Circuit Split Cracks the Foundation of Illinois Brick: The Co-Conspirator Exception's Circuit Split Exposes Need to Overturn Illinois Brick's Indirect Purchaser Rule But Uphold Hanover Shoe

By: Stephen Kerstein

CIRCUIT SPLIT CRACKS THE FOUNDATION OF ILLINOIS BRICK: THE CO-CONSPIRATOR EXCEPTION'S CIRCUIT SPLIT EXPOSES NEED TO OVERTURN ILLINOIS BRICK'S INDIRECT PURCHASER RULE BUT UPHOLD HANOVER SHOE[*]

I. INTRODUCTION

The United States Supreme Court confronting a circuit split is the legal world's version of a traveler coming upon the proverbial fork in the road. Federal circuit courts reach differing interpretations to the same legal question and the Supreme Court decides which interpretation is the correct direction for federal law to follow.[1] This Comment considers a circuit split with two unsatisfactory interpretations of antitrust law's "co-conspirator exception."

The co-conspirator exception has not presented a fork in the road, it has exposed a dead end. This Comment argues that both the "price-fixing-only" interpretation and the "all-vertical-conspiracies" interpretation of the co-conspirator exception expose fundamental and irreconcilable inconstancies with the rule they claim to be an exception to—the "indirect purchaser rule." This Comment posits that the Supreme Court should pick neither direction the fork purports to offer, but rather make a U-turn and finally overturn the indirect purchaser rule.

The indirect purchaser rule says that indirect purchasers do not have standing to collect damages for federal antitrust law violations.[2] The rule has a defensive counterpart—the "passing-on" or "pass-on" defense prohibition.[3] The pass-on defense prohibition precludes defendants from raising the fact that a direct purchaser passed on damages to the defendant's indirect

---

[*] Stephen Kerstein, J.D. Candidate, Temple University James E. Beasley School of Law, 2022.
[1] *See* SUP. CT. R. 10(a).
[2] PHILLIP E. AREEDA (LATE) & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 346a (4th Edition, 2020 Cum. Supp. 2013-2019).
[3] *Id.* at ¶ 346b.

purchaser as a defensive posture in federal antitrust litigation.[4] An indirect purchaser is one who is separated from an antitrust-violating seller by at least one intermediary in a distribution chain.[5]

The foundation of the co-conspirator exception to the indirect purchaser rule is that in certain conspiracies, the first non-conspiring member in the distribution chain has standing to collect damages from any of the conspiring parties, not just the party it directly purchased from.[6] In some circuits this exception is recognized for price-fixing conspiracies only, while other circuits acknowledge the exception for all vertical conspiracies.[7] This Comment's thesis is that rather than resolve the circuit split directly, the Court should overturn the indirect purchaser rule while keeping the pass-on defense prohibition.

Section II of this Comment provides an overview of jurisprudence on the co-conspirator exception. Section III first argues that the Supreme Court's recent opinion in *Apple v. Pepper*,[8] dismisses the legitimacy of the price-fixing-only interpretation.[9] Section III then argues that the all-vertical-conspiracies interpretation upends the balance of competing interests that the Court tried to strike by creating the indirect purchaser rule. Finally, Section III analyzes three potential

---

[4] *Id.*
[5] Kansas v. Utilicorp United, Inc., 497 U.S. 199, 207 (1990).
[6] *See* Karen Hoffman Lent & Kenneth Schwartz, *Differing Views on the Co-Conspirator Exception to the Indirect Purchaser Rule; Antitrust Trade And Practice*, 264; No. 92 N.Y. L.J. (EXPERT ANALYSIS) p.3 col.1 (2020).
[7] *Compare, e.g.*, *Dickson v. Microsoft Corp.*, 309 F.3d 193, 215 (4th Cir. 2002) ("[Plaintiff] asserts that [prior cases recognizing the co-conspirator exception] stand for the proposition that *Illinois Brick* is inapplicable when any conspiracy has been alleged, but we interpret these cases as standing for the more narrow proposition that *Illinois Brick* is inapplicable to a particular type of conspiracy -- price-fixing conspiracies.") with *Marion Healthcare LLC v. Becton Dickinson & Co.*, 952 F.3d 832, 837 (7th Cir. 2020) ("The district court agreed with Becton that the *Illinois Brick* rule applied on these facts and that dismissal was therefore required. It found the conspiracy rule inapplicable not because of any failure to plead conspiracy adequately, but because the case did not involve simple vertical price-fixing. This, we conclude, was in error.").
[8] 139 S. Ct. 1514 (2019).
[9] *Pepper*, 139 S. Ct.

solutions to this problem, and concludes that the best possible solution for balancing the competing interests at play is for the Supreme Court to overturn the indirect purchaser rule but keep the pass-on defense prohibition.

II. OVERVIEW

"*[A]ny* person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue" their injurer.[10] This is the command of Section 4 of the Clayton Antitrust Act of 1914.[11] *Hanover Shoe v. United Shoe Machinery*,[12] and *Illinois Brick v. Illinois*,[13] are two seminal Section 4 cases.[14] In *Hanover Shoe*, the Supreme Court held that a seller cannot raise the fact that a direct-purchaser plaintiff passed on overcharges down the distribution chain as a defense to federal antitrust allegations.[15] In *Illinois Brick* the Court created the indirect purchaser rule.[16] The indirect purchaser rule prohibits indirect purchasers from collecting damages arising out of federal antitrust violations.[17]

A circuit split has emerged regarding the scope of the indirect purchaser rule's co-conspirator exception.[18] In certain cases, where a seller and would-be direct purchaser conspire to violate antitrust law, the co-conspirator exception permits the first non-conspiring member in

[10] Clayton Antitrust Act of 1914 § 4, 15 U.S.C § 15 (2018) (emphasis added).
[11] Clayton Antitrust Act of 1914 § 4, 15 U.S.C § 15 (2018).
[12] 392 U.S. 481 (1968).
[13] 431 U.S. 720 (1977).
[14] *See Ill. Brick*, 431 U.S.; *Hanover Shoe*, 392 U.S.
[15] *Hanover Shoe*, 392 U.S. at 488.
[16] *See Ill. Brick*, 431 U.S. at passim.
[17] *See id*.
[18] Preslav Mantchev, Note, *Another Brick in the Wall: The 'Illinois Brick' Co-conspirator Exception's Treatment by United States Circuit Courts*, 24 ILL BUS. L. J.17, 17 (2018).

the distribution chain to sue any member of the conspiracy.[19] The split concerns whether this exception extends to all types of vertical conspiracies or just price-fixing conspiracies.[20]

This Section details the legal foundation of the co-conspirator exception circuit split. Part II.A outlines Section 4 of the Clayton Antitrust Act. Part II.B sets forth the facts, procedural history, and the Supreme Court's analysis of both *Illinois Brick* and *Hanover Shoe*. Part II.C provides background on the current state of the co-conspirator exception circuit split.

A. Section 4 of The Clayton Antitrust Act

Section 4 of the Clayton Act allows for a private right of action for victims of antitrust violations.[21] It states that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue … and shall recover threefold the damages by him sustained."[22] This means that for every dollar a victim is injured because of an antitrust violation, they can recover three dollars in damages.[23]

When Section 4 says "anything forbidden in the antitrust laws," it is referring to prohibitions expressed primarily in the Sherman Antitrust Act and certain sections of the Clayton Act.[24] For example, a plaintiff may sue a defendant under Section 4 of the Clayton Act because of the defendant's illegal merger under Section 7 of the Clayton Act.[25] The line of cases that this Comment focuses on is grounded in the federal court system's struggle to balance competing

---

[19] *See, e.g.*, *Marion Healthcare LLC v. Becton Dickinson & Co.*, 952 F.3d 832, *passim* (7th Cir. 2020).
[20] Lent & Schwartz, *supra* note 6.
[21] Clayton Antitrust Act of 1914 § 4, 15 U.S.C § 15 (2018).
[22] *Id.*
[23] *Id.*
[24] *Id.* § 1 (defining "antitrust laws").
[25] *Id.* §§ 4, 7.

antitrust principles when interpreting the "any person who shall be injured" wording in Section 4.

B. Seminal Cases: Hanover Shoe And Illinois Brick

Hanover Shoe v. United Shoe Machinery, and its complementing successor, *Illinois Brick v Illinois*, are two seminal Section 4 cases that interpret the Clayton Act's "any person who shall be injured" language.[26] These two cases establish the foundational rules that the co-conspirator exception purports to be an exception to.[27]

This part proceeds in two subparts. Part II.B.1 discusses *Hanover Shoe* and the pass-on defense prohibition. Part II.B.2 discusses *Illinois Brick* and its creation of the indirect purchaser rule.

