Competition Vol. 23, No. 2
Fall 2014

The Journal of the Antitrust and Unfair Competition Law Section of the State Bar of California

RECOVERIES FOR VIOLATIONS OF FEDERAL AND CALIFORNIA ANTITRUST STATUTES SHOULD NOT BE APPORTIONED

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There is increased cartel behavior today, affecting more businesses and people, than at any time since the enactment of state antitrust laws and the Sherman Act. Private enforcement of the antitrust laws was established to protect the economy from collusion. It was for this reason that quasi-criminal fines were included as remedies available to private plaintiffs, such as double – and then treble – damages as well as attorneys' fees and costs.

The Sherman Act has been called a "charter of freedom"[2] and the "Magna Carta of free enterprise"[3] and described as a

> [c]omprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.[4]

Congress passed the Sherman Act to protect consumers from inflated prices, foster free competition in the marketplace, and encourage efficient behavior by firms.[5]

Congress and the state legislatures that enacted the nation's antitrust laws intended private enforcement to be an important tool in preventing cartel behavior. Courts have interpreted the antitrust laws with a view to promoting that purpose.[6] The primacy of the deterrent goals of the Sherman Act and the Cartwright Act (and other state antitrust laws) has been a constant since the enactment of those statutes.

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2 *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359 (1933).

3 *United States v. Topco Assoc., Inc.*, 405 U.S. 596, 610 (1972).

4 *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

5 E. THOMAS SULLIVAN, HERBERT HOVENKAMP & HOWARD A. SHELANSKI, ANTITRUST LAW, POLICY AND PROCEDURE: CASES, MATERIALS, PROBLEMS 11 (6TH ED. LEXISNEXIS 2006).

6 *See, e.g., Minn. Mining & Mfg. Co. v. N.J. Wood Finishing Co.*, 381 U.S. 311, 318-319 (1964) ("*Minn. Mining*") ("Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws"); *Clayworth v. Pfizer, Inc.*, 49 Cal.4th 758, 764 (2010) ("*Clayworth*") (noting "Legislature's overarching goals [in enacting and amending the Cartwright Act] of maximizing effective deterrence of antitrust violations, enforcing the state's antitrust laws against those violations that do occur, and ensuring disgorgement of any ill-gotten proceeds").

Congress provided for private remedies and penalties to enforce the Sherman Act because it recognized that government resources were limited and that compliance with the antitrust laws was critical to the economic health of the nation. It is for this reason that Congress provided broad remedies for private plaintiffs who would act as "private attorneys general."[7] The Supreme Court has stated that "[e]very violation of the antitrust laws is a blow to the free-enterprise system envisaged by Congress" and that the "system depends on strong competition for its health and vigor."[8] Congress believed that providing remedies – including treble damages – to private plaintiffs would "open the doors of justice to every man"[9] while furthering the Sherman Act's overarching goal of deterring collusion. The importance of private actions as a tool in the enforcement of the antitrust laws has been repeatedly recognized by the Supreme Court and invoked in its construal of the Sherman Act.[10]

The California State Legislature premised its decision to provide remedies to indirect purchasers on these same goals. The availability of remedies to indirect purchasers, in addition to those remedies available to direct purchasers under federal law, is necessary to effectuate that policy and to deter antitrust violations. Further, it has long been recognized that the states' power to regulate economic conduct and to protect consumers and competition is not limited by federal antitrust laws. For this reason, damages should not be apportioned between plaintiffs suing under federal and state laws. To do so would contravene the intent of Congress and the state legislatures, and would contradict the rulings of the United States Supreme Court and California Supreme Court in interpreting these statutes. Apportioning damages between claimants under federal and state antitrust laws would frustrate the goal of deterring antitrust violations and would embolden cartels to continue their behavior.

As discussed below, three cases unequivocally establish that the states may provide remedies for antitrust violations that are in addition to those provided by federal law, that those remedies cannot affect federal law, and that federal law does not limit the remedies provided by state law. Limiting the availability of the full range of remedies provided by both state and federal law by apportioning damages would contravene the intent of the respective sovereigns, violate fundamental principles of federalism, and frustrate the primary goal of state and federal antitrust laws of protecting competition and preventing collusive conduct at a time when such conduct is pervasive.

I. *HANOVER SHOE*

In *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968) ("*Hanover Shoe*") the Supreme Court held that an antitrust defendant could not assert as a defense that a

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7 *See, e.g.*, 21 CONG. REC. 2456 (1890) (remarks of Sen. Sherman).

