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Kansas and Missouri v. Utilicorp United, Inc.: The Supreme Court Applies the Illinois Brick Rule to Regulated Utilities

Although Congress has charged the Department of Justice and the Federal Trade Commission (FTC) with primary responsibility for enforcing the federal antitrust laws, it also has authorized, in section four of the Clayton Act, a private right of action. Section four provides that:

[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Many authorities believe that private actions have yielded substantial benefits in the form of enhanced oversight and enforcement, and compensation for persons wronged by anticompetitive behavior. Others, however, point to excessive costs, complexity, and a widespread belief that many treble damage suits are brought merely to acquire a settlement based on nuisance value or to harm one's competitors. Regardless of the efficacy of private actions, they continue to constitute a substantial component of antitrust enforcement. Recent studies demonstrate that the vast majority of antitrust suits are brought by private parties, rather than by the government.

In adjudicating claims under section four of the Clayton Act, courts have drawn a distinction between plaintiffs who are “direct purchasers,” that is, parties who bought price-fixed goods or services directly from one of the conspirators, and “indirect purchasers,” those who bought further down the distribution chain. The United States Supreme Court in Illinois Brick Co. v. Illinois declared that, except in certain narrow circumstances, indirect purchasers lack standing to sue under section four. The Illinois Brick Court offered several

1. ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 385 (2d ed. 1984).
3. Loevinger, Private Action—The Strongest Pillar of Antitrust, 2 ANTITRUST BULL. 167, 168-69 (1958). Loevinger points out that governmental enforcement focuses on punitive sanctions rather than compensating victims. Id. Thus, private actions may result in outcomes more compatible with the antitrust laws’ primary goals, which are to deter future illegality, compensate victims, and ensure that violators disgorge their ill-gotten gains. Blue Shield v. McReady, 457 U.S. 465, 472 (1982).
6. See California v. ARC Am. Corp., 109 S. Ct. 1661, 1663 (1989); Illinois Brick Co. v. Illinois, 431 U.S. 720, 724 (1977). To illustrate, assume that A conspires illegally with other producers to raise prices of the product that A manufactures and sells. B then purchases some of these overpriced products from A and in turn resells them to C. B would be a “direct purchaser” and C would be an “indirect purchaser.”
8. Id. at 736.
policy reasons for creating this limitation: (1) a desire to avoid the complex analysis necessary to establish the amount of an overcharge borne by various parties in a distribution chain; (2) a fear that defendants might face multiple liability; and (3) a concern that dividing the damage award among multiple plaintiffs would so reduce any individual recovery that future claimants would be discouraged from pursuing valid claims. 9

The Illinois Brick decision has generated considerable controversy and interest in the academic community. 10 Most of the commentary has focused on situations involving actors in competitive markets. However, when the direct purchaser does not operate in a free market but is instead a regulated utility, some of the policy concerns underlying the Illinois Brick rule change. The United States Supreme Court, in the recent case of Kansas v. Utilicorp United, Inc., 11 re-examined its standing rules in this new context. The Utilicorp Court reaffirmed its commitment to Illinois Brick by extending the standing limitation to situations involving a direct purchaser in a regulated industry. 12

This Note, after presenting the factual background of Utilicorp and a brief summary of the seminal cases addressing direct purchaser standing, will discuss some of the concerns raised by various commentators and evaluate their applicability to the regulatory context of Utilicorp. It then will examine two areas of the standing issue clarified in Utilicorp. The Note concludes that the majority's decision to adhere to the Illinois Brick rule, despite a troubling lack of precedent to support some of its assertions, best promotes the antitrust laws' goals of deterrence, compensation, and disgorgement of wrongfully obtained profits.

The claim in Utilicorp arose out of an alleged conspiracy to inflate natural gas prices. 13 Defendants in the action included three companies and two limited

9. Id. at 737-47. For a detailed discussion of Illinois Brick, see infra text accompanying notes 102-15.
12. Id. at 2811.
13. In re Wyoming Tight Sands Antitrust Cases, 695 F. Supp. 1109, 1111 (1988), aff'd, 866 F.2d 1286 (10th Cir. 1989), aff'd sub nom. Kansas v. Utilicorp United, Inc., 110 S. Ct. 2807 (1990). For the sake of clarity, this case is referred to in the text as Utilicorp even when discussing the case at the district court and appeals court levels. When citing to the district court or appeals court opinions in footnotes, the title Wyoming Sands is used.
partnerships that produced natural gas from the Wyoming Tight Sands Formation in Wyoming, and an interstate pipeline operator. Among the plaintiffs were three investor-owned public utilities that had purchased gas directly from the pipeline, and the States of Kansas and Missouri, whose attorneys general asserted claims in a parens patriae capacity on behalf of all residential customers who had purchased gas from the utilities. Plaintiffs brought the action pursuant to section four of the Clayton Act and sought treble damages for the overcharge.

The defendants claimed that the public utilities, despite the fact that they were direct purchasers, nonetheless lacked standing because they supposedly had raised their own prices to offset the illegal overcharge and thus had suffered no damage. The utilities’ customers, the defendants argued, had borne the entire cost of the overcharge and were, therefore, the proper parties to the action. The district court rejected this argument, relying on Illinois Brick and Hanover Shoe Co. v. United Shoe Machinery Corp. Although the direct purchasers in Utilicorp were regulated utilities, rather than members of a competitive market, the standing limitation formulated in Hanover Shoe and Illinois Brick was applicable nonetheless. Because only direct purchasers could pursue the claim, the parens patriae claims had to be dismissed.

In reaching its decision, the district court also relied on a recent Seventh Circuit case, Illinois ex rel. Hartigan v. Panhandle Eastern Pipe Line Co. In Panhandle Eastern, the State of Illinois sought to represent customers of a regulated gas distributor that had purchased natural gas at prices inflated because of antitrust violations. The Seventh Circuit dismissed the claim, holding that Illinois Brick barred claims by indirect purchasers unless they fell within one of two narrow exceptions to this general rule. The court refused to adopt an expansive interpretation of these exceptions: “Illinois Brick did not . . . leave it

\[\text{\textit{Wyoming Sands}, 695 F. Supp. at 1111.}\]
\[\text{\textit{Id. at 1112.}\}
\[\text{\textit{id. at 1119.}\}
\[\text{\textit{Id. at 1112.}\}
\[\text{\textit{Id.}\}
\[\text{\textit{Hanover Shoe}, 392 U.S. 481 (1968). In Hanover Shoe, the defendants similarly argued that the claims of the direct purchaser plaintiff should be dismissed because it allegedly had passed on any overcharge to its customers. The Hanover Shoe Court rejected this argument, holding that direct purchasers were proper parties to an action even if they had passed on the entire overcharge. Id. at 489. For a detailed discussion of this case, see infra text accompanying notes 97-101.}\]
\[\text{\textit{Id. at 1115.}\]
\[\text{\textit{id. at 1118.}\}
\[\text{\textit{839 F.2d 1206 (7th Cir.), withdrawn, aff'd in part, rev'd in part upon rehearing, 852 F.2d 891 (7th Cir.) (en banc), cert. denied, 109 S. Ct. 543 (1988).}\]
\[\text{\textit{id. at 1207.}\}
\[\text{\textit{Id. at 1210. Dictum in Illinois Brick stated that indirect purchasers may be allowed standing in certain narrow instances. These exceptions are discussed infra in note 31, and in texts accompanying notes 113-15, 129-35.}\]
to the discretion of the lower courts to expand the exceptions to include situations [merely] within some range of approximation of the exceptions defined in *Illinois Brick.*"

