The Developing Role of State Indirect Purchaser Statutes:
The Current and Future Status of Indirect Purchaser Remedies using
Mylan Laboratories as a Benchmark

By Liesl Finn

I. Introduction

In recent years, state attorneys general have been known to make claims on behalf of indirect purchasers in multistate antitrust actions brought in federal court. Though the growing number of such claims suggests that this role of attorneys general is well-established, the trend is a relatively new one. In the late 1960s and 1970s, the U.S. Supreme Court eliminated recovery by indirect purchasers in federal antitrust actions in two decisions, Hanover Shoe, Inc. v. United Shoe Machinery\(^1\) (“Hanover Shoe”) and Illinois Brick Co. v. Illinois (“Illinois Brick”)\(^2\). While this elimination of recovery under federal law enabled the Supreme Court to both simplify Sherman Act cases, by limiting recovery to direct purchasers only, and maintain consistency between Hanover Shoe and Illinois Brick, it simultaneously created what some call an unfair system of recovery.

Since the landmark ruling in Illinois Brick, pressure from legislatures, courts, and authorities in the field has curtailed its impact. Responses, however, are still in flux.

States have reacted by passing “Brick repealer statutes,” becoming more active in antitrust enforcement, and increasing the efficiency of multistate litigation involving indirect purchaser actions. Some federal courts have adopted a more permissive view toward recovery on behalf of indirect purchasers, while others continue to view indirect

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\(^1\) 392 U.S. 481 (1968).
purchaser actions as a burden on the system. Among academic and government authorities, vocal opposition to restitution for indirect purchasers continues to be heard today. Yet, a growing number of authorities suggest that the Supreme Court’s longstanding rule is finally beginning to erode.

In his article, *Indirect Purchaser Pot Keeps Boiling*, journal editor Ronald W. Davis urges, “[i]f, indeed, time has eroded *Illinois Brick*’s policy foundations, then perhaps the time has come for the Supreme Court to take a fresh look at the indirect purchaser doctrine.”3 This paper examines the role of attorneys general in multistate antitrust cases, traces the history of federal courts’ treatment of state indirect purchaser statutes, and focuses on both the recent trend in indirect purchaser actions and the corresponding controversy through the lens of *FTC v. Mylan Laboratories, Inc*4 (*“Mylan”*). In doing so, it becomes clear that, given the growing presence of indirect purchaser claims in federal antitrust cases and courts’ increasing permissiveness toward restitution on behalf of indirect purchasers, the Supreme Court’s review of the indirect purchaser doctrine is overdue as Davis suggests. The Supreme Court should take the opportunity, when presented, to formulate a new rule without regard to its consistency with *Hanover Shoe* and *Illinois Brick*, which unfairly limited recovery to direct purchasers. But, why wait for the Supreme Court?

At present, states can and should continue to build upon the precedent set by *Mylan* while seeking methods for increasing the efficiency of multistate litigation. This paper concludes that the need for improvements in orchestrating multistate litigation involving indirect purchaser actions is not an indication that the indirect right of recovery should be

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eliminated. Rather, the need for improvements is an indication that our focus should be how to consolidate actions in federal court with clear guidelines that improve efficiency.

II. Attorneys General’s Role in Multistate Antitrust Cases

Antitrust law is comprised of both federal and state law. Federal law includes the Sherman, Clayton, Hart-Scott-Rodino, and Federal Trade Commission Acts. Every state has its own set of antitrust laws, though many states rely on federal antitrust jurisprudence to construe them. Attorneys general may use state, federal, or state and federal law to assert their authority. The cases discussed in this paper were brought under both federal and state law in federal courts. Under federal law, attorneys general may either represent “proprietary” interests of states and government agencies, after securing court certification, or, of particular relevance in this paper, may assert their parens patriae authority on behalf of individual consumers residing in their states, without court certification. Under state law, most attorneys general do not have explicit parens patriae authority, but they may possess such power under common law. The parens patriae (“father of the country”) doctrine enables a state to recover costs or damages incurred because of behavior that threatens the health, safety, and welfare of the state’s citizenry. In using these powers, attorneys general protect individuals, public interest, and the state.

6 In fact, the Hart-Sott-Rodino Act anticipated that federal and state enforcers would work together so that, through the states’ use of their parens patriae authority, illegal profits would be turned over to consumers and antitrust violators would be deterred. Calkins, supra note 5, at 683.
8 Email from Kevin O’Connor, Chair of the Godfrey & Kahn Antitrust and Trade Regulation Practice Group, to Liesl Finn, Columbia Law School student (Jan. 2, 2006, 14:00:45 EST).
The *parens patriae* antitrust authority of state attorneys general “lost much of its vitality and potential when the Supreme Court decided *Illinois Brick Co. v. Illinois.*”¹⁰ Due to *Illinois Brick*, one of the most significant limitations imposed on attorneys general by federal courts has been the preclusion of damage recoveries by indirect purchasers. An indirect purchaser is one who purchases a product, usually a price-fixed product in the context of antitrust cases, from a middleman who passes on an anticompetitive overcharge.¹¹ Judicial rulings over time, however, have become more permissive toward attorneys general using their *parens patriae* authority to assert state indirect purchaser laws supplemental to federal claims.

Due to the availability of federal all-inclusive remedies in pre-*Illinois Brick* days, indirect purchaser statutes were unnecessary and few states enacted them.¹² But with the *Illinois Brick* decision, most states recognized the need for state indirect purchaser statutes. The powers granted under state statutes, however, could not be exercised by attorneys general in multistate antitrust claims involving federal law. In such cases, state law was viewed as preempted by federal law. It was not until *California v. ARC America Corp.*¹³ (“ARC”), where the Court determined that federal law does not preempt state indirect purchaser statutes, that attorneys general were able to seek indirect purchaser recovery under state statutes in federal multistate antitrust litigation. Today, attorneys general may now bring large-scale indirect purchaser actions under indirect purchaser statutes, unfair

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¹¹ See Connors, *supra* note 7, at 861.