8 *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972).

9 51 CONG. REC. 9073 (1914) (statement of Rep. Webb).

10 *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969) ([T]he purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief but was to serve as well the high purpose of enforcing the antitrust laws) (citation omitted); *Minn. Mining*, 381 U.S. at 318; *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n. 10 (1997) (treble damages were regarded by Congress as a way of "giv[ing] the injured party ample damages for the wrong suffered" and as an important means of enforcing the law)(citation omitted).

(direct plaintiff did not suffer injury because it had passed on overcharges to its customers. The Court concluded that when a plaintiff shows that it paid an illegal overcharge and also shows the amount of the overcharge, it "has made out a prima facie case of injury and damage."[11]

The Court identified two reasons why accepting the pass-on defense would frustrate the purposes of the Sherman Act. First, it would require courts to consider numerous complex factors and create a burden of proof on plaintiffs that "would normally prove insurmountable."[12] In *Clayworth,* the California Supreme Court acknowledged the United States Supreme Court's concern that such a defense would depend on "massive and complex showings and rebuttals, potentially sidetracking every antitrust trial in a host of issues collateral to the central claim – whether the defendant had engaged in illegal anticompetitive conduct."[13] The Court's second rationale was that accepting this defense would discourage private antitrust enforcement. If the pass-on defense were permitted, "those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them" seriously compromising the enforcement of the antitrust laws.[14]

II. *ILLINOIS BRICK*

In *Ill. Brick Co. v. Ill.,* 431 U.S. 720 (1977) ("*Illinois Brick*"), a sharply divided Supreme Court held that indirect purchasers could not use a pass-on theory to sue for overcharges from antitrust violations. In *Illinois Brick,* the State of Illinois alleged that concrete block manufacturers had engaged in price fixing in violation of the Sherman Act. The resulting illegally increased prices had then been passed on to masonry contractors, who passed them on to general contractors, who then charged the State of Illinois higher prices to build buildings. The majority of the Court deemed the result necessary as a corollary to *Hanover Shoe* – *i.e.,* it would be unfair to deny the pass-on defense to defendants being sued by direct purchasers, while allowing indirect plaintiffs to recover the overcharges that had been passed on to them.

The Court identified three primary rationales for its result. The first rationale was that permitting indirect purchaser claims under federal law would create a risk of double recovery in cases where both direct and indirect purchasers brought claims against the same defendants.[15] The second rationale – similar to one of the underpinnings of *Hanover Shoe* – was that indirect purchaser claims would involve unmanageably complex issues as courts tried to trace overcharges through the chain of distribution of price-fixed products.[16] The third rationale was that *Hanover Shoe* was correct in its judgment that the Sherman Act would "be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than allowing every plaintiff potentially

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11 *Hanover Shoe,* 392 U.S. at 489.

12 *Id.* at 494.

13 *Clayworth,* 49 Cal. 4th 758, 768 (2010), *citing Hanover Shoe,* 392 U.S. at 493.

14 *Hanover Shoe,* 392 U.S. at 494.

15 *Illinois Brick,* 431 U.S. at 730-31.

16 *Id.* at 730-31.

affected by the overcharge to sue only for the amount it could show was absorbed by it."[17] It is important to note that the limitations of *Illinois Brick* are not based on the text of the Clayton Act. The Clayton Act specifically authorizes "any person" to recover under the Sherman Act.[18] Instead they were created by the Court for the policy reasons set forth in the opinion.

The *Illinois Brick* dissenters asserted that the rationales of *Hanover Shoe* – in particular encouraging private enforcement of the antitrust laws – should have led the Court to permit indirect purchaser claims. It is implicit in the rationale of *Hanover Shoe* that direct purchaser plaintiffs might be *overcompensated*, but this result was preferable to the risk of weakened deterrence of antitrust violations and allowing antitrust violators to keep their ill-gotten gains.[19] The dissent argued that permitting indirect purchaser claims under the Sherman and Clayton Acts would therefore further the same policies of deterrence that led to the result in *Hanover Shoe*.[20]

