The “Co-Conspirator Exception” to *Illinois Brick*: Mandatory Joinder of Direct Purchaser Co-Conspirators

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Illinois Brick *was intended to be a bright-line rule prohibiting indirect purchasers from recovering damages against an upstream antitrust violator under § 4 of the Clayton Act for overcharges passed-on by direct purchasers. In reality, the* Illinois Brick *decision has resulted in a patchwork of incongruent jurisprudence governing antitrust standing in private enforcement cases. In a seemingly endless struggle to satisfy long-recognized antitrust principles of compensation and deterrence through private enforcement, courts have employed an inconsistent array of rationales and "exceptions" to* Illinois Brick. *The so-called "co-conspirator exception" to* Illinois Brick *is intended to provide the first purchaser from outside a vertical antitrust conspiracy a right of action. While circuits recognizing the exception agree on its basic purpose, they differ on what the scope and reach of the exception should be. Much of the disagreement is arguably the result of over-application of* Illinois Brick *in a manner that broadly precludes indirect purchaser suits, even when no pass-through allegations are involved.*

As a result of disagreement among circuits as to the applicability of Illinois Brick *to various types of indirect purchaser litigation, the circuits recognizing the co-conspirator exception have developed inconsistent characterizations of the exception with varying procedural requirements for its invocation. One such varying procedural requirement is the joinder of direct purchaser co-conspirators. Circuits holding that* Illinois Brick *is inapplicable where indirect purchaser plaintiffs make no pass-through allegations tend not to require plaintiffs to join direct purchaser co-conspirators in order to invoke the co-conspirator exception. Conversely, circuits holding that* Illinois Brick *is applicable to most indirect purchaser litigation have largely implemented a mandatory joinder rule, requiring indirect purchaser plaintiffs to join essentially all direct purchaser co-conspirators in order to invoke the co-conspirator exception.*

This Comment evaluates the policy considerations underlying antitrust law and, specifically, Illinois Brick *to determine an appropriate approach to joinder of direct purchaser co-conspirators as a prerequisite to invoking the co-conspirator exception. I conclude that the joinder requirement should differ depending on whether the plaintiffs have alleged a pass-through theory of damages. If so, then mandatory joinder is appropriate. However, the rule should function as a rebuttable presumption that the plaintiffs may overcome by showing that the risk of duplicative liability*

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is minimized or that joinder is overly burdensome. If no pass-through theories are alleged, then mandatory joinder would be an unnecessary impairment on private enforcement, deterrence, compensation, and efficiency.

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I. INTRODUCTION

The general purpose of antitrust law is to "prevent firms from obtaining market power except as a result of innovation and other practices that generate social benefits."[1] While antitrust law provides for both public and private enforcement actions, courts have noted that there has been a "longstanding policy of encouraging

[1] ERIC A. POSNER, HOW ANTITRUST FAILED WORKERS 30 (2021).

vigorous private enforcement of the antitrust laws."[2] In theory, a private enforcement mechanism was appropriate because it conserved government resources while providing for the deterrence effects of litigation and compensating those most directly harmed by antitrust violations. Nevertheless, private enforcement actions have faced significant skepticism. Critics of private enforcement actions claim that private enforcement is both insufficient and excessive.[3]

Private enforcement is allegedly insufficient because it fails to adequately deter antitrust violations and compensate the real victims.[4] For instance, class action plaintiffs often only recover "worthless" coupons, discounts, products. At the same time, the cases are often inefficient with most proceeds going towards legal fees and claims administration expenses. When money is recovered, the recovery is often so small that victims do not find it worthwhile to claim them.[5] Beyond the compensation issues, indirect purchasers are often viewed as those who have suffered most of the losses while direct purchasers are often portrayed as nonvictims.[6]

On the other hand, private enforcement is allegedly excessive because it often fails to address anticompetitive conduct, deters procompetitive conduct by over deterring anticompetitive conduct, and incentivizes plaintiffs' attorneys to sell out their clients for quick, yet meager, settlements.[7] The potential overdeterrence effects of private antitrust litigation is exemplified in a study by John M. Bizjak and Jeffrey L. Coles. The study revealed that the initial announcement that a private antitrust suit has been filed tends to result in an approximately 0.6% decrease in the defendant firm's equity value; an average loss of $4 million.[8]

The skepticism towards private antitrust enforcement has not been confined to the scholarly realm. Courts have reflected this suspicion towards the merits of private enforcement by taking steps to reduce the risk of overdeterrence.[9] Such steps have

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2 Illinois Brick Co. v. Illinois, 431 U.S. 720, 745 (1977).

3 Joshua P. Davis & Robert H. Lande, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement*, 48 GA L. REV. 1, 40 (2013).

4 *Id.* at 39.

5 *Id.* at 41. Additionally, cy pres awards are often distributed to unrelated charities.

6 *Id.* (noting that most of these assertions are unsupported by empirical data).

7 *Id.* at 39, 75.

8 John M. Bizjak & Jeffrey L. Coles, *The Effect of Private Antitrust Litigation on the Stock-Market Valuation of the Firm*, 85 THE AM. ECON. REV. 436 (1995).

9 *See* Stephen Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO L.J. 1065, 1140 (1986) (noting that, as a response to the treble damages remedy, courts have been "relatively

often involved heightened standing requirements, limiting the types of plaintiffs that can bring suit and the types of injuries that they may allege.

A. The Indirect Purchaser Rule

One particular realm in which courts have taken steps to reduce overdeterrence is by limiting the "any person" language of § 4 of the Clayton Act to differentiate between the remedies that may be sought by direct and indirect purchasers. In *Hanover Shoe* and *Illinois Brick*, the Supreme Court limited the scope of actions that can be brought by prohibiting treble-damages suits based on pass-through (or "pass-on") theories.[10] A "pass-through" theory involves a situation where an antitrust violator charges direct purchasers a higher-than-competitive price, and the direct purchasers pass-on the antitrust violator's overcharge to their customers by charging higher prices. Thus, the direct purchaser would face no real harm because they were able to recover the overcharge from consumers. While *Hanover Shoe* prohibited passing-on defenses, *Illinois Brick* prohibited passing-on offenses whereby indirect purchasers would bring suit against the upstream violator for the overcharge on the theory that the direct purchaser passed the overcharge onto them in the form of higher prices. The *Illinois Brick* Court reasoned that prohibiting pass-on theories would encourage enforcement efforts from those perceived to be the most directly injured by anti-competitive conduct (direct purchasers) while limiting the risk of overdeterrence resulting from indirect purchaser suits.

However, the *Illinois Brick* rule proved troublesome in application. In fact, roughly half of states have passed *Illinois Brick*-repealers that provide a cause of action to indirect purchasers.[11] A particular concern arose over the application of *Illinois Brick* in cases where the direct purchaser had conspired with the

more willing to keep cases from going to trial"); William E. Kovacic, *Private Participation in the Enforcement of Public Competition Laws*, 2 CURRENT COMP. L. 167, 173–74 (Mads Andenas et al. eds., 2004) (finding that courts have attempted to minimize the risk of overdeterrence by modifying doctrine regarding liability standards and the value of private claims).

10 *See* Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968) (prohibiting the use of pass-on theories as a defense); *Illinois Brick*, 431 U.S. at 745 (prohibiting the use of pass-on theories as an offense).

11 California v. ARC America Corp., 490 U.S. 93 (1989); Jerome Musheno, *Antitrust Law—Should Standing Be an Issue for the Indirect Purchaser in a Vertical Conspiracy?*, 72 TEMPLE L. REV. 251, 265–66 (1999).

upstream antitrust violator.[12] A strict application of *Illinois Brick* would essentially provide the only option for private enforcement of federal antitrust law to co-conspirators of the antitrust violation, even though direct purchaser co-conspirators are unlikely to bring suit as long as the conspiracy is profitable. While indirect purchasers could seek injunctive relief, plaintiffs have little incentive to bring suit when no damages can be recovered. This reality was even recognized by the *Illinois Brick* court: concentrating recovery in one type of plaintiff would encourage enforcement by incentivizing that plaintiff to bring suit. Absent the ability for indirect purchasers to bring a suit for damages, the antitrust violators would be effectively insulated from liability.

A number of courts have responded to this issue by applying a co-conspirator exception to *Illinois Brick*. The theory behind this exception is that the first purchaser outside of the conspiracy is entitled to the damages rather than a direct purchaser who was complicit in the antitrust violation.[13] In other words, the would-be indirect purchaser becomes the direct purchaser from a conspiracy. Among circuits that recognize the exception, application is inconsistent, and the procedural requirements for invoking the exception vary. One such point of procedural disagreement is on whether indirect purchaser plaintiffs must join the alleged direct purchaser co-conspirators as defendants in order to invoke the co-conspirator exception.

B. The Co-Conspirator Exception and the Joinder Requirement

Circuits generally characterize the "co-conspirator exception" in one of two ways: (1) as an exception to *Illinois Brick*, or (2) as a situation in which *Illinois Brick* does not apply. The characterization a circuit accepts is seemingly correlated to its approach to joinder of direct purchaser co-conspirators. Circuits adopting the first characterization have also adopted a mandatory joinder rule.[14] On the other hand, circuits adopting the second

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[12] Matthew M. Duffy, *Chipping Away at the Illinois Brick Wall: Expanding Exceptions to the Indirect Purchaser Rule*, 87 NOTRE DAME L. REV. 1709, 1734–35 (2012).

[13] Paper Systems Inc. v. Nippon Paper Industries Co., Ltd., 281 F.3d 629, 631–32 (7th Cir. 2002); Marion Healthcare, LLC v. Becton Dickinson & Company, 952 F.3d 832, 839 (7th Cir. 2020); Insulate SB, Inc. v. Advanced Finishing Systems, Inc., 797 F. 3d 538, 542 (8th Cir. 2015).