1. Hanover Shoe v. United Shoe Machinery

In *Hanover Shoe* the Supreme Court held that a seller-defendant cannot raise the fact that the direct-purchaser-plaintiff passed on overcharges down the supply line as a defense to federal antitrust allegations brought under Section 4 of the Clayton Act.[28] This prohibited defense is known as the "pass-on defense."[29]

a) Facts and Procedural History

Respondent, United Shoe Machinery Corporation (United), was a manufacturer of shoe machinery.[30] Petitioner, Hanover Shoe Incorporated (Hanover), was a shoe manufacturer and

[26] *See* Ill. Brick Co. v. Illinois, 431 U.S. 720 (1977); Hanover Shoe v. United Shoe Mach. Corp., 392 U.S. 481 (1968).
[27] *See* Mantchev, *supra* note 18 at 18.
[28] *Hanover Shoe*, 392 U.S. at 488.
[29] *Id.*
[30] *Id.* at 483.

customer of United.[31] Hanover sued United under Section 4 of the Clayton Act for monopolizing the shoe machinery industry in violation of Section 2 of the Sherman Act.[32]

Hanover claimed United's policy of leasing machines but refusing to sell them was an "instrument" of its illegal monopolization of the shoe machinery industry.[33] The crux of this argument was that United's monopoly had resulted in Hanover being overcharged in an amount equal to the price it would have spent on machinery had it been able to purchase the machines, subtracted from the amount it actually spent on machine rentals.[34]

The pertinent part of *Hanover Shoe* is United's argument that Hanover did not actually sustain lost profits because it had "passed on" United's overcharge to its customers.[35] Defensive "pass-on" refers to the concept of a party raising the prices it charges its customers in response to a raise in price from its supplier.[36] United's pass-on theory was rejected by both the Federal District and Circuit Court.[37] Hanover appealed, and the Supreme Court ultimately upheld the lower court's ruling.[38]

b) Court's Analysis

United grounded its challenge in the economic analysis of market elasticity.[39] The Court found that this intensive economic analysis required answers to too many unanswerable

[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *See id.* at 489.
[35] See *id.* at. 487–88.
[36] *Id.*
[37] *Id.* at 488.
[38] *Id.*
[39] *Id.* at 492.

questions and was too difficult to burden courts with.[40] The Court also reasoned that allowing a pass-on defense would substantially mitigate the effectiveness of enforcing antitrust laws.[41]

This was problematic for the Court, which had long recognized Section 4 cases as an integral element in deterring antitrust violations.[42] The majority explained that United's preferred outcome would leave the private right of action solely in the hands of individual shoe buyers.[43] Unlike Hanover, who was damaged in excess of $4,000,000, each individual shoe buyer was only damaged a miniscule fraction of that amount.[44] The majority feared that at each subsequent step down the distribution chain, individual defendants would be less damaged, hold less stake in a potential suit, and therefore be less inclined to bring a Section 4 claim.[45] Based on both the economic analysis and effective enforcement arguments, the Court created the pass-on defense prohibition.[46]

2. Illinois Brick v. Illinois

While *Hanover Shoe* held that defendants in Section 4 suits are prohibited from asserting pass-on theories as a defensive posture in litigation, it left unanswered the question of *offensive* pass-on theories.[47] An offensive pass-on theory is when the plaintiff alleges that the defendant illegally overcharged someone who then passed on some portion of that overcharge to the plaintiff.[48] In *Illinois Brick v. Illinois*, the Supreme Court took up the issue of offensive "pass-

[40] *Id.* at 492-93.
[41] *Id.* at 494.
[42] *See id.*
[43] *See id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] Ill. Brick Co. v. Illinois, 431 U.S. 720, 726 (1977) ("Having decided that in general a pass-on theory may not be used defensively […] we must now decide whether that theory may be used offensively").
[48] *See id.*

on" and held that indirect purchasers may not use offensive pass-on theories.[49] As a result, indirect purchasers do not have standing under Section 4 of the Clayton Act to collect damages for antitrust violations.[50]

a) Facts and Procedural History

Illinois Brick Company (Illinois Brick) and ten other co-defendant-companies were manufacturers of concrete bricks.[51] The Illinois State Government (Illinois) was a customer of general construction contractors, who themselves were customers of subcontractors.[52] Those subcontractors were customers of the manufacturers.[53] Illinois alleged that they were entitled to treble damages under Section 4 of the Clayton Act because the manufacturers had entered into a horizontal price-fixing conspiracy.[54] Even though Illinois had not directly purchased anything from the manufacturers, the contractors and subcontractors had allegedly passed down their overcharges to Illinois.[55]

The District Court for the Northern District of Illinois granted summary judgement to the defendant-manufacturers.[56] It held that Illinois did not have standing under Section 4 of the

[49] *Id.* at 728.
[50] *Id.*
[51] *Id.* at 726.
[52] *Id.*
[53] *Id.*
[54] *Id.* at 726–27. A horizontal price-fixing conspiracy is an agreement among competitors to artificially set or maintain the price of a product, presumably above the price that the product would sell for in a competitive market (a market in the absence of the agreement). DEPARTMENT OF JUSTICE, ARCHIVED ANTITRUST RESOURCE MANUAL: IDENTIFYING SHERMAN ACT VIOLATIONS (2017).
[55] *Id.* at 727–28.
[56] Illinois v. Ampress Brick Co., 67 F.R.D. 461, 468 (N.D. Ill. 1975).

Clayton Act.[57] The Seventh Circuit reversed.[58] The manufacturers appealed, and the Supreme Court reversed and remanded the Seventh Circuit's decision.[59]

b) Court's Analysis

The Court began its analysis by accepting a premise agreed to by both parties: regardless of how the Court decides to treat pass-on theories, defensive and offensive pass-on theories should be given equal treatment, either allow both or neither.[60] The Court still provided reasoning for why the alternative option—upholding *Hanover Shoe* but permitting indirect purchasers to collect damages by raising offensive pass-on theories—would be unacceptable.[61]

First, the Court raised the issue of "duplicative recoveries."[62] If only defensive pass-on was prohibited, an antitrust violator could end up paying substantially more than treble damages.[63] The second rationale given by the Court was that *Hanover Shoe's* holding came largely from the Court's fear of unduly complex economic analyses, and such analyses would also be necessary for proving offensive pass-on theories.[64] The Court explained that it was therefore only logical that if *Hanover Shoe* was wrong and courts were capable of effectively performing this analysis, there would be no rationale for upholding *Hanover Shoe*.[65] If *Hanover*

[57] *Id.* ("The District Court based its grant of summary judgment against the indirect purchaser plaintiffs not on [pass-on], but rather on the ground that these indirect purchasers lacked standing to sue for an overcharge on one product - concrete block - that was incorporated … into an entirely new and different product" (citations omitted)). *Ill. Brick*, 431 U.S. at 728 n.7.
[58] Illinois v. Ampress Brick Co., 536 F.2d 1163, 1165 (7th Cir. 1976).
[59] *Ill. Brick*, 431 U.S. at 748.
[60] *Id.* at 729.
[61] *Id.* at 729–35.
[62] *Id.* at 730–31.
[63] *Id.* at 730. For example, if only defensive pass-on was prohibited, and a direct purchaser passed on an entire $100 overcharge to an indirect purchaser, the direct and indirect purchaser could each collect $300 for a total of $600 (sextuple damages). *See Id.*
[64] *Id.* at 731–33.
[65] *See Id.*

Shoe was upheld, those fears must be accepted as true and as a result, indirect purchasers must be prohibited from using offensive pass-on theories.[66]

In deciding whether to bar indirect purchasers or overturn *Hanover Shoe*, the Court reaffirmed the reasoning that allowing pass-on theories, which most indirect purchaser claims rely on, would make Section 4 proceedings overly complex and ineffective.[67] The Court also found that allowing pass-on claims would likely trigger the need for "compulsory joinder of absent and adverse claimants" under Rule 19 of the Federal Rules of Civil Procedure.[68] Rule 19(a) of the Federal Rules of Civil Procedure requires compulsory joinder of absent and potentially adverse claimants when there are "persons needed for just adjudication."[69] The Court explained that this need is traditionally triggered when the "interest of the defendant in avoiding multiple liability … [the] interest of the absent potential plaintiffs in protecting their right to recover … and the social interest in the efficient administration of justice and the avoidance of multiple litigation" are implicated.[70]

The Court then reasoned that the compulsory joinder requirements and the economic analysis necessary in pass-on theories would be impractical in a Section 4 suit spanning multiple classes and levels in the relevant distribution chain.[71] In reasoning as such, the Court reaffirmed its rationale from *Hanover Shoe*—the burdens associated with allowing pass-on theories would place an insurmountable burden on the need for "effective enforcement of the antitrust laws."[72]

---

[66] *See Id.*
[67] *Id.* at 737.
[68] *Id; see generally* FED. R. CIV. P. 19.
[69] FED. R. CIV. P. 19.
[70] *Id.* at 737–38 (1977).
[71] *Id.* at 740.
[72] *Id.* at 741.

As one final consideration, the Court discussed the ramifications of its decision in relation to one of antitrust law's thematic principles—compensation.[73] Weighing Section 4's competing twin interests—compensation and deterrence—the Court maintained its view that *Hanover Shoe* was correctly decided.[74] The Court acknowledged that "carry[ing] the compensation principle to its logical extreme" would require permitting indirect purchasers to have standing based on pass-on theories.[75] As such, the Court refused to do so.[76] The Court in *Illinois Brick* ultimately concluded that indirect purchasers do not have standing to collect damages under Section 4 of the Clayton Antitrust Act.[77]

C. Co-Conspirator Exception

One "exception" to *Illinois Brick's* indirect purchaser rule is the co-conspirator exception.[78] Sometimes, multiple entities conspire to commit a single antitrust violation.[79] The Federal Circuit Courts that have ruled on this issue (the Third, Fourth, Seventh, Eighth, Ninth, and Eleventh Circuits) are in agreement that when this happens and the type of conspiracy alleged is a vertical-price-fixing conspiracy, *Illinois Brick* does not prevent the first non-conspiring member of the distribution chain (the consumer) from bringing suit against any of the

[73] *Id.* at 746–47.
[74] *Id.* at 748.
[75] *Id.* at 746.
[76] *Id.*
[77] *See id.* at 748.
[78] *See* Areeda (late) & Hovenkamp, *supra* note 2 at ¶346h. The term "exception" is in scare quotes because as this comment goes on to discuss, the co-conspirator exception is really a co-conspirator rule that actually abides by *Illinois Brick's* direct purchaser rule.
[79] *See, e.g.*, Nat'l Football League's Sunday Ticket Antitrust Litig. v. DirecTV, LLC, 933 F.3d 1136 (9th Cir. 2019) (alleging that the National Football League, which produces professional football games, and DirecTV, which purchases the rights to sell television access to those games to its customers as part of NFL Sunday Ticket, conspired to restrict the output of out-of-market football games available for streaming).

conspirators.[80] This is true regardless of whether a given conspirator is immediately upstream from the consumer (the dealer) or further removed from the consumer (the manufacturer).[81]

The Fourth and Eleventh Circuits on one hand, and the Third, Seventh, Eighth and, Ninth Circuits on the other hand, are split over whether this co-conspirator exception applies to all vertical conspiracies or just price-fixing conspiracies.[82]

Scholars on both sides of the split believe that their respective interpretation is not actually an exception to *Illinois Brick*.[83] Rather, they believe that their respective view appropriately follows *Illinois Brick's* bright line holding.[84]

This part proceeds in two subparts. Part II.C.1 discusses the view that the co-conspirator exception applies only to price-fixing conspiracies. Part II.C.2 discusses the alternative view that the co-conspirator exception applies to all vertical conspiracies.