California, like many other states, responded to *Illinois Brick* almost immediately by amending its antitrust statute, the Cartwright Act, to prevent *Illinois Brick* from creating any limitations on the right to recover under state law. A.B. 3222 passed both houses of the California State Legislature unanimously. It rejected *Illinois Brick* as a matter of state law by providing that a suit under the Cartwright Act could be brought by any injured person, "regardless of whether such injured person dealt directly or indirectly with the defendant."[21] As the California Supreme Court stated not long after this amendment, "California's 1978 amendment to section 16750 in effect incorporates into the Cartwright Act the view of the dissenting opinion in *Illinois Brick* (431 U.S. at p. 748) that indirect purchasers are persons 'injured' by illegal overcharges passed on to them in the chain of distribution."[22] In addition to California, more than half of the states, by either judicial decision or legislation, have rejected *Illinois Brick* as a matter of state law and granted indirect purchasers the right to bring suit under state antitrust law.[23]

III. *ARC AMERICA*

California v. ARC Am. Corp. ("ARC America")[24] directly presented the question of whether the states could provide antitrust remedies for indirect purchasers even if those

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17 *Id.* at 735.

18 15 U.S.C. § 15(a) ("any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee").

19 *See also Clayworth*, 49 Cal.4th at 783 ("[t]he goal of deterring antitrust violations and concerns that a given private party may receive a windfall are not of equal weight").

20 *Id.* at 752-53.

21 Cal. Bus. & Prof. Code § 16750(a), added by Stats. 1978, ch. 536, § 1, p. 1693.

22 *Union Carbide Corp. v. Super. Ct.*, 36 Cal.3d 15, 20 (1984).

23 ABA SECTION OF ANTITRUST LAW, INDIRECT PURCHASER LITIGATION HANDBOOK CHAPTER XV, 5-8 (6TH ED. 2007).

24 *ARC America*, 490 U.S. 93 (1989).

remedies were duplicative of remedies available to direct purchasers under the Sherman Act. In *ARC America*, the States of Alabama, Arizona, California, and Minnesota brought suit alleging "violations of their respective state antitrust laws under which, as a matter of state law, indirect purchasers arguably are allowed to recover for all overcharges passed on to them by direct purchasers."[25] These state claims were centralized before the United States District Court for the District of Arizona as part of the multidistrict litigation *In re Cement and Concrete Antitrust Litig.*, MDL No. 296, along with direct purchaser claims. Several classes were certified and several defendants settled, creating a settlement fund in excess of $32 million intended to cover both the federal and state antitrust claims. Distribution of the settlement fund was left for later resolution.

The states sought payment out of the settlement funds, and direct purchasers objected. The district court refused to permit the states to recover pursuant to the state indirect purchaser statutes, holding that "[s]uch statutes are clear attempts to frustrate the purposes and objectives of Congress, as interpreted by the Supreme Court in *Illinois Brick*, and, accordingly, are preempted by federal law."[26]

The Ninth Circuit affirmed[27] on the basis of the "three purposes or objectives of antitrust law in this context": (1) avoiding unnecessarily complicated litigation; (2) providing direct purchasers with incentives to bring private antitrust actions; and (3) avoiding multiple liability of defendants.[28] The Ninth Circuit concluded that state laws permitting indirect purchasers to recover were preempted because they would conflict with these three policy goals.[29]

The Supreme Court framed the issue before it as "whether this rule limiting recoveries under the Sherman Act also prevents indirect purchasers from recovering damages flowing from violations of state law, despite express state statutory provisions giving such purchasers a damages cause of action."[30] The Court conducted an analysis of pre-emption principles and concluded that there was no bar to the state law indirect purchaser claims. In noting the "pre-sumption against finding pre-emption of state law in areas traditionally regulated by the States," the Court concluded that "[g]iven the long history of state common-law and statutory remedies against monopolies and unfair business practices,[ ] it is plain that this is an area traditionally regulated by the States."[31]

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25 *Id.* at 98.

26 *Id.* at 99.

27 *In re Cement and Concrete Antitrust Litig.*, 817 F.2d 1435 9th Cir. (1987).

28 *Id.* at 1445.

29 *Id.*

30 *ARC America*, 490 U.S. at 100.

31 *Id.* at 101; *see also* n. 4, recognizing that "[a]t the time of the enactment of the Sherman Act, 21 States had already adopted their own antitrust laws" and that "[m]oreover, the Sherman Act itself, in the words of Senator Sherman, 'does not announce a new principle of law, but applies old and well recognized principles of the common law to the complicated jurisdiction of our State and Federal Government.'"(citation omitted).