[14] *See* Link v. Mercedes Benz of N. Am., Inc., 788 F.2d 918, 931 (3rd Cir. 1986); In re Midwest Milk Monopolization Litigation, 730 F.2d 528, 529 (8th Cir. 1984); In re Beef Industry Antitrust Litigation, 600 F.2d 1148, 1163 (5th Cir. 1979); In re New Motor Vehicles Canadian Export Antitrust Litigation, 533 F.3d 1, 5 (1st Cir. 2008) (the court did not discuss whether or not the co-conspirator exception is an actual exception to *Illinois Brick*,

characterization generally do not require joinder of direct purchaser co-conspirators.[15]

Under the first characterization, the assumptions of *Illinois Brick* apply. As indirect purchasers, the plaintiffs must join direct purchaser co-conspirators to avoid the risk of duplicative recovery. Thus, by binding direct purchaser co-conspirators to the judgment, mandatory joinder is viewed as a mechanism for reducing the risk of duplicative liability that may accompany indirect purchaser litigation.[16]

Under the second characterization, the indirect purchaser has standing against the upstream violator if it is the direct purchaser from the conspiracy as a whole. Circuits following this reasoning have interpreted *Hanover Shoe* and *Illinois Brick* as allocating the right to collect 100% of the damages to the first non-conspirator.[17] In other words, the would-be indirect purchaser gains direct purchaser standing due to the existence of a conspiracy. The direct purchasers and upstream violators are considered a group of firms that is, collectively, the relevant seller. Since antitrust co-conspirators are joint and severally liable, the plaintiffs have standing to sue any of the co-conspirators.[18] If the conspiracy ends (i.e., the direct purchaser defects and sues the upstream violator), that "snitch" would then own the right to damages, and the indirect purchaser plaintiffs would no longer have standing. In this case, the direct purchaser co-conspirator would become the direct purchaser from the conspiracy while the original indirect purchaser plaintiffs would become indirect purchasers of the conspiracy.

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but it did suggest that it would recognize the exception if a vertical conspiracy had been alleged and the direct purchaser co-conspirators had been joined as defendants).

[15] *See Paper Systems*, 281 F.3d at 631–32 (recognizing the co-conspirator exception as a situation in which *Illinois Brick* does not apply); Dickson v. Microsoft Corp., 309 F.3d 193 (4th Cir. 2002) (recognizing *Illinois Brick* as inapplicable where a price-fixing conspiracy has been alleged, but finding the exception not applicable to the case since no price-fixing conspiracy was alleged); Crane v. International paper Co., 2005 WL 3627139, at 7–8 (D. S.C., 2005) (adopting the *Dickson* courts' reading of the co-conspirator exception and holding that joinder of co-conspirators was not required); Lowell v. American Cyanamid Co., 177 F.3d 1228, 1230–31 (11th Cir. 1999); State of Ariz v. Shamrock Foods Co., 729 F.2d 1208, 1211–13 (9th Cir. 1984) (recognizing *Illinois Brick* as inapplicable where a vertical conspiracy is alleged, but not addressing joinder); Frame-Wilson v. Amazon.com, Inc., 664 F. Supp. 3d 1198, 1205–06 (W.D. WA, 2023)(no mandatory joinder of direct purchaser co-conspirators).

[16] *See In re Midwest Milk*, 730 F.2d at 529–32.

[17] *Paper Systems*, 281 F.3d at 631–32.

[18] *See id.* at 632 ("Nothing in *Illinois Brick* displaces the rule of joint and several liability, under which each member of a conspiracy is liable for all damages caused by the conspiracy's entire output").

This Comment is not intended to be a discussion of the merits of *Illinois Brick* or the co-conspirator exception. Instead, this Comment presumes a world in which *Illinois Brick* and the co-conspirator exception exist and is solely intended to provide an analysis of the various approaches to joinder requirements in applying the co-conspirator exception. Part II of this Comment analyzes how various joinder rules may be more or less aligned with the fundamental policy considerations of antitrust law and *Illinois Brick*. Part III proposes an approach to joinder that balances competing interests and aligns with the policy considerations discussed in Part II. The proposed joinder rule calls for a presumption of mandatory joinder where pass-through is alleged that may be overcome by demonstrating that the risk of duplicative liability is minimal or that joinder would be overly burdensome. On the other hand, where no pass-through is alleged, there should be no additional joinder requirement beyond what the Federal Rules of Civil Procedure require.

II. THE FUNDAMENTAL POLICY CONSIDERATIONS OF ANTITRUST LAW

The treble damages remedy in § 4 of the Clayton Act and the overall private enforcement mechanism is designed to compensate those injured by the antitrust violation and incentivize them to bring suit, and to deter future anticompetitive conduct by imposing a significant penalty on defendants. The *Illinois Brick* rule of concentrating all recovery in the direct purchaser was intended to ensure that those who were most directly harmed by the overcharge could receive compensation. The prospect of such compensation would theoretically incentivize direct purchasers to bring suit.[19] However, scholars have long argued that *Illinois Brick* has been detrimental to the efficient enforcement of antitrust laws because it blocks those most likely to sue from bringing a claim.[20] In this sense, it undermines both compensation and deterrence.[21]

As courts heighten the standard for antitrust standing, less potential plaintiffs will meet that standard, thereby insulating many antitrust violators from liability. *Illinois Brick* and

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[19] *See Illinois Brick*, 431 U.S. at 746–47 (suggesting that concentrating recovery in the direct purchaser better aligns with the goals of compensation since the direct purchasers often absorb most of the overcharge).

[20] Joseph P. Bauer, *The Stealth Assault on Antitrust Enforcement: Raising the Barriers for Antitrust Injury and Standing*, 62 U. PITT. L. REV. 437, 443 (2001).

[21] Golnoosh Mostoufi, *Cleaning Up the Illinois Brick Mess*, 45 J. CORP. L. 263, 264 (2019).

subsequent case law has hampered private enforcement by placing limits on the ability of both indirect and direct purchasers to bring suit.[22] For instance, courts have restricted the relatively broad language of the Clayton Act to include only a limited category of antitrust injuries suffered by only a limited category of potential plaintiffs.[23] A plaintiff may only have standing for an antitrust injury that it suffered as the result of reduced competition.[24] The injury must have been "direct" and "foreseeable" within the "target area" of the defendant's conduct.[25] Further, the plaintiffs must fall within the "zone of interest" protectable by the antitrust rule.[26] In fact, in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, the Court listed a number of factors considered in determining whether to grant antitrust standing: the presence of a causal connection between the antitrust violation and the harm, a specific intent requirement for the defendant,[27] whether the nature of the plaintiff's injury falls within the type that Congress sought to redress in providing a private remedy[28], and the directness of the asserted injury.[29] The Court noted that lower courts should analyze each case on a fact-specific basis in light of these factors.[30] Further, circuits have imposed their own additional requirements on antitrust standing. The fact that the antitrust standing inquiry is more of a balancing test leaves plaintiffs with uncertainty over what they must plead to overcome the motion to dismiss hurdle.[31]

In addition to concerns over enforcement, deterrence, and compensation, *Illinois Brick* was also concerned with increasing the efficiency of antitrust litigation.[32] The evaluation of these principles that follows provides guidance for formulating an appropriate joinder rule and reveals that neither per se mandatory joinder nor per se no joinder is an appropriate approach to joinder

[22] Mark A. Lemley & Christopher R. Leslie, *Antitrust Arbitration and* Illinois Brick, 100 IOWA L. REV. 2115, 2116 (2015); *see* American Exp. Co. v. Italian Colors Restaurant, 570 U.S. 228 (2013) (holding direct purchasers bound to an arbitration clause, thus providing another potential escape route for antitrust violators).

[23] Bauer, *supra* note 20, at 439.

[24] *Id.* at 441.

[25] *Id.* at 442.

[26] *Id.*

[27] Associated General Contractors, 459 U.S. 519, 537 (1983).

[28] *Id.* at 538–40.

[29] *Id.* at 540.

[30] Michael Puleo, *Antitrust—Being a Player Against a Monopoly*, 46 VILL. L. REV. 881, 885 (2001).

[31] Puleo, *supra* note 30, at 890.

[32] Musheno, *supra* note 11, at 257.

in indirect purchaser litigation under the co-conspirator exception.

A. Enforcement

The *Illinois Brick* court reasoned that its restriction on indirect purchaser standing would improve antitrust enforcement by concentrating all recovery in the direct purchasers, thereby giving them a substantial financial incentive to bring suit against the upstream violator.[33] However, this theory falters in the conspiracy context. When the conspiracy is formed, the direct purchaser co-conspirators may have intentionally joined the conspiracy or simply acquiesced. Regardless, direct purchaser co-conspirators are unlikely to defect from the conspiracy as long as it is profitable. Bringing suit against the upstream violator would not only risk exclusion from the profitable conspiracy, but the direct purchaser co-conspirator may also face supply constraints if the upstream violator subsequently refuses to deal with them. Moreover, competitors with the upstream violator could be reluctant to deal with direct purchaser co-conspirators as they gain a reputation for bringing suit against their suppliers. Therefore, unless the recovery and the probability of success in litigation outweigh the financial benefits of continuing the conspiracy, a direct purchaser co-conspirator is unlikely to defect and bring suit against the upstream violator. A strict adherence to the *Illinois Brick* bar on indirect purchaser litigation would leave upstream violators virtually insulated from all liability since it would concentrate recovery in the hands of those who are unlikely to bring suit. To avoid this situation, courts recognizing the co-conspirator exception reallocate the cause of action to the first purchaser outside of the conspiracy. The co-conspirator exception can therefore be viewed as a method for improving enforcement efforts.

Within the co-conspirator exception context, mandatory joinder of direct purchaser co-conspirators can aid in enforcement efforts. For instance, mandatory joinder would ensure that all co-conspirators face liability. Absent a joinder requirement, direct purchaser co-conspirators may be largely insulated from liability, similar to upstream violators absent the co-conspirator exception. At the same time, a mandatory joinder rule for invoking the co-conspirator exception can harm enforcement efforts for similar reasons that pushed courts to recognize the exception in the first place.

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[33] *Illinois Brick*, 431 U.S. at 745.

First, mandatory joinder may disincentivize indirect purchaser litigation by imposing a substantial economic burden on plaintiffs. For instance, plaintiffs' attorneys may be disincentivized from taking on indirect purchaser clients due to the increased costs of locating and serving process on hundreds or thousands of direct purchaser co-conspirators.[34]

Second, mandatory joinder may disincentivize indirect purchaser litigation by exposing plaintiffs to reputational and business risks. The *Illinois Brick* court recognized that prohibiting or inhibiting indirect purchaser litigation can largely insulate upstream violators from liability because the direct purchasers are unlikely to bring suit against their suppliers for fear of retaliation.[35] Similarly, indirect purchasers could be wary about bringing suit against the direct purchaser for fear of retaliation. This would be especially true in areas where the direct purchaser holds a local/geographic monopoly.[36] For example, imagine an auto repair shop and its supplier conspired to fix prices. If that shop holds a local monopoly in the auto repair market, the indirect purchaser may be disincentivized from bringing suit against the auto repair shop out of fear that the shop may retaliate and refuse service. Where a mandatory joinder rule would require joining that auto repair shop, the upstream antitrust violator (the supplier) would essentially become insulated from potential liability if the direct purchaser (the shop) fears retaliation or as long as the conspiracy is profitable.