¹² Alabama and Mississippi were atypical states that enacted indirect purchaser statutes prior to *Illinois Brick*. See Ala. Code § 6-5-60 and Miss. Code Ann. § 75-21-9.

competition statutes, or both, on behalf of indirect purchasers. As a result of these developments, we find ourselves in a “trifurcated” antitrust legal landscape: federal criminal or civil enforcement actions, federal direct purchaser actions, and state indirect purchaser actions that are approaching national coverage. Thus, a historical sketch of federal courts’ treatment of indirect purchaser statutes indicates that the scope of attorneys general’s authority under both federal and state law, particularly state law, has broadened in the realm of multistate antitrust cases in federal court.

Unlike the federal government, attorneys general are able to deliver substantial monetary recoveries to both direct and indirect consumers. Such ability gives state attorneys general a comparative advantage over the federal government in seeking recovery for injured parties in multistate litigation. By examining federal courts’ growing permissiveness toward recovery to indirect purchasers, the subsequent sections of this paper will delve into the comparative advantage of attorneys general with respect to state indirect purchaser statutes, the recent role of attorneys general in bringing claims on behalf of indirect purchasers and securing remedies, and the ongoing debate over state-level indirect purchasers states.

III. Setting Precedent: Hanover Shoe and Illinois Brick

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16 See Calkins, supra note 5, 679-80.
In two decisions, *Hanover Shoe, Inc. v. United Shoe Machinery*\(^\text{17}\) and *Illinois Brick Co. v. Illinois*,\(^\text{18}\) the Supreme Court laid out arguments against indirect purchaser recovery that still resonate today.

### A. Hanover Shoe

In *Hanover Shoe, Inc. v. United Shoe Machinery*, a shoe manufacturer, Hanover Shoe, Inc., brought an antitrust treble-damages action under Section 4 of the Clayton Act\(^\text{19}\) against a machinery manufacturer, United Shoe Machinery. Hanover claimed that it should recover from United the difference between what it paid United in shoe machine rentals and what it would have paid if United had been willing to sell its machines during its monopoly of the shoe machinery industry.\(^\text{20}\) United claimed in its “pass-on” defense that Hanover was not injured as required by Section 4 because it had passed on the allegedly illegal overcharge to its shoe customers.\(^\text{21}\) United reasoned that if it had charged Hanover a lower rate, then Hanover would in turn charge its shoe customers lower prices; Hanover’s profit margin would be the same either way and indirect purchasers, rather than Hanover, were the ones who were impacted by United’s rates.\(^\text{22}\)

The Court rejected this argument, holding that except in certain limited circumstances, a direct purchaser suing for treble damages is injured within the meaning of Section 4 by the full amount of the overcharge paid and, consequently, that United was barred from introducing evidence that indirect purchasers were in fact injured by the illegal

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\(^{17}\) 392 U.S. 481 (1968).


\(^{19}\) Section 4 of the Clayton Act, 15 U.S.C. § 15, provides, “Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover treble the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.”

\(^{20}\) *Hanover*, 392 U.S. at 484.

\(^{21}\) *Id.* at 488.

\(^{22}\) *Id.*
overcharge.\textsuperscript{23} The Court offered two primary reasons for its rejection of United’s argument. First, treble damage actions would be complicated by attempts to trace the effects of the overcharge on the purchaser’s prices, sales, costs, and profits.\textsuperscript{24} Second, unless direct purchasers were allowed to sue for the portion of overcharge passed on to indirect purchasers, then antitrust violators would “retain the fruits of their illegality” because indirect purchasers do not have enough of an incentive to bring suit.\textsuperscript{25} Ultimately, because the Court disallowed United from avoiding liability by showing that Hanover passed on the illegal overcharge to indirect purchasers, the Court held that Hanover, as a direct purchaser, had been injured by the full amount of the overcharge. The Court’s refusal to acknowledge injuries to indirect purchasers set a precedent that later determined the \textit{Illinois Brick} decision.

\textbf{B. \textit{Illinois Brick}}

The Court in \textit{Illinois Brick Co. v. Illinois} addressed the corollary of the central question in \textit{Hanover Shoe}. In \textit{Hanover Shoe}, the issue of whether a direct purchaser should be viewed as suffering the full injury, at the expense of sharing recovery with an indirect purchaser, arose when the “pass-on” theory was used defensively by an antitrust violator against a direct purchaser plaintiff. In \textit{Illinois Brick}, the issue arose when the pass-on theory was used offensively by an indirect purchaser plaintiff against an alleged violator.\textsuperscript{26} Despite the different angles from which the issue was approached, the Court reached a similar result. In the words of Kevin O’Connor, Chair of the Godfrey & Kahn Antitrust and Trade Regulation Practice Group, the outcome was a product of the Supreme

\textsuperscript{23} \textit{Id.} at 492-495.
\textsuperscript{24} \textit{Id.} at 492-493.
\textsuperscript{25} \textit{Id.} at 494.
\textsuperscript{26} \textit{Illinois Brick}, 431 U.S. at 726.
Court feeling “boxed in by Hanover when it decided Illinois Brick.”27 In other words, if defendants did not get the benefit of “pass through” overcharges in suits brought by direct purchasers, then plaintiffs should not get the benefit of “pass through” overcharges to allow indirect purchaser claims.28

Illinois Brick involved a multi-level distribution chain for bricks. The defendant brick manufacturer and distributor, Illinois Brick Co., sold bricks to masonry contractors, who would submit bids to general contractors, who would then submit bids for projects to customers. One such customer was the State of Illinois. Thus, the State was an indirect purchaser of Illinois Brick Co. products, which pass through two separate levels before reaching the State.

