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## The Passing-On Doctrine in Robinson-Patman Actions After Hanover Shoe, Illinois Brick, and Proposed Remedial Legislation

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## THE PASSING-ON DOCTRINE IN ROBINSON-PATMAN ACTIONS AFTER HANOVER SHOE, ILLINOIS BRICK, AND PROPOSED REMEDIAL LEGISLATION

Economic passing-on<sup>1</sup> occurs when direct purchasers from an antitrust violator transfer price overcharges or undercharges down the vertical chain of distribution to injure or aid customers of direct purchasers who are not in privity with the violator.<sup>2</sup> Legal passing-on questions concern the extent to which an antitrust suit can embrace this economic reality. Traditional legal analysis of passing-on has encompassed the type of evidence admissible to prove passing-on,<sup>3</sup> the effect of privity on the ability of the plaintiff to prove

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1. Economic passing-on theory has fostered thorough comment. See generally R. POSNER, ANTITRUST 147-49 (1974); P. SAMUELSON, ECONOMICS 389-91 (10th ed. 1976); M. SPENSER, CONTEMPORARY ECONOMICS 346-50 (2d ed. 1974); Cirace, *Price-Fixing, Privity, and the Pass-On Problem in Antitrust Treble-Damages Suits: A Suggested Solution*, 19 WM. & MARY L. REV. 171 (1977); Schaefer, *Passing-On Theory in Antitrust Treble Damage Actions: An Economic and Legal Analysis*, 16 WM. & MARY L. REV. 883 (1976).

Any anticompetitive activity creates supernormal prices resulting in reduced output, dead-weight losses, and misallocation of resources. R. POSNER, ECONOMIC ANALYSIS OF LAW 104-13 (1972); F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 8-19 (1970). In short, passing-on theory attempts to trace the injury flowing in ripple fashion throughout the vertical chain of distribution that results from the anticompetitive activity. If the demand for the product of the business that purchases directly from the antitrust violator is totally inelastic or the supply totally elastic, the direct purchaser can pass the entire illegal overcharge and escape injury. See, e.g., Cirace, *supra*, at 180; Schaefer, *supra*, at 887-906. Conversely, if demand is totally elastic or supply totally inelastic, the direct purchaser must absorb the entire overcharge, and remote purchasers are protected from injury. See, e.g., Cirace, *supra*, at 181; Schaefer, *supra*, at 887-906. In the majority of markets, however, elasticities of demand or supply are neither completely elastic nor inelastic; thus, each member of the vertical chain of distribution may simultaneously absorb and pass on a portion of the illegal price. See Cirace, *supra*, at 181; Schaefer, *supra*, at 893. In a normal market purchasers three or four levels of distribution removed from the antitrust violator can be injured in fact to the extent of the illegal price they absorb. For a more detailed analysis of the economics of passing-on, including the use of tax incidence theory, the effect of derived demand, and the profit maximization assumption, see Schaefer, *supra*, at 887-906.

2. For the purpose of this Note, a purchaser who is in privity of contract with the antitrust violator is referred to as a direct purchaser, direct customer, or direct buyer. Customers of direct purchasers who are not in privity of contract with the violator are referred to as customers, indirect customers, remote customers, indirect purchasers, or remote purchasers. An intermediary is a direct or indirect purchaser who occupies a position between the antitrust violator and the plaintiff or between the violator and the plaintiff's competitor.

3. Experts use several types of evidence to identify instances of passing-on: the statistical determination of elasticities derived through multiple-regression analysis, used in conjunction with tax incidence theory; an interrupted time-price series analysis; testimony of the purchaser on his pricing decision in relation to purchase price and resale price; or a combination of any of these methods.

passing-on, and the distinction, if any, between the offensive<sup>4</sup> and defensive<sup>5</sup> use of passing-on.

Unfortunately, the courts and commentators have overlooked an element of the passing-on question. Past economic and legal analyses have not differentiated between the issues presented by passing-on in the context of monopolization<sup>6</sup> or price fixing<sup>7</sup> under the Sherman Act, and the related but separate issues presented by passing-on in the context of price discrimination under the Robinson-Patman Act.<sup>8</sup> Too many similarities exist between Sherman and Robinson-Patman cases to ignore the interrelation of adjudications of the passing-on issues under the two Acts. For example, interpretation of the scope of section 4 of the Clayton Act,<sup>9</sup> under which all private antitrust actions must be pleaded, partially determines the resolution of the passing-on issue in all private enforcement contexts. Although more empirical data may be available in price discrimination cases to prove passing-on,<sup>10</sup> basic similarities exist between the economic models used to prove passing-on under the two Acts.

The differences between the issues presented by the Acts, however, dictate that the passing-on rules developed by the courts and Congress for Sherman cases should not be applied summarily to Robinson-Patman cases. Sherman and Robinson-Patman cases differ in terms of policy considerations and economic characteristics.<sup>11</sup> Moreover, the ability to present evidence of passing-on is more often vital to the maintenance of an action under the Robinson-Patman

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4. Indirect purchasers have pleaded passing-on offensively to prove they have absorbed the overcharge and, thereby, have been injured.

5. Antitrust violators have pleaded passing-on defensively to prove that plaintiffs—who may either be direct or indirect purchasers—have passed the entire overcharge and, thereby, have escaped injury.

6. Sherman Act § 2, 15 U.S.C. § 2 (1970).

7. *Id.* § 1, 15 U.S.C. § 1 (1970).

8. Clayton Act § 2, as amended by Robinson-Patman Act § 2, 15 U.S.C. § 13 (1973). For a comparison of the different uses of passing-on under the two Acts, see text accompanying notes 69-87 *infra*.

9. 15 U.S.C. § 15 (1973).

10. In price discrimination violations the economist can examine, for example, the effects of a price increase in the plaintiff's chain of distribution and also the effect of a smaller price increase in the favored customer's chain of distribution. With price fixing or monopolization violations the economist can examine only the passing-on of one uniform price granted to all purchasers.