Therefore, while mandatory joinder ensures that direct purchaser co-conspirators will face liability, it is likely an ineffective tool for improving private enforcement efforts overall. The co-conspirator exception arose out of concern that the parties holding the cause of action would be disincentivized from bringing suit, leaving antitrust violators insulated from liability. In a similar manner, mandatory joinder may disincentivize indirect purchaser litigation due to the economic and reputational risks it poses. Nevertheless, when indirect purchasers do have sufficient incentive to bring suit, mandatory joinder can function as an effective tool for promoting deterrence.

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[34] *See* discussion *infra* Section II.B.1.

[35] 431 U.S. at 745–46.

[36] Joel Mitnick, *Vertical Agreements in 35 Jurisdictions Worldwide: United States*, GETTING THE DEAL THROUGH (2014) (discussing exclusive distributorship arrangements).

B. Deterrence

Antitrust law is not only intended to stop and remedy existing antitrust violations, but also to prevent future violations by imposing significant financial repercussions, such as treble damages, on violators. Mandatory joinder of direct purchaser co-conspirators may also be rationalized as a tool for improving deterrence. Mandatory joinder will bind the direct purchaser co-conspirators to the judgment. As such, a finding for the plaintiffs will concentrate all recovery for the overcharge in the indirect purchaser, depriving the direct purchaser of their cause of action and exposing them to potential damages payments. Therefore, the threat of potential liability and losing their cause of action should, theoretically, disincentivize direct purchasers from joining a conspiracy.

On the other hand, a significant critique of mandatory joinder's deterrence benefits is that antitrust co-conspirators are joint and severally liable with no right to contribution. Under this form of liability, each conspirator is responsible for the entire overcharge of all other conspirators. As such, "any direct purchaser from any conspirator can collect its own portion of damages . . . from any conspirator."[37] Joint and several liability is meant to deter entities from entering into conspiracies out of fear that they may be liable for all damages arising from the conspiracy. However, it may also reduce deterrent effects for direct purchaser co-conspirators with minimal market power. Plaintiffs are unlikely to collect from relatively "powerless" defendants when they can recover from a "powerful" upstream violator. Thus, while the powerless direct purchaser co-conspirators may be joined as co-defendants, they may face minimal financial consequences for their illegal behavior.

However, other deterrence tools associated with mandatory joinder compromise this argument. Even though antitrust co-conspirators cannot seek contribution, being named as a defendant in an antitrust suit can be enough incentive to deter anticompetitive conduct.[38] In particular, mandatory joinder deters direct purchasers from participating in a conspiracy by exposing them to reputational risks and potential contribution through judgment sharing agreements (JSAs).

First, joining direct purchaser co-conspirators may expose them to the reputational harms associated with being involved in

[37] *Paper Systems*, 281 F.3d at 632.
[38] Bizjak & Coles, *supra* note 8.

antitrust litigation. The *Illinois Brick* court recognized that direct purchasers may be disincentivized from bringing suit for fear of retaliation that could have detrimental effects on their business operations.[39] The reputational and business harms that disincentivize direct purchasers as plaintiffs may also deter them from becoming co-conspirator co-defendants. Empirical research has shown that simply being named as a defendant in an antitrust suit may result in a decrease in equity value of 0.6% from the time of filing, which equates to an average of $4 million.[40] Thus, even if direct purchaser co-conspirators are not required to pay damages due to joint and several liability, the financial impacts of simply being named as a defendant in an antitrust suit may serve as a tool for deterrence.

Second, judgment sharing agreements (JSAs) between the direct purchasers and the upstream violator could require the conspiring direct purchasers to pay some level of contribution. Antitrust defendants have long argued that joint and several liability can have ruinous consequences. Under the joint and several liability rule, the winning plaintiffs determine what defendants must pay damages. Therefore, a defendant with a small market share could end up paying damages attributable to the entire conspiracy, leading to "ruinous or bankruptcy producing collection action[s]."[41] Defendants have argued that this situation may lead to coercive settlements.[42] To circumvent these potential consequences of joint and several liability, defendants have successfully utilized JSAs to obtain some form of contribution.

Typically, successful JSAs focus on the defendants' relationships with settlement defendants.[43] For example, the JSAs in *In Re Broiler Chicken* permitted defendants to settle with a plaintiff's claim at any time, but described an "unqualified settlement" as "any settlement that does not require a settling plaintiff to reduce the dollar amount collectible from non-settling parties pursuant to any final judgment by a percentage equal to the settling parties sharing percentage."[44] Furthermore, permissible JSAs may create a contractual right of contribution among the signatory defendants, allocating responsibility for damages in

39 431 U.S. at 745–46.

40 Bizjak & Coles, *supra* note 8.

41 In re Broiler Chicken Antitrust Litig., 2022 WL 2028237, at *1 (N.D. Ill. May 4, 2022).

42 *Id.*

43 *Id.*

44 *Id.* at *2.

proportion to their respective market shares (i.e., Sharing Percentage).[45] On the other hand, courts are unlikely to uphold JSAs that inhibit signatory defendants' right to settle with a plaintiff individually, demonstrate an "improper motive to prevent resolution of litigated claims," or have an adverse impact on settlement negotiations.[46]

While plaintiffs have argued that JSAs compromise the deterrence benefits of joint and several liability, it could improve deterrence efforts in the co-conspirator exception context. A direct purchaser co-conspirator who may be joined as a defendant does face a risk of paying damages to plaintiffs. At the same time, they could also end up paying no damages if winning plaintiffs choose to collect from the upstream violator. Signing a JSA with a sharing percentage provision almost certainly will require the joined direct purchaser co-conspirator to pay some amount of damages to prevailing plaintiffs. Why then would a direct purchaser co-conspirator sign such a JSA? Where upstream violators hold significant market power, their direct purchaser co-conspirators may be reluctant to take any action compromising their business relationship, even if it requires paying a share of the damages in antitrust litigation. Due to these pressures that JSAs can place on direct purchaser co-conspirators, would-be conspirators may be disincentivized from joining future conspiracies.

In cases involving small direct purchasers and upstream violators without significant market power, mandatory joinder will likely have a minimal impact on deterrence efforts. For instance, joinder of small direct purchaser co-conspirators may impose less reputational harm as they are less likely to garner media attention. Additionally, because antitrust violators are joint and severally liable, they are unlikely to pay any damages. This is especially true where the upstream violator does not hold enough market power to encourage direct purchaser co-conspirators to sign a JSA. Thus, with minimal reputational and economic risks, the deterrent effects of mandatory joinder are seriously undermined. Conversely, in cases involving larger direct purchasers or upstream violators with significant market power, mandatory joinder can serve as an effective deterrence tool as it imposes both

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[45] California v. Infineon Techs. AG, 2007 WL 6197288, at *1 (N.D. Cal. Nov. 29, 2007).

[46] *In re Broiler Chicken*, 2022 WL 2028237, at *1 (citing *Infineon Techs. AG*, 2007 WL 6197288; In re Brand Name Prescription Drugs Antitrust Litig., 1995 WL 221853 (N.D. Ill. Apr. 11, 1995); Cimarron Pipeline Const., Inc. v. Nat'l Council on Comp. Ins., 1992 WL 350612 (W.D. Okla. Apr. 10, 1992)).

reputational and economic risks on direct purchaser co-conspirators.

C. Compensation

Many facets of private antitrust enforcement rely on compensation. The treble damages remedy not only compensates those injured by the violation, but it also incentivizes plaintiffs to bring suit. A common justification for the *Illinois Brick* rule is that it concentrates recovery in the hands of those likely to be the most directly injured by the antitrust violation. Under the co-conspirator exception, the first purchaser outside of the conspiracy is deemed to be the appropriate set of hands. Mandatory joinder may be used as a tool for ensuring that all potential recovery is concentrated in the appropriate plaintiffs. If the indirect purchaser plaintiffs succeed, the direct purchaser co-conspirators will be bound to the judgment finding that they were involved in a vertical conspiracy. As such, the direct purchasers will lose any cause of action against the upstream violator for violations related to the conspiracy.[47] Conversely, if there is truly no vertical conspiracy involving the direct purchasers, joinder will provide an opportunity for direct purchasers to defend themselves against the conspiracy allegations. Therefore, the direct purchasers will retain their cause of action and be entitled to all potential recovery. With assurance that the proper party will receive the full recovery, potential plaintiffs are provided with a financial incentive to undertake the often costly process of litigation.

However, the absence of a joinder requirement will not necessarily compromise accurate compensation models.[48] Scholars have long argued that indirect purchasers are often the party most directly injured by the anticompetitive conduct.[49] Professors Areeda and Hovenkamp explain, "the consumer is the only party who has paid any overcharge . . . There is no tracing to be done." If the co-conspirator were to sue, it would not base its damages on an overcharge. The direct purchaser co-conspirator would base its damages on a lost profits theory due to the constraint on its retail price.[50] Therefore, and especially in the case of vertical

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[47] *See In re Beef Industry Antitrust Litigation*, 600 F.2d at 1163.

[48] *See infra* Section II.C.

[49] *See infra* Section II.C.

[50] PHILLIP E. AREEDA & HERBERT HOVENKAMP, 2 ANTITRUST LAW ¶ 346h (2nd ed. 2000).

conspiracies like exclusive distributorships[51] where there are no pass-through allegations, the action brought by direct purchasers would involve a different damages theory than that of indirect purchasers. While duplicative liability is prohibited, multiple liability is not.[52]

It is important to note that this discussion of compensation is separate from the discussion of duplicative liability. For the purposes of this compensation discussion, Areeda and Hovenkamp's argument against finding duplicative liability in pass-through cases simply shows that indirect purchasers and direct purchasers are not pulling from the same pot. The *Illinois Brick* court was concerned with apportioning damages in a way that disincentivizes parties from bringing antitrust suits. In short, the less money plaintiffs are likely to recover, the less likely they are to bring action against violators. However, recognizing the difference in damages claims, no group of plaintiffs would be losing any money that they were entitled to. Any apparent decrease in damages would more likely be the result of improperly conflating the damages claims, especially where no pass-through is alleged.

Even where the damages claims are improperly conflated, mandatory joinder remains an ineffective tool for ensuring appropriate compensation. Absent mandatory joinder, all recovery would more likely than not remain in the hands of successful indirect purchaser plaintiffs. Direct purchaser co-conspirators are already unlikely to bring subsequent litigation against the upstream violator. All that mandatory joinder would do is reduce that low probability to a slightly more definitive zero.

