Is the *Illinois Brick* Wall Crumbling?

BY KEVIN J. O'CONNOR

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages . . . ."

SO PROVIDES SECTION 4 OF THE Clayton Act, 15 U.S.C. § 15. Almost a quarter century ago, the Supreme Court in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), put an end to federal indirect purchaser actions by interpreting this language to allow damage actions only by those who purchased goods or services directly from antitrust wrongdoers.[1] In hindsight, it was probably inevitable that *Illinois Brick* would ignite a series of actions by state legislatures and courts intent on reasserting the primacy of the principle that those injured by unlawful conduct should be compensated. As described below, critical mass now appears to have been reached, with some form of indirect purchaser recovery apparently available in over two-thirds of the states.

However, *Illinois Brick* and the reaction to it has resulted in a trifurcated legal landscape for unlawful cartels: federal criminal or civil enforcement actions, federal direct purchaser actions, and state indirect purchaser actions that are approaching national coverage. These developments have raised the specter that the worst fears of the *Illinois Brick* majority and antitrust defendants—risk of multiple recovery and difficult damage apportionment issues—may come to pass. And, to make matters worse, the new rights will likely be asserted in multiple state proceedings rather than in a single federal court. Because there is no formal mechanism for consolidating state court actions, both defendants and indirect purchasers may confront a legal battlefield with significant procedural and substantive variation across states.

The central thesis of this article, however, is that recent attempts at coordination initiated by state attorneys general, in conjunction with private plaintiffs' and defendants' counsel, have dealt effectively with some of these issues. In recent cases, the parties achieved global or near-global settlements after independently assessing the costs and uncertainties of continued litigation. Even where settlement is not possible, the cost and uncertainty of this litigation to all sides can be reduced substantially through multistate pretrial coordination. In a sense, these cases raise the intriguing possibility that coordination of independent state claims can result in a manageable, national indirect purchaser right of action that can actually contribute to global peace for both plaintiffs and defendants.

The discussion below is divided into two main parts. The first part briefly describes: (1) the policy statements of the *Illinois Brick* Court and the arguably predictable state reaction to it; (2) the costs and uncertainties inherent in the state-based system of indirect purchaser recovery resulting from this reaction; and (3) the relevance of state attorney general multistate litigation to indirect purchaser litigation, with emphasis on two recently-settled indirect purchaser cases. The second part questions the continued vitality of the *Illinois Brick* policy goals in light of the recent multistate litigation experience and outlines likely developments in indirect purchaser litigation.

Reaction to *Illinois Brick*

The *Illinois Brick* decision was premised on three policy goals: avoiding the risk of multiple liability that would otherwise be faced by defendants; sparing the federal courts from the task of apportioning damages among indirect and direct victims; and concentrating the full recovery in direct purchasers so as to provide an incentive for them to bring actions that would deter others from committing similar violations. *Id.* at 730–35.

Justice Brennan's dissent in *Illinois Brick* articulated a contrary view that valued fairness and compensation to all victims and "reasoned estimation" over unachievable precision in apportioning damages. *Id.* at 759–60. More pointedly, the dissent not only noted the broad, seemingly unambiguous language of Section 4 permitting any injured person to sue, but also referenced the legislative intent that:

> The recently enacted Hart-Scott-Rodino Antitrust Improvements Act of 1976 was expressly adopted to create "an effective mechanism to permit consumers to recover damages for conduct which is prohibited by the Sherman Act, by giving State attorneys general a cause of action [to sue as *parens patriae* on behalf of the States' citizens] against antitrust violators." S. Rep. No. 94-803, p. 6 (1976).

Id. at 756. Because an adverse ruling in *Illinois Brick* threatened the state attorneys generals' ability to represent consumers in combined direct-indirect purchaser actions,[2] forty-seven states and the United States filed separate amici briefs in support of the plaintiff. *Id.* at 733 n.14.

In the wake of *Illinois Brick*, several states almost immediately passed so-called *Illinois Brick* repealer-statutes to permit damage actions by or on behalf of indirect purchasers including, especially, ultimate consumers. At present, nineteen states, the District of Columbia, and Puerto Rico have

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statutes permitting actions by or on behalf of indirect purchasers harmed by antitrust violations.[3] In addition, another seventeen states appear to permit recovery on behalf of consumers, either in the form of restitution or damages under either state consumer protection laws or state unfair trade practices statutes.[4] Thus, thirty-six states and the District of Columbia, representing over 70 percent of the nation's population, now provide for some sort of right of action on behalf of some or all indirect purchasers.[5] In addition, another four states allow for indirect purchaser recovery on behalf of indirect state government purchases.[6] Finally, the trend toward allowing indirect purchaser actions is continuing, with legislation pending in a growing number of state legislatures.[7]

Costs and Uncertainties

The increasing availability of indirect purchaser damages in state courts has raised some of the same concerns that informed the *Illinois Brick* majority: risk of multiple recoveries and difficulties with damage apportionment among competing layers of indirect purchasers. As noted in the companion articles in this issue, these concerns may be amplified from a defense perspective because they will likely be faced in multiple state proceedings, without the benefit of a formal multistate coordination procedure equivalent to that available in the federal system.