As an indirect purchaser, the State, on behalf of itself and local governmental entities, brought an antitrust treble-damages action under Section 4 of the Clayton Act, alleging that petitioners engaged in a conspiracy to fix the prices of concrete block in violation of Section 1 of the Sherman Act.29 Assuming that the full overcharge by Illinois Brick was passed on to the State, the complaint alleged that the price paid by the State was $3 million higher due to the price fixing conspiracy.30 Faced with the State’s claim of injury after the overcharge was passed on by the masonry and general contractors, rather than being absorbed at the first two levels of distribution, the Court claimed to be left with two alternatives: either overrule Hanover Shoe or preclude indirect purchasers from seeking to recover on their pass on theory.31 The Court chose the latter.

27 Email from Kevin O’Connor, supra note 8.
28 Id.
29 Id.; Section 1 of the Sherman Act, 15 U.S.C. s 1, provides, “Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal…”
30 Illinois Brick, 431 U.S. at 727.
31 Id. at 736.
In deciding to preclude indirect purchasers from recovery, the Court offered three reasons, drawn from those given in *Hanover Shoe*, to support its conclusion. In doing so, the Court recognized that the *Hanover Shoe* rule “denies recovery to those indirect purchasers who may have been actually injured by antitrust violations.”\(^{32}\) Still, the Court found that the following considerations outweighed the resulting failure to redress injuries of indirect purchasers. First, the Court did not want to introduce additional complexity into antitrust suits by requiring courts to determine the effect of overcharges on direct purchasers and to apportion damages among indirect and direct victims.\(^{33}\) Second, allowing all indirect purchasers who purchased from a particular direct purchaser to recover would lead to fewer antitrust suits because they would not have enough of a stake in suits to sue.\(^{34}\) Finally, the Court did not want to impose on defendants multiple liabilities from various levels in distribution chains.\(^{35}\) In accepting the reasoning of *Hanover Shoe*, the Court declined to overrule the case. As a result, for over a decade, *Illinois Brick* stood as the policy of the antitrust laws with regard to who can recover money for violations of those laws. Subsequent cases that recognize injuries to indirect purchasers indicate that the system of recovery created by *Illinois Brick* was unfair to indirect purchasers and the reasons offered in support of the system were ill-founded.

### C. Reactions to *Illinois Brick*

32 *Id.* at 746. In this portion of the opinion, the Court justifies its denial of recovery to injured indirect purchasers with Justice Brennan’s claim that “it is irrelevant to whom damages are paid, so long as some one redresses the violation.”

33 *Id.* at 741.

34 *Id.* at 745.

35 *Id.* at 740.
Though *Illinois Brick* upheld the precedent set by *Hanover Shoe*, the court’s decision sparked controversy. State legislatures, state courts, and eventually the Supreme Court made efforts to limit the effect of the *Illinois Brick* ruling.

1. **State Legislatures**

The onset of the *Illinois Brick* case caused a ripple effect. Recognizing that an adverse ruling in *Illinois Brick* would threaten the state attorneys generals’ ability to represent consumers in direct-indirect purchaser actions, forty-seven states and the U.S. government filed separate amici briefs in support of the plaintiff prior to the *Illinois Brick* decision.\(^{36}\) In addition, several states passed statutes, known as “Illinois Brick repealer-statutes,” at the onset of the case in order to permit damage actions by or on behalf of indirect purchasers, including ultimate consumers.\(^{37}\) Following the decision, states and consumer advocates were quick to agree with the dissenting Justices that the result was anti-consumer protection and antithetical to the larger statutory purposes of the private treble damage right of action.\(^{38}\) The *Illinois Brick* majority left indirect purchasers injured and unprotected from illegal overcharges. Sharing the sentiment of dissenting Justices, states generally took one of two courses of action. Some states took legislative action; nineteen states, the District of Columbia, and Puerto Rico enacted statutes expressly permitting actions by or on behalf of indirect purchasers harmed by antitrust violations.\(^{39}\) Other states took judicial action; because indirect purchasers were barred from federal court by *Illinois Brick*, state courts refused to follow its precedent as a matter of state law.

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\(^{37}\) See O’Conner, *supra* note 15, at 34.  
\(^{39}\) Id. States with such statutes include California, Hawaii, Idaho, Kansas, Maryland, Maine, Michigan, Minnesota, North Dakota, New Mexico, Nevada, New York, Rhode Island, South Dakota, Vermont, and Wisconsin. Alabama and Mississippi expressly permitted indirect purchaser suits prior to *Illinois Brick*. See Ala. Code § 6-5-60 and Miss. Code Ann. § 75-21-9.
antitrust law. Eventually, the Supreme Court also reacted to *Illinois Brick*, narrowing the scope of its rule at the federal level.

2. Judicial: *California v. ARC America*

Twelve years after the *Illinois Brick* decision, the Supreme Court refined the *Illinois Brick* rule without overruling it. The Court in *California v. ARC America Corp.* decided that *Illinois Brick* does not preempt states from permitting indirect purchasers to recover for violations of state antitrust law. In doing so, the Court overturned District and Ninth Circuit Court rulings, which rendered indirect purchasers statutes as preempted for frustrating congressional intent as interpreted in *Illinois Brick*.

In *ARC*, attorneys general on behalf four states and their respective government entities brought suit together as indirect purchasers of cement and concrete in federal court. The parties reached a settlement that covered both federal and state law claims. A conflict arose between direct purchasers and states over the distribution of class action settlement proceeds, and the case was ultimately heard by the Supreme Court. Since indirect purchasers are not permitted to sue for damages under the Sherman Act, the Court was left with the issue of whether the rule limiting recoveries under federal law also prevents indirect purchasers from recovering damages flowing from violations of state law.