1. Price-Fixing-Only Interpretation

---

[80] *See* Lent & Schwartz, *supra* note 6.This Comment follows Areeda and Hovenkamp's suggestion that "Although the manufacturer need not be the defendant when there are more tiers, it is convenient to describe the actors as manufacturer, dealer, and consumer." Areeda (late) & Hovenkamp, *supra* note 2 at ¶346h. n.61.
[81] *See* Lent & Schwartz, *supra* note 6.
[82] *Id.*
[83] *See, e.g.*, Areeda (late) & Hovenkamp *supra* note 2 at ¶346h; *Sunday Ticket*, 933 F.3d at 1157-58.
[84] *Compare., e.g.*, Areeda (late) & Hovenkamp *supra* note 2 at ¶346h. (adopting the price-fixing-only view that "*Illinois Brick* does not limit suits by consumers against a manufacturer who illegally contracted with its dealers to set the latter's resale price" (Footnote Omitted)), *with* Sunday Ticket, 933 F.3d at 1157-58 (adopting the all-vertical-conspiracies interpretation and stating that "the 'co-conspirator exception is not really an exception at all.'").

Proponents of the price-fixing-only interpretation view the co-conspirator exception as inapplicable to non-price-fixing conspiracies.[85] The Fourth and Eleventh Circuit Courts are the only federal appellate courts to affirmatively hold this position.[86]

In *Dickson v. Microsoft*,[87] plaintiff-debtors alleged multiple non-price-fixing conspiracies.[88] The Fourth Circuit rejected the argument that *Illinois Brick* was inapplicable to all types of conspiracies.[89] The court held that if there is a co-conspirator exception at all, it is limited to price-fixing conspiracies only.[90]

In *Lowell v. American Cynamid Co.*,[91] plaintiff-farmers alleged a vertical-price-fixing conspiracy.[92] The Eleventh Circuit found that the co-conspirator exception for a vertical price-fixing conspiracy was applicable.[93] However, the majority stated that the exception does not apply to non-price-fixing cases.[94]

Advocates of the price-fixing-only interpretation consider the consumer to be the direct purchaser of the dealer but not the manufacturer.[95] Framed in this way, the reasoning behind the price-fixing-only interpretation of the co-conspirator exception can be broken down into three

---

[85] *See* Lent & Schwartz, *supra* note 6.
[86] *Id.*; *see generally* Dickson v. Microsoft Corp., 309 F.3d 193 (4th Cir. 2002); Lowell v. Am. Cyanamid Co., 177 F.3d 1228 (11th Cir. 1999).
[87] 309 F.3d 193 (4th Cir. 2002).
[88] *Dickson* 309 F.3d at 198-99.
[89] *Dickson*, 309 F.3d at 215 ("[Plaintiff] asserts that [prior cases recognizing the co-conspirator exception] stand for the proposition that *Illinois Brick* is inapplicable when any conspiracy has been alleged, but we interpret these cases as standing for the more narrow proposition that *Illinois Brick* is inapplicable to a particular type of conspiracy -- price-fixing conspiracies.").
[90] *Id*.
[91] 177 F.3d 1228 (11th Cir. 1999).
[92] *Cyanamid*, 177 F.3d. at 1228.
[93] *Id.*
[94] *Id. at* 1232.
[95] *See Dickson*, 309 F.3d at 215; *Cyanamid*, 177 F.3d at 1229, 1232.

elements.[96] First, the Supreme Court has directed federal courts not to create new exceptions to the indirect purchaser rule.[97] Second, the indirect purchaser rule only governs cases that might require a pass-on theory.[98] Third, price-fixing cases are the only type of vertical conspiracy case that never requires a pass-on theory.[99]

The remainder of Part II.C.1 examines the reasoning behind each of these three determinations that together produce the price-fixing-only interpretation. Part II.C.1.a discusses the Supreme Court's mandate that lower courts should not create new exceptions to the indirect purchaser rule. Part II.C.1.b describes how some judges and academics have interpreted the indirect purchaser rule as only applying to cases that could potentially require a pass-on theory. Part II.C.1.c explains why price-fixing cases are the only type of vertical conspiracy case that never require pass-on theories.

a) The Supreme Court Has Mandated that Federal Courts Should Not Create New Exceptions to Illinois Brick

In *Illinois Brick*, the Supreme Court only "expressly contemplated two exceptions to the indirect purchaser rule: (1) where the indirect purchaser acquired goods through a preexisting cost-plus contract and (2) 'where the direct purchaser is owned or controlled by its customer.'"[100] The co-conspirator exception falls outside of these two expressed exceptions.[101] The rationale behind the price-fixing-only interpretation of the co-conspirator exception

[96] *See* Lent & Schwartz, *supra* note 6.
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Dickson*, 309 F.3d at 214.
[101] *See Id.*

therefore begins with the argument that the Supreme Court has subsequently urged that no new exceptions to the indirect purchaser rule be recognized.[102]

In *Kansas v. Utilicorp United*,[103] plaintiff-consumers of regulated public utilities sought an exception to the indirect purchaser rule for the public utilities market.[104] The Supreme Court declined to create such an exception.[105] The Court reasoned that even though certain markets might be constructed or regulated in manners that mitigate the complex economic analysis feared in *Illinois Brick*, the process of litigating whether a series of exceptions should apply to a given market would be unduly complex, "unwarranted and counterproductive."[106] While *Utilicorp* can potentially be read as narrowly discouraging carving out specific markets as deserving of an exemption from the indirect purchaser rule, the Federal Courts have interpreted *Utilicorp* as more broadly discouraging the creation of *any* type of *Illinois Brick* exception.[107]

b) Illinois Brick Only Governs Cases That Might Implicate Pass-on

The second step courts tend to take in rationalizing the price-fixing-only interpretation of the co-conspirator exception is to examine what types of situations *Illinois Brick* actually governs.[108] As discussed in Part II.B.2.b, *Illinois Brick* sought to prevent the complicated process of analyzing pass-on theories.[109] Since indirect purchasers usually require pass-on theories to prove damages, the court created the indirect purchaser rule.[110] Courts advocating for the price-

[102] *See, e.g.*, *id.* at 214–15.
[103] 497 U.S. 199 (1990).
[104] *Utilicorp*, 497 U.S. at 199.
[105] *Id.* at 216.
[106] *Id.*at 216–17.
[107] *E.g.*, *Dickson*, 309 F.3d at 214-15.
[108] *See, e.g.*, Nat'l Football League's Sunday Ticket Antitrust Litig. v. DirecTV, LLC, 933 F.3d 1136, 1160-62 (9th Cir. 2019) (Smith J., dissenting).
[109] *See supra* notes 67-71 and accompanying text.
[110] See *supra* notes 67-78 for a discussion on the underlying policy goals behind the indirect purchaser rule.

fixing-only interpretation infer from this that classes of cases that cannot possibly implicate pass-on analysis lie outside the purview of the indirect purchaser rule.[111]

c) Only Price-Fixing Conspiracies Never Implicate Pass-on

The next part of the price-fixing-only interpretation's rationale is that, among vertical antitrust conspiracies, price-fixing agreements have the unique characteristic of never implicating pass-on analyses.[112] In their seminal antirust treatise, Herbert Hovenkamp and the late Phillip Areeda write that in a vertical-price-fixing conspiracy, members of the first non-conspiring level of the distribution chain have standing to collect damages from any conspirator.[113] They reason that "[t]here is no problem of duplication or apportionment, because the consumer is the only party that has paid any overcharge."[114] Without addressing its merits, the *Dickson* majority acknowledged Areeda and Hovenkamp's position but then went on to argue that lack of apportionment considerations are not relevant in other types of vertical conspiracies.[115]

The dissent in *Nat'l Football League's Sunday Ticket Antitrust Litig. v. DirecTV, LLC,*[116] agreed with this rationale from *Dickson*.[117] In *Sunday Ticket* where the majority adopted the all-vertical-conspiracies interpretation of the co-conspirator exception,[118] plaintiffs sued the National

---

[111] *See, e.g.*, *Sunday Ticket*, 933 F.3d at 1160 (Smith J., dissenting) (arguing that *Illinois Brick* does not apply to price-fixing conspiracies but does apply to other types of conspiracies, because price-fixing conspiracies have the unique quality of never implicating pass-on).
[112] See *id*; Lent & Schwartz, *supra* note 6.
[113] Areeda (late) & Hovenkamp *supra* note 2 at ¶ 346h.
[114] *Id*.
[115] Dickson v. Microsoft Corp., 309 F.3d 193, 215 (4th Cir. 2002) (finding that non-price-fixing conspiracies require apportionment considerations because each downstream member within the conspiracy pays some overcharge).
[116] 933 F.3d 1136 (9th Cir. 2019).
[117] *Sunday Ticket*, 933 F.3d at1161–62 (Smith J., dissenting).
[118] *Id.* at 1158.