Similarly, even though the increased availability of damages is a welcome development from a plaintiff's perspective, there are still potentially significant hurdles facing prospective plaintiffs in at least some of the states. In addition, proceeding on a state-by-state basis can undermine what, in effect, are significant economies of scale in discovery, expert retention, and general case management often realized in direct purchaser actions brought by the state attorneys general or private plaintiffs. These inefficiencies are exacerbated by variations in state law, such as class certification standards, standing requirements, recoverability of damages, required proof of damages, and available defenses.[8] The lack of well-developed decisional law in many states on many key issues increases both the cost of litigation and the uncertainty of litigation outcomes.

As one example, class certification can be a significant hurdle to indirect purchaser recovery in some states, while in other states, class certification is relatively straightforward.[9] In this sense, class certification can be viewed as the analogue to the apportionment problem identified in *Illinois Brick*. Where plaintiffs assert a broad class, including multiple layers of distribution of a price-fixed product where each layer may have absorbed part of the unlawful overcharge, it can be challenging (but feasible) to satisfy courts that the manageability prerequisites of state law versions of Federal Rule of Civil Procedure 23 are met.[10] Moreover, each side may attempt to have the class certification issue resolved first in states with law perceived to be favorable to its side, thereby adding another layer of tactical complexity to these cases.

Because of these variations in state laws, it is possible that indirect purchasers in some states could obtain substantial recoveries, and in others, nothing. Although defendants may face multiple recoveries in some states, they may completely avoid indirect purchaser liability in others. Absent some method to consolidate claims and to resolve them globally, the costs and uncertainties are high on both sides. Indeed, these prospective costs and uncertainties constitute strong inducements to all sides to achieve global settlement.

The *Infant Formula* Cases

An early case that underscored these costs and uncertainties of state indirect purchaser litigation was the infant formula litigation. Following the settlement of almost two dozen direct purchaser cases that had been consolidated in the Northern District of Florida,[11] indirect purchaser actions were filed in at least eighteen states. Plaintiffs' counsel made a credible effort at multistate coordination. Notwithstanding this, the litigation was characterized by motions to dismiss

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challenging the right of indirect purchasers to standing in every state without an explicit *Brick*-repealer, attempted removals to federal court, attempts by the respective sides to accelerate the cases pending in fora perceived to be favorable to their side, and intense class certification battles.

The outcomes of these battles varied greatly across states. For example, defendants were successful in establishing the lack of standing of indirect purchasers to obtain relief in some states. But, in other states, indirect purchasers were held to have standing in decisions giving states without statutory *Brick*-repealers significant precedents for future actions.[12] The results of class certification battles were similarly mixed.[13] In the only trial of an infant formula indirect purchaser case, the jury returned a verdict for the defendants, finding insufficient evidence to support a finding of conspiracy. But, notwithstanding the defendants' success on the procedural front in a number of states, the cases eventually settled for significant amounts of cash and formula in a limited number of states. The result was hardly satisfying for either side.

Coordinating Multistate Litigation

State Attorneys General. The state attorneys general played only a limited role in the infant formula litigation. However, at least partly in an attempt to avoid the mixed results of the infant formula litigation, the states have attempted to apply their extensive experience in multistate direct purchaser litigation to the burgeoning area of indirect purchaser litigation.

As is well-known, the states have broad experience with coordinated multistate *direct purchaser* litigation in federal courts. These cases often, although not exclusively, involve resale price maintenance claims by numerous states. The litigation usually involves: (1) the formation of a well-organized working group of state assistant attorneys general; (2) the filing of a single complaint in federal court asserting federal and supplemental state claims, but relying on the state attorneys general *parens patriae* authority under federal law;[14] (3) close coordination among the states of both discovery and expert retention and preparation; (4) long-standing practices for the sharing of costs and of ultimate recoveries; (5) attempts (not always successful) to coordinate with private plaintiffs' counsel; and (6) coordinated settlement discussions leading to national distributions of damages and global peace for defendants. This model has worked for a wide variety of industries and types of cases.[15]

Because the "glue" that held these multistate cases together was the presence of a common federal claim and the pendency of the action in a single federal court, it was not immediately obvious that this litigation model would be relevant to cases filed by attorneys general in separate state courts. For example, most aspects of traditional multistate coordination were not followed by the attorneys general in the cases brought in the mid-1990s against the major tobacco companies for the medical costs associated with smoking paid by the states. Moreover, because individual states, or small groups of states, retained various private counsel and there was little coordination of expert retention and preparation, it was difficult to coordinate this litigation. However, some aspects of multistate coordination did survive in the form of a national document depository and the coordination of some fact discovery. Perhaps most important, the states coordinated settlement negotiations in a manner that resulted in a settlement agreement entered into by all fifty states.[16] A committee of attorneys general oversees the implementation of the Master Settlement Agreement in the tobacco litigation.