11. See generally text accompanying notes 69-87 *infra*.

Act than under the Sherman Act.<sup>12</sup>

This Note will assess the current status and predict the future trends of the passing-on doctrine under the Robinson-Patman Act.<sup>13</sup> Because most current developments and debate on the passing-on doctrine have surfaced in a Sherman Act context, analysis of the Sherman passing-on issue is a prerequisite to examination of Robinson-Patman passing-on. After identifying the policies crucial to the disposition of the passing-on question under the Sherman Act, the issues presented in Robinson-Patman and Sherman passing-on will be distinguished to enable assessment of the current status of passing-on under the Robinson-Patman Act and prediction of the future trend in price discrimination passing-on.

#### POLICY CONSIDERATIONS AND PASSING-ON UNDER THE SHERMAN ACT

##### *Hanover Shoe*

The Supreme Court first addressed the passing-on question in a 1968 decision, *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*<sup>14</sup> In *Hanover Shoe*, the direct purchasing plaintiff alleged that it had suffered damage from United Shoe's monopolization of the shoe machinery market to the extent that its lease payments exceeded

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12. For example, a hypothetical rule which asserts that passing-on evidence is inadmissible would preclude only an indirect purchaser from suing under the Sherman Act. In a price discrimination context, however, such a rule would preclude a direct purchaser from proving he was injured by competition with an indirect customer of the discriminator. The direct purchaser would not be allowed to prove the low price was passed to his competitor. See, e.g., *Perkins v. Standard Oil Co. of Cal.*, 395 U.S. 642 (1969); *Standard Oil Co. v. FTC*, 173 F.2d 210 (7th Cir. 1949), *rev'd on other grounds*, 340 U.S. 231 (1951).

13. The courts have created uncertainty over the use of passing-on in price discrimination cases by limited treatment of the issue and by suggested application of Sherman rules to Robinson-Patman cases. The inquiry into whether a purchaser without privity has a cause of action under the Robinson-Patman Act has been confined to statutory interpretation. See, e.g., *Hiram Walker, Inc. v. A & S Tropical, Inc.*, 407 F.2d 4 (3d Cir.), *cert. denied*, 396 U.S. 901 (1969); *Klein v. Lionel Corp.*, 237 F.2d 13 (3d Cir. 1956). Because of the erosion of the doctrine that an indirect purchaser does not have a cause of action unless the discriminator effectively controls his price, *FLM Collision Parts, Inc. v. Ford Motor Co.*, 406 F. Supp. 224 (S.D.N.Y. 1975); *Southern Concrete Co. v. United States Steel Corp.*, 394 F. Supp. 362, 377-79 (N.D. Ga. 1975) (citing *Littlejohn v. Shell Oil Co.*, 483 F.2d 1140, 1143 n.3 (5th Cir.), *cert. denied*, 414 U.S. 1116 (1973)), courts soon will have to confront the passing-on issue in a price discrimination context. Of course, the Supreme Court has allowed a direct plaintiff to prove passing-on of the favored price to his competitor, *Perkins v. Standard Oil Co. of Cal.*, 395 U.S. 642 (1965), but this decision was vague and failed to directly address the passing-on issues. See notes 121-38 *infra* & accompanying text.

14. 392 U.S. 481 (1968).

the competitive purchase price of the equipment.<sup>15</sup> United defensively pleaded passing-on, arguing that it had not injured Hanover because Hanover had passed on the overcharge as a higher resale price without suffering a loss in sales volume. If the overcharge applied equally to all of the plaintiff's competitors and if the demand for the plaintiff's product was so inelastic that the plaintiff could increase its price by the amount of the overcharge without realizing a decline in sales,<sup>16</sup> United asserted that passing-on should be a defense. The issue was not whether United had monopolized the market, because this determination had been made in a preceeding government action;<sup>17</sup> rather, the question was whether Hanover could establish injury to its business or property within the ambit of section 4 of the Clayton Act<sup>18</sup> by showing that it had paid an illegally high price, without regard to whether it had passed on the price increase. The Supreme Court rejected the passing-on defense,<sup>19</sup> contrary to the result reached by the majority of courts.<sup>20</sup>

Justice White, speaking for eight Justices on the passing-on issue, concluded that the policies of deterring antitrust violations by treble-damage actions<sup>21</sup> and of expediting protracted litigation with a judicially manageable standard<sup>22</sup> mandated disallowance of the

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15. *Id.* at 483-84.

16. *Id.* at 492-93. One of the two requisites created by *United Shoe*, however, is never satisfied in a price discrimination suit because in such suits a high price is imposed on the plaintiff and a low price is granted his competitor; but a uniform high price is never imposed equally on the plaintiff and all of his competitors.

17. *United Shoe Mach. Corp. v. United States*, 347 U.S. 521 (1954). A final judgment or decree in any civil or criminal suit brought under the antitrust laws by the United States is "prima facie evidence . . . as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto . . ." Clayton Act § 5(a), 15 U.S.C. § 16(a) (1973 & Supp. 1978).

18. 15 U.S.C. § 15 (1973 & Supp. 1978).

19. 392 U.S. at 489.

20. *E.g.*, *Freedman v. Philadelphia Terminals Auction Co.*, 301 F.2d 830 (3d Cir. 1962) (plaintiffs denied recovery because charges passed-on); see Note, *Scaling the Illinois Brick Wall: The Future of Indirect Purchasers in Antitrust Litigation*, 63 CORNELL L. REV. 309, 314 n.21 (1978) (numerous cases cited supporting proposition that prior to *Hanover Shoe* the majority of courts allowed defensive passing-on). Moreover, in 1922, the Supreme Court implied that it would allow a passing-on defense. *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156, 165 (1922) ("[n]o court or jury could say that, if the rate had been lower, . . . the . . . advantage would have accrued to [the plaintiff]").

21. 392 U.S. at 494.

