without jeopardizing their recovery, then there is no need to run two separate trials. Given the complexity of antitrust trials, this could help to alleviate some burden on an already busy federal court system.

As perhaps the greatest benefit, a system that prohibits defensive pass-on but allows offensive pass-on would presumably maximize enforcement efforts. First, direct purchasers would be more likely to sue if their claim was not subject to the pass-on defense. Second, indirect purchaser suits would not be deterred in any way because indirect purchasers would still be allowed to use pass-on offensively.

Finally, allowing a greater range of damages gives courts the power to adequately punish and deter socially harmful behavior. While these benefits exist, they must be balanced against the risk of over-deterrence. Courts awarding high levels of damages could easily deter socially beneficial behavior. Thus, Iowa courts must be able to use great discretion in awarding damages if the Iowa Competition Law is construed to allow sextuple damages.

143. See Task Force Report, supra note 135, at 238.
144. See id. (describing this possibility).
145. This is not to say that forum shopping would be completely eliminated. Many differences between state and federal courts still remain and would influence this choice.
146. Of course juries and their awards may be impacted by the seeming unfairness: why should two different parties receive the entire overcharge amount? This danger, while real, could be avoided or mitigated with careful jury instructions.
147. As discussed in Part II.B.2, the calculations involved with a pass-on defense are by no means easy or uncontroversial. Thus, the removal of this issue from litigation would make such suits less costly and more attractive to direct purchasers. This is in accord with the Comes court's argument that the difficulty of apportioning damages should not interfere with the rights of victims to recover. Comes v. Microsoft Corp., 646 N.W.2d 440, 450–51 (Iowa 2002) ("[W]e should not defeat the ends of justice simply because the litigation may be complicated.").
148. This benefit is perhaps most persuasive to those who feel that treble damages are not adequate to remedy most antitrust violations. See sources cited supra note 22 (discussing the adequacy of treble damages).
D. THE IOWA COMPETITION LAW'S UNIQUE DAMAGES PROVISION
WOULD ALLOW SUCH A SYSTEM TO WORK

The prohibition of defensive pass-on coupled with the allowance of offensive pass-on could lead to sextuple damages. While mandatory sextuple damages in antitrust cases would clearly be harmful, the Iowa Code does not mandate this result. To the contrary, under the Iowa Competition Law, Iowa judges have wide discretion in crafting damages awards.

The Woodcorp example illustrates the potential benefits of Iowa's current system. Consider a situation where Intermediary Inc. brings suit and recovers damages from Woodcorp. As Woodcorp would not have the benefit of defensive pass-on, it would be liable for the full amount of the overcharge. In determining the amount of damages to award under the system introduced by this Note, the court would consider factors such as (1) the possibility that indirect purchasers will bring suit, and (2) the amount of damages that Woodcorp actually caused. If the court determines that individual indirect purchasers have little to gain from filing suit, that an award of treble damages would reflect the damage caused, and that the facts of the case meet the elements of Iowa Code section 553.12(3), it could award exemplary damages to reflect this determination.

The major danger that would remain, however, is that indirect purchasers might subsequently bring suit, potentially exposing Woodcorp to greater liability than the district court judge felt was appropriate. This concern is mitigated, however, by the fact that the first judge's determination that indirect purchasers would not bring suit would have been influenced by a low rate of probable recovery for such purchasers. Further, under the Iowa Code, exemplary damages would not be required.

149. See supra note 139 (explaining how an award could reach sextuple damages).
150. See supra Part III.B (noting that Iowa law gives judges the discretion to award exemplary damages up to twice the amount of actual damages). The 2001 proposed changes to the Iowa Competition Law would have eliminated this discretion. The relevant portion of the changed text would have been as follows:

1. The state or a person who is injured or threatened with injury by conduct prohibited under this chapter may bring suit:

   b. To recover three times the actual damages resulting from conduct prohibited under this chapter, and the cost of suit, including, but not limited to, reasonable attorney fees.

H.S.B. 95, 79th Gen. Assem., 1st Sess. (Iowa 2001). This change clearly would have resulted in mandatory treble damages. As of the current Iowa Code, however, the Iowa legislature has not changed this section of the Code.

151. See supra Part I.
152. This example assumes that the parties have not made use of, or the court has not required, a consolidated trial.
Thus, any recovery in such a second lawsuit should be minimal. If, however, the judge in the second case determines that the actual damages caused by the conduct exceed the amount awarded in the first case, she would have the discretion to award exemplary damages to reflect that fact.

Looking more generally, a judge facing a damages calculation in a direct purchaser suit would do a calculation similar to that indicated by the following formula: \( A = D_r - (D_w)(X) \). The variable \( A \) equals the damages award to the direct purchaser. This is what the judge will ultimately award, taking into account the jury's award. The variable \( D_r \) represents the ideal total damages penalty imposed on the monopolist, taking into account deterrence. \( D_w \) represents the damages imposed on the indirect purchasers, and the variable \( X \) is equal to the probability of such indirect purchasers bringing suit. This \( X \) would be a function of the perceived likelihood of success and the likely recovery in such a suit versus the costs of bringing the suit. Naturally, as the two former values rise, \( X \) will rise.