In reversing the Ninth Circuit, the Court relied on several prior decisions holding that federal antitrust laws do not pre-empt state law.[32] The Court stated that state indirect purchaser laws are "consistent with the broad purposes of the federal antitrust laws: deterring anticompetitive conduct and ensuring the compensation of victims of that conduct."[33] In a critical passage, the Court stated:

> It is one thing to consider the congressional policies identified in *Illinois Brick* and *Hanover Shoe* in defining what sort of recovery federal antitrust law authorizes; it is something altogether different, and in our view inappropriate, to consider them as defining what federal law allows states to do under their own antitrust law. As construed in *Illinois Brick*, § 4 of the Clayton Act authorizes only direct purchasers to recover monopoly overcharges under federal law. We construed § 4 as not authorizing indirect purchasers to recover under federal law because that would be contrary to the purposes of Congress. But nothing in *Illinois Brick* suggests that it would be contrary to congressional purposes for States to allow indirect purchasers to recover under their own antitrust laws.[34]

The Court further noted that state indirect purchaser statutes "cannot and do not purport to affect remedies available under federal law."[35] The Court rejected arguments that state indirect purchaser statutes might create a disincentive to direct purchaser suits before turning to the Ninth Circuit's conclusion that permitting state indirect purchaser claims "might subject antitrust defendants to multiple liability, in contravention of the 'express federal policy' condemning multiple liability."[36] The Supreme Court emphatically rejected this argument:

> [ ] *Illinois Brick*, as well as *Associated General Contractors* and *Blue Shield*, all were cases construing § 4 of the Clayton Act; in none of those cases did the Court identify a federal policy against States imposing liability in addition to that imposed by federal law. Ordinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law, see *Silkwood v. Kerr-McGee Corp.*, 464 U.S. [238], at 257-258; *California v. Zook*, 336 U.S. 725, 736 (1949), and no clear purpose of Congress indicates that we should decide otherwise in this case.[37]

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32 *Watson v. Buck*, 313 U.S. 387, 403 (1941); *Puerto Rico v. Shell Co.*, 302 U.S. 253, 259-260 (1937).

33 *ARC America*, 490 U.S. at 102.

34 *Id.* at 103.

35 *Id.*

36 *Id* at 105, quoting *In re Cement and Concrete Antitrust Litig.*, 817 F.2d at 1446; the Ninth Circuit had cited *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 544 (1983) ("*Associated General Contractors*"), and *Blue Shield of Va. v. McCready*, 457 U.S. 465, 474-75 (1982) ("*Blue Shield*") for this proposition.

37 *ARC America*, 490 U.S. at 105.

IV. FEDERAL AND STATE REMEDIES ARE EXCLUSIVE AND SHOULD NOT BE ALLOCATED

Since *ARC America*, critics have advocated changes to the law that would upset the federal and state policies of deterrence supported by private enforcement. Among the arguments advanced is the claim that it is unfair to subject an antitrust violator to "duplicative" damages as a result of concurrent federal and state claims. The critics also claim that *Hanover Shoe* suggested a "catch-all" exception to the rule barring evidence of pass through of overcharges.

In *In re TFT-LCD (Flat Panel) Antitrust Litig.* ("*TFT-LCD*"),[38] direct purchaser class plaintiffs, indirect purchaser class plaintiffs, opt out plaintiffs – some direct purchasers and some indirect purchasers – and state attorneys general all asserted claims against the defendants for a price-fixing conspiracy. As trial approached, a group of defendants filed a motion "Regarding Trial Structure and for Relief to Avoid Duplicative Recovery."[39] Defendants argued that there must be an allocation of damage claims of direct purchasers under federal law and indirect purchasers under state law, and introduced a parade of horribles – including "crippling liability" – that would result if the relief they asked for was not granted.

The defendants made three arguments to support their position. First they claimed that due process required an allocation. Citing *W. Union Tel. Co. v. Commonwealth of Penn.*[40] ("*Western Union*"), defendants argued that Supreme Court precedent concerning the Sherman Act – including *Hanover Shoe* – "must yield to the dictates of due process."[41] But *Western Union* was not an antitrust case. It addressed the question of whether the State of Pennsylvania could compel a telephone company to escheat unclaimed and unpaid money orders originating from other states to Pennsylvania. Pennsylvania law provided that property within the Commonwealth and unclaimed for seven years escheated to the Commonwealth. Western Union argued that other states might argue that the personal property at issue was subject to their jurisdiction, and thus that it would be denied due process if Pennsylvania took the property without protecting Western Union from claims by individuals with an interest in the unclaimed property or the other states which might assert a similar claim to escheat the funds.