22. If passing-on were allowed as a defense, antitrust defendants frequently would seek to establish its applicability. "Treble-damage actions would often require additional long and complicated proceedings involving massive evidence and complicated theories." *Id.* at 493.

passing-on defense. Unless treble-damage actions by direct purchasers were encouraged, violators would retain the fruits of their illegality because ultimate consumers would be unlikely to sue.<sup>23</sup> Justice White also was concerned that approval of defensive passing-on would hamper the judicial administration of the anti-trust laws because the difficulty of establishing defensive passing-on was more burdensome in the "real" economic world than in the economist's hypothetical model:<sup>24</sup> businessmen cannot account for their price decisions;<sup>25</sup> cost data is elusive;<sup>26</sup> and finally, even if the defendant established passing-on, the plaintiff could allege that it would have raised its resale price, absent the overcharge, and would have maintained the same level of sales with an increase in its profit margin.<sup>27</sup> Aside from these practical difficulties, Justice White contended that defendants eager to establish defensive passing-on would thrust the courts into a complicated, theoretical, and time-consuming process of proof.<sup>28</sup> Therefore, the Court decided that defensive passing-on would be permitted only if proof of passing-on could be established easily, as in the instance of a pre-existing cost-plus contract.<sup>29</sup>

The Court's holding in *Hanover Shoe* was the first indication that the consideration of the difficulty of proof should take precedence over the policy of deterrence. Nevertheless, after *Hanover Shoe*, many courts<sup>30</sup> and commentators<sup>31</sup> believed that the offensive use of passing-on remained a viable theory in antitrust litigation because offensive passing-on forwarded the goal of deterrence.

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23. *Id.* at 494.

24. *Id.* at 493.

25. *Id.* at 492-93.

26. *Id.* at 493.

27. *Id.*

28. *Id.*

29. *Id.* at 494. A cost-plus contract is one which fixes the amount to be paid the contractor on a basis, generally, of the cost of the material and labor, plus an agreed percentage thereof. *The Spica*, 289 F. 436, 445 (C.C.A.N.Y. 1923).

30. See note 32 *infra* for cases upholding the offensive use of passing-on after *Hanover Shoe*.

31. E.g., McGuire, *The Passing-On Defense and the Right of Remote Purchasers to Recover Treble Damages Under Hanover Shoe*, 33 U. PITT. L. REV. 1977 (1971); Schaefer, *supra* note 1; Note, *Mangano and Ultimate Consumer Standing: The Misuse of the Hanover Doctrine*, 72 COLUM. L. REV. 394 (1972); Note, *The Effect of Hanover Shoe on the Offensive Use of the Passing-On Doctrine*, 46 S. CAL. L. REV. 98 (1972); Note, *Standing to Sue in Antitrust Cases: The Offensive Use of Passing-On*, 123 U. PA. L. REV. 976, 988-90 (1975). But see Handler & Blechman, *Antitrust and the Consumer Interest: The Fallacy of Parens Patriae and A Suggested New Approach*, 85 YALE L.J. 626, 638-49 (1976).

*Illinois Brick*

Nine years after *Hanover Shoe*, conflict among the circuits over the offensive use of passing-on<sup>32</sup> forced the Supreme Court to resolve the controversy by invalidating all forms of passing-on. In *Illinois Brick v. Illinois*,<sup>33</sup> the State of Illinois and local government units alleged that manufacturers of concrete block conspired to fix prices.<sup>34</sup> Most plaintiffs had to allege that general and masonry contractors passed on the overcharges to them in the form of higher building costs, because these plaintiffs were not in privity with the antitrust violators. The district court granted the defendants' motion for summary judgment against the indirect purchasers because these plaintiffs' injuries were too remote to confer standing.<sup>35</sup> The Seventh Circuit reversed, stating that otherwise the compensatory goal of section 4 of the Clayton Act would be emasculated.<sup>36</sup> The Supreme Court did not reach the standing issue<sup>37</sup> but concluded in

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32. Many courts have upheld the offensive use of passing-on, stressing deterrence objectives, noting that privity is not required in antitrust suits, and de-emphasizing problems of proof and apportionment of damages. *E.g.*, *In re Western Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974); *In re Ampicillin Antitrust Litigation*, [1977-1] TRADE CAS. (CCH) ¶ 61,434 (D.D.C. 1977); *Carnivale Bag Co. v. Slide-Rite Mfg. Corp.*, 395 F. Supp. 287 (S.D.N.Y. 1975); *Boshes v. General Motors Corp.*, 59 F.R.D. 589 (N.D. Ill. 1973); *In re Master Key Antitrust Litigation*, [1973-2] TRADE CAS. (CCH) ¶ 74,680 (D. Conn. 1973), *appeal dismissed*, 528 F.2d 5 (2d Cir. 1975). Other courts rejected the offensive use of passing-on because it encouraged the massive evidence and complicated theories spurned by the Court in *Hanover Shoe*. *Mangano v. American Radiator & Standard Sanitary Corp.*, 438 F.2d 1187 (3d Cir. 1971), *aff'g* Philadelphia Hous. Auth. v. American Radiator & Standard Sanitary Corp., 50 F.R.D. 13 (E.D. Pa. 1970); *In re Sugar Indus. Antitrust Litigation*, 73 F.R.D. 322 (E.D. Pa. 1976); *Donson Stores, Inc. v. American Bakeries Co.*, 58 F.R.D. 481 (S.D.N.Y. 1973); *Balmac, Inc. v. American Metal Prods. Corp.*, [1972] TRADE CAS. (CCH) ¶ 74,235 (N.D. Cal. 1972); *Travis v. Fairmount Foods Co.*, 346 F. Supp. 679 (E.D. Pa. 1972). 33. 431 U.S. 720 (1977).

34. Sherman Act § 1, 15 U.S.C. § 1 (1973 & Supp. 1978).

35. *Illinois v. Ampress Brick Co.*, 67 F.R.D. 461 (N.D. Ill. 1975) (court noted that ultimate consumers, consumers who purchase product in form other than that sold by violator, rarely are conferred standing).