D. Efficiency

Traditionally, joinder is viewed as a tool for promoting judicial efficiency.[53] For instance, joinder avoids repetitious litigation of multiple claims against multiple parties.[54] As such, joinder is typically required whenever a person not joined may subject the

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51 ALBERT A. FOER & RANDY M. STUTZ, PRIVATE ENFORCEMENT OF ANTITRUST LAW IN THE UNITED STATES: A HANDBOOK 30 (2012).

52 *See* Apple Inc. v. Pepper, 139 S.Ct. 1514, 1525 (2019) ("Apple [may be] subject to multiple suits by different plaintiffs. But *Illinois Brick* did not purport to bar multiple liability that is unrelated to passing an overcharge down a chain of distribution . . . . 'that an antitrust violation produces two different classes of victims hardly entails that their injuries are duplicative'").

53 *See* League to Save Lake Tahoe v. Tahoe Regional Planning Agency, 558 F. 2d 914, 917 (9th Cir. 1977); Goodman v. H. Hentz & Co., 265 F. Supp. 440, 443 (N.D. Ill. 1967); Hercules Inc v. Dynamic Export Corp., 71 F.R.D. 101, 106 (S.D. N.Y. 1976).

54 Robin J. Effron, *The Shadow Rules of Joinder*, 100 GEO L.J. 759, 770.

defendant to double "or otherwise inconsistent liability."[55] According to the *Illinois Brick* court and circuits mandating joinder of direct purchaser co-conspirators, indirect purchaser litigation exposes antitrust defendants to a risk of duplicative liability. The indirect purchaser may bring repetitious litigation against the direct purchasers and upstream violators. The upstream violators may face repetitious litigation from indirect purchaser and subsequent direct purchaser plaintiffs. In this sense, mandatory joinder of direct purchaser co-conspirators may improve efficiency by consolidating such litigation.

At the same time, joinder rules under the Federal Rules of Civil Procedure recognize the need for judicial discretion to avoid the inefficiency that may accompany joinder of multitudes of claims and parties.[56] In the co-conspirator exception context, mandatory joinder of direct purchaser co-conspirators may result in similar "unwieldly and inefficient"[57] litigation.

i. Burden on Plaintiffs

Mandatory joinder of direct purchaser co-conspirators may compromise efficiency by placing substantial burdens on plaintiffs. Imagine an upstream violator with nationwide operations, using different distributors across the nation. A class of plaintiffs bringing antitrust claims against the upstream violator may have purchased from different distributors (the direct purchasers) throughout the nation. While the indirect purchaser plaintiffs share a common conspiracy claim, mandatory joinder requires that they must now join all of the nationwide distributors.

In fact, a similar situation occurred in *Campos v. Ticketmaster*. The plaintiffs had alleged that Ticketmaster had obtained control over a vast majority of ticket sales for almost all large-scale popular music concerts in the U.S. and that Ticketmaster had used this control to charge supracompetitive fees to purchasers.[58] The court characterized the plaintiffs as indirect purchasers who purchased tickets from the concert venues who had purchased ticket distribution services from Ticketmaster.[59] In order to invoke the co-conspirator exception, the court noted that

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[55] *See* Window Glass Cutters League of America AFL-CIO v. American St. Gobain Corp., 47 F.R.D. 255, 258 (W.D. PA 1969) (citing 3A MOORE'S FEDERAL PRACTICE ¶ 19.01 [5,-3]).

[56] Effron, *supra* note 54.

[57] *Id.*

[58] Campos v. Ticketmaster, 140 F.3d 1166, 1168–69 (8th Cir. 1998).

[59] *Id.* at 1171.

plaintiffs were required to join the direct purchaser co-conspirators.[60] However, this would have required plaintiffs to join virtually every concert venue in the United States.[61]

The vast number of direct purchaser co-conspirators that would need to be joined in cases similar to *Campos* would require an expansive notice and service of process undertaking for plaintiffs' attorneys.[62] With contingency and hybrid-contingency representation, attorneys may be reluctant to take on such economic risk.[63] Thus, the lack of efficiency in simply complying with mandatory joinder may also hamper enforcement efforts as plaintiffs and their attorneys are reluctant to bring suit.

ii. Increased Complexity to Litigation

The *Illinois Brick* court found that prohibiting indirect purchaser suits would lead to more efficient litigation by reducing difficult questions of allocating damages among downstream purchasers.[64] Setting the damages allocation issue aside, an overinclusive mandatory joinder requirement may raise additional efficiency concerns as both the indirect purchaser plaintiffs and the direct purchaser co-conspirators are likely to fight the mandatory joinder requirement.

a) Characterization issues

The economic and reputational risks associated with mandatory joinder may incentivize the indirect purchaser plaintiffs to recharacterize the distribution chain as one in which they are direct purchasers. This recharacterization would inevitably require more complex inquiries into the relevant market and the

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60 *Id.* at n. 4.

61 PHILLIP E. AREEDA & HERBERT HOVENKAMP, 2 ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 346h (2d ed., 2000).

62 Absent joinder, plaintiffs' attorneys face a number of costs that may not be recovered if the case is unsuccessful. *See* Foer, *supra* note 51, at 260–62.

63 Jiamie Chen, *Promoting Competition in Competition Law: The Role of Third-Party Funding*, 30 J. ANTITRUST, UCL & PRIVACY SECTION CA LAW. ASSOC. 137, 140 (2020); *see also*, *2024 Average Process Server Cost (with Price Factors)*, THUMBTACK (Aug. 26, 2020), https://perma.cc/8WUK-UC9L (a website that provides a list of process servers and estimated prices based on zip code). Serving process can also be delaying, uncertain, and potentially dangerous. *See* William M. Janssen, *Rule 4(D) and Self-Initiated Extensions to Answer*, 68 FED. LAW. No. 4, July/Aug 2021, at 55; *Process Servers Taking a Beating—Literally*, DGR LEGAL, https://perma.cc/RTU5-5LSQ (demonstrating the physical safety concerns of process servers); *see also*, ABA, ANTITRUST CLASS ACTIONS HANDBOOK 24–32 (2nd ed. 2018).

64 *Illinois Brick*, 431 U.S. at 741–45.

particular distribution chain in order to simply determine whether plaintiffs are indirect or direct purchasers.

In fact, the indirect vs. direct characterization issue is exemplified in *Apple v. Pepper*, where one of the main points of disagreement between the majority and the dissent was whether to characterize plaintiffs as direct or indirect purchasers.[65] The plaintiffs claimed that Apple had monopolized the market for the sale of apps and that it has used its monopolistic power to charge higher-than-competitive prices.[66] The majority characterized plaintiffs as direct purchasers. Under this characterization, the plaintiffs directly purchased apps from Apple, who sourced the apps from app developers.[67] Thus, the case involved a simple distribution chain where plaintiffs are analogous to a consumer who purchases a product from a retailer (Apple) that sources its inventory from a supplier (the app developers). On the other hand, the dissent characterized the plaintiffs as indirect purchasers. Under this characterization, the plaintiffs purchased apps from the developers who paid Apple for access to its platform.[68] Thus, the distribution chain is analogous to one in which consumers (the plaintiffs) are direct purchasers of the store (developers) who leases the space from its landlord (Apple) This later characterization would seem more accurate considering that Apple does not purchase anything from the developers. Instead, the developers paid Apple a $99 annual membership fee and a 30% commission to sell an app in Apple's App store. The majority's characterization, although likely inaccurate, provided the plaintiffs an avenue of relief without requiring the Court to reevaluate *Illinois Brick*. While *Apple* was not a case involving mandatory joinder, it does demonstrate how plaintiffs and courts may attempt to work around obstacles to indirect purchaser standing.

b) Resistant direct purchaser co-conspirators

Where recharacterization efforts fail, the direct purchaser co-conspirators are likely to resist efforts to join them as co-defendants. Theoretically, a direct purchaser may desire to be joined in order to protect its reputation against conspiracy allegations. However, these reputational risks may be outweighed by the reputational harm associated with being named as a defendant in an antitrust conspiracy. Antitrust defendants may face a significant

[65] *See* Apple v. Pepper, 139 S. Ct. at 1514.
[66] *Id.* at 1518.
[67] *Id.* at 1526.
[68] *Id.* at 1527–28 (Gorsuch, J., dissenting).

decrease in equity value regardless of whether they are ultimately held liable for an antitrust violation.[69] Being named as a defendant may also cause direct purchasers' stakeholders to lose trust in them, especially if the litigation draws negative publicity that damages the company's brand image.[70] These reputational harms may therefore encourage direct purchasers to, for example, evade efforts to serve notice on them in an attempt to delay joinder. Such evasive mechanisms may substantially impair litigation, especially when a multitude of direct purchaser co-conspirators are involved.

c) Problematic strategies

To avoid dismissal of their claims, plaintiffs may be encouraged to join as many defendants as possible, leading to an overinclusive pool of defendants and misjoinder claims that will further delay litigation.[71] Where plaintiffs are unsuccessful in joining all direct purchaser co-conspirators, the upstream violators may use the mandatory joinder rule as a strategic tool to evade liability. Upstream violators often argue that plaintiff's lack standing because they have not joined direct purchaser co-conspirators as defendants. Courts have granted motions to dismiss on these grounds, even though general principles of joinder typically argue against dismissal for failure to join whenever possible. Instead, general principles of joinder tend to call for the court to subsequently order joinder.[72] Even where courts do follow these general principles of joinder, the mandatory joinder requirement may be used, at a minimum, to delay litigation.[73]

iii. Unnecessary Requirement

It is critical to understand that, even absent a mandatory joinder requirement for invoking the co-conspirator exception, Rule 19 still applies. Typically, joint tortfeasors with joint and

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69 Bizjak, *supra* note 8.

70 *See 5 Steps to Recover Your Reputation After a Business Litigation*, DOYLE L. OFF., https://perma.cc/ED9E-YATT.

71 *See* Geico Corporation v. Autoliv, Inc., 345 F. Supp. 3d 799 (E.D. Mich. Aug. 30, 2018).

72 International Union of Operating Engineers, Local 103, AFL-CIO v. Irmscher & Sons, Inc., 63 F.R.D. 394, 397 (N.D. Ind. Oct. 30, 1973).