Football League (NFL), the 32 independently owned franchises that make up the NFL, and DirecTV.[119] The plaintiffs alleged a conspiracy to restrict the output of out-of-market NFL broadcasts.[120] The 32 franchises have a horizontal agreement allowing the NFL to pool each individual team's broadcasting rights and enter into a single vertical agreement with DirecTV for the right to sell consumers streaming access to all out-of-market NFL games.[121]

The dissent in *Sunday Ticket* pointed out that in a price-fixing conspiracy, the manufacturer and dealer set a single price for the consumer to pay and therefore there is no "passed on" overcharge.[122] The dissent further argued that in *Sunday Ticket's* conspiracy to restrict output, pass-on *is* implicated because the court would have to decide (1) if the NFL overcharged DirecTV, (2) the amount of that overcharge, and (3) the amount of overcharge DirecTV passed on to *Sunday Ticket* purchasers.[123]

This analysis is substantively the same in all vertical conspiracies that are not price-fixing conspiracies.[124] This difference between price-fixing conspiracies and all other types of vertical conspiracies is what leads advocates of the price-fixing-only interpretation to their ultimate conclusion.[125] They argue that because price-fixing conspiracy cases have the unique quality of never containing a pass-on element, a narrow co-conspirator "exception" that is limited to price-fixing conspiracies is not actually an otherwise prohibited exception to the indirect purchaser

[119] *Id.* at 1148.
[120] *Id.*
[121] *Id.* NFL Sunday Ticket is the name of this DirecTV streaming package. *Id*.
[122] *Id.* at 1161–62 (Smith J., dissenting).
[123] *See id.* at 1160 (Smith J., dissenting).
[124] *See* Dickson v. Microsoft Corp., 309 F.3d 193, 215 (4th Cir. 2002).
[125] *See* Lent & Schwartz, *supra* note 6; Mantchev, *supra* note 18 at 19–22.

rule.[126] It is merely the co-conspirator *rule* for situations that lay outside the purview of the indirect purchaser rule.[127]

2. All-Vertical-Conspiracies Interpretation

Standing in opposition to the price-fixing-only interpretation is a broader interpretation that sees the co-conspirator exception as applicable to all types of vertical conspiracies.[128] The rationale for this "all-vertical-conspiracies" interpretation can be consolidated into two primary justifications.[129] First, in all vertical conspiracies, consumers are direct purchasers of all members of the conspiracy.[130] Second, the Supreme Court in *Apple v. Pepper* held that *Illinois Brick* held that direct purchasers always have standing to collect damages under Section 4 of the Clayton Act.[131] The Seventh and Ninth Circuits have adopted this interpretation of the co-conspirator exception through this rationale.[132]

a) Consumers are Direct Purchasers of all Co-Conspirators

In *Sunday Ticket* and *Marion Healthcare v. Becton Dickinson & Co.*,[133] the Ninth and Seventh Circuit Courts, respectively, found that the plaintiff-consumers were the direct

---

[126] *See* Lent & Schwartz, *supra* note 6; Mantchev, *supra* note 18 at 19-22.
[127] *See* Lent & Schwartz, *supra* note 6; Mantchev, *supra* note 18 at 19-22.
[128] *See* Lent & Schwartz, *supra* note 6.
[129] *See* Lent & Schwartz, *supra* note 6.
[130] *See* Lent & Schwartz, *supra* note 6.
[131] *See* Lent & Schwartz, *supra* note 6; *see generally* Apple Inc. v. Pepper, 139 S. Ct. 1514, 1520 (2019).
[132] Marion Healthcare, LLC v. Becton Dickinson & Co., 952 F.3d 832 (7th Cir. 2020); Nat'l Football League's Sunday Ticket Antitrust Litig. v. DirecTV, LLC, 933 F.3d 1136 (9th Cir. 2019). The Third and eight Circuits have also adopted the all-vertical-conspiracies interpretation of the co-conspirator exception. Insulate SB, Inc. v. Advanced Finishing Sys., 797 F.3d 538 (8th Cir. 2015); Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc., 424 F.3d 363 (3d Cir. 2005). However, both circuits did so in cases that predate *Pepper*. *Compare Insulate SB*, 797 F.3d, *and Howard Hess*, 424 F.3d, *with* Pepper, 139 S. Ct. 1514. Because the arguments ultimately made in this Comment rely on Supreme Court precedent set in *Pepper*, this Comment discusses the all-vertical-conspiracy interpretation through the Seventh and Ninth Circuit's rationale exclusively.
[133] 952 F.3d 832 (7th Cir. 2020).

purchasers of all members of the alleged conspiracy.[134] Both courts based this finding on the fact that the consumers were the party directly injured by the vertical conspiracy alleged.[135] *Sunday Ticket* supported this interpretation of "direct purchaser" by looking to various precedents that had adopted the same "party directly injured" definition.[136] *Marion Healthcare* went further, delving into the policy rationale for adopting this definition of "direct purchaser."[137]

In *Marion Healthcare*, the court held that every application of *Illinois Brick* requires the identification of the direct seller and purchaser.[138] The majority explained that, in deciding who is the direct-seller, looking to the specific role each member of the distribution chain played does not make sense in a vertical conspiracy case because it "would render upstream antitrust violators effectively immune from suit through the simple expedient of conspiring with a middleman."[139] Unlike non-conspiracy cases, where the dealer is victimized, the dealer in a vertical conspiracy usually benefits from any "supracompetitve" pricing by its manufacturer-co-conspirators.[140] In any antitrust case alleging a vertical conspiracy, the Seventh and Ninth Circuits therefore identify the party that directly purchased from the conspiracy as the direct purchaser of all members of the conspiracy.[141]

b) Apple v. Pepper Held that Direct Purchasers Always Have Standing

[134] *Marion Healthcare*, 952 F.3d at 839-840; *Sunday Ticket*, 933 F.3d at 1157–58.
[135] *Marion Healthcare*, 952 F.3d at 839–40; *Sunday Ticket*, 933 F.3d at 1157–58.
[136] *Sunday Ticket*, 933 F.3d at 1156–57.
[137] *See Marion Healthcare*, 952 F.3d at 838–40.
[138] *Id.* at 838.
[139] *See id.* at 839.
[140] *Id.*
[141] *Id.* at 839-840; *Sunday Ticket*, 933 F.3d at 1157–58.

In 2019, the Supreme Court decided its most recent Illinois Brick progeny—*Apple v. Pepper*.[142] Advocates of the all-vertical-conspiracies interpretation argue that *Pepper* offers a resolution to the co-conspirator circuit split.[143] *Pepper* held that *Illinois Brick* established a bright line rule that direct-purchasers always have standing to collect damages from direct-sellers.[144]

(1) Facts and Procedural History

In *Pepper*, the plaintiffs were a class of a consumers who had purchased applications ("apps") from Apple's App Store.[145] The App Store is the only retail marketplace to buy and download apps for Apple devices.[146] Apple contracts with independent app developers to offer their apps on Apple's App Store in exchange for a 30% commission of each app sale and a $99.00 annual fee.[147] With the only restriction being that the price end in $0.99, the developers set the prices for their own apps.[148] Consumers of apps send their money directly to Apple when they purchase an app, and then Apple sends the app developers their share of the sale.[149]

Plaintiffs alleged that Apple was maintaining an unlawful monopoly by ensuring that all app purchases and downloads on Apple devices had to go through the App Store.[150] Plaintiffs further alleged that by locking out other digital marketplaces from being able to sell apps on Apple devices, Apple was able to charge an artificially high commission rate of 30%.[151] The

---

[142] Apple Inc. v. Pepper, 139 S. Ct. 1514 (2019).
[143] *See e.g.*, *Marion Healthcare*, 952 F.3d at 839 (acknowledging that *Pepper* involves different issues than the co-conspirator exception yet arguing that it still provides an answer to how the co-conspirator exception should be applied).
[144] *Pepper*, 139 S. Ct. at 1520.
[145] *Id.* at 1519.
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] *Id.*

plaintiffs argued that in a competitive environment, Apple would be unable to maintain such a high commission rate, and, as a result, app developers would be able lower their prices.[152]

Apple argued that the plaintiffs did not have standing to bring their suit even though they had purchased apps directly from Apple.[153] It premised its theory on its distribution chain being substantively different from the distribution chain in *Illinois Brick*.[154] The rationale for this premise was that even though it had sold the apps directly to the plaintiffs, the independent app developers had set the price of their respective apps.[155] Apple then argued that an economically symmetric application of *Illinois Brick* to an asymmetric distribution chain would require the court to identify the developers as the direct sellers because the developers set the price of the apps.[156] Apple also argued that its distribution chain mandated a "who set the price" rule in order to fulfill *Illinois Brick's* stated interest in avoiding pass-on analyses.[157]

The District Court agreed with Apple and dismissed the case.[158] The Ninth Circuit reversed that decision.[159] The majority rejected Apple's "who set the price" argument and held that app purchasers were direct purchasers of Apple because sending their money to Apple in exchange for an app constituted a direct purchase from Apple.[160] Apple appealed, and the Supreme Court ultimately affirmed the Ninth Circuit's holding, in favor of the plaintiffs.[161]

(2) Court's Analysis

---

[152] *Id.*
[153] *Id.*
[154] *See id.* at 1521–22.
[155] *Id.* at 1519.
[156] *See id.* at 1522.
[157] *Id.* at 1524.
[158] In re Apple iPhone Antitrust Litig., No. 11-cv-06714-YGR, 2013 U.S. Dist. LEXIS 169836 (N.D. Cal. Dec. 2, 2013).
[159] Pepper v. Apple Inc., 846 F.3d 313 (9th Cir. 2017).
[160] *Pepper*, 846 F.3d at 324–25.
[161] *Pepper*, 139 S. Ct. at 1519.