Soon thereafter, however, the Seventh Circuit withdrew its holding in *Panhandle Eastern* and granted a motion for rehearing. Based on this development, the district court judge in *Utilicorp* granted a request by the attorneys general of Kansas and Missouri for interlocutory appellate review of the standing issue. The district judge certified the following question to the Tenth Circuit:

In a private antitrust action under 15 U.S.C. § 15 involving claims of price fixing against the producers of natural gas, is a State a proper plaintiff as *parens patriae* for its citizens who paid inflated prices for natural gas, when the lawsuit already includes as plaintiffs those public utilities who paid the inflated prices upon direct purchase from the producers and who subsequently passed on most or all of the price increase to the citizens of the State?

Before the Tenth Circuit heard this appeal, the Seventh Circuit, sitting en banc, reversed in part its earlier decision in *Panhandle Eastern.* Judge Posner, writing for a five-judge plurality on a ten-judge panel, stated that the regulated gas distributor, which was the direct purchaser, had passed on all of the overcharge, pursuant to a contract requiring it to do so. Therefore, the indirect purchasers had standing under the so-called "cost-plus contract exception."

The Tenth Circuit in *Utilicorp* refused to follow the Seventh Circuit's holding. The court first noted that in *Panhandle Eastern* only one regulated company sought relief, while in the case *sub judice* three utilities claimed damages.

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28. Id.
29. See *Panhandle E.*, 852 F.2d at 899. For a discussion of this case, see *infra* text accompanying notes 118-28.
30. 852 F.2d at 894. "Pass-through" clauses are now very common in public utility regulatory schemes. See Hammond, *An Overview of Electric Utility Regulation*, in *ELECTRIC POWER: Deregulation and the Public Interest* 3, 46 (J. Moorhouse ed. 1986). They also are referred to as "flow-through" provisions, "price adjustment mechanisms," and other variations as well.
31. See *Panhandle E.*, 852 F.2d at 898-99. The "cost-plus exception" to the direct purchaser rule devolves from dicta in *Hanover Shoe and Illinois Brick* stating that indirect purchasers "might" have standing to assert an antitrust claim in situations in which the direct purchaser has passed on the entire overcharge to the indirect purchaser pursuant to a pre-existing cost-plus contract. See *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 494 (1968). In such instances, the direct purchaser would not suffer any cognizable injury because: (1) any overcharge resulting from the illegal behavior would pass through to the buyer as required by the contract; and (2) the direct purchaser would not suffer any loss of sales because the buyer(s) would be obligated to purchase the amount agreed to in the contract. See generally Comment, *A Legal and Economic Analysis of the Cost-Plus Contract Exception in Hanover Shoe and Illinois Brick*, 47 U. Chi. L. Rev. 743, 752-53 (1980) (applying techniques of economic analysis to explain the absence of injury to the direct purchaser and to evaluate the cost-plus exception).
33. Id. at 1292.
Not all of these operated under fuel-price adjustment clauses as did the utility in Panhandle Eastern.\textsuperscript{34} Thus, the issue of whether the utilities had passed on \textit{all} of the overcharge was an unresolved question of fact.\textsuperscript{35} The Tenth Circuit stated further that even a complete pass-through would not bring the facts within the cost-plus exception,\textsuperscript{36} as Judge Posner had asserted in Panhandle Eastern.\textsuperscript{37} The cost-plus doctrine, claimed the Tenth Circuit, applied only when the indirect purchasers were contractually bound to purchase a fixed quantity of the item fixed by contract; no such agreement was present between the utilities and residential consumers.\textsuperscript{38} Because the exception was inapplicable, the general rule prohibiting indirect purchaser standing controlled. The Tenth Circuit thus disregarded the Seventh Circuit's holding in Panhandle Eastern and upheld the district court's dismissal of the \textit{parens patriae} claims.\textsuperscript{39}

To resolve this conflict between the two circuits,\textsuperscript{40} the United States Supreme Court granted the states' petition for certiorari.\textsuperscript{41} In a five to four decision, the Court affirmed the Tenth Circuit’s holding.\textsuperscript{42} Writing for the majority,\textsuperscript{43} Justice Kennedy began by rejecting the petitioners’ argument that indirect purchaser standing should be allowed in cases involving a regulated utility that has passed on one hundred percent of the overcharge to its customers.\textsuperscript{44} Even if a utility raises its rates to offset fully the cost increase, it still may have suffered an injury by the overcharge:

"The mere fact that a price rise followed an unlawful cost increase does not show that the sufferer of the cost increase was undamaged. His customers may have been ripe for his price rise earlier; if a cost rise is merely the occasion for a price increase a businessman could have imposed absent the rise in his costs, the fact that he was earlier not enjoying the benefits of the higher price should not permit the [wrong-doer] . . . to take those benefits from him . . . . This statement merely recognizes the usual principle that the possessor of a right can recover for its unlawful deprivation whether or not he was previously exercising it."\textsuperscript{45}