Indirect Purchaser "Multistate" Litigation

Recent Cases. Two recently settled cases—the *Vitamins* indirect purchaser litigation and the *Mylan* case—suggest that multistate coordination by the attorneys general can be a catalyst for resolving these cases or, at a minimum, for lowering the cost and uncertainty of litigating them.

In the *Mylan* case, thirty-three states and the FTC alleged that *Mylan* entered into agreements that effectively cut off competitors' access to the active ingredients of two important anti-anxiety drugs, lorazepam and clorazepate, thereby causing the prices of these drugs to soar over 2000 percent.[17] The states consolidated their indirect purchaser claims as supplemental claims in one complaint, which also alleged violations of federal law. The FTC sought injunctive relief and disgorgement of profits.

In the *Vitamins* litigation, the state working group eventually filed actions in numerous state courts, after guilty pleas had been obtained by the U.S. Department of Justice and after direct purchaser actions had been filed in federal court and numerous private indirect purchaser actions had been filed in state courts.

Both cases are similar in that they followed the usual model for multistate coordination used by the attorneys general in direct purchaser litigation, with the exception that in the *Vitamins* litigation the state claims were not asserted in one federal court as supplemental claims but rather in separate state courts. These cases provide two competing models for multistate coordination of indirect purchaser litigation.

Choice of Forum. A critical issue at the outset from the plaintiffs' perspective is whether to file the state claims as supplemental claims in a consolidated federal action or separately in state courts. At first blush, the efficiencies of filing in one federal forum seem self-evident (e.g., coordination of discovery, likely consolidation of other federal cases, a single judge, well-developed procedures). However, where private indirect purchaser actions are already pending in multiple state courts, the state attorneys general may be forced to consider only the "state court" option, as was the case in the *Vitamins* litigation.[18] Indeed, because the state court vitamin actions had been coordinated in the District of Columbia Superior Court, the equivalent of a "state" court, the states decided to participate actively in the Alternative Dispute Resolution (ADR) process initiated by the D.C. Superior Court.[19]

Also, because federal judges are governed by *Illinois Brick* with respect to federal claims, there is at least the general perception among plaintiffs' counsel that the federal bench is skeptical, at best, of state indirect purchaser claims. However, federal decisions supportive of such claims, as in the *Mylan* case, 99 F. Supp. 2d at 4–10, may ameliorate this concern.

Coordination with Private Plaintiffs. In general, because private plaintiffs and state attorneys general often attempt to represent overlapping groups of indirect purchasers, it is advisable for those on the plaintiffs' side to coordinate as closely as possible. Realizing efficiencies in discovery and expert retention and development, as well as presenting a united front in settlement discussions, are obviously desirable.

However, the degree of coordination between state and private plaintiffs can depend on a number of factors (e.g., the stage of the cases, the identity of the various players, and differing perceptions of possible outcomes). For example, where actions, such as *Mylan*, are initiated by state (and federal) enforcers, and private plaintiffs are perceived simply to be following the principal government action, there is often less reason or willingness on the part of state enforcers to coordinate closely with private plaintiffs' counsel. In cases where private plaintiffs have a substantial investment in pending cases, and are willing to work closely with state attorneys general to further the interests of plaintiffs, close coordination can be beneficial and desirable to state and private plaintiffs. In the *Vitamins* litigation, the coordination throughout the

ADR process and initial litigation preparation was instrumental in resolving these cases. Moreover, effective organization of private plaintiffs' counsel made coordination with both state attorneys general and defendants more successful than in other cases.[20]

Even where private plaintiffs' counsel have made substantial investments in cases prior to the entry of state attorneys general, the assertion of state *parens* claims can materially improve chances for success by avoiding class certification hurdles. Seventeen states and the District of Columbia expressly allow *parens* actions by the attorney general[21] and courts have interpreted statutes in fourteen other states to allow *parens* actions.[22] Another five states have statutes authorizing the attorney general to maintain class actions or seek restitution on behalf of injured consumers.[23]

Settlement Implementation. Although the *Vitamins* litigation and *Mylan* offer competing models for settlement, they are similar in that both provide a central role for the attorneys general in the settlement implementation. In the *Vitamins* litigation, the state attorneys general and private counsel on behalf of indirect purchasers in twenty-four states

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and jurisdictions reached settlement agreements with defendants totaling $305 million dollars for indirect purchasers, not including attorneys fees.[24] Notwithstanding the variations noted above in state procedural laws, the plaintiffs and defendants were able to reach an agreement not only on a settlement amount, but on a process for distributing a portion of the settlement amounts on a multistate basis to commercial indirect purchasers in 23 of the 24 states, with California claims to be dealt with separately.[25] Because of the difficulties inherent in identifying overcharged consumers, the settlement provides for distribution of a substantial portion of the settlement amount through *cy pres* distribution administered by the attorneys general in consultation with private counsel.