The Court began its analysis by stating its bright-line rule interpretation of the *Illinois Brick* holding: "direct purchasers may sue [and] indirect purchasers may not."[162] The majority rejected Apple's argument that *Illinois Brick* had been rooted in economics.[163] It reasoned that arrangements between upstream tiers in the distribution are irrelevant to whether a downstream direct purchaser has standing to collect damages from its direct seller.[164] The Court repeated that if no intermediary separates the antitrust violator from the purchaser—as is the case when an app purchaser buys from Apple—then *Illinois* Brick says that purchaser is a direct purchaser with standing.[165]

The Court rejected Apple's argument that its distribution chain mandated a "who set the price" rule in order to fulfill *Illinois Brick's* stated interest in avoiding pass-on analyses.[166] The majority deemed it obvious that *Illinois Brick's* interest in deterring would-be antitrust violators outweighs its interest in avoiding pass-on analyses.[167] The Court concluded that "to the extent that *Illinois Brick* leaves any ambiguity … we should resolve that ambiguity in the direction of the statutory text. And under the text, direct purchasers from monopolistic retailers are proper plaintiffs to sue those retailers."[168]

Pepper stands for the proposition that under *Illinois Brick* purchasers always have standing to collect damages under Section 4 of the Clayton Act, even when pass-on analyses is implicated.[169] *Pepper* involved a single firm's monopolization.[170] However, by supplementing

---

[162] *Id.* at 1520-21.
[163] *Id.* at 1522.
[164] *Id.*
[165] *Id.*
[166] *Id.* at 1524.
[167] *See id.*
[168] *Id.* at 1522.
[169] *See id.* at *passim.*
[170] *Id.*

Pepper with the belief that in all vertical conspiracies the consumers are direct purchasers of all of the conspirators, advocates of the all-vertical-conspiracies interpretation reach their interpretation of the co-conspirator exception.[171]

III. DISCUSSION

Because of the unviability of both sides of the co-conspirator exception circuit split, the indirect purchaser rule should be overturned. Part III.A demonstrates the invalidity of the price-fixing-only interpretation. Part III.B concedes that unlike the price-fixing-only interpretation of the co-conspirator exception, the all-vertical-conspiracies interpretation is at least precedentially sound. However, Part III.B goes on to argue that the practical implications of applying the all-vertical-conspiracies interpretation make it incompatible with the rationales underlying the indirect purchaser rule. Part III.B concludes that the all-vertical-conspiracies interpretation necessitates pass-on analyses and without eliminating pass-on, the indirect purchaser rule does not provide enough benefit to warrant burdening compensation.

Part III.C analyzes the benefits and detriments of three possible solutions to this problem. The first possible solution is to replace the indirect purchaser rule with the "who set the price" rule rejected in *Pepper*.[172] The second is to overturn *Hanover Shoe*, and the indirect purchaser rule.[173] The final proposal, and the one that this Comment ultimately supports, is to overturn the indirect purchaser rule while maintaining the holding in *Hanover Shoe.*[174]

A. Price-Fixing-Only Interpretation Does not Comply with Apple. v. Pepper

[171] *See* Marion Healthcare, LLC v. Becton Dickinson & Co., 952 F.3d 832, 839–40 (7th Cir. 2020); Nat'l Football League's Sunday Ticket Antitrust Litig. v. DirecTV, LLC, 933 F.3d 1136, 1157–58 (9th Cir. 2019).
[172] *See infra* Part III.C.1; *see generally Pepper*, 139 S. Ct.
[173] *See infra* Part III.C.2.
[174] *See infra* Part III.C.3.

The price-fixing-only interpretation of the co-conspirator exception is no longer a meritorious interpretation. In any vertical antitrust conspiracy, the consumers are direct purchasers of all of the co-conspirators,[175] and *Pepper* held that direct purchasers always have standing to collect damages under Section 4 of the Clayton Act.[176]

Part III.A.1 argues that the price-fixing-only interpretation relies on the premise that consumers are direct purchasers of dealers, but indirect purchasers of the dealers' manufacturer-co-conspirators. Part III.A.2 argues that in all vertical conspiracies, consumers are actually direct purchasers of all co-conspirators. Part III.A.3 discusses how *Pepper* stands for the proposition that *Illinois Brick* created a bright-line rule that all direct purchasers have standing to collect damages under Section 4 of the Clayton Act. Part III.A.3 concludes that because the arguments in Parts III.A.1-3 are true, the price-fixing-only interpretation is not a meritorious interpretation of the co-conspirator exception.

1. Price-Fixing-Only Relies on Consumers Being Indirect Purchasers

The price-fixing-only interpretation of the co-conspirator exception relies on the premise that consumers are direct purchasers of dealers but indirect purchasers of all other coconspirators.[177] Courts that have arrived at this interpretation of the co-conspirator exception then argue that, (1) the Supreme Court has urged federal courts not to create new exceptions to the indirect purchaser rule,[178] (2) the indirect purchaser rule only applies to types of cases that might implicate pass-on analysis,[179] and (3) price-fixing conspiracies never require pass-on

[175] *See Marion Healthcare*, 952 F.3d at 839–40; *Sunday Ticket*, 933 F.3d at 1157–58.
[176] *Pepper*, 139 S. Ct. at 1520.
[177] *See supra* Part II.C.1.
[178] *See supra* Part II.C.1.a.
[179] *See supra* Part II.C.1.b.

analysis but other types of conspiracy cases do.[180] However, if you disprove the premise that consumers are not direct purchasers of conspirator-manufacturers, then *Pepper* delegitimizes the price-fixing-only interpretation of the co-conspirator exception.[181]

2. In all Vertical Conspiracies, Consumers are Direct Purchasers of all Violators

The key factor in determining that the consumers in *Pepper* were direct purchasers of Apple was that no intermediary existed between them and Apple.[182] The consumers sent their money directly to Apple in exchange for apps.[183] That simple analysis cannot be applied to vertical conspiracies.[184] Since vertical conspiracies involve conspirators from different levels of the distribution chain, dealers will always be intermediaries between the consumers and the manufacturers.[185] This is true for both price-fixing and non-price-fixing conspiracies.[186]

However, an intermediary in a monopoly case is different than an intermediary in a conspiracy case.[187] While an intermediary in a monopoly case would displace the end consumer as the party directly injured by the monopolist, the "intermediary" in a vertical conspiracy case is

[180] *See supra* Part II.C.1.c.
[181] *See Pepper*, 139 S. Ct. at 1520–21 (holding that "direct purchasers may [always] sue").
[182] *Id.* at 1521 ("The iPhone owners pay the alleged overcharge directly to Apple. The absence of an intermediary is dispositive. Under *Illinois Brick*, the iPhone owners are direct purchasers from Apple[.]").
[183] *Id.* at 1519.
[184] See Nat'l Football League's Sunday Ticket Antitrust Litig. v. DirecTV, LLC, 933 F.3d 1136, 1157 (9th Cir. 2019) (explaining that the principles underlying *Pepper's* "intermediary" approach apply differently "apply differently when the injury to plaintiffs is caused by a multi-level conspiracy to violate antitrust laws").
[185] *See* Lent & Schwartz, *supra* note 6.
[186] *Id.*
[187] *Compare, e.g.*, Hanover Shoe v. United Shoe Mach. Corp., 392 U.S. 481 (1968) (stating that intermediary Hanover was a victim of United's monopoly) *with* Sunday Ticket, 933 F.3d at 1157 (stating intermediary-DirecTV is a beneficiary of the alleged conspiracy).

not a victim of the violator, but a co-violator.[188] These two situations are not parallel.[189] The consumers are the first to purchase from the conspiracy.[190] There is no intermediary-*victim* separating them from the conspiracy violation or the violators.[191]

Looking at *Pepper* this way, the Court's discussion on intermediaries is not about the lack of an intermediary separating Apple from the app purchasers.[192] It is about the lack of an intermediary between the violation and the app purchasers.[193] Once it is determined that there is no intermediary between the consumer and the violation, the consumer becomes the party directly injured by all of the violators responsible for the violation.[194] The consumer becomes all of the co-conspirators' direct purchaser.[195] This is why in all types of vertical conspiracies, the consumer is the direct purchaser of all of the co-conspirators.[196]

Marion Healthcare does the best job at explaining why the direct purchaser must be identified by looking to the violation and not the literal situational relationship between tiers of the distribution chain.[197] As that case pointed out, "[a] contrary rule that looked behind the conspiracy to the role each member played would render upstream antitrust violators effectively immune from suit through the simple expedient of conspiring with a middleman."[198] *Marion*

---

[188] *Compare, e.g.*, Hanover Shoe, 392 U.S. *with* Sunday Ticket, 933 F.3d at 1157.
[189] *Compare, e.g.*, Hanover Shoe, 392 U.S. *with* Sunday Ticket, 933 F.3d at 1157.
[190] Sunday Ticket, 933 F.3d at 1157.
[191] *Id.*
[192] *See* Apple Inc. v. Pepper, 139 S. Ct. 1514, 1521 (2019) ("The iPhone owners pay the alleged overcharge directly to Apple. The absence of an intermediary is dispositive. Under *Illinois Brick*, the iPhone owners are direct purchasers from Apple").
[193] *See id.*
[194]*See, e.g.*, Marion Healthcare, LLC v. Becton Dickinson & Co., 952 F.3d 832, 839–40 (7th Cir. 2020); Sunday Ticket, 933 F.3d at 1157–58.
[195] *See, e.g.*, Marion Healthcare, 952 F.3d at 839–40; Sunday Ticket, 933 F.3d at 1157–58.
[196] *See, e.g., Marion Healthcare*, 952 F.3d at 839–40; Sunday Ticket, 933 F.3d at 1157–58.
[197] *See generally* Marion Healthcare, 952 F.3d at 838–40.
[198] *Id.* at 839.