In holding that Western Union's right to due process was violated because Pennsylvania took the property without protecting Western Union from future claims from other states, the Supreme Court drew from a long line of precedent, holding that "when a state court's jurisdiction purports to be based, as here, on the presence of property within the State, the holder of such property is deprived of due process of law if he is compelled to relinquish it without assurance that he will not be held liable again in another jurisdiction or in a suit brought by a claimant who is not bound by the first judgment."[42]

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38 Case No. 3:07-md-1827 SI. MDL No. 1827.

39 *Id.* (Dkt. 5258).

40 368 U.S. 71 (1961)

41 Case No. 3:07-md-1827 SI. MDL No. 1827 (Dkt. 5258, 2:25-27).

42 *Western Union*, 368 U.S. at 75.

Western Union concerned claims to escheat funds by multiple sovereigns with claims to those funds and had nothing to do with the purposes and policies of the federal and state antitrust laws. The arguments made by defendants in *TFT-LCD* stretched the holding in *Western Union* beyond recognition and ignored the fact that *ARC America* – decided decades after *Western Union* – endorsed duplicative recoveries under federal and state law with no mention of the concerns underlying *Western Union*.

Second the *TFT-LCD* defendants argued that treble damage awards are "punitive in nature," and that multiple awards "for the same overcharge violate the constitutional protection against excessive punitive damages." Defendants relied on *State Farm Mut. Auto Ins. Co. v. Campbell*[43] and *BMW of N. Am., Inc. v. Gore*.[44] This argument is noteworthy for its acceptance that the purpose of treble damages for antitrust violations is deterrence, but the defendants made a great leap from stating that treble damages are similar to punitive damages to concluding that the same limitations on punitive damages apply to treble damages for antitrust violations. Furthermore, like their due process argument, this argument ignores the holding of *Arc America* that states are free to enact laws providing remedies "over and above" federal law.

The third argument made by the *TFT-LCD* defendants was that state laws like the Cartwright Act require that the court take steps to avoid duplicative recoveries. Defendants quoted the *Clayworth* Court when it said that "the bar on consideration of pass-on evidence must necessarily be lifted" when a court seeks to avoid duplicative recovery.[45] However, this portion of the *Clayworth* opinion was part of a longer discussion of potential future cases under the Cartwright Act in which multiple levels of purchasers asserting claims ***under the Cartwright Act*** were present and where the trial court in such future case had determined that "damages must be allocated amongst the various levels of injured purchasers."[46] While the California Supreme Court was envisioning what might happen in a potential future case, it was dicta and was certainly not intended to suggest that the bar of pass-through evidence required by federal law would be lifted in a federal action because of the presence of a coordinated or consolidated California action. As stated in *ARC America,* the Cartwright Act cannot limit remedies available under federal law.[47]

In support of their third argument, defendants also argued that California state law itself bars this duplicative recovery. For this proposition they cited Cal. Bus. & Prof. Code § 16760(a)(1), which provides that "[t]he court shall exclude from the amount of monetary relief awarded in the action any amount of monetary relief (A) which duplicates amounts which have been awarded for the same injury, or (B) which is properly allocable to (i) natural persons who have excluded their claims . . . . and (ii) any business entity." However, this provision only applies to actions brought by the Attorney General on a *parens patriae* basis. The fact that the Legislature did not include a similar limitation on

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43 538 U.S. 408 (2003).

44 517 U.S. 559 (1996).

45 Case No. 3:07-md-1827 SI. MDL No. 1827 (dkt. 315)

46 *Id.*

47 *ARC America,* 490 U.S. at 103 (state indirect purchaser statutes "cannot and do not purport to affect remedies available under federal law").

actions brought by private plaintiffs demonstrates that no such limitation or allocation was intended.[48]

Finally, defendants quoted Judge Wilken's suggestion in a hearing in *In re Static Random Access Memory ("SRAM") Antitrust Litig.*,[49] that "It seems to me that wouldn't be allowed. There has to be some method of allocating . . . . But in the end, when we come down to actually writing checks, you don't get it twice, I don't think, or the defendants don't have to pay it twice."[50] However, these comments of Judge Wilken, made during a hearing on an issue not yet briefed, carry no force of law.