The *Mylan* case was settled for a payment of $100 million to be used to compensate both private and governmental indirect purchasers. The case was notable for decisions establishing the FTC's authority to obtain disgorgement under Section 13(b) of the FTC Act, *Mylan Labs.*, 99 F. Supp. 2d at 36–37, and the authority of numerous states to obtain indirect damages or restitution, *id.* at 4–10. Because the states and the FTC had worked closely together in the *Mylan* litigation, the FTC deferred to the states in the distribution of the settlement funds. Even though only thirty-three states were party plaintiffs in the *Mylan* matter, the fact that the FTC had obtained a disgorgement remedy supported a national distribution of a significant portion of the settlement funds to all overcharged consumers, including those who resided in states with no apparent indirect purchaser right of action, in effect nationalizing the settlement. This synthesis of the FTC disgorgement remedy with the state indirect purchaser remedies could portend a fruitful method of federal and state cooperation in the future.

Illinois Brick Reprise

Although the reasons for the Court's decision in *Illinois Brick* have not been forgotten, the recent experience with multistate indirect damage actions suggests that these concerns were, at least in part, ill-founded. First, defendants have not been subjected to multiple liability, at least not beyond the treble damages allowable under federal law and many state laws. The fear has been expressed that direct purchasers and each layer of indirect purchasers all the way down to consumers would in theory collect treble damages, or at least single damages, with potentially no offset for passed-on overcharges. The recently resolved cases, negotiated at arms-length by vast arrays of plaintiff and defendant lawyers, suggest such concerns are significantly overblown. In *Mylan*, the defendants paid somewhat less than single damages to the combined federal and state plaintiffs. In the *Vitamins* litigation, the six settling defendants have paid approximately two-and-a-half times a reasonable estimate of the single damage overcharge when one combines the approximately $875 million in criminal fines, the $1.1 billion in direct damages, and approximately $400 million in indirect damages.[26]

In truth, *Vitamins* represents a defendant's "worst case" scenario: the defendants pled guilty to long-standing international conspiracies regarding various vitamins and, therefore, liability was not a significant issue in the direct and indirect damage actions that followed the guilty pleas. Even these aggregated amounts look paltry when one takes into account the time value of money and other factors reflecting an accurate measure of the economic harm caused by illegal cartels.[27]

The apportionment problem also appears to be tractable, although the lack of significant case law in most states make predictions concerning this issue difficult. Apportioning damages precisely among many layers of potential direct and indirect purchasers surely is a daunting task if carried to a high level of precision. However, most states have not had a sufficient number of decided cases to develop this area of law. Moreover, most indirect purchaser statutes and parallel case law were adopted against a backdrop of procedural standards better suited to other types of litigation. Now that a critical mass of states have adopted in some fashion an indirect purchaser right of action, it is likely that procedural enhancements will occur that will make such litigation fairer and more manageable. The adoption of *parens* authority for attorneys general and approaches to damage calculation similar to that of the District of Columbia or the oil overcharge cases will likely ameliorate this potential problem.[28] Indeed, state

courts attempting to devise standards for allocation of restitutionary funds might do well to study the oil overcharge litigation for guidance.

Finally, the notion that indirect purchasers lack a sufficient incentive to sue so as to deter antitrust violators has certainly been laid to rest. Notwithstanding the procedural difficulties outlined here, private plaintiffs have increasingly sought such relief under state laws. If a right of action for indirect purchasers had been available under federal law, we undoubtedly would have seen a substantial development and streamlining of such practice in the federal system. In fact, it is likely that indirect purchasers are perhaps more likely to bring suit than direct purchasers, given their lack of a direct business relationship with the alleged violator.

Trends in Multistate Litigation

Several trends are apparent from this brief history. First, the success of these actions in achieving results for state consumers (and for other commercial indirect purchasers) is bound to lead to additional cases. State law remedies may yet fulfill the purpose of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 "to assure that consumers are not precluded from the opportunity of proving the amount of their damage and to avoid problems with respect to manageability [of class actions], *standing, privity, target area, remoteness, and the like.*"[29]

Second, multistate indirect purchaser litigation is likely to follow either the *Mylan* model (state supplemental claims combined with federal claims in federal court) or the vitamin model (closely coordinated state court actions with attempts at de facto state MDL coordination). Indirect purchaser plaintiffs have been understandably reluctant to have their claims litigated in federal fora perceived to be unfriendly to such claims because they are governed for federal law purposes by *Illinois Brick*. It remains to be seen whether decisions like those in *Mylan* and the oil overcharge cases will assuage the concerns of such plaintiffs that federal judges are unable and unwilling to view state law claims through the prism of state law, not *Illinois Brick*.