36. *Illinois v. Ampress Brick Co.*, 536 F.2d 1163 (7th Cir. 1976) (difficult proof should not deny injured party standing).

37. "[T]he question of which persons have been injured by an illegal overcharge for purposes of § 4 is analytically distinct from the question of which persons have sustained injuries too remote to give them standing to sue for damages under § 4." 431 U.S. at 728 n.7; see *Handler & Bleckman*, *supra* note 31, at 644-45. The analysis of the Court, however, belied this statement. The Court ignored evidence that § 4 permitted actions by indirect purchasers, see notes 53-56 *infra* & accompanying text, and resorted to an analysis of the difficulties of proving passing-on to determine effectively the standing of indirect purchasers.

an opinion<sup>38</sup> written by Justice White that indirect plaintiffs could not introduce evidence that they were injured within the meaning of section 4.<sup>39</sup>

The Court could have overruled *Hanover Shoe*, narrowly limited it, or applied it to bar offensive passing-on.<sup>40</sup> Justice White stated that limiting *Hanover Shoe* to defensive passing-on would expose defendants to multiple liability and inconsistent adjudications.<sup>41</sup> The concern in *Hanover Shoe* with further encumbering treble-damage actions with massive evidence and complicated theories applied equally to offensive and defensive passing-on.<sup>42</sup> The majority also felt that the rationale of *Hanover Shoe* and stare decisis militated against overruling the earlier decision.<sup>43</sup> The Court hy-

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38. Justice Brennan wrote a dissenting opinion joined by Justices Marshall and Blackmun. 431 U.S. at 748.

39. *Id.* at 728-29.

40. *Id.*

41. *Id.* at 730. Justice White feared that if offensive, but not defensive, passing-on were allowed, a direct purchaser could recover automatically the full overcharge after an indirect purchaser had proved passing-on and recovered a portion of the overcharge. The dissenters did not share this fear. *Id.* at 753 (Brennan, J., dissenting). Delaying recovery until the possibility of duplicative suits is foreclosed or apportioning damages would allay the fears of the majority. See *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 1, 221-31 (1977) [hereinafter cited as *The Supreme Court*].

42. The same methods used to prove passing-on defensively are used to demonstrate offensive use; however, this evidence is not necessarily massive and complicated. Complete passing-on can be assumed if "a price-fixed product is used by an intermediate purchaser as a component of a final product [and] . . . represents a small portion of the final product's price, and if substitution for the component is difficult . . . ." Schaefer, *supra* note 1, at 921. The Court, however, spurned attempts to carve out exceptions for particular types of markets, such as the component part market, because "classifying various market situations according to the amount of pass-on likely to be involved and its susceptibility of proof in a judicial forum would entail the very problem that the *Hanover Shoe* rule was meant to avoid." 431 U.S. at 744-45. Nevertheless, the Court did carve out two exceptions if market forces were superseded. See text accompanying note 45 *infra*. Even if assumptions of passing-on for particular markets are not allowed, proof of passing-on does not manifest an onerous burden. See generally Schaefer, *supra* note 1. Antitrust litigation has always been complex and costly. Withrow & Larm, *The "Big" Antitrust Case: 25 Years of Sisyphean Labor*, 62 CORNELL L. REV. 1 (1976). The Court in *Illinois Brick* exaggerated the margin of complexity and costliness added by the injection of passing-on into the litigation formula. The Court also was wary of compounding the "uncertainty of how much of an overcharge could be established at trial" with the "uncertainty of how that overcharge would be apportioned among the various plaintiffs." 431 U.S. at 745. This concern, although applicable to price-fixing or monopolization cases, has no validity in a price discrimination context because a comparison of prices charged rather than a calculation of a theoretical competitive price yields the overcharge. See text accompanying notes 80-82 *infra*.

43. 431 U.S. at 736.



pothesized that if it overruled *Hanover Shoe* to allow offensive and defensive passing-on, procedural rules could not regulate satisfactorily the resulting multiple litigation.<sup>44</sup> Failing to overrule or limit *Hanover Shoe*, the prohibition against defensive passing-on was extended to offensive passing-on. In dictum, the Court stated that the possible application of passing-on may be permitted only if a pre-existing cost-plus contract provided the mechanism for establishing passing-on or if a direct purchaser was controlled by his customer, two situations in which passing-on could be easily established or assumed.<sup>45</sup>

Justice White emphasized avoiding complex legal actions and protecting defendants from multiple liability at the expense of compensating injured indirect plaintiffs.<sup>46</sup> He believed that antitrust laws were more likely to be enforced if direct purchasers could recover the full overcharge.<sup>47</sup> From a deterrence standpoint, according to Justice White, it did not matter if the injured party sued, as long as the violation was redressed by someone.<sup>48</sup> The dissenters, however, maintained that the decision emasculated the paramount deterrence objective of *Hanover Shoe*.<sup>49</sup> Justice Brennan believed that the decrease in claims by the now precluded indirect purchasers would more than offset any possible increase in actions brought by direct purchasers seeking the full overcharge.<sup>50</sup> Accordingly, problems of proof and multiple liability were less significant to Justice Brennan than redress of injured parties and deterrence of antitrust violations.<sup>51</sup>

Justice White's analysis focused upon the proper balance of con-

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44. *Id.*

45. See notes 127-31 *infra* & accompanying text.

46. Because "a price-fixing agreement is more likely for a product that is subject to inelastic demand because greater profits can be exacted under such market condition . . .," Schaefer, *supra* note 1, at 898, the results in *Illinois Brick* often totally frustrate the compensation policy.