73 *See, e.g.*, *Campos*, 140 F.3d at 1168, 1171 n. 4 (mandatory joinder would have required plaintiffs to join venues for "almost every popular music concert in the United States").

several liability are permissive parties.[74] Yet, any direct purchasers that are necessary for just adjudication would still be required to be joined. Courts have acknowledged this, and joinder would likely be required under Rule 19(a) where pass-through theories are alleged.[75] Under the *Illinois Brick* assumption that direct and indirect purchasers will have the same damages theory when pass-through is alleged, the direct purchaser co-conspirators would be a required party under Rule 19(a). In the direct purchaser's absence, the litigation could impair or impede the direct purchaser's cause of action.[76] Additionally, the existing defendant would be at a substantial risk of incurring duplicative liability.[77]

The Ninth Circuit, for example, has held that plaintiffs are not required to join alleged antitrust co-conspirators since they are joint tortfeasors and not indispensable parties.[78] Yet, where the co-conspirator's absence would prevent the court from according complete relief among the parties, the Ninth Circuit has held that joinder would be required under Rule 19(a).[79] Thus, where, for instance, a contract between the direct purchasers and the upstream violator is going to be set aside, joinder under Rule 19(a) would likely be required.[80]

Because the joinder requirements of Rules 19 and 20 apply, the mandatory joinder rule for the co-conspirator exception to *Illinois Brick* would be an additional joinder rule beyond what the *Federal Rules of Civil Procedure* require. Likely, it would encapsulate those direct purchasers who could be permissively joined under Rule 20, subject to the courts' discretion. These direct purchaser co-conspirators would likely qualify for joinder under Rule 20 because (1) the indirect purchaser's right to relief is asserted against them jointly and severally with the upstream violator, and (2) questions of law or fact common to all defendants—the existence of a conspiracy—will arise in the action.[81]

Therefore, if the defendant wanted to be extra sure that direct purchaser co-conspirators would have no cause of action or that the direct purchaser would be bound to a judgment sharing

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74 *See* Temple v. Synthes Corp., Ltd., 498 U.S. 5, 7 (1990); *see also* Fed. R. Civ. P. 19(a) advisory committee's note to 1966 amendment.

75 *See Illinois Brick*, 431 U.S. at 737–39; *Lowell*, 177 F.3d at 1231.

76 Fed. R. Civ. P. 19(a)(1)(B)(i).

77 Fed. R. Civ. P. 19(a)(1)(B)(ii).

78 Ward v. Apple, Inc., 791 F.3d 1041 (9th Cir. 2015).

79 *Id.* at 1048.

80 *Id.* at 1049.

81 *See* Fed. R. Civ. P. 20(a)(2).

agreement,[82] then the defendant would theoretically be able to do so under Rule 20. However, where a direct purchaser is barred from bringing suit, highly unlikely to bring suit, or seeks to sue based on different damages theories than the indirect purchasers, a mandatory joinder requirement would be an unnecessary requirement that is potentially burdensome on plaintiffs and brings unnecessary complexity into the litigation.

E. The Economic Side of Things

As with many issues in antitrust law, courts on both sides of the mandatory joinder issue rest their opinions on economic theories. To understand these opinions, it is necessary to first understand the economic theories behind existing antitrust law. First, courts have largely adopted the Chicago School of thought in determining the appropriate relationship between antitrust law and economics. Second, a major rationale underlying *Illinois Brick* was that barring indirect purchaser litigation would reduce the risk of duplicative recovery. Circuits mandating joinder of direct purchaser co-conspirators heavily rely on this rationale while circuits without mandatory joinder question its relevance. Finally, changing market structures and increased public scrutiny have raised calls for increased antitrust enforcement and reform.

i. The Relationship Between Antitrust, *Illinois Brick*, and Economics

The most influential school of thought in antitrust case law has arguably been the Chicago School of thought.[83] Sometimes called the "liberty" camp of antitrust theory,[84] the Chicago School advocates a noninterventionist approach that relies on the ability of free markets to efficiently allocate resources and self-correct by incentivizing competition. Under this theory, antitrust law should focus on maximizing consumer welfare by relying on economic factors like price, quality, and output. As this school of thought has bled into the courts, economic evidence rather than

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82 *See* Christopher R. Leslie, *Judgment-Sharing Agreements*, 58 DUKE L.J. 747 (Feb. 2009).

83 Maureen K. Ohlhausen, *Liberty, Equality, and Fraternity: Evolution or Revolution in Antitrust?*, 35 ANTITRUST 25 (2021). Virtually since its inception, scholars have been skeptical of the Chicago School. *See* Filippo Lancieri, Eric A. Posner & Luigi Zingales, *The Political Economy of the Decline of Antitrust Enforcement in the United States* 3 (Becker Friedman Inst., Working Paper No. 2022–104, 2022) (arguing that the Chicago School was largely overtaken by the "post-Chicago" approach in scholarship since the 1980s).

84 Ohlhausen, *supra* note 83.

presumptions and standards have become the focus of substantive antitrust law.[85] While scholars have scrutinized, and largely abandoned, the Chicago School since the 1990s, courts still readily embrace the Chicago School's ideas.[86]

Nevertheless, the indirect purchaser rule is seemingly at odds with the Chicago School's ideas. This "liberty" camp disfavors categorical distinctions. Instead, it favors a functionalist approach that will focus on economic theory and maximize consumer welfare. The *Illinois Brick* prohibition on passing through theories, however, has been questioned by a number of scholars as being based on an inaccurate economic theory.[87] Moreover, the Court's opinion in *Apple v. Pepper* seems to have further solidified this incorrect economic analysis. According to Professor Hovenkamp, the dissent in *Apple* ignored the fact that the largest burden of the overcharge fell on the consumer.[88] Many intermediaries suffer no overcharge injuries because they pass it on. Instead, the injury that they incur is reduced transaction volume. Thus, Hovenkamp suggests that a better rule for compensating injured parties would be to provide the indirect purchasers with an overcharge cause of action and the direct purchasers with an action for lost profits.[89] In this situation, there is neither apportioning nor duplicative recovery.

In addition, some scholars have argued that the bright-line rule of *Illinois Brick* and Hanover Shoe may be unnecessary. For instance, Professors Robert G. Harris and Lawrence A. Sullivan offer an economic theory for simplifying the tracing a passed-on

[85] *See, e.g.*, Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) (holding that nonprice vertical restraints should be analyzed using the rule-of-reason); Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984) (increasing the standard for proving vertical conspiracies); Leegin Creative Leather Products v. PSKS, Inc., 551 U.S. 877 (2007) (holding that resale price maintenance should be analyzed using the rule of reason); United States v. Syufy Enterprises, 903 F.2d 659 (9th Cir. 1990) (finding a merger involving high market shares permissible because of procompetitive evidence of ease of entrance); FTC v. University Health, Inc., 938 F.2d 1206 (11th Cir. 1991) (holding that evidence of increased market concentration can be rebutted by evidence of substantial efficiencies). Mark Glick & Darren Bush, *The Chicago School, the Post-Chicago School, and the New Brandeisian School*, 30 GEORGE MASON L. REV. 935, 946 (2023).

[86] Glick & Bush, *supra* note 85.

[87] The Post-Chicago School and the New Brandeisian School argue that the Chicago School's ideas have largely been disproven. Nevertheless, courts have been reluctant to abandon the Chicago School's principles. *See, e.g.*, Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 407 (2004); Glick & Bush, *supra* note 85, at 954.

[88] Herbert Hovenkamp, *Framing the Chicago School of Antitrust Analysis*, 168 U. PA. L. REV. 1843, 1875 (2020).

[89] *Id.* (stating that opinions like Apple "represent a tortured effort to limit liability even when sound and up-to-date economics point in the other direction").

overcharge down a distribution chain.[90] In essence, Harris and Sullivan identify a variety of methods and mechanisms that "illustrate specific, manageable inquiries through which a court can investigate and resolve passing-on questions with reasonable confidence and dispatch."[91] Utilizing this theory, courts should be able to sometimes trace passing on. Where such tracing is possible Harris and Sullivan argue that courts would strike the best balance between preventing duplicative liability and encouraging compensation and enforcement by permitting both offensive and defensive passing-on evidence.[92]

On the other hand, Professors Landes and Posner argued that overruling *Illinois Brick* would seriously undermine enforcement efforts by direct purchasers. Overruling *Illinois Brick*, the theory goes, would not impact the amount of compensation indirect purchasers receive, but would disincentivize direct purchaser from bringing suit. Concentrating recovery in the direct purchasers provides an incentive for direct purchasers to bring suit because "an antitrust claim is equivalent to a valuable, though risky, asset that includes a zero recovery as one possible outcome."[93] This does not leave indirect purchasers with no compensation. Instead, indirect purchasers receive compensation in the form of lower prices that, over time, will approximate the recovery they could have obtained through litigation. Thus, direct purchaser bear the risk of antitrust litigation while indirect purchasers "receive a certain benefit based on the anticipated value of the claim."[94] Absent the *Illinois Brick* bar on indirect purchaser litigation, the direct and indirect purchasers would "share the risk and the possible return on the antitrust claim," leading to increased prices "to compensate the direct purchaser for the lower expected value of his antitrust claim."[95]

Regardless of which argument one finds more persuasive, the *Illinois Brick* bar on indirect purchaser standing for pass-through claims stands today. Scholarship is plentiful on the issue of *Illinois Brick* and around half of States have reacted to *Illinois Brick* by giving indirect purchasers a state cause of action. The question

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[90] Robert G. Harris & Lawrence A. Sullivan, *Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis*, 128 U. PA. L. REV. 269 (1979).

[91] Harris & Sullivan, *supra* note 90, at 275.

[92] *Id.*

[93] William M. Landes & Richard A. Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of* Illinois Brick, 46 U. CHI. L. REV. 602, 605–06 (1979).

[94] *Id.* at 606.