Because of this concern, an indirect purchaser, to prove that the utilities had not incurred any damage from the overcharge, would have to demonstrate that the utilities could not have raised prices had there been no increase in fuel cost.\textsuperscript{46}

\begin{itemize}
  \item \textsuperscript{34} Id. at 1292-93 & n.2.
  \item \textsuperscript{35} Id. at 1293.
  \item \textsuperscript{36} See id.
  \item \textsuperscript{38} \textit{Wyoming Sands}, 866 F.2d at 1292.
  \item \textsuperscript{39} Id. at 1294.
  \item \textsuperscript{40} The Supreme Court explicitly stated that its reason for hearing the Utilicorp case was “to resolve a conflict between this decision and . . . Panhandle Eastern.” Utilicorp, 110 S. Ct. at 2811 (citation omitted).
  \item \textsuperscript{41} Kansas v. Kansas Power & Light Co., 110 S. Ct. 833 (1990).
  \item \textsuperscript{42} See Utilicorp, 110 S. Ct. at 2810.
  \item \textsuperscript{43} Joining the majority were Justices Stevens, O'Connor, Scalia, and Chief Justice Rehnquist.
  \item \textsuperscript{44} Utilicorp, 110 S. Ct. at 2812-13.
  \item \textsuperscript{45} Id. (quoting Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 493 n.9 (1968)).
  \item \textsuperscript{46} Id.
\end{itemize}
Such a demonstration would require evidence that prevailing market conditions would not have permitted a price hike or evidence that state regulators would have rejected a rate increase.\textsuperscript{47} Allowing indirect purchasers to attempt such a showing would necessitate delving into the intricacies of economic analysis or state regulatory law, all to ascertain a fact wholly unrelated to the defendants' liability.\textsuperscript{48} Even if an indirect purchaser succeeded in proving this fact, the utilities still would have incurred nominal losses in the form of decreased earnings during the so-called "lag period,"\textsuperscript{49} and the apportionment problem would remain.\textsuperscript{50} The Court stated that these complexities need not be incurred to secure compensation for residential consumers; if the utilities prevailed in the litigation, state regulators likely would require them to pass on a portion of the amount recovered to their customers.\textsuperscript{51}

Justice Kennedy then focused on the potential problems that would ensue if \textit{parens patriae} actions were permitted on behalf of indirect purchasers.\textsuperscript{52} The states, noted the Court, had authority to represent only residential customers.\textsuperscript{53} Industrial and nonresident users would have to fend for themselves. Many of these unrepresented parties would intervene in the action, making the suit unmanageable and raising the possibility of error.\textsuperscript{54} The Court concluded that "even if ways could be found to bring all potential plaintiffs together in one huge action, the complexity thereby introduced into treble-damages proceedings argues strongly for retaining the \textit{Hanover Shoe} rule."\textsuperscript{55}

The Court next rejected the petitioners' assertion that the utilities, having passed on the cost of the overcharge, would lack incentive to pursue the claim.\textsuperscript{56} The majority noted that state utility commissions have broad discretionary powers under most state regulatory schemes and might forbid a utility from passing on the costs of the overcharge if it failed to pursue a valid claim.\textsuperscript{57} Moreover, if the utility sued and won, it would net a sizeable recovery, even after refunding the overcharge amount to its customers.\textsuperscript{58} Justice Kennedy concluded by citing

\textsuperscript{47} \textit{Id.}
\textsuperscript{48} \textit{Id.}
\textsuperscript{49} \textit{Id.} at 2814. The "lag period" refers to the time from when the antitrust violator raises the price of the gas sold to the utility to the time when the utility is able to offset this increase by raising its prices. During this period the utility will be paying higher prices for fuel while charging the same pre-overcharge price to customers for its service. Thus, the utility's profits per unit will drop until it clears the necessary bureaucratic hurdles. See generally, \textsc{M. Schmidt, Automatic Adjustment Clauses: Theory and Application} 7-8 (1980) (discussing the lag period concept).
\textsuperscript{50} \textit{Utilicorp}, 110 S. Ct. at 2814.
\textsuperscript{51} \textit{Id.} at 2814-15.
\textsuperscript{52} See \textit{id.} at 2815.
\textsuperscript{53} \textit{Id.} The enabling statute reads, in relevant part: "Any attorney general of a State may bring a civil action in the name of such State, as \textit{parens patriae} on behalf of \textit{natural persons residing in such State.}" 15 U.S.C. § 15e(a)(1) (1988) (emphasis added).
\textsuperscript{54} \textit{Utilicorp}, 110 S. Ct. at 1215.
\textsuperscript{55} \textit{Id.} (quoting Illinois Brick Co. v. Illinois, 431 U.S. 720, 731 n.11 (1977)).
\textsuperscript{56} See \textit{id.} at 2816.
\textsuperscript{57} \textit{Id.}
\textsuperscript{58} \textit{Id.}
past instances of diligent claim enforcement by utilities.\textsuperscript{59}

The Court then addressed the issue of deterrence. Allowing indirect purchaser standing, stated the majority, may hamper private antitrust enforcement because most retail customers lack the expertise and experience necessary to detect a price-fixing conspiracy.\textsuperscript{60} Even if they did discover illegal behavior, the small individual amounts at stake probably would be insufficient to entice retail customers into enduring the inconveniences of prolonged litigation.\textsuperscript{61} Moreover, \textit{parens patriae} actions would not solve these difficulties because the enabling statute affords only limited representation\textsuperscript{62} and because states' attorneys general may be hesitant to pursue smaller, more speculative claims.\textsuperscript{63}

Justice Kennedy acknowledged that the rationales underlying \textit{Hanover Shoe} and \textit{Illinois Brick} would not be equally compelling in all cases.\textsuperscript{64} Nevertheless, adhering to the rules announced in those cases, even in circumstances in which the policy justifications were weaker, was preferable to having courts attempt to "'carve out exceptions to the [direct purchaser] rule for particular types of markets.'"\textsuperscript{65} Allowing the latter would "'inject the same "massive evidence and complicated theories" into treble-damages proceedings'" as courts tried to determine which industry groups qualified and which did not.\textsuperscript{66}

The states' attorneys general also had argued that the utilities' one hundred percent pass-through provisions brought them within the cost-plus exception\textsuperscript{67} mentioned in \textit{Hanover Shoe} and \textit{Illinois Brick}.\textsuperscript{68} The Court concluded, however, that the facts in \textit{Utilicorp} were not within that exception:

The respondent did not sell the gas to its customers under a pre-existing cost-plus contract. Even if we were to create an exception for situations that merely resemble those governed by such a contract, we would not apply the exception here. . . . The utility customers made no commitment to purchase any particular quantity of gas, and the utility itself had no guarantee of any particular profit.\textsuperscript{69}

The petitioners' final argument was that section 4C of the Hart-Scott-Rodino Antitrust Improvements Act of 1976\textsuperscript{70} gave states the right to sue on