Third, coordination is likely to intensify on both sides of these cases, and between sides, given the dual imperatives of resource constraints and judicial impatience with duplicative litigation. The state attorneys general have developed protocols for litigation coordination, both among themselves and with the federal agencies.[30] And, as the examples above suggest, the state attorneys general and private plaintiffs' counsel are beginning to develop new working relationships, although not without significant issues. Similarly, the ability of defendants to coordinate successfully often depends on the posture of the cases, but it does appear that the defendants in the cases discussed were able to adopt common strategies both for pre-trial discovery and settlement discussions.

Fourth, the uncertainty, complexity, and expense of these actions will likely lead litigants in nearly all cases to consider settling on a global or near-global basis at some point rather than engaging in state-by-state litigation. All sides to such litigation have significant weapons in their arsenals to prolong such litigation and, in theory, achieve tactical victories in particular states. Plaintiffs and defendants may each perceive an advantage to pressing litigation in those states where they perceive a procedural advantage to their side in order to build momentum for future litigation or settlement negotiations. For example, plaintiffs may seek to file an initial action in a state with favorable damage and class certification rules, together with assertion of a multistate class, in order to get quick approval of a settlement that might otherwise be subject to challenges in a number of states. Similarly, defendants facing multiple state litigation may move to dismiss or limit indirect purchaser claims in those states where defendants perceive a procedural advantage.

On the other hand, risk assessment of such a wide range of litigation tactics can result in wide ranges of possible outcomes and, hence, defensible settlement ranges. From the plaintiffs' perspective, the unfairness of some consumers receiving a substantial recovery in some states and others receiving nothing is likely to lead plaintiffs to meaningful compromise. From the defendants' perspective, the prospect of global peace in the face of significant uncertainties and the expense of a scorched earth litigation posture has proved similarly compelling in industries as diverse as tobacco, vitamins, and pharmaceuticals.

Fifth, plaintiffs are likely to insist that some or all of any indirect purchaser recovery go to end users either directly in a formal claims process (e.g., *Mylan*) or, where such end users cannot be identified efficiently, via *cy pres* distributions (e.g., *Vitamins*). Moreover, because these cases often involve transactions that cross state borders, the states are likely to insist on some sort of multistate claims administration for commercial claims as is provided for in the pending *Vitamin* settlement. Using the oil overcharge litigation as an example, it is also likely that the states and private plaintiffs will press for decisional law in those states with embryonic indirect purchaser rights of action directed toward establishing a rule that overcharges are presumed to have been borne by end-using consumers and recovery should be distributed to them either through a claims process or via *cy pres*.

Finally, on a more general note, it is almost a certainty that our system of concurrent antitrust enforcement will continue to flourish. This is a strength of our system, not a weakness.[31] Allowing two federal agencies, the state attorneys general, businesses, and consumers to bring actions under a common federal standard dampens swings in enforcement and engenders enough decisional law to allow the law to develop.[32] The ability of indirect purchasers to obtain recovery at the state level could lead to a softening of federal decisional law or, possibly, a statutory change designed to coordinate direct and indirect purchaser litigation. In short, our system of antitrust federalism has led to a much more vital antitrust law. ■

[1] Although the Court in this case seemingly carved out exceptions for certain types of cases, the Court has since made it clear that these exceptions are narrow. *See* Kansas v. Utilicorp United Inc., 497 U.S. 199 (1990).

[2] For example, in 1970, 37 states settled a nationwide class action against drug companies accused of price fixing. West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1970). Five million of the $37 million settlement fund was distributed via a claims process and the remaining $32 million was distributed by the states as *cy pres*. More recently, in actions involving competing direct and indirect claimants, the state attorneys general successfully established the principle that consumers who purchased petroleum products indirectly ought to receive the bulk of the money recovered for oil overcharge violations from 1973–81. In *In re Department of Energy Stripper Well Exemption Litigation*, 578 F. Supp. 586, 594 (D. Kan. 1983), the district court ordered the distribution of $2 billion to states as cy pres restitution. In *United States v. Exxon*, 561 F. Supp. 816 (D.D.C. 1983), *aff'd*, 773 F.2d 1240 (TECA 1984), the court of appeals held that the trial court did not abuse its discretion in fashioning its remedy, and found the *cy pres* form of distribution to be an "equitable, and fair, and a reasonable method of compensating the consuming public for the certain overcharges." *Exxon*, 773 F.2d at 1286. Note that limitations on pass-through were applied to some private enforcement actions brought under Section 210 of the Economic Stabilization Act. See Eastern Airlines, Inc. v. Atlantic Richfield Co., 609 F.2d 497 (Emer. Ct. App. 1979).