Healthcare also explained that the indirect purchaser rule requires courts to identify the direct purchaser and seller.[199] No violating seller nor victimized direct purchaser can exist without a violation.[200] For an illegal conspiracy, that means the direct purchaser must come into the picture after the conspiracy is made.[201]

For example, in *Sunday Ticket* the consumer-plaintiffs sent their money to DirecTV in exchange for access to out-of-market NFL games.[202] This distribution chain would seem to make DirecTV an intermediary between the plaintiffs and the NFL.[203] However, since DirecTV is an alleged co-conspirator, the plaintiff-consumers directly purchased from the conspiracy.[204] The purchasers of the "Sunday Ticket Package" were the direct purchasers of all of the co-conspirators.[205]

DirecTV cannot possibly be the correct direct purchaser to have standing against the NFL for its antitrust violation. Prior to the NFL allegedly conspiring with DirecTV, no conspiracy-to-restrict-output violation had allegedly taken place.[206] The only purchasers arising after the NFL allegedly entered into an illegal vertical conspiracy, were Sunday Ticket purchasers.[207] If Sunday Ticket purchasers are not the NFL's direct purchasers, then nobody is, so nobody has standing to bring a Section 4 claim against them.[208]

---

[199] *Id.* at 838.
[200] *See* Clayton Antitrust Act of 1914 § 4, 15 U.S.C § 15 (2018).
[201] *See* Sunday Ticket, 933 F.3d at 1150 (stating as settled law that one of the elements needed to state a claim for a violation of §1 of the Sherman Act is " a contract, combination or conspiracy among two or more persons or distinct business entities").
[202] *Id.* at 1148.
[203] *See id.*
[204] *Id.* at 1157–58.
[205] *Id.*
[206] *See id* at 1143–44.
[207] *See id* at 1148–50.
[208] *See id.*

Even though there is a separate alleged horizontal conspiracy agreement between the 32 franchises, that agreement is imbedded within the single vertical conspiracy.[209] To hold that the consumers are not direct purchasers of all members of a vertical conspiracy would lead to an absurd result—one that allows manufacturers to violate the antitrust law without fear of any Section 4 repercussions.[210] This would directly contradict the overarching purpose for *Illinois Brick's* indirect purchaser rule.[211]

3. Apple v. Pepper Held that all Direct Purchasers Have Standing

In *Pepper*, the Supreme Court repeatedly rejected the view that *Illinois Brick* could ever be twisted in a manner that prevents any direct purchaser from having standing.[212] As outlined in Part II.C.2.b, the *Pepper* Court saw the indirect purchaser rule as "a bright line that allow[s] direct purchasers to sue."[213] The Court directly addressed whether the arrangements amongst other levels of purchasers and sellers in the distribution chain, or the potential difficulty in calculating damages, could ever affect the ability of the direct purchaser to have standing under Section 4 of the Clayton Act.[214] The Court said that it could not.[215] *Pepper* makes it clear that under *Illinois Brick* direct purchasers always have standing to collect damages for antitrust violations.[216]

Ultimately, in any vertical antitrust conspiracy, the consumers are the direct purchasers of all of the co-conspirators.[217] Under *Pepper*, this means that the consumers must have standing to

---

[209] *See id.* at 1136.
[210] *See* Lent & Schwartz, *supra* note 6.
[211] *See* Apple Inc. v. Pepper, 139 S. Ct. 1514, 1522 (2019).
[212] *See supra* Part II.C.2.b for a discussion of *Pepper*.
[213] *See supra* Part II.C.2.b.
[214] Pepper, 139 S. Ct. at 1522-23.
[215] *Id.*
[216] *See supra* Part II.C.2.b for a discussion of *Pepper*.
[217] *See supra* Part III.A.2.

bring a claim for damages under Section 4 of the Clayton Act against any of the co-conspirators.[218] The price-fixing-only interpretation of the co-conspirator exception does not comport with the recent Supreme Court precedent set in *Pepper* holding and must be discarded.

B. All-Vertical-Conspiracies Interpretation Undermines Rationale Underlying Illinois Brick

Unlike the price-fixing-only interpretation of the co-conspirator exception, the all-vertical-conspiracies interpretation is precedentially sound.[219] The all-vertical-conspiracies interpretation is therefore a required feature of the indirect purchaser rule.[220] However, while the all-vertical-conspiracies interpretation does not directly contradict Supreme Court precedent, it undermines the underlying policy rationale that the Supreme Court relied on in creating the indirect purchaser rule.[221] The Court created the indirect purchaser rule because it presumed that pass-on analysis was impractical but the all-vertical-conspiracies interpretation requires extensive use of pass-on analysis.[222]

1. Pass-on Analysis was Presumed Impractical

Illinois Brick's ultimate rationale for instituting the indirect purchaser rule was that it provided for the most "effective enforcement of the antitrust laws."[223] The Court created the indirect purchaser rule because it feared that pass-on analysis would make it impractical to deter

---

[218] *See supra* Part III.A.3.
[219] *See supra* Part III.A for a discussion on why the all-vertical conspiracies interpretation is not precedentially sound.
[220] *See supra* Part III.A for a discussion on why *Pepper* makes it impossible to restrict the co-conspirator exception to price-fixing conspiracies only.
[221] *See* Lent & Schwartz, *supra* note 6; *see supra* Part II.B.2.b for a discussion on the assumptions made by the Supreme Court in *Illinois Brick.*
[222] *See* Lent & Schwartz, *supra* note 6; *see supra* Part II.B.2.b for a discussion on the assumptions made by the Supreme Court in *Illinois Brick.*
[223] *See* Ill. Brick Co. v. Illinois, 431 U.S. 720, 741 (1977).

would-be antitrust violators.[224] The Court did so while acknowledging the negative impact that the indirect purchaser rule might have on deterrence's competing principle—compensation.[225] The Supreme Court thought that the economic figures required for sorting out pass-on analysis were "virtually unascertainable figures."[226] They concluded that the ultimate task of performing pass-on analysis "would normally prove insurmountable."[227] The all-vertical-conspiracies interpretation of the co-conspirator exception either directly disproves this assumption or proves that the indirect purchaser rule opens the door to the very "insurmountable" task it sought to eliminate.[228]

2. All-Vertical-Conspiracies Interpretation Requires Extensive Pass-On Analysis

In a non-price-fixing conspiracy, pass-on analysis is a near-guaranteed requirement.[229] Returning to *Sunday Ticket*, the court on remand will have to figure out, (1) if the NFL overcharged DirecTV, (2) the amount of that overcharge, and (3) the amount of overcharge DirecTV passed on to *Sunday Ticket* purchasers.[230] This problem exposes an "insurmountable" crack in the foundation of the indirect purchaser rule. The rule exists mainly because pass-on analysis was presumed impractical, and yet the rule mandates that the door be kept open to vertical conspiracy cases which require that the presumed impractical analysis be performed.[231]

---

[224] *Id.* at 737-741.
[225] *Id*. at 746.
[226] *Id.* at 725 n.3 (quoting Hanover Shoe v. United Shoe Mach. Corp., 392 U.S. 481, 493 (1968)).
[227] *Id.* (quoting *Hanover Shoe*, 392 U.S. at 493).
[228] *See infra* Part III.B.2.
[229] *See* Nat'l Football League's Sunday Ticket Antitrust Litig. v. DirecTV, LLC, 933 F.3d 1136, 1160 (9th Cir. 2019) (Smith J., dissenting).
[230] *See Id.*
[231] *See* Lent & Schwartz, *supra* note 6.

The indirect purchaser rule was the Supreme Court's attempt to best balance competing antitrust principles.[232] The Court believed that eliminating pass-on analysis as well as compulsory joinder was necessary in order to effectively deter would-be antitrust violators.[233] The Court sacrificed compensation in favor of deterrence and avoiding duplicative liability.[234] In light of the practical realities posed by the all-vertical-conspiracies interpretation of the co-conspirator exception, the balance struck by the *Illinois Brick* Majority must be reevaluated.

C. Analysis of Three Potential Alternatives to the Current State of the Law

The price-fixing-only interpretation of the co-conspirator exception is not compliant with recent Supreme Court precedent.[235] The all-vertical-conspiracies interpretation would therefore be the correct interpretation of the co-conspirator split under current law, but it upends the balance that the Court thought it was striking by implementing the indirect purchaser rule.[236] The Court must reevaluate the indirect purchaser rule and determine if there is a better solution for balancing antitrust law's competing principles.

This Part considers three alternative solutions to the indirect purchaser rule. Part III.C.1 considers replacing the indirect purchaser rule with the "who set the price" rule discussed in *Apple v. Pepper*. Part III.C.2 contemplates overturning the indirect purchaser rule and *Hanover Shoe*. Part III.C.3 argues that the indirect purchaser rule should be overturned but *Hanover Shoe* should be upheld. Parts III.C.1-3 analyze their respective solutions through the ability of each to sufficiently balance the competing principles outlined in *Illinois Brick.*[237] This Part concludes

---

[232] *See Ill. Brick*, 431 U.S. at 733-35, 746–47.
[233] *See id.*
[234] *See id.* at 746.
[235] *See infra* Part III.A.
[236] *See infra* Parts III.B.
[237] *See generally Ill. Brick*, 431 U.S. at 733–35, 746–47.

that the best solution is for the Supreme Court to overturn the indirect purchaser rule but not *Hanover Shoe*.

1. Alternative 1: Replace Indirect Purchaser Rule with "Who Set The Price" Rule

The first possible alternative is for the Court to replace the indirect purchaser rule with the "who set the price" rule rejected in *Pepper*.[238] This would allow for the co-conspirator exception to be resolved through the price-fixing-only interpretation.[239] One the one hand, it is better than the current state of the law because it eliminates the potential for pass-on analysis being used in Section 4 cases. On the other hand, it is worse than the current state of the law in regard to compensation and deterrence. Since the underlying purpose of eliminating pass-on analysis was to aid deterrence, the detriments of this solution outweighs its benefits. This solution should not be adopted.

a) Pass-on

A "who set the price" rule eliminates the potential for pass-on analysis being used in Section 4 cases.[240] Part III.B.2 illustrated how the all-vertical-conspiracies interpretation of the co-conspirator exception requires the use of pass-on analysis.[241] *Pepper*, a monopoly case, shows that the risk of pass-on analysis under the indirect purchaser rule is not limited to vertical conspiracies.[242] On remand, the court will have to decide whether the 30% commission charged to app developers was an overcharge, how much of an overcharge it was, and how much of that overcharge was actually then passed on to the consumers.[243] Since victims would only have

---

[238] *See supra* Part II.C.2.b.
[239] *Contra supra* Part III.A.
[240] Apple Inc. v. Pepper, 139 S. Ct. 1514, 1527–28 (2019) (Gorsuch J., dissenting).
[241] *See supra* Part III.B.2.
[242] *See Pepper*, 139 S. Ct. at 1527–28 (Gorsuch J., dissenting).
[243] *See id.* at 1527–29 (Gorsuch J., dissenting).

standing to collect damages from an antitrust-violating price setter, that third decision cannot ever happen under a "who set the price" rule.[244] Courts would only ever have to decide whether a victim was illegally overcharged and by how much.[245]

b) Compensation

A "who set the price" rule hinders compensation. If *Pepper* was governed by a "who set the price" rule, the victimized developers would be unaffected, but the consumers would have no means of relief.[246] The consumers would technically have standing to collect damages from the developers, but the developers were not alleged to have of violated any law.[247] Conspiracy victims' ability to be compensated is also harmed by a "who set the price" rule. Unlike the situation presented in *Pepper*, price-setting dealers would present *an* avenue to recovery for consumers in non-price-fixing conspiracies.[248] However, the practical realities of joint and several liability looms large. Section 4 defendants are subject to joint and several liability.[249]