\textsuperscript{59} Id. (citing Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 335 F.2d 203, 208 (7th Cir. 1964); Ohio Valley Elec. Corp. v. General Elec. Co., 244 F. Supp. 914, 949-51 (S.D.N.Y. 1965)).
\textsuperscript{60} Id. at 2816.
\textsuperscript{61} Id. at 2817.
\textsuperscript{62} Id. at 2816-17. The federal \textit{parens patriae} statute is 15 U.S.C. § 15c(a)(1) (1988). For a discussion of this statute, see \textit{infra} text accompanying notes 136-43.
\textsuperscript{63} \textit{Utilicorp}, 110 S. Ct. at 2816.
\textsuperscript{64} Id. at 2817. For a discussion of the policy rationales underlying the standing limitation, see \textit{supra} text accompanying note 9, and \textit{infra} text accompanying notes 102-10.
\textsuperscript{65} \textit{Utilicorp}, 110 S. Ct. at 2817 (quoting Illinois Brick Co. v. Illinois, 431 U.S. 720, 744 (1977)).
\textsuperscript{66} Id. (quoting \textit{Illinois Brick}, 431 U.S. at 745).
\textsuperscript{67} See \textit{supra} note 31.
\textsuperscript{68} \textit{Utilicorp}, 110 S. Ct. at 2817. This same assertion formed the basis for the Seventh Circuit's en banc holding in \textit{Panhandle Eastern}. See \textit{supra} text accompanying notes 30-31; \textit{infra} text accompanying notes 118-28.
\textsuperscript{69} \textit{Utilicorp}, 110 S. Ct. at 2817-18.
\textsuperscript{70} 15 U.S.C. § 15c(a)(1) (1988); see \textit{infra} text accompanying note 137.
behalf of consumers even in situations in which the consumers themselves, as indirect purchasers, would not have standing to sue.\textsuperscript{71} The Court rejected this assertion, stating that section 4C merely "‘created a new procedural device . . . to enforce existing rights of recovery under § 4 [of the Clayton Act].’"\textsuperscript{72} The statute did not create standing for states’ attorneys general to bring \textit{parens patriae} actions on behalf of persons who themselves lacked standing to assert antitrust claims.\textsuperscript{73}

Justice White, joined by three members of the Court, dissented.\textsuperscript{74} White claimed that the majority’s adherence to direct purchaser standing contravened the “plain language” of section four, which Congress had enacted to ensure that “victims of anticompetitive conduct receive compensation.”\textsuperscript{75} Although acknowledging that \textit{Illinois Brick} had denied standing to indirect purchasers, White distinguished the facts in that case from the \textit{Utilicorp} situation, noting that the participants in \textit{Illinois Brick} operated in competitive markets but the direct purchasers in \textit{Utilicorp} were regulated monopolies.\textsuperscript{76}

Justice White also criticized the majority for engaging in “what amounts to a fact-finding mission” as to whether the utilities passed on the entire overcharge.\textsuperscript{77} Both the district court and the Tenth Circuit had assumed a complete pass-through; therefore, White argued, the Court should have done the same.\textsuperscript{78}

The dissent considered the majority’s concern over apportionment unfounded in this context.\textsuperscript{79} The apportionment problem in \textit{Illinois Brick} arose from the complexity involved in determining the portion of the overcharge borne by the direct and indirect purchasers.\textsuperscript{80} But in \textit{Utilicorp}, the utilities were permitted to pass on all of the overcharge to their customers, thus obviating any need for apportionment.\textsuperscript{81} Justice White stated that it would be “fanciful, at least unrealistic, to think that a utility entitled to pass on to its customers the cost of gas that it has purchased will not do so to the maximum extent permitted by law.”\textsuperscript{82}

The dissent next took issue with the majority’s claim that restricting standing to the utilities would enhance enforcement.\textsuperscript{83} Indirect purchasers, contrary to the Court’s assertion, would discover easily the antitrust violation as the price

\textsuperscript{71} See \textit{Utilicorp}, 110 S. Ct. at 2818.

\textsuperscript{72} \textit{Id}. (quoting \textit{Illinois Brick Co. v. Illinois}, 431 U.S. 720, 734 n.14 (1977)).

\textsuperscript{73} \textit{Id}. See infra text accompanying notes 117-24.

\textsuperscript{74} 110 S. Ct. at 2818 (White, J., dissenting). Joining the dissent were Justices Brennan, Marshall, and Blackmun. It is interesting to find Justice White leading the dissent here; he wrote the majority opinions in both \textit{Hanover Shoe} and \textit{Illinois Brick}.

\textsuperscript{75} \textit{Id}. at 2818-19 (White, J., dissenting).

\textsuperscript{76} \textit{Id}. at 2819 (White, J., dissenting).

\textsuperscript{77} \textit{Id}. (White, J., dissenting).

\textsuperscript{78} \textit{Id}. (White, J., dissenting).

\textsuperscript{79} \textit{See id}. at 2820 (White, J., dissenting).

\textsuperscript{80} \textit{Id}. (White, J., dissenting).

\textsuperscript{81} \textit{Id}. (White, J., dissenting) Justice White also dismissed the majority’s concerns over lag period losses as unlikely and “speculative.” \textit{Id}. at 2821 n.* (White, J., dissenting).

\textsuperscript{82} \textit{Id}. at 2820 (White, J., dissenting).

\textsuperscript{83} \textit{See id}. at 2821 (White, J., dissenting).
increases would appear in their utility bills. Conversely, argued Justice White, the majority overstated the utilities' incentives to sue. He claimed that treble damages would be calculated only on the basis of the utilities' lost sales, not on the amount of the overcharge, since they had passed on that cost to their customers. Moreover, the Court engaged in mere speculation by asserting that a state regulatory commission would allow the utility to keep a portion of any recovery. No precedent existed for such an assertion.

Lastly, the dissent claimed that the majority's concern over possible multiple liability was unfounded. As no apportionment problem existed here, there was no chance that the defendant would end up paying overlapping damages to direct and indirect purchasers.

One can trace the roots of the direct purchaser rule back to the early part of this century. In Southern Pacific Co. v. Darnell-Taenzer Lumber Co. the plaintiff, a shipper of goods, brought suit against a railroad, claiming that it had charged unreasonably high rates. The defendant alleged that, because the plaintiffs were able to pass on the overcharge, they could not claim damages and thus had no cause of action. Justice Holmes, writing for the Court, rejected this argument, stating:

The general tendency of the law, in regard to damages at least, is not to go beyond the first step. As it does not attribute remote consequences to a defendant so it holds him liable if proximately the plaintiff has suffered a loss. The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events. The carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum. Probably in the end the public pays the damages in most cases of compensated torts.