47. The direct purchaser is in a stronger financial position to bring suit than his generally smaller customers and may have greater incentive to do so if he can recover the full overcharge even though he has not been injured. Note, *Antitrust Law—Private Actions: The Supreme Court Bars Treble-Damage Suits by Indirect Purchasers*, 56 N.C.L. Rev. 341, 351 (1978) [hereinafter cited as *Antitrust Law*]. Alternatively, the direct purchaser may be unwilling to destroy his business relationship with the violator if he has not suffered injury. *In re Western Liquid Asphalt Cases*, 487 F.2d 191, 198 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974).

48. 431 U.S. at 746.

49. *Id.* at 749-50 (Brennan, J., dissenting).

50. *Id.* at 748-61.

51. *Id.* at 758-65.

flicting antitrust policies and goals,<sup>52</sup> but virtually ignored evidence that Congress had intended section 4 of the Clayton Act to embrace injuries to indirect purchasers.<sup>53</sup> The dissenters cited<sup>54</sup> the Hart-Scott-Rodino Antitrust Improvements Act of 1976 as evidence of a Congressional intent contrary to the holding of the majority.<sup>55</sup>

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52. One commentator asserts,

Total accommodation of these conflicting policies, however, is virtually impossible. Compensating injured parties, for example, often is incompatible with a manageable legal standard because of theoretical problems in the economic analysis of a damage award. In a pass-on situation, this analysis is complicated further because a monopolistic overcharge has cumulatively larger effects as it occurs farther back in the chain of production and distribution. Similarly, the practical problem of measuring the injuries plaintiffs suffer in specific instances is nearly insoluble. If courts emphasize deterrence, however, the remedy should be available to the party best able to assert it; thus, deterrence is not necessarily compatible with compensation. If the protection of defendants from multiple liability and the definition of a manageable legal standard are primary concerns, that is, if courts follow a privity rule, compensation and deterrence assuredly will suffer.

Cirace, *supra* note 1, at 174.

53. The legislative history of § 7 of the 1890 Sherman Act, the precursor of § 4 of the Clayton Act, indicates that Congress intended that parties not in privity with the violator be entitled to a cause of action. Senator George observed that individual consumers were the parties primarily protected by the Act:

The right of action against the persons in the combination is given to the party damnified. Who is the party injured, when, as prescribed in the bill, there has been an advance in the price by the combination? The answer is found in the bill itself in the words, "intended to advance the cost to the consumer of any such articles." The consumer is the party "damnified or injured . . ."

Who are the consumers? The people of the United States as individuals; whatever each individual consumes, or his family, marks the amount of his interest in the price advanced by the combination.

21 CONG. REC. 1767, 1768 (1899). Senator George was not referring simply to consumers who had purchased directly from the violator. He recognized passing-on of overcharges from middlemen to consumers:

An advance in price to the middlemen is not mentioned in the bill, for the obvious reason that no such advance would damnify them; it would rather be a benefit, as it would increase the value of the goods he has on hand. He buys to sell again. He buys only for profit on a subsequent sale. So whatever he pays he receives when he sells, together with a profit on his investment; and so all of them including the last, who sells directly to the consumer. The consumer, therefore, paying all the increased price advanced by the middlemen and profits on the same, is the party necessarily damnified or injured.

*Id.* at 1767.

Interestingly, six months before *Illinois Brick*, the Supreme Court, in an unanimous decision, observed that § 4 was conceived of primarily as a remedy for consumers. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n.10 (1977); see Report of the Senate Judiciary Comm. accompanying S. 1874, 95th Cong., 2d Sess., pt. 1, at 11-14 (1978).

54. 431 U.S. at 754-58 (Brennan, J., dissenting).

55. See 15 U.S.C.A. §§ 15c-15h (West Supp. 1978). One commentator has predicted that

### *The Congressional Response to Illinois Brick*

The judiciary committees of the Senate<sup>56</sup> and House of Representatives<sup>57</sup> also have found the majority's opinion in *Illinois Brick* and the broader language of *Hanover Shoe* to be contrary to the proper scheme of private enforcement of the antitrust laws and have proposed overruling legislation. As reported by the Senate bill, the proposed Antitrust Enforcement Act of 1978 mandates that parties to an action brought under sections 4, 4A, or 4C of the Clayton Act may establish offensive or defensive passing-on.<sup>58</sup> The new law would apply retroactively to the date of the decision in *Illinois Brick*.<sup>59</sup> The Act leaves unaltered the laws of standing, proximate cause, speculative damages, and the type of evidence used to prove passing-on, because the drafters believed that those issues could be developed best by courts on a case-by-case basis.<sup>60</sup> The Act merely eliminates the artificial prerequisite of privity.<sup>61</sup>

The pending legislation alters the balance of the antitrust policies established in *Illinois Brick* and *Hanover Shoe*.<sup>62</sup> The proponents of

the holding in *Illinois Brick* will not nullify the Act's creation of *parens patrie* suits brought by attorney generals for indirect consumers because "[r]eports of both houses as well as the remarks of one bill's principal sponsors leaves no doubt that the Congress contemplated . . . suits on behalf of indirect purchasers . . . ." *The Supreme Court, supra* note 41, at 230 (footnotes omitted). However, the prevailing opinion is that *Illinois Brick* seriously undercut *parens patrie* suits. See S. REP. NO. 934, 95th Cong., 2d Sess. 14-17 (1978).

56. S. 1874, 95th Cong., 2d Sess. (1978).

57. H.R. 11942, 95th Cong., 2d Sess. (1978).

58. The Act provides:

SEC. 3. The Clayton Act is amended by inserting immediately after section 44 the following new section:

SEC 41(1) In any action under sections 4, 4A, or 4C of the Clayton Act, the fact that a person or the United States has not dealt directly with the defendant shall not bar or otherwise limit recovery.

(2) In any action under section 4 of the Clayton Act, the defendant shall be entitled to prove as partial or complete defense to a damage claim, that the plaintiff has passed on to others, who are themselves entitled to recover under section 4, 4A, or 4C of this Act, some or all of what would otherwise constitute plaintiff's damage.