In reaching a decision, the Court looked to the “path” carved out by previous pre-emption cases, stating:

First, when Congress intends that federal law occupy a given field, state law in that field is preempted. Second, even if Congress has not occupied the

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42 Id.
43 Id.
field, state law is nevertheless pre-empted to the extent it actually conflicts with federal law, that is, when compliance with both state and federal law is impossible. In this case, in addition, appellees must overcome the presumption against finding preemption of state law in areas traditionally regulated by the States...given the long history of state common law and statutory remedies against monopolies and unfair business practices, it is plain that this is an area traditionally regulated by the States.44

In light of these principles, the precedent was set against the Court finding that federal antitrust laws pre-empt state antitrust laws. One of the strongest arguments against finding for California was the incompatibility of state indirect purchaser statutes with Illinois Brick; “permitting indirect purchaser recoveries [would] pose an obstacle to the accomplishment of the purposes and objectives of Congress.”45 However, the Court rejected this position. First, it found that state antitrust laws permitting recoveries for indirect purchasers are consistent with the general purposes of federal antitrust laws because they deter anticompetitive conduct and ensure that victims are compensated.46 Second, Illinois Brick is not directly applicable to ARC; the Illinois Brick decision construed the federal antitrust laws, while ARC defined the interrelationship between the federal and state antitrust laws.47 Thus, the Court determined that neither the intent of Congress nor the limited holding Illinois Brick preempts states from permitting indirect purchasers to recover for violations of state antitrust law.

a. ARC’s impact

The ARC decision was groundbreaking for allowing both federal and state forms of recovery to direct and indirect purchasers. It “reopened the door to a phenomenon in American antitrust law that had not played a significant role since the advent of the

44 Id. at 100-101.
45 Gavil, supra note 38, at 868 (citing ARC Am. Corp., 490 U.S. at 102).
46 ARC Am. Corp. 490 U.S. at 103.
47 Id. at 105.
Sherman Act—remedial diversity.” As a result of the ARC Court’s endorsement of state antitrust laws coexisting with federal antitrust laws, state antitrust litigation has developed in a range of new areas, one of which is state litigation in the pharmaceutical industry.

The *FTC v. Mylan Laboratories, Inc.* is illustrative of recent federal judicial responses to multistate cases brought by attorneys general on behalf of indirect purchasers, as well as the general debate over the viability of state indirect purchaser statutes.

**IV. The Current Treatment of Indirect Purchaser Statutes: *FTC v. Mylan Laboratories***

Against the back-drop of *Illinois Brick*, the *FTC v. Mylan Laboratories, Inc.* case is unique in the sense that the court allowed the FTC to seek restitution and disgorgement profits, and broadened its original reading of indirect purchaser statutes. By allowing indirect purchasers to recover, the court reaffirmed the authority of attorneys general to bring suit on behalf of indirect purchasers in federal court multistate litigation. Today, *Mylan* provides a procedural template for multistate indirect purchaser actions, and the resulting criticism and praise of the case indicates the types of improvements that need to be made to future multistate indirect purchaser actions.

In *Mylan*, thirty-three states, by their respective attorneys general, and the Federal Trade Commission (“FTC”) alleged that Mylan Laboratories, Inc. entered agreements that prevented competitors’ access to the Active Pharmaceutical Ingredients (“API”) of lorazepam and clorazepate, both of which are popular anti-anxiety drugs. Mylan, the second largest generic drug manufacturer in the U.S., contracted with API suppliers for exclusive ten-year licenses that would provide Mylan with complete control over the

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48 Gavil, supra note 38, at 869.
manufacturers’ entire supply of the active ingredients for lorazepam and clorazepate.51 In return for the exclusive licenses, Mylan offered to pay the API suppliers a percentage of gross profits on sales of the Mylan drugs, irrespective of from whom Mylan purchased the API.52 After the agreements were made, Mylan raised its price of clorazepate tablets to State Medicaid programs, wholesalers, retail pharmacy chains, and other customers by anywhere from 1,900 percent to 3,200 percent.53 Mylan then raised its price of lorazepam tablets by amounts anywhere from 1,900 percent to 2,600 percent.54 In other words, a bottle of lorazepam rose from approximately $7.30 to $190.00.55 Normally, generic drugs are a cheaper cost alternative to consumers. However, when Mylan began collecting enormous profits on these drugs, consumers were forced to cease using them, despite the danger to patients who discontinue their treatment too quickly after being on the drugs for long periods of time.56 As Connecticut Attorney General Blumenthal, a leading authority on the case, observed, “the fact that these drugs are anti-anxiety medications frequently prescribed for nursing home and hospice patients, including those suffering from long-term debilitating conditions such as Alzheimer's Disease, makes Mylan's predatory actions even more unconscionable.”57 With overcharge injuries of such magnitude, the unfairness of a system that limits recovery solely to direct purchasers at the expense of indirect purchasers becomes all the more apparent.

51 Id. at 34.
52 Id.
53 Id.
54 Id.
56 Id. “Mylan’s illegal conduct deprived some consumers of access to these important drugs and put some consumers’ health at risk.”
The first Mylan action was brought by the FTC under § 13(a) of the Federal Trade Commission Act58 (“FTC Act”), alleging that the defendants “engaged and are engaging in unfair methods of competition in or affecting commerce in violation of § 5(a) of the FTC Act, 15 U.S.C. § 45(a).”59 The FTC sought to permanently enjoin the defendants from engaging in such conduct, rescind the defendants’ unlawful licensing agreements, and order other equitable relief, including disgorgement.60 The second action was filed on the same day as that of the FTC; state attorney generals of fifteen states filed a parallel suit against Mylan in the same court for violations of §§1 and 2 of the Sherman Act and various supplemental state antitrust laws.61 Seventeen additional states and the District of Columbia subsequently joined the case. The way in which Mylan unfolded indicates that the fact that states filed at the same time was no mere coincidence; states recognized how their shared local issues fit into the larger national phenomenon and joined together to address the problem. Stephen Calkins recognizes this type of familiarity with local issues as a comparative advantage, which states have over the federal government in multistate antitrust cases (discussed below).