[95] *Id.*

here is whether compulsory joinder aligns with the *Illinois Brick*'s characterization of sound economic theory that maximizes consumer welfare. In short, a "per se" requirement of joinder does not further these goals. Under the view that the co-conspirator exception is truly an exception to *Illinois Brick*, then joinder would be required for vertical conspiracies alleging passing-on. Even though the theory that direct and indirect purchasers would have the same damages theories, requiring complex apportionment calculations has been largely refuted, *Illinois Brick* remains as a bar to indirect purchaser litigation alleging overcharge damages based on pass-through theories. Conversely, under the view that the co-conspirator exception is actually a situation in which *Illinois Brick* is not applicable, then a relaxed joinder rule could enable courts to correct some of the incorrect economic theories underpinning *Illinois Brick*. With *Illinois Brick* inapplicable, the indirect purchaser can bring its overcharge claims. Regardless of the view that one takes, where no pass-through theories are alleged, a per se joinder requirement seems meaningless as a tool for preventing duplicative recovery.

ii. Duplicative Liability

The idea behind the co-conspirator exception is that *Illinois Brick* allocates the right to collect 100% of the damages for an overcharge to the first non-conspirator in the distribution chain. Thus, circuits that mandate joinder as a pre-requisite to recognizing the co-conspirator exception often focus on the risk of duplicative liability.[96] Simply, duplicative recovery is where one person recovers damages for the injuries of another person who has also recovered for those injuries.[97] Providing both indirect purchasers and direct purchasers a cause of action heightens the risk of duplicative liability.[98] Mandatory joinder, the argument goes, prevents the risk of duplicative liability by binding the co-

[96] Note that courts often use the terms "multiple liability" and "duplicative liability" interchangeably. *See, e.g.*, In re Mid-Atlantic Toyota Antitrust Litigation, 516 F. Supp. 1287, 1291 (D. Md. 1981); *In re Beef*, 600 F.2d at 1163. However, multiple liability refers to an antitrust violator being held liable for two different injuries caused by the same antitrust violation. Duplicative liability refers to an antitrust violator being held liable to two different classes of victims that have faced the same injury caused by the same antitrust violation. *See Apple v. Pepper*, 139 S. Ct. at 1525.

[97] HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 830 (5th ed. 2016).

[98] *See Illinois Brick*, 431 U.S. at 737–38.

conspirators to the decision.[99] If the direct purchaser co-conspirator defects and aligns themselves as plaintiffs, then they would come to own the right to damages. If the co-conspirator does not defect, then they will be bound to the judgement holding them as co-conspirators and be barred from bringing their own suit.

Circuits that hold *Illinois Brick* as inapplicable where vertical conspiracies are alleged do not hold such a hardline stance on joinder. To these circuits, the need to encourage enforcement often outweighs the risk of duplicative liability. Since these circuits hold *Illinois Brick* is inapplicable where plaintiffs allege a vertical conspiracy with no pass-through allegations, the indirect purchaser can bring a claim for overcharge damages. These circuits have reasoned that direct purchasers are unlikely to subsequently bring suit. If they do, courts have determined that there would be no duplicative recovery because the direct purchaser's claims would be based on damages for lost profits rather than for a passed-through overcharge.[100] In other words, the direct purchaser would argue that it lost profits because the conspiracy required it to charge a higher price. Therefore, the upstream violator would face multiple liability but not duplicative liability.

The idea that courts can limit the risks of duplicative recovery is based on the idea that there is an identifiable total amount of injury caused, and § 4 of the Clayton Act limits this amount to treble damages.[101] Thus, there is one pool of damages available that contains a large enough sum to account for the harms suffered by each type of plaintiff.[102] By prohibiting pass-on theories, the direct purchasers are entitled to the entire pool. Where indirect purchasers are able to assert pass-on theories, and both indirect and direct purchasers bring suit, two outcomes could occur. First, the defendant could be subjected to duplicative liability as both types of plaintiffs would claim they are entitled to the entire pool. In other words, the defendant would end up paying for two pools instead of one. Alternatively, courts could apportion damages among each type of plaintiff. In other words, each type of plaintiff would recover their respective damages from the total pool of available recovery.

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99 *See id.* (noting that one of the interests supporting compulsory joinder is the interest of the defendant in avoiding multiple liability for the fund).

100 *See, e.g.*, *Lowell*, 177 F. 3d at 1231.

101 *See* HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 97 (noting that antitrust violations rarely produce an easily identifiable "pool of injuries").

102 *Id.*

The *Illinois Brick* court determined that indirect purchasers should be prohibited from recovering damages against the upstream violator because allocating the amount of overcharge incurred by each purchaser in the distribution chain would be an overly complex task.[103] Additionally, apportioning damages to this degree could disincentive direct purchasers, the oft-considered most directly injured party, from bringing suit as the financial incentive decreases. Thus, courts have been reluctant to read exceptions into *Illinois Brick* that increase the risk of duplicative liability. By binding the direct purchaser co-conspirators to the litigation, A mandatory joinder rule would aid efforts to decrease the risk of multiple liability while also ensuring that the cause of action lies in the hands of the first purchaser outside the conspiracy.[104]

Circuits without a mandatory joinder rule often recognize the ability for joinder to prevent duplicative liability. However, they also recognize that an overinclusive mandatory joinder rule could impair enforcement efforts. For instance, while the Ninth Circuit has not expressly addressed the joinder issues, lower courts in this circuit have interpreted the exception to hold that joinder is not required where they find that there is no risk of duplicative recovery.[105] Similarly, in *Lowell v. American Cyanamid Co.*, the Eleventh Circuit held that the *Illinois Brick* bar against indirect purchaser litigation does not apply to vertical conspiracies with no allegations of passing on.[106] The court specifically refuted the idea that there would be a risk of duplicative recovery in such cases. Where the dealer and manufacturer conspired to set the dealer's resale price, there is no issue of duplicative recovery or apportionment because only the consumer has paid any overcharge.[107] The manufacturer, as a fellow conspirator of the dealer who sold directly to the consumer, is jointly and severally liable with the dealer for the consumer's overcharge injury. In this sense, the court viewed there as being one illegal act: the vertical

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[103] In addition to the complexity of apportioning damages, restricting the right of action to direct purchasers may increase private enforcement. Under *Illinois Brick*, the direct purchasers can recover for the entirety of the overcharge, even if it passed it on to its customers. This larger recovery incentivizes direct purchasers to bring suit. If damages must be apportioned among indirect and direct purchasers, there will be less incentive to sue as recovery for each plaintiff would be lower. *See* Landes & Posner, *supra* note 93.

[104] *See In re Beef*, 600 F.2d at 1163; *Link*, 788 F.2d at 931–32.

[105] *See, e.g.*, *Frame-Wilson*, 2023 WL 2632513 at 1205–06; *see also State of Ariz v. Shamrock Foods Co.*, 729 F.2d at 1212–13.

[106] *Lowell*, 177 F.3d at 1230.

[107] *Id.* at 1230 (citing 2 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 264 (rev. ed. 1995)).

conspiracy. They additionally viewed there as being only one set of potential plaintiffs: the consumers. The court further explains that the two other kinds of potential plaintiffs are intermediaries who could sue the manufacturer either for coerced participation in an unlawful scheme or termination for refusing to adhere. However, these cases would be based on a different measure of damages. In other words, there would be distinct injuries that each kind of plaintiff would recover rather than a duplicative recovery for the same injury. Thus, the indirect purchasers were permitted to bring suit against the manufacturer for the full cost of the conspiracy since they are jointly and severally liable with the direct purchasers. In other words, these circuits hold that *Illinois Brick* does not bar multiple liability unrelated to pass-through theories. Instead, it bars duplicative liability based on the same damages theory (pass-through theories).

Moreover, mandatory joinder may prove ineffective at preventing defendants from actually paying more than treble damages. The Supreme Court has permitted states to give a right of action to indirect purchasers.[108] Under these state statutes—commonly called *Illinois Brick*-repealers—indirect purchasers can also receive damages for the overcharge they incurred while direct purchasers recover the same under the Clayton Act.[109] Technically, the claims brought by direct and indirect purchasers are different types of liability: one federal, another state. However, to the upstream violator, the consequences are the same: the upstream violator is exposed to the risk of paying up to 6 times the alleged harm caused by their conduct. Adding insult to injury, direct and indirect purchasers can bring their claims together: direct purchasers would sue for damages under the Clayton Act while the indirect purchaser sues for injunctive relief under the Clayton Act and for damages under state statutes through supplemental jurisdiction. Thus, in one federal action, defendants are at risk of paying double what the Clayton Act would provide. To

108 *California v. ARC*, 490 U.S. at 101.

109 *See, e.g.*, KAN. STAT. ANN. § 50-161(b) (providing a cause of action for indirect purchasers and the ability to recover treble damages; HAW. REV. STAT. § 480-14(c) (providing a cause of action to indirect purchasers but restricting recovery to only compensatory damages); ALASKA STAT. § 45.50.562-598 (permitting indirect purchaser claims through state action); CAL. BUS. & PROF. CODE § 16750(b) (courts have interpreted this statute to permit suits by indirect purchasers; *see, e.g.*, Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC, 737 F. Supp. 2d 380 (E.D. Pa. 2010)); COLO REV. STAT. § 6-4-111 (2) (permitting indirect purchaser claims through state action where the indirect purchasers are governmental or public entities). For more information on state approaches to *Illinois Brick*, see ABA SECTION OF ANTITRUST LAW, INDIRECT PURCHASER LITIGATION HANDBOOK 397–442 (2nd ed., 2016).

the defendant, there is not much difference between having to pay treble damages to both direct and indirect purchasers simply because one claim is brought under state law.

Finally, it is important to note that, although the main justification for mandatory joinder has been the risk of duplicative liability, courts requiring joinder of direct purchaser co-conspirators as defendants have applied the joinder requirement as a blanket rule. For instance, in *Insulate SB, Inc. v. Advanced Finishing Systems, Inc.*, the court held that indirect purchaser plaintiffs had standing because they alleged that the direct purchasers were co-conspirators and had joined them as defendants. However, plaintiffs made no pass-through allegations. Instead, plaintiffs alleged a conspiracy to artificially raise prices based on exclusive dealing agreements.[110] While *Illinois Brick* makes clear that pass-through offenses are prohibited, it seems clear that there is no risk of duplicative liability, in the *Illinois Brick* sense, when no pass-through theories are alleged. Thus, mandatory joinder can become an overinclusive tool that comprises enforcement of antitrust law in an age of increased market concentration and minimal public enforcement efforts.

iii. Calls for Antitrust Reform in Response to Changing Market Conditions

Over the past few decades, changing economic conditions and market structures have renewed calls for antitrust reform, especially in regard to indirect purchasers. Since at least the 1980s, the American economy has become less competitive. A number of industries have become more concentrated, including the airline industry, the healthcare industry, and the beer market.[111] The average markup across the U.S. economy has increased from 21% above cost in 1980 to 61% above cost in 2016.[112] More importantly for the antitrust context, researchers have noted that both markups and profitability have increased, demonstrating that increased overhead costs alone do not account for the dramatic increase in markups.[113] Furthermore, this research also revealed that not only the average profitability rate increased, but also the

110 Insulate SB, Inc. v. Advanced Finishing Systems, Inc., 797 F. 3d 538, 544 (8th Cir. 2015).

111 David Wessel, *Is Lack of Competition Strangling the U.S. Economy?,* HARV. BUS. REV. (Mar.–Apr. 2018), https://perma.cc/GC3K-4PNA.