When multiple parties contribute to a single injury, joint and several liability allows a plaintiff to collect the entirety of their awarded compensation from any one of the parties.[250] Plaintiffs choose to go after parties that have the highest ability to pay.[251] This ensures that a plaintiff is not left uncompensated if one of the liable parties goes bankrupt or is otherwise unable to pay compensation.[252] A "who set the price" rule would leave plaintiffs with only one

---

[244] *Contra id* (Gorsuch J., dissenting).
[245] *Contra id* (Gorsuch J., dissenting).
[246] *See id.* at 1523–25.
[247] *See id.* at 1519–20.
[248] *Compare, e.g.*, *id.* at 1523-25, *with* Nat'l Football League's Sunday Ticket Antitrust Litig. v. DirecTV, LLC, 933 F.3d 1136 (9th Cir. 2019).
[249] Tex. Indus. v. Radcliff Materials 451 U.S. 630, 646 (1981).
[250] Marc A. Franklin, Robert L. Rabin, Michael D. Green & Mark A. Geistfeld, Tort Law and Alternatives: cases and materials 370-71 (10th ed. 2016).
[251] *See id.*
[252] *See id.*

option when deciding who to pursue damages from, leaving them vulnerable to being left uncompensated.[253]

c) Deterrence

A "who set the price" rule also hinders deterrence. Part III.A.2 showed that in a vertical conspiracy, consumers are the only vehicle willing to and capable of deterring manufacturers under Section 4 of the Clayton Act.[254] A "who set the price" rule would prohibit consumers from suing those manufacturers in non-price-fixing conspiracies.[255] In a non-price-fixing conspiracy, the manufacturer sets the price paid by their co-conspirator-dealer who in turn sets the price paid by the consumer.[256]

Pepper shows that a "who set the price" rule's hindrance on deterrence is not limited to vertical conspiracies.[257] Under current law, app purchasers have standing to collect damages from Apple because they directly purchased from Apple's alleged monopoly.[258] The Court explained that the developers also have standing to collect damages from Apple, but under a separate theory that they directly supplied Apple's alleged monopsony.[259] A "who set the price" rule "would allow a monopolistic retailer to insulate itself from antitrust suits by consumers."[260] The developers would still have standing to bring a monopsony case, but nobody would have standing to collect damages from Apple for its alleged monopoly.[261]

---

[253] *See Pepper*, 139 S. Ct. at 1524.
[254] *See supra* Part III.A.2.
[255] *See* Nat'l Football League's Sunday Ticket Antitrust Litig. v. DirecTV, LLC, 933 F.3d 1136, 1160 (9th Cir. 2019) (Smith J., dissenting).
[256] *See, e.g., id.*
[257] *See Pepper* at 1523–24 (2019).
[258] *Id.* at 1525.
[259] *Id.* at 1524–25.
[260] *Id.* at 1523.
[261] *See id.* at 1523-25.

This hindrance on deterrence is not only bad in its own right, it also mitigates the significance of the pass-on-analysis benefit discussed in Part III.C.1.a.[262] The reason courts care about pass-on analysis in the first place is that complicating Section 4 proceedings makes it harder to deter antitrust violators.[263] A "who set the price" rule eliminates pass-on analysis in the exact situations where it hinders deterrence—monopolists who do not set the prices of goods they directly sell, and manufacturer-conspirators.[264] Because of this, a "who set the price" rule has no practical benefit and should not be adopted.

2. Alternative 2: Overturn Indirect purchaser Rule and Hanover Shoe

The second possible alternative is for the Court to simply overturn the indirect purchaser rule and *Hanover Shoe's* pass-on defense prohibition. This would reconcile the issues exposed in Part III.B. [265] The current state of the law requires extensive use of pass-on analysis anyway, but overturning the indirect purchaser rule and *Hanover Shoe* would at least allow more victims standing to be compensated for their damages.[266] It would also help stop direct purchasers who did not actually suffer harm, as a result of passing on their overcharges, from collecting a windfall.[267]

However, the benefit to compensation is not guaranteed because overturning the indirect purchaser rule and *Hanover Shoe* would implicate compulsory joinder under Rule 19(a) of the Federal Rules of Civil Procedure.[268] This would significantly delay Section 4 proceedings,

---

[262] *See* Hanover Shoe v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968); *see generally supra* Part III.C.1.a.
[263] *See Hanover Shoe*, 392 U.S. at 494.
[264] *See supra* Part III.C.1.a; Nat'l Football League's Sunday Ticket Antitrust Litig. v. DirecTV, LLC, 933 F.3d 1136, 1160 (9th Cir. 2019) (Smith J., dissenting); *Pepper*, 139 S. Ct. at 1523-24.
[265] *See supra* Part III.B.
[266] *See supra* Part III.B; Ill. Brick Co. v. Illinois, 431 U.S. 720, 746 (1977).
[267] *See* PHILIP E. AREEDA, ANTITRUST ANALYSIS: PROBLEMS, TEXT, CASES 75 (2d ed. 1974).
[268] *See* Ill. Brick, 431 U.S. at 737–41.

making it harder for direct purchasers who were actually damaged to collect compensation.[269] The need for compulsory joinder would significantly hinder deterrence as well.[270] This solution is worse than the current state of the law overall, because the hindrance to deterrence is severe and the benefit to compensation is not guaranteed.

a) Compensation

Section 4's "compensation" interest is twofold, (1) victims who suffer actual damages should be compensated, and (2) parties who do not suffer actual damages should not be compensated.[271] Overturning the indirect purchaser rule would allow more victims standing to be compensated under Section 4 of the Clayton Act.[272] Overturning *Hanover Shoe* would prevent direct purchasers who had passed on overcharges to their customers from collecting a windfall.[273] The *Illinois Brick* majority acknowledged both of these possibilities.[274]

Under the indirect purchaser rule, indirect purchasers cannot be compensated for damages despite falling under the literal reading of the phrase "any person who shall be injured."[275] Under *Hanover Shoe*, a direct purchaser who passed on the entirety of an overcharge can still collect treble damages for their overcharge.[276] Consider monopolist "A" who overcharges direct purchaser "B" by $100.00. If B passes on the entire $100.00 overcharge to

[269] *See id.* at 737,41, 746–48.
[270] *Id.*
[271] *See id.* at 746; Karen Lee Turner, Note, *Antitrust - Treble-Damage Action - Hanover Shoe Inc. Rule Bars Offensive Use of Passing- On Doctrine by Indirect Purchaser,* 23 VILL. L. REV. 381, 394 (1978) (arguing that *Illinois Brick "*sacrificed the compensatory goal of the antitrust laws by creating a windfall for direct purchasers who do sue, and depriving the admittedly injured party of even the opportunity to seek compensation").
[272] *Ill. Brick*, 431 U.S. at 746.
[273] *See id.* at 737–41.
[274] *Id.* at 737–41, 746.
[275] *See id.* at 728; Clayton Antitrust Act of 1914 § 4, 15 U.S.C § 15 (2018).
[276] Hanover Shoe v. United Shoe Mach. Corp., 392 U.S. 481, 488 (1968).

end-consumer "C", then B has suffered no actual damage besides potential lost profits and C has suffered $100.00 in damages. Under the indirect purchaser rule and *Hanover Shoe,* C cannot be compensated and B can collect a $300.00 windfall.[277]

While overturning the indirect purchaser rule and *Hanover Shoe* aids compensation in principle, the practical benefits are far from guaranteed. As mentioned in Part II.B.2.b, since Section 4 cases in the absence of both rules would turn into massive suits that include parties from all levels of the distribution chain, the cases would likely require compulsory joinder under rule 19(a) of the Federal Rules of Civil Procedure.[278] *Illinois Brick* recognized three interests that typically trigger Rule 19(a), (1) defendants not wanting to be subjected to duplicative liability, (2) potential plaintiffs not wanting to lose their right to recover, and (3) society's desire for efficient and just litigation. [279]

Section 4 of the Clayton Act implicates all three of these interests in the absence of the indirect purchaser rule and *Hanover Shoe.*[280] Defendant's would have an interest in joining all indirect-purchaser-potential plaintiffs so that they can raise a pass-on defense.[281] All potential plaintiffs would have an interest in being joined so that they can collect their portion of any potential recovery.[282] Society would share in both these interests since their effectuation would be required for just litigation.[283]

---

[277] *See Ill. Brick*, 431 U.S. at 728; *Hanover Shoe*, 392 U.S. at 488.
[278] *See infra* Part II.B.2.b.
[279] *Ill. Brick*, 431 U.S. at 737–38.
[280] *Id.*; *see generally* Clayton Antitrust Act of 1914 § 4, 15 U.S.C § 15 (2018); *Hanover Shoe*, 392 U.S.
[281] *Ill. Brick*, 431 U.S. at 737–38.
[282] *Id.*
[283] *Id.*

While this Part already discussed direct purchasers being overcompensated, direct purchasers still have a legitimate interest in being compensated for damages that they actually sustained.[284] Compulsory joinder would harm compensation in this regard because it would delay Section 4 proceedings, making it harder for direct purchasers to collect compensation.[285]

Consider an *Illinois Brick*-like scenario, if all potentially injured parties had to be joined. First, manufacturers overcharge subcontractors. Subcontractors respond by raising prices on contractors. Contractors respond by raising the prices of buildings. Building buyers respond by raising rent on storeowners. Storeowners respond by raising the prices of goods they sell. *Illinois Brick* recognized the impracticability of tracking down all potentially injured parties.[286] Defendants could delay litigation by posing an infinite list of potential claimants.[287] Even if courts found an appropriate cutoff, litigating the matter could delay everyone from being compensated for years.[288] Compulsory joinder significantly mitigates the potential compensation benefit that comes from overturning the indirect purchaser rule and the pass-on defense prohibition.

b) Deterrence

Overturning the indirect purchaser rule and *Hanover Shoe* would hinder deterrence. Not only could defendants delay litigation through compulsory joinder, but they would be less likely to be sued in the first place.[289] Under the current state of the law, direct purchasers have a major incentive to enforce Section 4 since a win would result in them collecting the entirety of the

[284] *Id.* at 746
[285] *See id.* at 737–38.
[286] *Id.* at 739.
[287] *See id.* at 737–41.
[288] *See id.*
[289] *See* Hanover Shoe v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968).

treble damages award.[290] Without the indirect purchaser rule and *Hanover Shoe's* pass-on defense prohibition, treble damages would have to be shared amongst plaintiffs across multiple levels of the distribution chain.[291] The potential benefit any prospective plaintiff has in bringing a Section 4 claim would go down, and because of the need to litigate compulsory joinder, the potential costs would go up.[292] There will be cases in which no plaintiffs determine that it is in their best interest to enforce Section 4.