It was in two more recent cases, Hanover Shoe, Inc. v. United Shoe Machinery Corp. and Illinois Brick Co. v. Illinois, however, that the Court clearly enunciated its stance regarding the standing of direct and indirect purchasers. In Hanover Shoe, the plaintiff shoe company brought suit under section four of

84. Id. at 2820-21 (White, J., dissenting).
85. Id. at 2821 (White, J., dissenting).
86. Id. (White, J., dissenting). Justice White cites no authority for this claim. Indeed, it seems odd that a direct purchaser would be able to recover three-fold only for lost profits. Since, under Illinois Brick, indirect purchasers cannot sue for the overcharge, this would mean that nobody can recover this amount from the wrongdoer. This result seems antithetical to the antitrust laws' deterrence goal.
87. Id. (White, J., dissenting).
88. Id. (White, J., dissenting).
89. Id. at 2821 (White, J., dissenting).
90. Id. (White, J., dissenting).
91. 245 U.S. 531 (1918).
92. Id. at 533.
93. Id.
94. Id. at 533-34 (citations omitted).
95. 392 U.S. 481 (1968).
the Clayton Act against United, a manufacturer of shoe machinery, claiming that United was monopolizing the shoe machinery industry by refusing to sell its equipment, requiring users to lease it instead.97 United contended that Hanover had suffered no cognizable injury because it had passed on the illegal overcharge to its customers.98 The Court rejected this pass-on defense, stating that entertaining such a claim would raise difficult issues of proving the amount of the overcharge passed on and determining whether, absent any overcharge, the plaintiff could have raised its prices.99 The Court also expressed concern that the ultimate buyers would have only a minuscule personal stake in a lawsuit and thus would be unwilling to endure the inconveniences of litigation.100 This would diminish private enforcement and increase the likelihood that those guilty of breaking the antitrust laws would escape liability.101

Nine years later, the Court in Illinois Brick was faced with a different application of the pass-on theory. Illinois Brick involved a suit brought by the State of Illinois and 700 local governmental entities against a group of concrete block manufacturers, alleging a price-fixing conspiracy in violation of section one of the Sherman Act.102 Masonry contractors had purchased the allegedly overpriced blocks from the conspirators and had resold them to general contractors. The general contractors then used these blocks in state projects.103 Illinois claimed that part or all of the overcharge had been passed through the chain of distribution and, as a result, the state had paid three million dollars in excess charges for the overpriced blocks.104 The Court dismissed the claim, holding that indirect purchasers may not sue for antitrust damages.105 Because Hanover Shoe disallowed defensive use of a pass-on theory by a defendant,106 the Court in Illinois Brick felt obligated to prohibit offensive use of the pass-on doctrine by plaintiffs.107 To permit the latter while disallowing the former would create a risk of multiple liability: "A one-sided application of Hanover Shoe substantially increases the possibility of inconsistent adjudications—and therefore 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

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97. Hanover Shoe, 392 U.S. at 483, 488-89.
98. Id. at 487-88.
99. Id. at 489-94.
100. Id. at 494.
101. Id.
102. Illinois Brick, 431 U.S. at 726-27. Section 1 of the Sherman act provides, in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1988).
103. Illinois Brick, 431 U.S. at 726.
104. Id. at 727.
105. Id. at 736.
106. "Defensive use" of the pass-on theory refers to a situation such as the one presented in Hanover Shoe: a defendant claims that the plaintiff, who is a direct purchaser, should have her claim dismissed because she has passed on all of the overcharge to her customers. "Offensive use" refers to situations like that in Illinois Brick: a plaintiff who is an indirect purchaser tries to establish standing by claiming that part or all of an illegal overcharge has been passed on to him.
107. 431 U.S. at 730. The Court also discussed the option of abandoning the Hanover Shoe rule as an alternative to denying standing to indirect purchaser plaintiffs. Id. at 729. The Court refused to take this option, however. Id.; see infra text accompanying note 112.
using that presumption against the other plaintiff. . . ." 108

The Illinois Brick Court also reiterated the concern expressed in Hanover Shoe that uncertainties and difficulties inherent in analyzing price and output decisions made by companies would cause confusion and lead to judicial inefficiency. 109 Allowing multiple parties from remote links in the distribution chain to join a suit would transform section four actions into massive multi-party proceedings, requiring the courts to trace the effects of the overcharge through each step of the distribution chain. 110

The Court noted that Congress, if it disagreed with the Court's use of the pass-on rule, was free to legislate an alternative interpretation. 111 Absent congressional action, however, the Illinois Brick Court was unwilling to overrule Hanover Shoe, noting that eight justices had voted with the majority in that case, and that concerns of stare decisis weighed heavily in the area of statutory construction. The Court stated, "This presumption of adherence to our prior decisions construing legislative enactments would support our reaffirmance of the Hanover Shoe construction of § 4 . . . even if the Court were persuaded that the use of pass-on theories by plaintiffs and defendants . . . is more consistent with the policies underlying the treble-damages actions than is the Hanover Shoe rule." 112

The Court mentioned two possible exceptions to the direct purchaser limitation. The first, initially announced in Hanover Shoe, would confer standing on an indirect purchaser when the direct purchaser has passed on the entire overcharge with a pre-existing cost-plus contract for a fixed quantity. 113 The rationale underlying this exception is that the fixed-volume term in the contract furnishes ready proof that the direct purchaser suffered no damage. 114 The second situation in which indirect purchaser standing may be permitted arises when the direct purchaser is owned or controlled by its customer. 115 In these instances, the indirect purchaser is, in a sense, also the direct purchaser.

Following the Illinois Brick decision, lower courts struggled to define the scope of the cost-plus exception. While some felt it applied only to actual cost-plus contracts with fixed-quantity requirements, 116 a few courts were willing to expand its application to situations that were mere "functional equivalents." 117

108. 431 U.S. at 730.
109. Id. at 732-33.
110. Id. at 737.
111. Id. at 736. In fact, there have been numerous congressional attempts, all unsuccessful, to change the standing rules adopted by the Court. See infra note 142 and accompanying text.
113. See id. at 735-36; Hanover Shoe, 392 U.S. at 494. For an explanation of the cost-plus exception, see supra note 31.
114. Illinois Brick, 431 U.S. at 736.
115. See id. at 736 n.16.
117. See, e.g., Illinois ex rel. Hartigan v. Panhandle E. Pipe Line Co., 852 F.2d 891, 898 (7th
In *Illinois ex rel. Hartigan v. Panhandle Eastern Pipe Line Co.*, the State of Illinois brought suit on behalf of all customers of Central Illinois Light Company (CILCO) against Panhandle Eastern Pipeline Company, alleging that it had inflated illegally the price of gas sold to CILCO. A provision in CILCO’s contract mandated a one hundred percent pass-through of all cost increases to its residential customers. The Seventh Circuit originally dismissed the claim, holding it barred under *Hanover Shoe* and *Illinois Brick*. The court subsequently withdrew the opinion and granted rehearing. Sitting en banc, the Seventh Circuit partially reversed its earlier ruling and held that the State did have standing as an indirect purchaser under the cost-plus exception. Judge Posner, writing for a plurality, stated that the facts in *Panhandle Eastern* were far removed from those in *Illinois Brick*, claiming that “[t]he Supreme Court has never adverted to the issue involved in the present case.” He further asserted that no apportionment problem existed in *Panhandle Eastern* because the direct purchaser (CILCO) and the indirect purchasers (CILCO’s residential customers represented by the State) suffered different types of damage. Specifically, CILCO incurred lost profits from the reduced sales volume caused by the price rise while residents bore the entirety of the overcharge. Because there was no overlap in damages claimed, each party could pursue its own discrete recovery. The combination of cost-plus pricing and ease of apportionment led Judge Posner to hold that the residential consumers fell within the cost-plus exception. Although admitting that there was no actual fixed-quantity requirement present, Posner claimed that such a literal application of *Illinois Brick* would be inappropriate here given the difference in fact situations. Ease of differentiating CILCO’s lost sales damages from the residential consumers’ overcharge damages provided a valid surrogate to a fixed-quantity contract.