112 Jan De Loecker, Jan Eeckhout & Gabriel Unger, *The Rise of Market Power and the Macroeconomic Implications*, 135 Q. J. ECON. 561 (2020).

113 *Id.*

stock market valuation and share of sales have increased over the same period.[114]

Moreover, consumers may often be the party that is the most directly impacted by the lack of competition. For instance, the right to repair movement sees significant antitrust concerns with regard to repair restrictions. This movement has gained the most attention in the business-to-consumer (B2C) context where consumers are frustrated by restrictions placed on their ability to personally repair (or hire technicians unaffiliated with the manufacturer to repair) their farming equipment, home appliances, consumer electronics, and medical equipment.[115] For instance, farmers who have already spent thousands, if not millions, of dollars on equipment like combines may face further thousands of dollars of lost crops while waiting for an approved dealer with access to the specific software tools to repair their machines.[116] However, minimal federal action has been taken to address these concerns.[117] The concerns of this movement largely reflect the idea that indirect purchasers are likely to be those most injured and most likely to desire antitrust enforcement. Since the direct purchasers are benefiting from repair restrictions, they are unlikely to bring suit against their upstream co-conspirator.

If we buy into the idea that we need antitrust reform, the question of mandatory joinder clearly falls within an evolutionary approach to antitrust reform.[118] In this way, the joinder requirement is an opportunity for courts to make incremental changes leading to long-term reform. Per se rules with minimal economic justification are often overinclusive and pose risks of error in their application.[119] Therefore, our approach to driving legal change in antitrust law must be based in economic principles, and this is no

114 *Id.*

115 Robert Cunningham & Darby Hobbs, *The Evolution of the Right to Repair*, 37 ANTITRUST 43, 44 (2023).

116 *See* Alexander Joseph Gambino, *Right to Repair: Whose Right is it Anyway?*, 25 TRANSACTIONS: TENN. J. BUS. L. 125, 126–27 (2023).

117 In 2021, President Biden issued an Executive Order charging the FTC with improving antitrust enforcement in repair restrictions. *See* Cunningham & Hobbs, *supra* note 115, at 45. While federal action is minimal, states have begun to take action in response to the right to repair movement. California, Colorado, Minnesota, and New York have enacted legislation that require manufacturers to provide certain other people the means to repair certain products such as electronics, appliances, and farm equipment. *See* NCSL, *Right to Repair 2023 Legislation*, https://perma.cc/Q8FR-Z3C5.

118 Ohlhausen, *supra* note 83.

119 William H. Page, *The Chicago School and the Evolution of Antitrust: Characterization, Antitrust Injury, and Evidentiary Sufficiency*, 75 VA. L. REV. 1221, 1222 (1989).

different for the question of joinder in invoking the co-conspirator exception.[120]

III. SOLUTION: COMPULSORY JOINDER . . . SOMETIMES

A balance must be struck between the aims and defects of both a mandatory joinder rule and no joinder requirement. Since the inception of the co-conspirator exception, all forms of vertical conspiracies have largely been lumped together into one category. However, joinder may pose more of a benefit or detriment depending on the type of vertical conspiracy alleged. Therefore, the ideal joinder requirement should be differentiated among different types of vertical conspiracies. Specifically, joinder should generally not be required for vertical conspiracy claims with no pass-through allegations but should be required for those with pass-through allegations. Regardless, in the context of the co-conspirator exception, joinder should always be a rebuttable presumption rather than a bright-line rule.

A. No Mandatory Joinder for Vertical Conspiracy Claims with No Pass-Through Allegations

Absent allegations of pass-through, there appears to be no need for mandatory joinder. While direct purchaser co-conspirators may evade liability, the main rationale underlying the joinder requirement has been the risk of duplicative recovery.[121] Where plaintiffs have not alleged a pass-through damages theory, subsequent suits by direct purchasers would not pose a risk of duplicative recovery because the damages theories brought by direct and indirect purchasers would be different. Imagine a manufacturer that offers its distributors a rebate if they sell the product above a minimum resale price. The direct purchaser would be the distributors and the indirect purchaser would be the consumer who purchased from the distributor. The distributor could have an action for lost sales as a result of having to charge a higher price. The indirect purchaser could have an action for the overcharge. Unlike in *Illinois Brick*, the distributor did not incur any overcharge. In fact, the distributor got the opposite; it effectively got a discount from the manufacturer for charging consumers a higher price. This is what happened in *Lowell v. American Cyanamid Co.*[122] For this reason, the Eleventh Circuit

[120] *Id.* at 1223.
[121] *See, e.g.*, *In re Midwest Milk*, 730 F.2d 528.
[122] *Lowell*, 177 F.3d 1228.

distinguished vertical conspiracies with no pass-through allegations from the traditional *Illinois Brick* bar on recovery for indirect purchasers. It is true that many scholars have found that even pass-on allegations are based on different damages theories,[123] however, this Comment operates under the assumption that *Illinois Brick* remains a bar against pass on allegations.

With the risk of duplicative liability minimized and the *Illinois Brick* bar to pass on theories inapplicable, a mandatory joinder would unnecessarily impair enforcement and efficiency.[124] As Professors William M. Landes and Richard A. Posner argued in the context of incidence analysis, "[It] is a source of added cost and uncertainty. It is a step that should not be taken where, as in this context, it promises no increase in the effectiveness of antitrust enforcement."[125] In vertical conspiracy cases with no pass-through allegations, mandatory joinder of direct purchaser co-conspirators is analogous: it is simply an added cost with no benefit to enforcement efforts.

B. Mandatory Joinder for Vertical Conspiracies with Pass-Through Allegations

Where indirect purchaser plaintiffs allege a vertical conspiracy with a pass-through damages theory, mandatory joinder of direct purchaser co-conspirators is generally appropriate. As previously explained, compulsory joinder is intended to prevent duplicative recovery. In cases like *Illinois Brick* where there are passing-on allegations, compulsory joinder will prevent the complex litigation feared by *Illinois Brick* where courts would be tasked with determining the precise amount of the overcharge that each level in the distribution chain incurred.

Notably, the true complexity of such litigation is now questioned by a number of scholars. In fact, even the dissent in *Apple v. Pepper* acknowledged that "modern economic techniques" may now be capable of mitigating concerns over complex damages allocations that *Illinois Brick* sought to prevent.[126] Also, state courts are arguably sharpening courts' future ability to determine

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123 *See, e.g.*, Areeda & Hovenkamp, *supra* note 50.

124 *See*, *supra* Sections II.A, D.

125 Posner & Landes, *supra* note 93, at 620.

126 *See Apple v. Pepper*, 139 S. Ct. at 1531; *see also* Jan Boone & Wieland Muller, *The Distribution of Harm in Price-Fixing Cases*, 30 INT'L J. INDUS. ORG. 265 (Mar. 2012); Leonardo J. Basso & Thomas W. Ross, *Measuring the True Harm from Price-Fixing to Both Direct and Indirect Purchasers*, PHELPS CTR. STUDY GOV. & BUS. (Working Paper No. 2007-01, Apr. 25, 2007).

complex damages allocations as their *Illinois Brick*-repealed legislation has played out. Nevertheless, *Illinois Brick* still stands, and as long as it does, indirect purchaser suits based on theories that a direct purchaser passed-on the illegal overcharge to them are barred.

The presumption of mandatory joinder for vertical conspiracies alleging a pass-through damages theory will aid enforcement, deterrence, compensation, and efficiency by ensuring that direct purchaser co-conspirators face liability and are bound by the judgement.[127] Moreover, a presumption of mandatory joinder where pass-through is alleged provides a more narrow application of the exception in cases where *Illinois Brick* would bar suit if not for the conspiracy.[128]

C. Joinder as a Rebuttable Presumption

Regardless of whether plaintiffs have alleged pass-through damages theories, the benefits of mandatory joinder erode where joinder would be unduly burdensome and the risks of duplicative liability are minimized. Therefore, mandatory joinder of direct purchaser co-conspirators should function as a rebuttable presumption that plaintiffs may overcome by showing that duplicative liability is unlikely or that joinder is unduly burdensome.

The Third Circuit seemed to embrace some form of this rebuttable presumption approach in *Howard Hess Dental Laboratories Inc. v. Dentsply Intern., Inc.* The court recognized a limited co-conspirator exception where there is "complete involvement" in

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[127] *See*, *supra* Section II.

[128] In both *Hanover Shoe* and *Illinois Brick*, the court discouraged creating exceptions to its bar on pass-on theories. *See Illinois Brick*, 431 U.S. at 745. Additionally, it is important to note that, if the co-conspirator exception was a true exception to *Illinois Brick*, it would only apply to cases in which indirect purchaser plaintiffs have alleged a vertical conspiracy and a pass-through theory of damages. Yet, courts and parties often construe *Illinois Brick* as a general bar on indirect purchaser standing. For example, in *Insulate SB, Inc. v. Advanced Finishing Systems, Inc.*, the court held that the plaintiffs lacked standing because they were indirect purchasers and were unable to invoke the co-conspirator exception because they did not join the direct purchaser co-conspirators as defendants. 797 F.3d at 542. However, plaintiffs had alleged that the upstream violator (Gama) entered into exclusive dealing arrangements with its direct purchasers (distributors) as part of an anticompetitive scheme to increase its market power. *Id.* at 541. As a result of the exclusive dealing agreements and Gama's significant market power, plaintiffs alleged that the distributors were able to charge anticompetitive prices and obtain geographic monopolies. *Id.* Plaintiffs made no pass-through allegations. Thus, *Illinois Brick* should have posed no bar to plaintiffs' claims, and the co-conspirator exception should have been irrelevant. *See Lowell*, 177 F.3d at 1230.

the conspiracy.[129] Where truly complete involvement is alleged, joinder is not required because the direct purchaser co-conspirators would be barred from bringing a subsequent claim against the upstream violator, thus eliminating the risk of duplicative liability.[130] The court explained that involvement in a conspiracy may meet the requirement of being "truly complete" where the co-conspirators "could be considered 'substantially equal' participants in the alleged conspiracy . . . or that their participation was 'voluntary in any meaningful sense."[131] Additionally, the Seventh Circuit has recognized some, albeit vague, carveouts for cases in which there is no risk of double recovery. In *Paper Systems*, the sales to two manufacturers were separated from the case at the outset to preserve their direct purchasers' right to recover.[132] Thus, indirect purchaser claims relating to purchases from those two manufacturers were barred while the remaining were permitted to proceed under the co-conspirator exception. The risk of duplicative liability was further reduced by offsetting the damages available to plaintiffs by the overcharge applicable to the two manufacturers.[133]

Beyond the justifications provided by the Third and Seventh Circuit, holding mandatory joinder as a rebuttable presumption is particularly beneficial where direct purchaser co-conspirators have no cause of action against the upstream violator. For instance, imagine a four tier distribution chain: (1) the supplier, (2) the manufacturer, (3) the distributor, and (4) the retailer. Under the traditional *Illinois Brick* rule, only the direct purchaser can sue. Thus, the retailer can sue the distributor who can then sue the manufacturer who can then sue the supplier. Now imagine that the supplier, the manufacturer, and the distributor start a vertical conspiracy. Without the co-conspirator exception, the retailer would have no standing to sue the supplier. Under the co-conspirator exception with a mandatory joinder rule, the retailer could sue the supplier if the manufacturer and distributor are joined as defendants. The idea is that the manufacturer and distributor would then be barred from later bringing their own suits against the supplier.