Because it lessens the potential benefit and raises the potential costs, overturning the indirect purchaser rule and *Hanover Shoe* is bad for deterrence.[293] *Illinois Brick* made it clear that Section 4's interest in deterrence outweighs its interest in compensation.[294] Since the hindrance to deterrence is severe, and the benefit to compensation is not guaranteed, this solution is a worse option than maintaining the current state of the law.

3. Alternative 3: Overturn Indirect Purchaser Rule but Maintain Hanover Shoe

The third possible alternative, and the one that this Comment argues is the best, is to overturn the indirect purchaser rule but maintain the *Hanover Shoe* holding. This would reconcile the issues exposed in Part III.B without triggering the need for compulsory joinder.[295]

This solution is superior to the current state of the law in regard to deterrence and compensation.[296] Although this solution implicates duplicative liability,[297] the benefit gained to deterrence and compensation is substantially greater than the detriment incurred to duplicative

---

[290] *See id.* at 488.
[291] *See Ill. Brick*, 431 U.S. at 728; *Hanover Shoe*, 392 U.S. at 488.
[292] *Ill. Brick*, 431 U.S. at 745.
[293] *Id.*
[294] *See id.* at 741, 746.
[295] *See supra* Part III.B; *Ill. Brick*, 431 U.S. at 737–38.
[296] *See infra* Parts III.C.3.b–c.
[297] *See infra* Part III.C.3.a.

liability.[298] The benefit gained to compensation is, at worst, a complete and exact overlap of the detriment incurred to duplicative liability.[299] What is more, deterrence will be substantially more effective under this solution than under the current state of the law.[300] The Supreme Court should therefore adopt this solution as law because it strikes the best balance of Section 4's competing interests.

a) Duplicative Liability

Overturning the indirect purchaser rule but keeping *Hanover* Shoe would subject antitrust violators to duplicative liability.[301] In an example where the direct purchaser passes on the entire $100.000 overcharge to its customers, then both the direct and indirect purchasers would be entitled to full treble damages—$300.00.[302] The violator ends up being liable for sextuple damages instead of treble.[303] Overturning the indirect purchaser rule but not *Hanover Shoe* would allow a violator's liability to grow astronomically, while its culpability stays the same.[304] This solution hinders Section 4's interest in avoiding duplicative liability. However, it is a hinderance worth permitting because Parts III.C.3.b and III.C.3.c show that the hindrance is effectuated in a manner that offset by the enhances to Section 4's competing interest in compensation[305] while also enhancing Section 4's other competing interest—deterrence.[306]

b) Compensation

---

[298] *See infra* Parts III.C.3.b–c.
[299] *See infra* notes 303–05 and accompanying text for an explanation on why the benefit gained to compensation is, at worst, a complete and exact overlap of the detriment incurred to duplicative liability.
[300] *See infra* Part III.C.3.c.
[301] Ill. Brick Co. v. Illinois, 431 U.S. 720, 730 (1977).
[302] Clayton Antitrust Act of 1914 § 4, 15 U.S.C § 15 (2018).
[303] *See Ill. Brick*, 431 U.S. at 730.
[304] *Id.*
[305] *See infra* notes 303-305.
[306] *See infra* Part III.C.3.c.

Overturning the indirect purchaser rule but keeping *Hanover Shoe* would benefit compensation. As discussed in Part III.C.2.a, overturning the indirect purchaser rule would allow more victims standing to be compensated under Section 4 of the Clayton Act.[307] While not overturning *Hanover Shoe* would allow direct purchasers who passed on overcharges to their customers to collect a windfall, that is happening anyway under the current state of the law.[308]

The benefit to compensation is guaranteed under this solution, because compulsory joinder would not be necessary.[309] None of the interests discussed in Part III.C.2.a are implicated if *Hanover Shoe* remains good law.[310] Defendants would have no protected interest in avoiding duplicative liability or being able to raise a pass-on defense because this solution would purposefully allow duplicative liability and continue to prohibit pass-on-defenses.[311] Plaintiffs would have no interest in protecting their right to recover because earlier plaintiffs recovering full treble damages first would not prevent the later plaintiffs' right to also recover full treble damages.[312]

This guaranteed benefit to compensation is especially significant when balancing the competing interests at play in Section 4 litigation because it perfectly offsets the hindrance this solution poses regarding duplicative liability.[313] Both the new benefit to compensation, and the new hindrance regarding duplicative liability will only be effectuated by indirect purchasers who would wish to bring a Section 4 claim, but do not have standing under the current state of the

---

[307] *See supra* Part III.C.2.a.
[308] *See* Turner *supra* note 262 at 394.
[309] *See* Ill. Brick Co. v. Illinois, 431 U.S. 720, 737–38 (1977).
[310] *See infra* Part III.C.2.a for a summary of the three interests that tend to implicate compulsory joinder.
[311] *See supra* Part III.C.2.a.
[312] *Compare infra* Part III.C.2.a *with* Part III.C.3.a.
[313] *See infra* Part III.C.3.a.

law.[314] If anything, the potential benefit to compensation is greater than the potential hindrance to avoiding duplicative recovery because there could conceivably be cases where an indirect purchaser chooses to bring a Section 4 claim, but a direct purchaser has chosen not to.

c) Deterrence

Overturning the indirect purchaser rule but keeping *Hanover Shoe* would benefit deterrence. Part III.C.3.a discussed the negative impact that this solution would have on Section 4's interest in avoiding duplicative liability,[315] but duplicative liability would also serve a positive purpose—deterrence. The cost-benefit analysis made by a would-be violator in deciding whether to violate antitrust law would be more effective at preventing violations because the potential cost would be more than the treble damages that they could be liable for under current law.[316]

Part II.B.2.b discussed the *Illinois Brick* majority's concern that a pass-on analysis would hinder deterrence.[317] This solution would require pass-on analysis beyond vertical conspiracies.[318] However, unlike the solution proposed in Part III.C.2, direct purchaser suits would be unaffected.[319] Elevated levels of pass-on theories would therefore pose no risk to deterrence.[320] This solution guarantees that current levels of deterrence are, at worst, unaffected, and at best, significantly increased. Overall, overturning the indirect purchaser rule while

---

[314] *See Ill. Brick*, 431 U.S. at 228-730.
[315] *See supra* Part III.C.3.a
[316] *See supra* Part III.C.3.a
[317] *See infra* Part II.B.2.b.
[318] *See Ill. Brick,* 431 U.S. at *passim.*
[319] *Contra supra* Part III.C.2 for a discussion on how overturning *Hanover Shoe* would affect direct purchaser suits.
[320] *Contra Ill. Brick*, 431 U.S. at 737 (arguing that the complexities of permitting both offensive and defensive pass-on would hinder deterrence).

keeping *Hanover Shoe* provides the best balance of competing Section 4 interests. Therefore, the Supreme Court must adopt this solution.

IV. CONCLUSION

The indirect purchaser rule must be overturned but *Hanover Shoe's* prohibition against pass on defenses should remain good law. The co-conspirator exception has exposed a crack in *Illinois Brick's* indirect purchaser rule that cannot be ignored.[321] In any vertical antitrust conspiracy, members of the first non-conspiring level of the distribution chain are the party directly injured by the conspiracy and are therefore the direct purchasers of all of the conspirators.[322] Under *Illinois Brick* and *Pepper* this means they must, regardless of what type of vertical conspiracy exists, have standing to collect damages from all of the conspirators under Section 4 of the Clayton Antitrust Act.[323] As such, the price-fixing-only interpretation of the co-conspirator exception is wholly without merit.[324]

The all-vertical-conspiracies interpretation requires extensive use of pass-on analysis.[325] The indirect purchaser rule was the Supreme Court's attempt to best balance competing antitrust principles.[326] The Court believed that eliminating pass-on analysis, and compulsory joinder, was necessary in order to effectively deter would-be antitrust violators.[327] The Court sacrificed compensation in favor of deterrence and avoiding duplicative liability.[328] In light of the practical

[321] *See supra* Part III.A; Part III.B.
[322] *See Supra* Part III.A.2.
[323] *See Supra* Part III.A.3.
[324] *See Supra* Part III.A.
[325] *See Supra* Part III.B.2
[326] *See Supra* Note 223.
[327] *See supra* Note 224.
[328] *See supra* Note 225.

realities posed by the all-vertical-conspiracies interpretation of the co-conspirator exception, the balance struck by the *Illinois Brick* Majority must be reevaluated.

In reevaluating the balance struck by the *Illinois Brick* majority, the court must overturn *Illinois Brick* but keep *Hanover Shoe.*[329] Doing so will better serve Section 4's interest in compensating injured victims and deterring antitrust violators.[330] While this solution will allow for duplicative recoveries, the benefits it brings to Section 4's competing interest far outweigh the costs.[331] This solution strikes a better balance than the current state of the law, a "who set the price rule," and overturning both *Illinois Brick* and *Hanover Shoe*.[332]

[329] *See supra* Part III.C.
[330] *See supra* Parts III.C.3.b–c.
[331] *See supra* Part III.C.
[332] *See supra* Part III.C.