As to the argument that permitting duplicative damage claims under both federal and state law is unfair or violates due process, the first, and most simple, solution is the cessation of cartel and monopoly behavior. Beyond this, those critics can point to no basis in law to support their arguments, as the Supreme Court has made clear that in this field the states are free to impose liability above and beyond that imposed by federal law, and that both state and federal antitrust statutes serve the same purpose – to discourage and deter antitrust violations. Studies performed since *ARC America* indicate that defendants have not been actually subject to duplicative damages despite the existence of numerous claimants and damage multipliers.[51]

In addition to the arguments made in *TFT-LCD*, some argue that the exceptions to the rule barring the pass through defense identified in *Hanover Shoe* were only illustrative and other exceptions may be made. The two exceptions articulated in *Hanover Shoe* are (1) where the plaintiff had entered into a cost-plus pricing contract with an indirect purchaser before the plaintiff begins paying the artificially inflated price, and (2) where the direct purchaser is owned or controlled by the defendant, and thus is unlikely to bring a claim against the defendant. The first exception is grounded in *Hanover Shoe*'s concern with the immense complexity of determining indirect purchaser damages. It articulates the Court's recognition that where there is a pre-existing cost-plus contract the complexities of proving the pass through of overcharges is mitigated. The second exception is grounded in the need to promote the private enforcement of the antitrust laws or accomplish the deterrent purpose of those laws.

Advocates of a change argue that these exceptions were not intended to be the only circumstances in which a pass through defense should be allowed, and that if both direct purchasers and indirect purchasers are present before the same court the pass through defense should be permitted because the indirect purchasers will be presenting evidence of the pass through.[52] This argument, if accepted, would eviscerate the federal and

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48 Cal. Bus. & Prof. Code § 16750 (permitting private claims for violation of the Cartwright Act by "any person who is injured in his or her business or property") contains no language similar to that in § 16760(a)(1) requiring elimination of duplicative damages.

49 Case No. 3:07-md-1819 CW. MDL No. 1827.

50 *Id.*, [Hearing Tr. 9:2-4, 8-10 (December 14, 2010)].

51 *See e.g.* Robert H. Lande, *Five Myths About Antitrust Damages*, 40 U. S.F. L. Rev. 651, 658 (2006). (finding there has "never been even one case where a cartel's total payouts exceeded three times the damages involved").

52 *See, e.g.*, Gary A. Winters, *Trial Issues in Consolidated Direct and Indirect Purchaser Cases: Lessons from the SRAM Litigation* ABA Antitrust Trial Practice Newsletter, Spring 2011.

state antitrust laws by overriding the explicit teachings of *Hanover Shoe, Illinois Brick,* and *ARC America.* It would diminish recoveries to injured plaintiffs, and thus eliminate the incentives for private plaintiffs to pursue antitrust claims – a primary purpose of the antitrust laws for over a century. At a time rife with cartel activity, private enforcement is needed more than ever before.

Providing incentives for both direct purchasers and indirect purchasers to pursue antitrust violations is not only wholly consistent with the broad purposes of the antitrust laws, it is one of the primary means by which the state and federal legislatures sought to enforce the antitrust laws. The recent discovery of massive, worldwide antitrust cartels which target American businesses and consumers – in industries including electronics products, automobiles, motorcycles, air transportation, air cargo transportation, and freight forwarding – demonstrates that retaining the incentives for private plaintiffs to enforce the antitrust laws is more necessary now than ever before. Congress and state legislatures have long-recognized the harm caused by cartels – the "supreme evil of antitrust"[53] in the words of Justice Scalia. Apportioning damages between federal and state claimants would remove a crucial incentive for plaintiffs to bring cases. The only outcome from such a move would be to embolden companies considering collusion and to promote cartel behavior.

Given the multiple hurdles that have been placed on antitrust plaintiffs in recent years,[54] cartelists will face liability only if they have, in fact, violated the antitrust laws.

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53 *Verizon Commc'ns v. Law Office of Curtis V. Trinko,* 540 U.S. 398, 408 (2004).

54 *Matsushita Electrical Industrial Co.., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574 (1986) (summary judgment standards); *Bell Atl. Corp. v. Twombly,* 550 U.S. 544 (2007) (motion to dismiss standards); *Comcast Corp. v. Behrend,* 133 S. Ct. 1426 (2013) (summary judgment standards).