[3] See, *e.g.*, CAL. BUS. & PROF. CODE § 16750(a) (enacted in 1978); D.C. CODE ANN. § 28-4509 (1980); HAW. REV. STAT. §§ 480-3, 480-14 (enacted in 1987); IDAHO CODE § 48-108(2) (enacted in 2000); 740 ILL. COMP. STAT. ANN. 10/7(2) (1979); KAN. STAT. ANN. § 50-801(b) (enacted in 1985); MD. CODE ANN., COM. LAW §11-209(b)(2)(ii) (enacted in 1982); ME. REV. STAT. ANN. 10, § 1104 (enacted in 1989); MICH. COMP. LAWS § 445.778(2) (enacted in 1984); MINN. STAT. ANN. § 325D.57 (same); N.D. CENT. CODE § 51-08.1-08 (enacted in 1991); N.M. STAT. ANN. § 57-1-3 (1979); NEV. REV. STAT. § 598A. 210 (enacted in 1999); N.Y. GEN. BUS. § 340(6) (enacted in 1998); R.I. GEN. LAWS § 6-36-12(g) (1979); S.D. CODIFIED LAWS § 37-1-33 (enacted in 1980); VT. STAT. ANN. 9, § 2465(b) (1999) and WIS. STAT. ANN. § 113.18(1)(a) (enacted in 1979). Antitrust statutes in Alabama and Mississippi expressly permitted indirect purchaser suits prior to *Illinois Brick*. ALA. CODE § 6-5-60; MISS. CODE ANN. § 75-21-9. The Supreme Court in *California v. ARC America Corp.* upheld the validity of state indirect purchaser statutes because federal antitrust law did not expressly pre-empt state antitrust law and because there was no legislative intent to "occupy the field." 490 U.S. 93 (1989). Moreover, the Court held that federal courts would not be unduly burdened with indirect purchaser actions because such state statutes had no bearing on the damages available to direct purchasers under federal law and federal courts were not obligated to exercise supplemental jurisdiction over indirect purchasers' claims. *Id.* at 103–04.

[4] Alaska, Arizona, Arkansas, Connecticut, Florida, Kentucky, Louisiana, Massachusetts, Missouri, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, Utah, Washington, West Virginia. All of these states, except Arizona and Massachusetts, were plaintiffs in *FTC v. Mylan Labs., Inc.*, 99 F. Supp. 2d 1 (D.D.C. 1999), *reconsidering* 62 F. Supp. 2d 25 (D.D.C. 1999). Case law discussing the particular grounding of the indirect purchaser right of action is discussed in these opinions. *See also* McLaughlin v. Abbott Labs., Inc., No. C95-0526 (Ariz. Super. Ct., Yavapai County, filed July 9, 1996).

[5] Based on census figures from April 1, 2000, the 36 states and D.C. account for 72.046 % of the total U.S. population. U.S. CENSUS BUREAU, RESIDENTIAL POPULATION OF THE 50 STATES, THE DISTRICT OF COLUMBIA AND PUERTO RICO, *available at* http://www.cache.census.gov/population/cen2000/tab04.txt.

[6] These include Colorado, Delaware, Maryland, and Virginia.

[7] For example, as of February 2001, bills were pending in Iowa, Oregon, and Pennsylvania. H.S.B. 93, 79th Gen. Ass., IA. 1st Sess. (2001); H.B. 2217, 71st Leg., Or. Gen. Sess. (2001); S.B. 21, 185th Leg., Pa. Gen. Sess. (2001).

[8] Some state indirect purchaser statutes limit recovery to state government purchases. *See, e.g.*, Maryland, MD. CODE ANN., COM. LAW § 11-209(b)(2)(ii). Others authorize only the attorney general to bring an action on behalf of indirect purchasers residing within the state. See, e.g., IDAHO CODE § 48-108(2). The *Mylan* court seemed to suggest that with respect to the Mylan "nine," only the attorneys general would be permitted to seek restitution under state antitrust and consumer protection statutes for the most part. Other states appear to prohibit the recovery of damages sustained prior to the enactment of the indirect purchaser statute. *See, e.g., In re* Vitamins Antitrust Litig., 2000 WL 1511376 (D.D.C. Oct. 6, 2000) (holding that New York's indirect purchaser statute does not apply to conduct occurring before its enactment—Dec. 23, 1998); Krotz v. Microsoft Corp., No. A416361 (Nev. Dist. Ct. June 22, 2000) (refusing to apply Nevada's indirect purchaser statute—enacted October 1, 1999—retroactively). Other states apparently only apply their antitrust statutes to intrastate conspiracies. *E.g.*, Abbott Labs. v. Durrett, 746 So. 2d 316, 338-39 (Ala. 1999); Archer Daniels Midland Co. v. Seven Up Bottling Co., 746 So. 2d 966, 987–89 (Ala. 1999); Blake v. Abbott Labs, Inc., 1996-1 Trade Cas. (CCH) ¶ 71,369, 1996 WL 134947 (Tenn. Ct. App. 1996).