In Mylan, state attorneys general used their parens patriae capacity on behalf of natural persons, states’ economies, and injured purchasers under state Medicaid and other programs.62 States requested that the Court enjoin the defendants from violating §§ 1 and 2 of the Sherman Act, permanently enjoin the defendants from engaging in such conduct, rescind the defendants’ unlawful licensing arrangements, award treble damages, award

59 Mylan, 62 F.Supp.2d at 32.
60 Id.
61 Id.
62 Id.
appropriate relief to indirect purchasers under state statutes, and order other equitable relief under federal law, including disgorgement and restitution.\footnote{Id. at 33-34.}

\textit{Mylan} provides two indications of the viability of indirect purchaser recovery mechanisms. First, the court assumed that the FTC has authority to seek recovery on behalf of indirect purchasers. The FTC sough $120 million in restitution and disgorgement of profits, claiming that this was the amount by which Mylan profited from illegally overcharging for its drugs.\footnote{Federal Trade Commission, \textit{Mylan}, supra note 55.} The court concluded that Section 13(b) of the FTC Act gave the Commission authority to seek restitution and disgorgement of profits.\footnote{\textit{Mylan}, 62 F.Supp. 2d at 36-37.} This decision was ground-breaking because it was the first time a court permitted the FTC to seek such relief in an antitrust case, especially since Section 13(b) does not expressly provide for equitable monetary relief.\footnote{Ivy Johnson, \textit{Restitution on Behalf of Indirect Purchasers: Opening the Backdoor to Illinois Brick}, 57 Wash. \\& Lee L. Rev. 1005, 1007 (2000).} In fact, until Mylan, no court had considered whether the FTC could seek equitable monetary relief in a case involving unfair methods of competition.\footnote{Id. at 1010.} Though the FTC sought to recover this money on behalf of indirect purchasers, the court did not expressly permit the FTC to do so.\footnote{See FTC v. Mylan Labs., Inc., 99 F.Supp. 2d 1, 5 n.2 (D.D.C. 1999) (“[Although no court has addressed the specific issue of restitution on behalf of indirect purchasers,…the Court will assume that the FTC does have the authority to seek such relief.”).} Still, the court assumed that the FTC had the authority to do so.

Second, the court became more willing to permit recovery on behalf of indirect purchasers under state law. Except for states with statutes that expressly permitted indirect purchaser recovery, the court initially barred claims by states on behalf of indirect purchasers. “[U]nless a state has specifically instituted a right of action for indirect
purchasers, that state cannot sue on behalf of indirect purchasers."69 The court’s reasoning was that because federal antitrust law bars damages claims on behalf of indirect purchasers and state laws prompt courts to follow federal statutes and decisions, states should not recover on behalf of indirect purchasers without a state law expressly granting that right.70 Upon interpreting state laws, Judge Hogan held that only about two dozen states had stated claims and the others were rejected.

Following the court’s initial ruling, a number of states sought reconsideration for their claims under their “Little FTC Acts” in FTC v. Mylan Labs., Inc,71 The states argued that the court erroneously relied on Illinois Brick to preempt state laws addressing the rights of indirect purchasers, in violation of the principles set forth in ARC.72 In response the court granted fourteen states’ motions.73 In doing so, the court noted that, contrary to the states’ argument, the ARC Court did not hold that state courts were forbidden from relying on Illinois Brick as “persuasive authority.”74 Still, the court agreed to review its prior ruling against state-level indirect purchaser recovery.

In reconsidering states’ indirect purchaser statutes, the court adopted a more permissive view of states’ Little FTC Acts and consumer protection laws. The court used its holding that the FTC could seek equitable monetary remedies as a basis for permitting states with Little FTC Acts to seek restitution on behalf of indirect purchasers. In addition, the court allowed states with consumer protection acts similar to the FTC Act to assert equitable claims on behalf of indirect purchasers. “[T]he Court will reassess its rulings in

69 Mylan, 62 F.Supp. 2d at 43.
70 Id.
72 Id. at 4.
73 The court granted the motions of Alaska, Arkansas, Connecticut, Florida, Kentucky, Louisiana, Maine, North Carolina, Ohio, Oklahoma, South Carolina, Utah, Vermont, and West Virginia. See Mylan, 99 F.Supp. 2d at 6-16.
respect to state statutes that explicitly reference, or are modeled after, the FTC Act, or that otherwise permit the state to pursue equitable remedies.”

In doing so, the court allowed states, such as Ohio, to recover if they had consumer protection laws that permitted attorneys general to obtain restitution for indirect purchasers. O’Connor views the court’s decision as a “very significant” one that “emboldened states to start scouring their state laws to find an indirect right of recovery buried in their statutes,” while states such as New York, Nevada, and Oregon, “seeing the clear trend, started passing indirect purchaser legislation.”

Ultimately, *Mylan* was settled for a payment of $147 million to be used for compensation to both private and governmental indirect purchasers. The case was notable for establishing both the FTC’s authority to obtain disgorgement under Section 13(b) of the FTC Act and states’ authority to obtain indirect damages and restitution.

Since the states worked closely together with the FTC in the case, the FTC deferred to the states in the distribution of the settlement funds. Under terms of the settlement, $72 million was made available for nationwide distribution to individual consumers injured by the price increases. In order to obtain a refund for a portion of what they paid for the drugs, consumers had to meet three conditions:

1. Consumer must have purchased lorazepam or clorazepate in 1998 or 1999;
2. Consumer must not have been fully reimbursed by any insurance company or government program;
3. Consumer must have submitted a valid claim to the claims administrator by September 29, 2001.

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75 *Id.* at 5.
76 Email from Kevin O’Connor, *supra* note 8.
The parameters of the settlement agreement were created to encompass those victimized by Mylan’s inflated prices. As stated by Vermont Attorney General Sorrell, “this settlement returns funds to consumers harmed by these illegal pharmaceutical pricing practices.”