S. REP. NO. 934, *supra* note 55, at 36.

59. The amendment made by the Act applies "to any action commenced under sections 4, 4A, or 4C(a)(1) of the Clayton Act which was pending on June 9, 1977, or filed thereafter." *Id.* The constitutionality of the retroactive application of the Act has been questioned. S. REP. NO. 934, *supra* note 55, pt. 2, at 10-14.

60. *Id.* pt. 1, at 24.

61. *Id.*

62. See generally Hoffman, *Antitrust Standing: Congress Responds to Illinois Brick*, 1978 WASH. U. L.Q. 529; Note, *Recovery By Indirect Purchasers: Illinois Brick and the Congress-*

the Act view Justice White's fear of complicated and protracted proof of passing-on as exaggerated or subordinate to the right of injured indirect parties to redress their wrongs. The Act concurs with Justice Brennan's belief that the *Illinois Brick* rule would lead to less effective deterrence of antitrust violations,<sup>63</sup> while respecting Justice White's concern with multiple liability and inconsistent judgments by permitting a defendant to plead passing-on defensively in some situations;<sup>64</sup> however if a defendant could not establish that he was in danger of being sued by the indirect party injured in fact, the direct purchaser could recover the entire overcharge.<sup>65</sup> It is better that the direct purchaser who passes on a portion of the overcharge recoup a windfall than that the violator retain the fruits of his illegality. Moreover, if the defendant established passing-on defensively, the injured indirect party could be able to use this finding against the defendant in a later suit under the doctrine of collateral estoppel.<sup>66</sup>

#### THE CASE AGAINST SUMMARY APPLICATION OF SHERMAN PASSING-ON RULES TO ROBINSON-PATMAN CASES

*Hanover Shoe, Inc. v. United Shoe Machinery Corp.*,<sup>67</sup> *Illinois Brick v. Illinois*,<sup>68</sup> and the legislation proposed to counter *Illinois Brick* all identified the following policies as crucial to the disposition of the passing-on question under the Sherman Act: deterrence of antitrust violations, expedition of protracted litigation with a judicially manageable standard, protection of defendants from multiple liability, and compensation of injured parties. Although each of these recent Sherman Act developments underscored identical policy considerations, all three of these interpretations of the law established a different balance of the policies because total accommodation of these conflicting considerations was impossible.<sup>69</sup> Courts will be tempted to summarily apply Sherman Act passing-on rules to Robinson-Patman Act cases because private enforcement actions under both Acts must proceed under section 4 of the Clayton Act,

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sional Response, 39 U. PITT. L. REV. 537 (1978).

63. S. REP. NO. 934, *supra* note 55, pt. 1, at 18-23.

64. *Id.* at 25. If the party to whom the overcharge was passed is not entitled to recover, however, defensive passing-on cannot be pleaded. *Id.*

65. *Id.*

66. See, e.g., *United States v. United Airlines*, 216 F. Supp. 709 (D. Nev. 1962).

67. 392 U.S. 481 (1968).

68. 431 U.S. 720 (1977).

69. See note 52 *supra*.

the section under which *Hanover Shoe* and *Illinois Brick* were decided and under which the proposed legislation is to be enacted. Although section 4 applies equally to both acts, the Robinson-Patman Act's distinct economic and legal characteristics create unique policy considerations that should be examined in the determination and application of Robinson-Patman Act passing-on rules.

Passing-on in a Robinson-Patman action serves two purposes. First, passing-on can demonstrate that an indirect purchaser has received a price favor.<sup>70</sup> In this context, passing-on establishes the causal nexus between a violation of the Robinson-Patman Act and an injury.<sup>71</sup> The finder of fact must determine that the price favor passed to the indirect purchasing competitor to establish cause-in-fact,<sup>72</sup> and the judge must decide that passing-on can be used to establish proximate cause. Second, passing-on is used to measure damages in Robinson-Patman Act cases.<sup>73</sup>

The Sherman Act and Robinson-Patman Act causes of action use passing-on for different purposes. First, in Sherman Act cases, passing-on determines whether a plaintiff purchasing indirectly received an overcharge. However, under a statutory interpretation of the Robinson-Patman Act, the plaintiff who has purchased indirectly may not prove that a high price was passed on to him because only direct purchasers may sue in price discrimination actions.<sup>74</sup> This same plaintiff, however, must use passing-on to prove that his competitor received a discriminatorily low price if the competitor did not purchase directly from the violator. Second, if offensive passing-on were allowed, the Sherman Act plaintiff would use passing-on to allocate damages between parties in the vertical chain of distribution and himself. Because only the direct purchaser can sue under the Robinson-Patman Act, the use of passing-on to allo-

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70. See notes 113-38 *infra* & accompanying text.

71. Passing-on establishes only one element of the causal nexus. Other elements include showing that the disfavored purchaser could not have acquired a lower price; that the price difference of a component significantly affected the resale price of the finished product, *Minneapolis-Honeywell Regulator Co. v. FTC*, 151 F.2d 786 (7th Cir. 1951); that the price difference created a competitive advantage, *Borden Co. v. FTC*, 381 F.2d 125 (5th Cir. 1967); and that there was actual competition.

72. *Perkins v. Standard Oil Co. of Cal.*, 395 U.S. 642 (1969).

73. See notes 139-61 *infra* & accompanying text. For a general discussion of recovery of damages for violations of the Robinson-Patman Act, see Seplaki, *The Economics of Treble Damages Under the Robinson-Patman Act*, 31 *RUTGERS L. REV.* 167 (1978).

74. See notes 162-78 *infra* & accompanying text.

cate general damages is unnecessary. In a price discrimination suit brought pursuant to the Robinson-Patman Act, however, passing-on is necessary in order to measure consequential damages. In Sherman Act cases, only general damages are demonstrable; therefore, passing-on is not needed to measure damages. Because passing-on policies relate dissimilarly to these two distinct legal schemes, Sherman Act passing-on rules should not be applied summarily to Robinson-Patman Act price-discrimination cases.