The United States Supreme Court in *Utilicorp* rejected the Seventh Circuit’s

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118. 852 F.2d 891 (7th Cir.) (en banc), *cert. denied*, 109 S. Ct. 543 (1988); *In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148, 1163-64 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980). The phrase “functional equivalent” refers to a situation in which the direct and indirect purchasers are not parties to an actual pre-existing cost-plus contract, but are in circumstances that make it easy for the indirect purchaser to demonstrate that the direct purchaser passed on the entire amount of any overcharge and suffered no diminution in sales volume as a result of the wrongful activity. *See Comment, supra* note 31, at 756-64 (discussing the differing lower court approaches to functional equivalence).

119. *Id.* at 892.

120. *Id.* at 894.


123. 852 F.2d at 893.

124. *Id.* at 896.

125. *Id.* at 897.

126. Utilities set rates by adding together all allowed costs and a preset return on capital. Hammond, supra note 30, at 45-46.


128. *Id.* at 893.

129. *Id.* at 895.
use of the cost-plus exception\textsuperscript{130} and clarified somewhat the conditions necessary to assert this doctrine. The Court held that a situation in which a direct purchaser’s only damage arises from lost sales volume, as was the case in \textit{Panhandle Eastern}, does not qualify as a valid cost-plus exception.\textsuperscript{131} Rather, the Court stated that to qualify, the indirect purchasers must demonstrate that the direct purchaser has not suffered injury of any kind whatsoever: “we might allow indirect purchasers to sue only when, by hypothesis, the direct purchaser will bear no portion of the overcharge and otherwise suffer no injury.”\textsuperscript{132} Moreover, the indirect purchaser must be able to demonstrate this absence of injury without resort to complex economic or market analysis.\textsuperscript{133} It is difficult to envision a situation other than an actual fixed-quantity cost-plus contract that would meet these strict requirements. Nonetheless, the Court did leave open the possibility of allowing the exception in circumstances “that merely resemble those governed by such a contract.”\textsuperscript{134} The \textit{Utilicorp} Court also refused to state definitively that it would recognize a cost-plus exception, choosing instead to repeat the equivocal language used in previous opinions—that indirect purchasers “might” have standing in these circumstances.\textsuperscript{135} Thus, while the \textit{Utilicorp} holding clarifies somewhat the parameters for the cost-plus contract exception, it fails to clarify whether or not it exists in the first place.

The \textit{Utilicorp} Court also delineated its interpretation of section 4C of the Hart-Scott-Rodino Antitrust Improvements Act of 1976.\textsuperscript{136} This statute reads, in relevant part:

\begin{quote}
Any attorney general of a State may bring a civil action in the name of such State, as \textit{parens patriae} on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of [the Sherman Act].\textsuperscript{137}
\end{quote}

The Court held that states could not represent anyone in a \textit{parens patriae} capacity unless that person would have had standing to sue in an individual capacity.\textsuperscript{138} This interpretation of section 4C seems contrary to the aims of its congressional proponents, who intended that the statute enable states’ attorneys general to sue on behalf of consumers, be they direct or indirect purchasers.\textsuperscript{139}

\begin{footnotes}
\item 130. \textit{Utilicorp}, 110 S. Ct. at 2811.
\item 131. \textit{Id.} at 2817.
\item 132. \textit{Id.} at 2818 (emphasis added).
\item 133. \textit{Id.}
\item 134. \textit{Id.} at 2817.
\item 135. \textit{Id.; see also Illinois Brick}, 431 U.S. at 735-36 (“[T]his Court in \textit{Hanover Shoe} indicated the narrow scope it intended for any exception to its rule barring pass-on defenses by citing, as the only example of a situation where the defense might be permitted, a pre-existing cost-plus contract.”); \textit{Hanover Shoe}, 392 U.S. at 494 (“[T]here might be situations—for instance, when an overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been damaged—where the considerations requiring that the passing-on defense not be permitted . . . would not be present.”).
\item 136. \textit{Utilicorp}, 110 S. Ct. at 2818.
\item 138. See \textit{Utilicorp}, 110 S. Ct. at 2818.
\end{footnotes}
Soon after passage of this legislation, however, the Supreme Court held in *Illinois Brick* that indirect purchasers had no standing to sue. 140 This caused much consternation among supporters of a broader interpretation of section 4C including Justice Brennan, who claimed, in his dissenting opinion to *Illinois Brick*, that "[t]oday's decision flouts Congress' purpose and severely undermines the effectiveness of the private treble-damages action as an instrument of antitrust enforcement." 141 Members of Congress have held numerous hearings on proposed legislation to overturn or limit the rule. 142 Thus far, however, none of these proposals has been enacted into law.

In spite of *Illinois Brick*, some thought that states might still be given standing to sue under section 4C on behalf of consumers who were indirect purchasers, even though such persons could not sue in an individual capacity. 143 The *Utilicorp* Court ended this speculation, holding that section 4C merely created a new procedural device to enforce existing rights; it did not create standing where none had previously existed. 144

The *Utilicorp* case is also significant for its application of the direct purchaser standing limitation, for the first time, to a regulated industry. 145 This holding should quell any notions that the rules set forth in *Hanover Shoe* and *Illinois Brick* were limited to selected industries or markets; 146 the majority was adamant in its belief that attempting to exempt certain industries would be "an unwarranted and counterproductive exercise." 147

*Recoveries are authorized by the compromise bill whether or not the consumers purchased directly from the price fixer, or indirectly, from intermediaries, retailers, or other middlemen. The technical and procedural argument that consumers have no "standing" whenever they are not "in privity" with the price fixer, and have not purchased directly from him, is rejected by the compromise bill.*

Id.

140. *Illinois Brick*, 431 U.S. at 735-36.

141. Id. at 749 (Brennan, J., dissenting).


144. See *Utilicorp*, 110 S. Ct. at 2818.

145. Id. at 2812.

146. This was one of the petitioners' arguments in *Utilicorp*. See Brief for the Petitioners at 10, *Kansas v. Utilicorp United, Inc.*, 110 S. Ct. 2807 (1990) (No. 88-2109).