While some experts framed this synthesis of the FTC disgorgement remedy with the state indirect purchaser remedies as a “fruitful method of federal and state cooperation in the future,” others felt that the combination would create inconsistencies between state antitrust laws and Little FTC Acts in some states. Such conflicting views on the Mylan case provide a window into a wider debate about attorneys general bringing federal court suits on behalf of indirect purchasers under state statutes.

V. The Viability of Indirect Purchaser Statutes; Where are subsequent actions likely to leave us?

Given the current controversy over indirect purchaser antitrust claims brought in federal court and the proliferation of court decisions granting restitution to indirect purchasers, there appears to be a promising future for the ability of attorneys general to bring claims on behalf of indirect purchasers in multistate actions. In light of current controversy and courts’ growing permissiveness toward restitution on behalf of indirect purchasers, Davis’ inquiry, “if, indeed, time has eroded Illinois Brick’s policy foundations, then perhaps the time has come for the Supreme Court to take a fresh look at the indirect purchaser doctrine,” appears to answer itself. When the Supreme Court does examine the issue, it is likely to take both cases like Mylan and arguments made by authorities who

80 Id.
81 O’Connor, supra note 15, at 37.
82 Johnson, supra note 66, at 1039.
83 See Davis, supra note 3.
support such actions into consideration while determining that *Illinois Brick* is ill-founded and outdated.

**A. The argument that the *Illinois Brick* rule should remain.**

The *Mylan* decision added fuel to the ongoing debate over indirect purchaser statutes. Today’s arguments against restitution on behalf of indirect purchasers in multistate cases brought in federal court are reminiscent of those presented in the *Illinois Brick* decision. However, a growing number of authorities support indirect purchaser recovery and, accordingly, the consolidation of nationwide indirect purchaser claims in federal court.

In line with the *Illinois Brick* decision, critics continue to claim that permitting restitution to indirect purchasers under state law will result in multiple liability for defendants, complexity, and the discouragement of private antitrust suits. For example, Judge Posner “would like to see…the states stripped of their authority to bring antitrust *[parens patriae]* suits, federal or state,” in part because “states do not have the resources to do more than free ride on federal antitrust litigation, complicating its resolution.”84 Similarly, Deputy Assistant Attorney General Deborah Platt Majoras identifies states’ authority to bring *parens patriae* antitrust suits as problematic. Majoras worries that the states’ role “adds a significant layer of uncertainty for businesses in consideration of possible mergers and in their business conduct,” and proposes that since antitrust matters have grown increasingly national in scope, “states should confine their role to local or perhaps regional antitrust issues.”85

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In the context of *Mylan*, some feel that the decision gives rise to “the very problems the Supreme Court sought to avoid in *Illinois Brick*.”\(^8\) Ivy Johnson, in *Restitution on Behalf of Indirect Purchasers: Opening the Backdoor to Illinois Brick*, highlights a “problem” that went unexamined in *Illinois Brick*, the issue of inconsistencies among state laws. According to some, the fact that injury among indirect purchasers is often widely dispersed and individual claims are relatively small makes indirect purchaser claims better suited for class actions.\(^7\) Yet, state courts often find that indirect purchasers do not meet the requirements for class certification.\(^8\) When cases are instead brought in the “dual state-federal system of antitrust enforcement permitted by *ARC America*,” courts will be left to reconcile inconsistent state indirect purchaser statutes.\(^9\) Johnson explains that courts’ reconciliation of inconsistent statutes may then vary and the end result, in turn, will be inconsistent rulings.\(^9\)

For example, Connecticut’s Antitrust Act lacks an express provision that defendants’ liability for antitrust overcharges extend to indirect purchasers. Because the Connecticut Antitrust Act instructs that interpretations given by federal courts to federal antitrust statutes should guide courts in construing its provisions, courts applying Connecticut law are likely to follow *Illinois Brick* and bar indirect purchasers from recovering for violations of the Connecticut statute.\(^9\) Still, in *Mylan*, the court permitted

\(^{8}\) *Id.* at 1008.


\(^{8}\) See Johnson, *supra* note 66, at 1038.

\(^{9}\) *Id.* at 1038-39. State statutes vary with respect to whom standing is granted, the procedural devices available to plaintiffs, the amount of damages that are recoverable, the requisite proof of damages, and available defenses. *See* Joel M. Cohen and Trisha Lawson, *Navigating Multistate Indirect Purchaser Lawsuits*, 15-SUM Antitrust 29, 30 (2001).

\(^{9}\) *Id.*
Connecticut to seek restitution on behalf of indirect purchasers. Johnson predicts the type of inconsistency between Connecticut’s statutory text and the decision in *Mylan* is indicative of other states “grapp[ling] with similar problems”; courts will rely upon different interpretations, thereby leading to inconsistent outcomes.\(^{92}\) The issue Johnson describes is cyclical in nature. There will inevitably be inconsistencies among state and federal courts’ interpretations of a particular state’s statute. Then, the problem is compounded in the context of subsequent multistate cases brought in federal court; courts will be left to reconcile both the textual variances among different state statutes, as well as courts’ inconsistent interpretations of them.

Due to these inconsistencies, Johnson claims the implications of the *Mylan* decision “extend well beyond the risk of multiple liability and complexity” raised in *Illinois Brick* and concludes, “for these reasons, *Mylan* was wrongly decided.”\(^{93}\) Against the back drop of the potent, conclusive arguments of authorities such as Posner, Majoras, and Johnson, it may be difficult to envision equally convincing counter-arguments. However, the proliferation of both cases and arguments in support of attorneys general’s authority to bring state claims on behalf of indirect purchasers in federal court indicate a promising future for indirect purchaser recovery.