[9] William H. Page, *The Limits of State Indirect Purchaser Suits: Class Certification In the Shadow of* Illinois Brick, 67 ANTITRUST L.J. 1, 22–23 (1999).

[10] See, *e.g.*, Wood v. Abbott Labs., Inc., 1997-2 Trade Cas. (CCH) ¶ 72,014, 1997 WL 824019 (Mich. Cir. Ct. filed Sept. 11, 1997) (class certification denied because plaintiffs' damage theory not specific enough). *But see* Gordon v. Microsoft Corp., 2001 WL 366432 (Minn. Dist. Ct. Mar. 30, 2001) (class certification granted). *See also* cases cited *infra* notes 13 and 28.

[11] *In re* Infant Formula Antitrust Litigation, M.D.L. 878 (N.D. Fl. 1991).

[12] *Compare* Abbott v. Segura, 907 S.W.2d 503 (Tex. 1995) (standing) *with* Mack v. Bristol-Myers Squibb Co., 673 So. 2d 100 (Fla. 1st D.C.A. 1996) (no standing).

[13] See, *e.g.*, Durden v. Abbott, No. CV 93-663 (Cir. Ct. Calhoun County, Ala., Jan. 16, 1996); Fischenich v. Abbott, No. MC 94-6868 (Minn. Dist. Ct., Hennepin County, filed May 26, 1995). States that certified classes generally did so in fairly uninformative decisions. *See, e.g.*, Donelan v. Abbott Labs., No. 94 C 709 (Kan. Dist. Ct. filed May 3, 1995); Hagemann v. Abbott Labs., Civ. No. 94-221 (S.D. Cir. Ct. filed Nov. 21, 1995); Carlson v. Abbott Labs., No. 94-CV-002608 (Wis. Cir. Ct. filed Mar. 23, 1995).

[14] State attorneys general are authorized to bring actions for injuries to natural persons residing in their states without the necessity of meeting the requirements of typical class actions (although notice and an opportunity to opt out must be given to such persons). 15 U.S.C. §§15c–h. Under state law, attorneys general also may have *parens patriae* authority. ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 744 n.102 (4th ed. 1997) [hereinafter ALD (4th)].

[15] See, *e.g.*, Texas v. Zeneca, Inc., 1997-2 Trade Cas. (CCH) ¶ 71,888 (N.D. Tex. settlement approved June 27, 1997); State of Missouri v. American Cyanamid Co., Dkt. No. 97-4024-CV-C-SOW (W.D. Mo. Jan. 30, 1997); New York v. Reebok Int'l, Ltd., 903 F. Supp. 532 (S.D.N.Y.).

[16] See *generally* National Association of Attorneys General, *Tobacco Libraries*, *available at* www.naag.org/Tobaccopublic/library.cfm.

[17] Mylan Labs., Inc., 62 F. Supp. 2d 25, 33–35 (D.D.C. 1999) (complaint allegations discussed).

[18] Federal criminal plea agreements involving the defendant vitamin companies and individuals employed by them were announced by the U.S. Department of Justice beginning in May 1999. Almost a year prior to the entry of the first pleas by the U.S. Department of Justice, private plaintiffs' counsel had filed lawsuits in state courts on behalf of indirect purchasers. Subsequently, indirect purchaser actions were filed in approximately 17 states and the District of Columbia. Similarly, cases were filed in federal court on behalf of direct purchasers, which were consolidated for pretrial purposes in the U.S. District Court for the District of Columbia.

[19] Giral v. F. Hoffmann-La Roche Ltd., No. 98 CA 7467 (D.C. Sup. Ct. filed 1998). This "state" court played an important role coordinating pretrial proceedings in the other state courts and presided over Alternative Dispute Resolution proceedings that eventually led to a "global" settlement.

[20] Lead counsel for the private plaintiffs in the *Vitamins* litigation was David Boies III, Straus & Boies, LLP, Fairfax, Virginia.

[21] California (CAL. BUS. & PROF. CODE § 16760), Colorado (COL. REV. STAT. § 6-4-111), Connecticut (CONN. GEN. STAT. § 35-32), Delaware (DEL. CODE ANN. § 6-2107), District of Columbia (D.C. CODE § 28-4507), Florida (FLA.

STAT. § 542.22), Hawaii (HAW. REV. STAT. § 480-14), Idaho (IDAHO CODE § 48-108), Massachusetts (MASS. GEN. LAWS 93 § 9), Nebraska (NEB. REV. STAT. § 84-212), Nevada (NEV. REV. STAT. § 598A.160), Ohio (OHIO REV. CODE § 109.81), Oklahoma (79 OKL. ST. § 205), Rhode Island (R.I. GEN LAWS § 6-36-12), South Dakota (S.D. LAWS § 37-1-23), Utah (UTAH CODE § 76-10-918), Virginia (VA. CODE § 59.1-9.15) and West Virginia (W. VA. CODE § 47-18-17).