147. *Utilicorp*, 110 S. Ct. at 2817.
Although the wide applicability of the direct purchaser limitation can no longer be in doubt, much controversy over the wisdom of the rule remains.\textsuperscript{148} To evaluate the Court’s holding in \textit{Utilicorp}, one should analyze its likely effect on the underlying goals of private antitrust enforcement: deterring future violations, compensating victims, and forcing disgorgement of illegal profits.\textsuperscript{149} Focusing first on compensation, an ideal resolution in the present context would be one that fully reimburses consumers for that portion of the overcharge borne by them and the utilities for any lost sales caused by having to raise their prices in reaction to a supplier’s illegal behavior (as well as any portion of the overcharge not passed on to consumers). The \textit{Utilicorp} Court’s holding, at first glance, seems to reward unduly the utilities by allowing them to recover the entire treble amount, including the portion allocable to the overcharge, while denying the consumers any recovery whatsoever. The Court justifies this outcome by predicting that a state regulatory commission most likely would force the utility to remit at least part of any damage award to its customers, presumably in the form of lower rates.\textsuperscript{150} In support of this proposition, the Court cites a lone case decided by the Louisiana Public Service Commission, \textit{In re Petition of LP & L for Order Relating to Disposition of Proceeds Against Gas Supplier}.\textsuperscript{151} The damages in \textit{LP & L}\textsuperscript{152} resulted from a breach of contract action rather than an antitrust claim.\textsuperscript{153} Nevertheless, the Commission mandated that the utility flow the proceeds back to its customers by reducing its rates over a five-year period.\textsuperscript{154} Outside of this example, however, there is scant precedent, either for or against, the Court’s assertion that utilities would have to disgorge part of any treble award.

Whether the \textit{Utilicorp} holding furthers or hinders the compensatory aims of section four of the Clayton Act essentially turns on how a state regulatory commission decides to allocate the damage award. If it orders a refund to consumers equal to the amount of the overcharge borne by them, then an almost ideal solution is achieved: nearly all injured parties would receive compensation.\textsuperscript{155} Conversely, if the regulators permitted a utility to keep the entire award, or instead required it to remit the entire amount to its customers, then some parties remain uncompensated while others received an award greatly in excess of any damage suffered. Because the first alternative yields a plainly superior result, and because regulators tend to seek outcomes that balance conflicting claims and

\begin{footnotes}
\item[148] See \textit{supra} note 10 (citing commentary).
\item[150] See \textit{Utilicorp}, 110 S. Ct. at 2815.
\item[152] "LP & L" is an abbreviation for "Louisiana Power and Light Company."
\item[153] \textit{LP & L}, at 26.
\item[154] \textit{Id.} at 31-32.
\item[155] The compensation scheme would be imperfect, even in this scenario. Some customers who paid the overcharge will have moved out of the area before the rate reduction goes into effect, thus forfeiting their portion of compensation. Also, persons who move into the utility’s service area after the violation is discovered and enjoined will reap the benefits of lower utility prices without having paid the previous overcharge.
\end{footnotes}
minimize harm to any one group,\textsuperscript{156} they most likely would choose it over the latter, more one-sided alternatives.

If, rather than limiting standing to direct purchasers, the \textit{Utilicorp} Court had allowed the states to sue on behalf of the indirect purchasers, then a court, rather than a regulatory commission, would have borne the responsibility for allocating the recovery among the various plaintiffs. This introduces the difficulties discussed by the \textit{Utilicorp} Court, such as apportionment and multiplicity of parties. The petitioners in \textit{Utilicorp} argued that no apportionment difficulties would arise; states would collect for the overcharge while the utilities would recover for lost profits from lower sales.\textsuperscript{157} The problem with this scenario is that one cannot assume a total pass-through. Not all utilities operate under automatic price-adjustment agreements. Utilicorp's Kansas Public Service operation, for example, was not subject to a flow-through mechanism until 1987.\textsuperscript{158} Companies without these provisions would have to petition the regulatory agency for a rate hike to offset the cost increase caused by the antitrust violation. This typically is a cumbersome process. As Professor Navarro notes:

\begin{quote}

The rate-making process is far from instantaneous. For a utility to raise its rates, it must first make a formal request, which is handled through courtlike proceedings. The time between the filing for a rate hike and actually having it granted is the lag time. . . . When regulatory lag is long—as it is in many states—the utility loses out on the potential earnings during the rate-setting process.\textsuperscript{159}
\end{quote}

On top of the lag period costs, there is no guarantee that the commission would allow a rate hike. Regulators have broad discretion in these matters and, depending on the political climate and the ideological makeup of the commission, may decide to deny the request.\textsuperscript{160}

Even utilities that are subject to price-adjustment mechanisms may have to bear part of the overcharge damage; some regulatory schemes now use "partial pass-through" clauses, which require utilities to absorb a percentage of any fuel-cost increase.\textsuperscript{161} The rationale behind these provisions is that forcing the utility to bear part of a cost increase will encourage it to operate prudently and efficiently.\textsuperscript{162} Several states have adopted this incentive-based methodology while others have rejected it.\textsuperscript{163} The implications of this development for utility cus-

\begin{footnotes}
\item \textsuperscript{156} Hammond, supra note 30, at 40.
\item \textsuperscript{157} Distributing the award to consumers may be more difficult in this situation. A regulatory commission would seem to be better situated to distribute the award to consumers than a court because the regulators can make use of the utilities' existing customer billing systems to channel funds to the rightful beneficiaries.
\item \textsuperscript{158} Respondents' Brief in Opposition at 6 n.5, \textit{Kansas v. Utilicorp United, Inc.}, 110 S. Ct. 2807 (1990) (No. 88-2109).
\item \textsuperscript{160} Id.
\item \textsuperscript{161} See, e.g., \textit{In re Niagara Mohawk Power Corp.}, (NY PSC 1983) 56 PUR 4th 315; see also \textit{Partial Passthrough (Incentive) Fuel Clauses}, PUB. UTIL. FORT., Aug. 8, 1985, at 52 (detailing the increasing use of partial pass-through provisions) [hereinafter \textit{Partial Passthrough}].
\item \textsuperscript{162} \textit{Partial Passthrough}, supra note 161, at 52.
\item \textsuperscript{163} Id.
\end{footnotes}
tomers seeking standing as indirect purchasers are serious: contrary to the assertions of the petitioners in Utilicorp, one cannot safely assume that a given utility will be able to pass on one hundred percent of an illegal overcharge. Instead, an investigation into state regulatory law may be required to determine if the utility is subject to an automatic adjustment provision and, if so, the amount of pass-on permitted. The court also would have to evaluate detailed cost data and financial computations to ascertain losses during periods of regulatory lag. It seems unnecessary to burden courts with these issues in an effort to compensate consumers; as stated before, a utility commission most likely would order a refund to customers for the amount of the overcharge borne by them. True, the commissioners would have to delve into regulatory law and perform the same financial calculations that a court otherwise would be faced with, but commissions are much more knowledgeable in this arcane area than most judges and could dispose of the task with greater efficiency and expertise. In sum, allowing indirect purchasers standing to sue in a Utilicorp-type setting would not improve their chances of ultimately receiving compensation for bearing their portion of an illegal overcharge.