**B. The argument that courts and legislatures should continue to progress away from the *Illinois Brick* rule.**

Though the increasing availability of indirect purchaser damages in state courts has raised some of the same concerns that informed the *Illinois Brick* majority, many look

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\(^{92}\) Id.

\(^{93}\) Id. at 1041.
beyond those concerns. As stated by Joel M. Cohen and Trisha Lawson, of the law firm Davis Polk & Wardwell, “multistate antitrust lawsuits brought on behalf or indirect purchasers…have become an increasingly important part of the antitrust landscape.”\footnote{See Cohen, supra note 88, at 29.} In the process of bringing settlements for hundreds of millions of dollars to injured consumers, plaintiffs and attorneys general have begun to show that the concerns raised in \textit{Illinois Brick} were unwarranted.

Using \textit{Mylan} and \textit{In re Vitamins}\footnote{2000 WL 1511376 (D.D.C. Oct. 6, 2000).} to substantiate his argument in the article, \textit{Is the Illinois Brick Wall Crumbling?}, O’Connor enumerates the ways in which the concerns cited by the \textit{Illinois Brick} majority were ill-founded. First, defendants have not been subjected to multiple liability beyond the treble damages permitted under federal and many state laws.\footnote{See O’Connor, supra note, at 37.} To the contrary, recent cases, such a \textit{Mylan}, have shown that defendants paid less than single damages to the combined federal and state plaintiffs.\footnote{Id. O’Connor also notes the \textit{Vitamins} case, where the six defendants paid approximately 2.5 a reasonable estimate of the single damage overcharge. However, even though \textit{Vitamins} represents a defendant’s “worse case” scenario, the amount paid by defendants “look[s] paltry when one takes into account the time value of money and other factors reflecting an accurate measure of the economic harm caused by illegal cartels.” \textit{Id.} at 37-38.} Second, apportioning damages between direct and indirect purchasers is manageable against a backdrop of procedural standards.\footnote{Id. at 37-38.} O’Connor admits that apportioning damages precisely may be a “daunting task,” however, now that a critical mass of states have adopted rights of actions for indirect purchasers, the increasing uniformity in procedures has made and will make litigation “fairer and more manageable.”\footnote{Id. 2000 WL 1511376 (D.D.C. Oct. 6, 2000); 138 F.Supp.2d 25 (D. Me., 2001); 2001 WL 493244 (M.D.Fla. Feb. 8, 2001),} As more indirect purchasers assert their state law claims in federal courts, pass-on calculations will become increasingly
commonplace and efficient.\textsuperscript{100} Finally, the impression that indirect purchasers lack sufficient incentives to sue so as to deter antitrust violators has been transformed. Private plaintiffs and attorneys general have increasingly sought such relief under state law, as evidenced by cases like \textit{Mylan, In re Vitamins, In re Compact Disc,} and \textit{In re Disposable Contact Lens.}\textsuperscript{101} O’Connor reasons:

If a right of action for indirect purchasers had been available under federal law, we undoubtedly would have seen a substantial development and streamlining of such practice in the federal system. In fact, it is likely that indirect purchasers are perhaps more likely to bring suit than direct purchasers, given their lack of a direct business relationship with the alleged violator.\textsuperscript{102}

Surveying recent cases, as O’Connor does, makes evident the ways in which the \textit{Illinois Brick} “cried wolf” when faced with indirect purchaser claims.

Beyond overcoming the criticisms of \textit{Illinois Brick}, cases brought by state attorneys generals on behalf of indirect purchasers have also made apparent several comparative advantages. Stephen Calkins, in \textit{Perspectives on State and Federal Antitrust Enforcement}, refutes Posner’s critique of states’ authority to bring both state and federal antitrust suits by discussing three main comparative advantages that states have over federal enforcers. They are: (1) familiarity with local markets; (2) familiarity with and representation of state and local institutions; and (3) ability to send money to injured individuals.\textsuperscript{103}

First, state attorneys general are better able to bring antitrust suits on behalf of direct and indirect purchasers because they have more firsthand experience with local

\textsuperscript{100} See Connors, \textit{supra} note 7, at 863.
\textsuperscript{101} Id.
\textsuperscript{102} Id. at 38.
\textsuperscript{103} See Calkins, \textit{supra} note 5, at 679-80.
markets than do federal antitrust enforcers. \textsuperscript{104} Even the Antitrust Division of the Department of Justice has recognized that, in some circumstances, it is logical for states to take the lead in challenging conspiracies in localized markets. \textsuperscript{105} Second, state attorneys general are more likely than federal enforcers to have relationships with and the trust of state and local government officials; they are uniquely situated to help prevent anticompetitive harm from being inflicted on or by government agencies. \textsuperscript{106} Third, state attorneys general are better able to compensate individuals because they are able to recover money for injured individuals in two ways. Attorneys general can recover overcharges exacted from state purchasing operations because states implicitly represent taxpayers. \textsuperscript{107} In addition, attorneys general are the only government officials specifically authorized by federal statute, 15 U.S.C. § 15(c), to recover monetary relief for those injured by Sherman Act violations. \textsuperscript{108} Armed with these two means for compensating injured individuals, state attorneys general have more extensive remedies than does the federal government. The observations brought by O’Connor, Calkins, and other leading authorities show that there is no longer a need to hold the concerns expressed in \textit{Illinois Brick} and highlight the crucial role states play in bringing recovery to injured indirect purchasers.