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129 Howard Hess Dental Laboratories Inc. v. Dentsply Intern., Inc., 424 F.3d 363, 381–382 (3rd Cir. 2005).

130 *Id.* at 378–79.

131 *Id.* at 383.

132 *Paper Systems*, 281 F.3d at 633.

133 *Id.*

However, this operates under the assumption that all levels of the distribution chain would have standing to sue the level above them. If, for example, the manufacturer and the supplier had already reached a settlement, there would be no need to join the manufacturer to litigation brought by the distributor. The manufacturer would no longer have a cause of action against the supplier. There would be no risk of duplicative recovery as long as the damages awarded to the distributor are offset by the manufacturer's settlement.[134] Alternatively, there would also be no need to join the manufacturer where it contractually assigned its cause of action to the distributor. Again, there is no risk of duplicative liability because the manufacturer would be barred from bringing a subsequent suit against the supplier. Under such circumstances, a mandatory joinder rule would simply be inefficient and do nothing to encourage enforcement or reduce the risk of duplicative liability.

Moreover, plaintiffs should be able to rebut the presumption of mandatory joinder where joinder of all direct purchaser co-conspirators would be unreasonably burdensome. For instance, in *Campos v. Ticketmaster Corp.*, the Eighth Circuit held that joinder was required in order for plaintiffs to invoke the co-conspirator exception.[135] However, Ticketmaster controlled "ticket sales for almost every large-scale popular music concert in the United States."[136] It would have been nearly impossible to join thousands of venues across the nation. Application of a mandatory joinder rule to similar cases would effectively insulate upstream violators from liability by disincentivizing indirect purchasers from bringing suit. As previously discussed, joining a vast number of direct purchaser co-conspirators can pose a significant economic risk on plaintiffs' attorneys. Where plaintiffs' attorneys are representing a large class based on a contingent fee structure, the cost of finding and serving process on all direct purchaser co-conspirators could pose a high upfront cost with no guarantee of recovery. Thus, plaintiffs' attorneys may be disincentivized from representing indirect purchaser classes. Alternatively, indirect purchaser plaintiffs may themselves be disincentivized from bringing suit as the increased costs result in less recovery for each plaintiff. Since the direct purchaser co-conspirators are unlikely to defect and bring suit as long as the conspiracy is profitable, there may

[134] *See* Leslie, *supra* note 82, at 752.
[135] *See* 140 F.3d 1166.
[136] *Id.* at 1168.

effectively be no private enforcement mechanism available to hold upstream violators accountable.

The main concern with allowing indirect purchaser plaintiffs to rebut a presumptive rule of mandatory joinder by showing that joinder is unreasonably burdensome is that it does not completely eliminate the risk of duplicative recovery. Theoretically, direct purchaser co-conspirators not joined as defendants could subsequently bring suit against the upstream violator, thus exposing them to duplicative liability. However, a showing that joinder is unreasonably burdensome does not necessarily mean that plaintiffs need not join any direct purchasers as defendants. The court may require joinder of some, a majority, or "at least x%" of direct purchaser co-conspirators. Alternatively, the court could require plaintiffs to also show that the direct purchaser co-conspirators are unlikely to bring suit.[137] Therefore, the risk of duplicative liability could still be significantly reduced, although not to zero.

Again, it is important to recognize that even with no mandatory joinder rule specific to the co-conspirator exception, the joinder rules under the Federal Rules of Civil Procedure still apply. Any party required to be joined under Rule 19 would still need to be joined. Moreover, any party that the upstream violator would like to be joined could be joined under Rule 20, pursuant to the court's discretion. Thus, the question becomes whether courts are willing to compromise enforcement efforts unless they can essentially guarantee that there is no risk of duplicative liability. It is unclear why any court would answer this question in the affirmative where even the defendants themselves do not fear Where the defendants themselves do not fear duplicative liability enough to request joinder of direct purchaser co-conspirators under Rule 20.

Implementing mandatory joinder as a rebuttable presumption provides a mechanism for courts to increase efficient enforcement of antitrust laws while remaining aligned with the principles of *Illinois Brick*. The risk of duplicative liability must be balanced against the risk of compromising enforcement. Where mandatory joinder will not contribute to reducing duplicative liability, it may serve as an unnecessary hindrance to private enforcement efforts. At the same time, even where mandatory joinder may contribute to reducing duplicative liability, an overly burdensome joinder requirement could significantly compromise

[137] For instance, the indirect purchaser plaintiffs could show that, since the statute of limitations is about to run and that the direct purchaser co-conspirators have yet to defect or bring suit. *See* Duffy, *supra* note 12, at 1737–38.

enforcement efforts. In such circumstances, alternatives to a mandatory joinder requirement could still reduce the risk of duplicative liability while preserving enforcement efforts.

IV. CONCLUSION

Commentary on the indirect purchaser doctrine casts a large shadow that can make issues such as joinder seem like non-issues. However, procedural requirements like joinder can have a significant impact on whether our laws will be enforced and who will be deterred from violating our law in the future. Additionally, lower courts have wrestled with this joinder issue in the absence of clear guidance.[138]

Like many things, a bright-line rule for joining direct purchaser co-conspirators when invoking the co-conspirator exception to *Illinois Brick* will be both over and under inclusive. A mandatory joinder rule would be overinclusive by requiring unnecessary defendants to be joined. This is especially true where there is no risk of duplicative recovery either because the direct purchaser has no cause of action against the upstream violator or because the indirect purchaser is not alleging any pass-through. At the same time, the mandatory joinder rule would be underinclusive where indirect purchaser plaintiffs successfully recharacterize themselves as direct purchasers in an attempt to avoid the rule.[139]

Conversely, a bright-line rule that indirect purchaser plaintiffs are not required to join any direct purchaser co-conspirators as defendants could, according to the *Illinois Brick* theory, expose defendants to duplicative liability. Furthermore, it would enable the direct purchaser co-conspirators to escape liability for the role they played in the conspiracy.

An appropriate joinder rule for the co-conspirator exception to *Illinois Brick* must balance interests in promoting efficient litigation, encouraging enforcement of antitrust law, deterring future antitrust violations, avoiding duplicative liability, and developing a body of antitrust jurisprudence sound in economic theory. While *Illinois Brick* has been heavily criticized, this Comment operates in a world where *Illinois Brick* is good law. As such, the policy considerations of the *Illinois Brick* court must guide the

[138] *See In re Deer & Company Repair Service Antitrust Litigation*, 2023 WL 8190256 (N.D. Ill. Nov. 27, 2023); *In re Brand Name Prescription Drugs*, 1998 WL 474146 at 13.

[139] *See, e.g.*, discussion of characterization issues, *supra* Section II.D.2.a.

analysis, regardless of whether scholars believe them to be accurate.

As is usually the case when balancing various interests, the result falls somewhere in between of the two extremes. In short, the joinder rule applicable to indirect purchaser litigation alleging a vertical conspiracy should turn on whether plaintiffs have alleged a pass-through theory of damages.

Where no pass-through has been alleged, the indirect purchaser plaintiffs should not be required to join the direct purchaser co-conspirators in order to invoke the co-conspirator exception. Mandatory joinder would function as an inefficient tool that does nothing to reduce the risk of duplicative liability. Any required or desired direct purchaser co-conspirators could be joined according to Rules 19 and 20.

Where pass-through theories have been alleged, there should be a rebuttable presumption that joinder of direct purchaser co-conspirators is required in order to invoke the co-conspirator exception the *Illinois Brick*. The fundamental rule of *Illinois Brick* is that indirect purchasers are prohibited from bringing suit against an upstream violator for an overcharge that was passed through the direct purchaser to the indirect purchasers. The *Illinois Brick* court reasoned that permitting such pass-through theories would expose the upstream violator to duplicative liability. [140] A mandatory joinder rule would eliminate the risk of duplicative liability by binding the direct purchaser co-conspirators, thereby preventing direct purchasers from recovering the same damages in subsequent litigation against the upstream violator. Nevertheless, even where pass-through theories are alleged, a bright-line mandatory joinder rule can compromise enforcement and efficiency. Therefore, the mandatory joinder rule should be formatted as a presumption that plaintiffs can rebut by showing that direct purchasers have no cause of action against the upstream violator or that joining all direct purchaser co-conspirators is unreasonably burdensome.

In other words, where the risk of duplicative liability is minimal, joinder would increase the complexity of the litigation, and joinder risks compromising enforcement efforts, indirect purchaser plaintiffs should not be required to join all direct purchaser co-conspirators in order to invoke the co-conspirator

[140] In fact, joinder of direct purchaser co-conspirators could be required under Rule 19. Outside of the conspiracy context, the *Illinois Brick* court noted that indirect purchaser litigation would likely require direct purchasers to be joined as plaintiffs under Rule 19. *See* 431 U.S. at 738–41.

exception to *Illinois Brick*. The co-conspirator exception is meant to provide a mechanism for private antitrust enforcement where *Illinois Brick* may otherwise insulate the upstream conspirators from liability. Circuits implemented joinder requirements as a safety valve in the off chance that the direct purchaser co-conspirators suddenly gained sufficient incentive to bring suit. However, a joinder requirement that significantly impairs enforcement efforts would largely render the co-conspirator exception meaningless. As changing economic conditions have led to increased market concentration and the federal government has been slow to respond, courts should be cautious about imposing any unnecessary procedural requirements that further diminish private enforcement efforts.