One policy reason for the result in *Illinois Brice* was the necessity of protecting defendants from the multiple liability that would result if all purchasers in the vertical chain of distribution could assert passing-on offensively but violators were not allowed to assert the same theory defensively. This policy is invalid in a price discrimination context because the traditional interpretation of the statutory language of the Robinson-Patman Act is that an indirect purchaser generally does not have a cause of action.<sup>76</sup> Therefore, only one potential plaintiff, the direct purchaser, threatens the price discriminator with liability. Consequently, a price discriminator would never face multiple liability or inconsistent adjudications even if offensive, but not defensive, passing-on were allowed.<sup>77</sup>

The price-discrimination plaintiff does not need passing-on to prove he received an illegally high price because generally he must purchase directly from the discriminator.<sup>78</sup> This plaintiff, however, must use passing-on if his competitor did not purchase directly from the antitrust violator to prove that his competitor received an unjustified price favor through an intermediary. If a direct purchasing victim of a price discrimination who is injured by competition with an indirect purchasing competitor was not allowed to prove the pass-on, antitrust violations would be encouraged and the deterrence policy frustrated because the violator could insulate himself from liability simply by selling to an intermediary who was not in competition with the injured party. The plaintiff could not sue for the favor granted the intermediary because the two parties were not competitors,<sup>79</sup> and he could sue for the favor flowing to his competi-

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75. See notes 139-61 *infra* & accompanying text.

76. For a more complete analysis, see notes 162-79 *infra* & accompanying text.

77. If plaintiffs without privity were allowed to sue under the Robinson-Patman Act, and if offensive but not defensive passing-on were allowed, then the defendant would be exposed to multiple liability or inconsistent adjudications. For cases holding that remote plaintiffs can sue, see notes 177-79 *infra* & accompanying text.

78. See notes 162-79 *infra* & accompanying text.

79. See note 97 *infra* & accompanying text.

tor only if passing-on were allowed. Thus, the *Illinois Brick* rule would preclude even a direct purchasing plaintiff injured by an indirect purchasing competitor from suing under the Robinson-Patman Act. Abrogation of the deterrence policy does not occur in a similar Sherman Act situation because the direct purchasing Sherman Act plaintiff never has to prove passing-on to his indirect purchasing competitor.

The policy reasons articulated in *Illinois Brick* for denying a plaintiff suing under the Sherman Act the right to prove the passing-on of an overcharge should not apply to a plaintiff suing under the Robinson-Patman Act, who seeks to prove that a favorable price discrimination was passed on to his competitor. Passing-on in the context of price discrimination would not expose the defendant to multiply liability and would aid, rather than hinder, the policy of deterring antitrust violations.

Passing-on also is used in Robinson-Patman Act cases to measure damages. The Court in *Illinois Brick* believed that allowing proof of passing-on in Sherman Act cases would result in an unacceptable judicial standard of damages because the "uncertainty of how much of an overcharge could be established at trial" would be compounded with the "uncertainty of how that overcharge would be apportioned among the various plaintiffs."<sup>80</sup> This argument is irrelevant in a price-discrimination context. An overcharge is difficult to measure in Sherman Act cases because the court must engage in a complex and theoretical analysis designed to predict the price that would have been charged if the defendant had not violated the antitrust laws.<sup>81</sup> In Robinson-Patman Act cases, however, the overcharge is not difficult to measure because it equals the difference between the high and low price granted by the discriminator. Moreover, apportionment of damages in Robinson-Patman Act cases is not required, and consequently passing-on is used for this purpose, because only one plaintiff, the direct purchaser, may sue.<sup>82</sup>

Furthermore, allocating damages among plaintiffs in the chain of

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80. 431 U.S. at 745. See also note 42 *supra*.

81. See *Thomsen v. Cayser*, 243 U.S. 66 (1917); *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U.S. 390 (1906). One author suggests that this uncertainty precipitated a liberal proof of damages because "the defendant's violation almost inevitably makes it impossible to know with precision what 'might have been' in the absence of a violation." ANTITRUST ADVISER 761 (2d ed. C. Hills ed. 1978).

82. See notes 162-79 *infra* & accompanying text.

distribution is conceptually distinct from measuring the total amount of damages. In Sherman Act cases, damages equal the total amount of the overcharge.<sup>83</sup> In those circuits following this general damages rule in Robinson-Patman Act cases,<sup>84</sup> passing-on is used solely to measure the price favor actually received by the indirect purchasing plaintiff's competitor.<sup>85</sup> The price favor received equals the damages. The use of passing-on to measure general damages should be allowed because it represents the best balance between accuracy and efficiency. The uncertainty argument advanced by the Court in *Illinois Brick* is inapplicable because passing-on under the Robinson-Patman Act is not used to allocate damages, and because the amount of the discrimination is determined more easily and accurately than the amount of the overcharge.

In those circuits that measure damages under the Robinson-Patman Act by the loss of profits instead of by the amount of price discrimination,<sup>86</sup> proof of passing-on has been complex and has led to protracted litigation.<sup>87</sup> Because the policy of expediting complex and protracted litigation applies to the consequential damage formula, the rule in *Illinois Brick* should eliminate the use of the consequential measure of damages.

#### CURRENT STATUS AND FUTURE TRENDS OF PASSING-ON IN TREBLE-DAMAGE ACTIONS UNDER THE ROBINSON-PATMAN ACT

##### *Background of the Price Discrimination Action*

The Robinson-Patman Act and its predecessor, the original section 2 of the Clayton Act,<sup>88</sup> condemned different forms of price discrimination. The drafters of the old section 2 sought to protect competitors of the discriminating seller from predatory geographical

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83. *Thomsen v. Cayser*, 243 U.S. 66, 88 (1917); *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U.S. 390, 396 (1906). Although this general damage formula is theoretically simple, it is often difficult to apply because of the uncertainties inherent in predicting the competitive legal price. See note 81 *supra*. This uncertainty is not present in price discrimination cases if the general damage formula is used because the damage equals the difference between the high and low price charged by the discriminator.