\textbf{VI. The Future of Indirect Purchaser Restitution}

The trend since \textit{Illinois Brick} suggests that there is a future role for state indirect purchaser recovery in federal antitrust litigation. The success of state attorneys generals

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\textsuperscript{104} Id. at 109.\
\textsuperscript{105} Id. (referencing \textit{Protocol for Increased State Prosecution of Criminal Antitrust Offenses}, 70 Antitrust & Trade Reg. Rep. (BNA) 362 (1996)).\
\textsuperscript{106} Id. at 110.\
\textsuperscript{107} Id. at 111.\
\textsuperscript{108} Id.
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and private plaintiffs in bringing indirect purchaser actions has caused some negative reactions, including calls for the elimination of indirect purchaser recovery. Yet, rather than focusing on eliminating indirect purchaser recovery for the ill-founded reasons given in *Illinois Brick*, the focus should instead be how to improve the system since the increasing occurrence of successful cases like *Mylan* suggest that multistate litigation involving indirect purchaser actions are here to stay. States can and should continue to seek methods of increasing the efficiency of multistate litigation. Both supporting and opposing authorities who write on indirect purchaser restitution agree that improvements are needed. As Connors notes, “[a]lthough the present system appears to work reasonably well, a better-synchronized federal/state regime, premised on repeal of *Illinois Brick*, presents a possible future alternative.”

Streamlining the coordination of multistate litigation depends on a wide range of factors. While some factors, such as willingness of plaintiffs, counsel, attorneys general, and courts to cooperate with one another, cannot be easily controlled, some may be accomplished through the implementation of procedural guidelines. Improving the system is especially important given that the public’s growing recognition of cases dealing with indirect purchaser recovery is bound to encourage future claims. There are several propositions.

One suggestion is that, before attempting coordination, it may be more efficient for defendants to litigate aggressively in states where plaintiffs’ claims are weakest. If plaintiffs litigate aggressively first in states where their claims are strongest, then they will create unfavorable momentum for defendants. Such a trend may discourage defendants

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early on, leading to quicker settlements. Encouraging settlement may be the best course of action for plaintiffs and defendants; multistate settlements allow defendants to obtain broader peace, reduce the litigation costs for both parties, and minimize disruption for clients.

A second, and more obvious, suggestion is to establish a good working relationship with the other side. Involving all relevant decision makers early on in the coordination process improves the likelihood of establishing good working relationships and coordination. The National Association of Attorneys General (NAAG) may be able to help states to better communicate with each other, and with defendants. In doing so, parties may be able to negotiate case management orders that provide for the sharing of discovery.

A third suggestion is to reduce the disparity among state laws, which should help to improve the coordination of multistate litigation and any resulting settlements. O’Connor notes that because of variations in state laws, it is possible that indirect purchasers in some states could obtain substantial recoveries and in others, nothing. This statement emphasizes the importance of narrowing the gaps between state laws. Authorities on the matter do not appear to have suggestions for achieving greater uniformity. Perhaps the most powerful incentive for state legislatures, which do not permit restitution for indirect purchasers, to change their laws would be further illustration that the concerns raised by the majority in Illinois Brick are ill-founded. Subsequent well-organized multistate

112 Id.
113 Id. Cohen acknowledges that a downside to settlement is that attempting to negotiate a multistate settlement may blur important distinctions among state laws. Still, coordination is beneficial to both sides.
114 Id. at 33.
115 See Calkins, supra note 5, at 679.
116 See Cohen, supra note 88, at 33.
117 See O’Connor, supra note 15, at 35.
litigation will yield such illustration. The suggestion that greater uniformity among state statutes would improve the system is a rather conditional one because it may depend on state legislatures observing improvements in the system first. However, it is an important one to keep in mind.

Finally, devising clear rules for apportioning damages among direct and indirect purchasers would improve the fairness and efficiency of multistate litigation involving indirect purchaser actions. O’Connor observes, “it seems logical to consolidate both direct and indirect actions in federal court with some clear rules on allocating damages among different layers of purchasers.”\textsuperscript{118} One main issue that needs attention is how to accomplish this in a manner fair to end-users who “usually bear the brunt of the overcharge but have the hardest time showing the pass through.”\textsuperscript{119} Though there is presently no known way to address this issue, the establishment of a clear set of rules will at least eliminate arbitrary damage apportionment and promote efficiency.

Given the increasing number of indirect purchaser claims in federal antitrust cases and courts’ increasing permissiveness toward restitution on behalf of indirect purchasers, the Supreme Court’s review of the indirect purchaser doctrine established by \textit{Illinois Brick} is overdue, as journal editor Ronald Davis suggests.\textsuperscript{120} The Supreme Court should take the opportunity, when next presented with one, to formulate a new rule. However, in the meantime, states should continue to increase the efficiency of multistate litigation using the methods described above. In doing so, states can build upon the success of \textit{Mylan} and create more opportunities for injured indirect purchasers to recover.

VI. Conclusion

\textsuperscript{118} Kevin O’Connor, supra note 8.
\textsuperscript{119} Id.
\textsuperscript{120} Davis, supra note 3.
By examining the role of attorneys general in multistate antitrust cases, tracing the history of federal courts’ treatment of state indirect purchaser statutes, and focusing on both the recent trend in indirect purchaser actions and the current controversy through the lens of FTC v. Mylan Laboratories, Inc., it is evident that there is a future role for state indirect purchaser recovery in federal antitrust litigation. As Calkins points out, state attorneys general play a crucial role in the future of multistate antitrust litigation, due to their comparative advantages. Though the Supreme Court should reconsider Illinois Brick and formulate a new rule that permits recovery on behalf of indirect purchasers, there is no need for states to postpone making improvements to the orchestration of multistate indirect purchaser actions. The Mylan case provides a procedural template for such actions, and the resulting criticism and praise of the case indicates the types of improvements that need to be made to future multistate indirect purchaser actions. The controversy sparked by Mylan has made evident a range of needed improvements; litigation should be undertaken in states where claims are weaken before national level settlements are reached, parties should emphasize communication and strong working relationships between one another, the disparity between state laws should be reduced, and clear rules for apportioning damages between direct and indirect purchasers should be established. The call for improvements in orchestrating multistate litigation involving indirect purchaser actions is not an indication that the indirect right of recovery should be eliminated; rather, it is an indication that our focus should be how to consolidate actions in federal court with clear guidelines that improve efficiency.