While the amount derived from this formula would not necessarily equal the damages award, it would allow the judge to determine the appropriate level of exemplary damages to award the direct purchaser in such a situation. If the amount calculated met or exceeded treble the damages awarded by the jury, and the facts of the case allowed exemplary damages, the judge could award the maximum amount allowed under the statute. While this procedure seems complicated, district court judges, we assume, "are fully capable" of making these determinations.

This system would allow judges a much greater role in shaping antitrust liability to fit the actual damages caused. Thus, damages awards may more accurately reflect the harm caused, resulting in better deterrence. While this result may be an unintended consequence of the court's narrowly focused decision in *Comes*, it has given Iowa an opportunity to experiment with a new solution to the indirect purchaser dilemma. And as this section has shown, this new solution need not result in over-deterrence.

E. BEYOND IOWA: A LESSON FOR STATES IN SEARCH OF DOCTRINE

In addition to the problems discussed above, the *Comes* decision has ramifications that extend beyond Iowa and its antitrust law. States that have

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154. The following formula would also work in indirect purchaser suits. The references to the parties need only be switched when looking at the variables. The important point is that the judge in the first suit would need to apply this type of formula when the first party (direct purchasers or indirect purchasers) brings suit. This issue could also be eliminated by the consolidation of cases, but that is outside of the scope of this Note.

155. A judge cannot award this amount if it exceeds treble the jury's award. In these situations, the judge would award treble the jury's award instead of "A."

156. See supra text accompanying note 138. While the introduction of formulas may make some cringe, the formula merely represents the variables that one would normally weigh in such a decision.
not yet interpreted their antitrust statutes, or those that will reconsider their prior decisions, must beware of the faulty analysis involved in *Comes*. Courts simply cannot rely on statutes enacted prior to *Illinois Brick* without paying attention to *Hanover Shoe*. While the Iowa Competition Law gives district courts the necessary discretion to make such a system work, other states may not have such advantageous antitrust provisions.

A recent article surveying the "national movement toward indirect purchaser standing" highlights the apparent appeal of, and hence danger of, the *Comes* logic. The article seems to advocate for the adoption of the *Comes* error by other states. In arguing that certain states should extend the right to sue to indirect purchasers, the author writes that "[b]ecause these states' legislatures likely, if not certainly, considered the federal courts' Sherman Act construction when they created their own antitrust acts, their acts' constructions had to resemble that which existed when they were enacted; namely, a construction allowing indirect purchaser claims." In fact, the author applies this logic to four states that enacted their relevant statutes after *Hanover Shoe*. The author, however, does not mention *Hanover Shoe*. This is precisely the error that the *Comes* court made.

Courts that are interpreting their statutes must be cognizant of *Hanover Shoe*. These states must avoid the *Comes* error—an error that appears to have already crept from judicial decisions to law review articles. Perpetuation of this error will not make it correct, it will only put other states in the position that Iowa now faces—uncertainty.

VI. CONCLUSION

The indirect purchaser problem has evoked comment from the judiciary, the academy, and practitioners. The problems introduced by *Illinois Brick* are numerous and cannot all be tackled in a Note such as this. One discrete problem that can be addressed was presented in *Comes v. Microsoft*. In that decision, the Iowa Supreme Court, in its determination to give indirect purchasers the right to sue, left defensive pass-on—and *Hanover Shoe*—without a thought. That decision warrants two considerations.

One is a cautionary tale applicable to state courts that have yet to examine their antitrust statutes (or have already done so, but incorrectly). Courts cannot ignore *Hanover Shoe*. While most of the arguments surrounding indirect purchaser standing revolve around *Illinois Brick*,

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158. *Id.* at 1392-95.
159. *Id.* at 1398.
160. *Id.* at 1398 n.300 (citing statutes from Connecticut, Kentucky, Missouri, and New Hampshire that were all enacted after *Hanover Shoe*).
161. See generally *Comes v. Microsoft Corp.*, 646 N.W.2d 440 (Iowa 2002).
Hanover Shoe has a voice too. Courts facing this issue should address Hanover Shoe and its implications. It is important that courts address this matter so that litigants know the system that they are working under.

The second consideration is the major focus of this Note. While the Iowa Supreme Court's decision in Comes seems incomplete, this oversight does not necessarily require immediate action. Absent further intervention, it allows judges great discretion to craft antitrust remedies that adequately reflect the damages imposed by antitrust violators. While this Note does not undertake the task of weighing the broad range of costs and benefits of this approach, it does recognize that it is not fundamentally inconsistent with the policies behind the Iowa Competition Law. It maximizes enforcement effort and allows all parties injured by illegal action to enforce their rights.

Absent a shift towards the lost profit model, or further reform in the indirect purchaser doctrine, this approach provides a system of damages that may most adequately reflect the damages caused by an antitrust violator while remaining mindful of the risk of over-deterrence. Thus, while Comes seems like an incomplete decision, it may have inadvertently opened the door to a fresh approach to an old antitrust problem. Comes allows Iowa to move beyond treble damages.

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162. For a discussion of the lost profits model and whether this model is preferred, see supra note 8.