A second major objective of allowing private actions under section four is deterrence of future violations. From this standpoint, an ideal outcome would provide a potential financial reward sufficient to encourage parties to endure the difficulties and inconveniences of protracted litigation, and discourage would-be offenders from breaking the law in the first place. The Illinois Brick standing limitation essentially places all the deterrence eggs in one basket: if the direct purchaser(s) should fail to bring suit, then the transgression will go unpunished. Therefore, the rule is sensible only if direct purchasers have adequate incentives to pursue claims. When the direct purchaser is a regulated utility, the incentive may not be as strong as if it were in a competitive industry; the utility in most instances will have passed on much of the overcharge; it may be reluctant to upset long-standing personal relationships that have developed between it and its supplier; and, if it recovers damages, it probably would have to share the award with its customers. To support its assertion that adequate incentives do exist in a regulatory context, the Utilicorp Court again found itself speculating as to how state regulators would act. The majority claimed that a commission probably would disallow a utility's request for a rate increase if it avoided bringing suit and that the threat of this occurrence would encourage the utility to pursue claims. A commission, however, may not be aware of the illegal activity and, in any case, may be somewhat reluctant to penalize a utility for mere inaction. Moreover, if the utility is subject to an automatic price adjustment mechanism, it could offset the overcharge through higher rates without seeking the regulators' approval, although the commission presumably could get its pound of flesh from the misbehaving utility at the next formal rate hearing. Overall, the threat of regulatory retribution may or may not provide a compelling incentive for a utility to pursue antitrust claims.

Besides the "stick" of a possible regulatory refusal of an offsetting rate in-
crease, a significant "carrot" awaits a utility should litigation be pursued to a successful conclusion. Apart from three-fold damages for lost profits caused by lower sales, the utility might get to keep a sizable chunk of the portion of the treble award based on the overcharge. Even if, as the majority in Utilicorp predicts, a regulatory commission requires the utility to flow back to its customers the full amount of any damages they suffered, two-thirds of the treble recovery from the overcharge would remain. A commission should allow the utility to keep some or all of this amount as compensation for incurring the difficulties and inconveniences of litigation.

A further incentive should be considered. Utilities have an interest in protecting their markets. Many large industrial customers will have access to alternative sources of energy available and might switch if a utility’s prices cease to be competitive with available alternatives. This could result in a substantial and possibly permanent loss in the utility’s market share. A utility facing this potential competition would be unlikely to ignore an overcharge even if a one hundred percent pass-through were available. As the respondents in Utilicorp noted, “Customers who believe that the utility is looking out for their interests are more likely to defer seeking permanent alternative sources of energy.”

If states had been permitted to bring parens patriae claims, they too would have had a strong incentive to do so, at least when the anticompetitive behavior affected large segments of the general public. Litigation would engender a high degree of visibility and publicity for the attorneys general, who are, after all, politicians. Not all commentators agree on the efficacy of such actions, however. Professor (now Judge) Posner has expressed concern that the political character of parens patriae makes it an unreliable tool for antitrust enforcement:

There may well be a tendency under parens patriae for state attorneys general to bring headline-grabbing, scapegoat-seeking suits against politically unpopular corporations, with little regard for the intrinsic antitrust merit of the suit and with little effort to press the suit to a successful conclusion. By the time the case is ready for trial, the state attorney general’s office may be occupied by a new politician with little

165. See id. at 2814-15.

166. To illustrate, assume that U, a utility, sues its gas supplier S for antitrust violations. U claims that S conspired illegally to raise the price of its fuel and that U thus incurred $800,000 in excess costs because of the overcharge. For simplicity’s sake, assume that U passed on this entire amount to its customers. As a result, U’s customers purchased less gas, costing U $200,000 in lost profits. If U sues for the entire loss of $1 million ($800,000 in overcharges and $200,000 in lost profits) and wins, trebling will result in a final award of $3 million, of which $2.4 million ($800,000 times 3) is allocable to the overcharge, and $600,000 ($200,000 times 3) is allocable to the utility’s lost profits. If regulators ordered all of the recovery traceable to the overcharge to be passed on, the customers would receive a windfall of $2.4 million ($1.6 million more than their actual damages) while the utility, which bore the risks and burdens of litigation, is left with only 20% of the award. This outcome may deter utilities from bothering to bring antitrust claims in the future. Alternatively, if regulators mandated a flow-through of only $800,000 to the consumers, which is the actual amount of damage they incurred, then the utilities would be left with a much more substantial recovery of $2.2 million. Note that this amount includes two-thirds of the portion allocable to the overcharge as well as all of the recovery allocable to lost sales. Regulators also could choose to split the difference between these two examples in any manner they wished.

interest in carrying out the projects of his predecessor.\textsuperscript{168}

Permitting \textit{parens patriae} actions on behalf of indirect purchasers could have an adverse impact on section four's deterrent effect. Injured parties not represented by the states would, for the most part, fail to join the action because their stake in the lawsuit would be nominal. This would reduce the aggregate amount of the damage recovery, thus lowering the cost of illegal behavior to the wrongdoers. Also, dividing the damage claims among plaintiffs at the outset will reduce the portion of the damages the utility may seek, thereby reducing its incentive to pursue the claim. As the number of potential plaintiffs grows, so grows the possibility that the potential recovery to each individual plaintiff will be insufficient to entice any of them into bringing an action.

Limiting standing to a regulated utility that has passed on most or all of the overcharge to its customers is, all in all, an appropriate policy choice as it offers the best chance of compensating the greatest number of victims while at the same time providing adequate incentives for putative plaintiffs to pursue claims vigorously. Allowing indirect purchasers to join the suit would lead to greater complexity, multiplicity of parties, and higher costs, and would necessitate probing the intricacies of state regulatory law and the subtleties of sophisticated economic analysis in order to apportion damages among the various plaintiffs. Applying the \textit{Illinois Brick} standing limitation to a regulated direct purchaser best advances the laws' compensatory and deterrence goals while providing a prudent, if controversial, check against what might otherwise become unmanageably complex litigation.

\textbf{LEE J. POTTER}