[22] Alaska, Arkansas, Maine, Michigan, Missouri, New Mexico, North Carolina, South Carolina, Texas, and Wisconsin—each found to have *parens* authority in *FTC v. Mylan Labs*, 62 F. Supp. 2d 25, *modified*, 99 F. Supp. 2d 1 (D.D.C. 1999), and others include: Kentucky—Commonwealth ex rel. Cowan v. Southern Belle Dairy Co., 801 S.W.2d 60 (Ky 1990), Louisiana—State v. Bordens, Inc., 684 So. 2d 1024, 1026 (La. Ct. Ap. 1996), Minnesota—State by Humphrey v. RI-MEL, Inc., 417 N.W.2d 102, 112 (Minn. Ct. Ap. 1988) and Vermont—State v. Therrien, 633 A.2d 272 (Vt. 1993).

[23] Arizona (ARIZ. REV. STAT. § 44-1407), Illinois (740 ILL. COMP STAT. § 10-7.8), Kansas (KAN. STAT. § 50-103), Maryland (MD. COM. LAW CODE § 11-209), and Washington (WASH. REV. CODE § 19.86.090).

[24] Eventually, the parties decided to separate the California portion of the settlement amount ($80 million) into a separate settlement agreement leaving $225 million for the other 23 states. In addition, the 6 defendants separately agreed to pay the 24 states, including California, $30 million for both direct and indirect state government purchases. Private plaintiffs counsel negotiated for a separate fund from which attorneys fees will be paid.

[25] Also, the settlement does not cover potential indirect consumer claims of several states—Alaska, Arkansas, Connecticut, Kentucky, North Carolina, Ohio, Oklahoma, South Carolina—involved in the *Mylan* litigation. In the midst of *Vitamins* negotiations on behalf of 24 states, the *Mylan* court initially ruled that these states did not appear to have a right of action for indirect purchasers. *Mylan Labs.*, 62 F. Supp. at 37–52. After the broad outline of a vitamin settlement became apparent, the *Mylan* court reconsidered its ruling with respect to these states, holding that an indirect action probably existed in those states, too late for them to be included in the *Vitamins* indirect settlement. *Mylan Labs.*, 99 F. Supp. 2d at 1.

[26] The total could rise somewhat depending on the resolution of a large number of opt-outs from the direct settlement and possible opt-outs from the indirect settlements.

[27] *See generally* Robert H. Lande, *Are Antitrust Treble Damages Really Single Damages?*, 54 OHIO L.J. 115 (1993).

[28] For example, the District of Columbia allows for proof of injury and the amount of damages "on a class-wide basis, without requiring proof of such matters by each individual member of the class." D.C. CODE ANN. § 28-4508 (1996). This section goes on to provide that "The percentage of total damages attributable to a member of such class shall be the same as the ratio of such member's purchases or sales to the purchases or sales of the class as a whole." Case law interpreting this statute creates a clear presumption in favor of class certification. *E.g.*, Goda v. Abbott Labs., 1997-1 Trade Cas. (CCH) ¶ 71,730, at 79,141 (D.C. Super. Ct. 1997). *See also* Page, *supra* note 9, at n.89 and accompanying text. After class certification was denied in the Minnesota infant formula litigation, the Minnesota Attorney General brought an action in his *parens patriae* capacity under state law.

[29] 431 U.S. at 757 (Brennan, J., dissenting (citing S. REP. No. 94-803, at 42)).

[30] For example, see the Joint FTC, DOJ, and NAAG protocol memorializing the procedures used by the federal and state agencies to conduct joint merger investigations. Trade Reg. Rep. (CCH) ¶ 13,420 (Mar. 18, 1998).

[31] Kevin J. O'Connor, *Interview with State Antitrust Enforcer*, ANTITRUST, Spring 1999, at 35–36.

[32] For example, in the mid-1980s several states asked the U.S. Department of Justice Antitrust Division to investigate the property and casualty insurance industry, including several syndicates of Lloyd's of London. The Division declined to do so. Hence, 19 states sued 32 insurers, reinsurers, and a key trade association of insurers, alleging boycotts of certain types of business and municipal insurance. Ultimately, the states prevailed on key issues in the Supreme Court, and the case settled for important structural relief. More to the point, and not without irony, many of the international cartel cases now resulting in criminal enforcement by the Antitrust Division of DOJ, including the *Vitamins* case, are premised on the precedent established by these states in litigation against foreign reinsurers. *In re* Insurance Antitrust Litig., 938 F.2d. 919 (9th Cir.), *aff'd in part, rev'd in part, and remanded sub nom.* Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993).