84. See notes 137-42 *infra* & accompanying text.

85. See notes 139-61 *infra* & accompanying text.

86. For a listing of cases requiring consequential damages in price discrimination actions, see note 149 *infra*.

87. See notes 139-61 *infra* & accompanying text.

88. Clayton Act, ch. 323, § 2, 38 Stat. 730 (1914).



price discrimination. Congress believed that multimarket firms, such as Standard Oil Company and American Tobacco Company, would charge unprofitable prices in competitive markets to drive their rivals out of business, while recouping their losses by charging high prices in markets in which they possessed monopoly power.<sup>89</sup>

In the 1920's and early 1930's, a new form of injurious price discrimination emerged. Chain stores with mass buying power were demanding and receiving purchase discounts in excess of those mandated by economic efficiency and were passing on the savings as lower resale prices.<sup>90</sup> This form of price discrimination did not injure the competitors of discriminating sellers as much as it injured the disfavored persons who purchased from the discriminating sellers and competed with the favored purchasers. The Robinson-Patman Act,<sup>91</sup> amending the original section 2, attempted to redress this new level of competitive injury. Congressman Patman stated that the bill was "designed to accomplish what so far the Clayton Act has only weakly attempted, namely to protect the independent merchant, the public whom he serves and the manufacturer from whom he buys from exploitation by his chain competitor."<sup>92</sup> If the purpose of the Act was to protect independent merchants, many of whom purchased indirectly through wholesalers, and the public, who are invariably indirect purchasers, the drafters must have contemplated actions by indirect purchasers using the passing-on doctrine. Rational lawmakers would not define a class to be protected by an act and then deny certain members of that class the means to redress their injury.

The Robinson-Patman Act allows an injured party or the government to sue the discriminator, and even the favored buyer, if the buyer knowingly induces or receives a discrimination prohibited by the Act.<sup>93</sup> The Act also prohibits the granting of discriminatory false brokerage<sup>94</sup> or allowances, services, and facilities.<sup>95</sup> The most impor-

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89. See H.R. REP. NO. 627, 63d Cong., 2d Sess. 8-9 (1914).

90. See, e.g., H.R. REP. NO. 2287, 74th Cong., 2d Sess. 3 (1936); 80 CONG. REC. 6621, 7324, 7887, 8104 (1936); cf. FTC, FINAL REPORT ON THE CHAIN STORE INVESTIGATIONS, S. DOC. NO. 4, 74th Cong., 1st Sess. (1935).

91. 15 U.S.C. § 13 (1973 & Supp. 1978).

92. 79 CONG. REC. 9078 (1936).

93. 15 U.S.C. § 13(a) (1973 & Supp. 1978) (amending Clayton Act § 2(a)).

94. *Id.* § 13(b) (amending Clayton Act § 2(c)). The brokerage clause claim does not require demonstration of competitive impact and does not permit legal justification. *Id.*

95. *Id.* §§ 13d-13e (amending Clayton Act §§ 2(d), (e)). The seller may not make payments

tant prohibition, however, is against price discrimination. Section 2(a) provides:

It shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . .<sup>96</sup>

The injury must be to competition; thus, the injured party must compete on the same functional level as the recipient of the favored price.<sup>97</sup> For example, a "discount granted to . . . wholesalers [would] not injure retailers who received no equivalent price reduction, since they [do] not compete for the consumer's business."<sup>98</sup> The Act embraces injury to at least four levels of competition: primary-line injury to competitors of the discriminator;<sup>99</sup> secondary-line injury to competitors of the discriminator's purchaser;<sup>100</sup> third-line injury to competitors of the customer of the discriminator's purchaser;<sup>101</sup> and fourth-line injury to competitors of the customer of the customer of the discriminator's purchaser.<sup>102</sup> Although the competitor of the plaintiff is not required to be in privity with the

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to or otherwise furnish services, allowances, or facilities for the benefit of his customer unless such consideration is available on proportionally equal terms to all competing customers. *Id.*

96. *Id.* § 13(a) (amending Clayton act § 2(a)).

97. See, e.g., *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968); *Tri Valley Packing Ass'n v. FTC*, 329 F.2d 694 (9th Cir. 1964); *Doubleday*, 52 F.T.C. 169 (1955).

98. *Doubleday*, 52 F.T.C. at 207-08.

99. See, e.g., *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967); *Borden Co. v. FTC*, 339 F.2d 953 (7th Cir. 1964).

100. See, e.g., *National Dairy Prods. Corp. v. FTC*, 395 F.2d 517 (7th Cir. 1968) (presumption of injury arises from systematic, substantial, and sustained discrimination); *Moog Indus., Inc. v. FTC*, 238 F.2d 43 (8th Cir. 1956) (relation of size of discounts and profit margin to injury); *Standard Motor Prod., Inc. v. FTC*, 265 F.2d 674 (2d Cir. 1959).

101. *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968); *Standard Oil Co. v. FTC*, 173 F.2d 210 (7th Cir. 1949), *rev'd on other grounds*, 340 U.S. 231 (1951). In *Meyer* the Court stated that if it "read 'customer' as excluding retailers who buy through wholesalers and compete with direct buyers, it would frustrate the purpose" of the Act. *Id.* at 352. Thus, the Court held that a customer who received the benefit of discrimination as regulated by the Act included direct and indirect purchasers. *Id.* at 356-57. Although the Court in *Meyer* was interpreting § 2(d), the same analysis applies to § 2(a). *Perkins v. Standard Oil Co. of Cal.*, 395 U.S. 642 (1969).

102. *Perkins v. Standard Oil Co. of Cal.*, 395 U.S. 642 (1969).

discriminator, the traditional interpretation of section 2(a) requires the plaintiff to be in privity.<sup>103</sup>

Section 4 of the Clayton Act provides that any person injured by acts prohibited by the antitrust laws, including subsections (a),<sup>104</sup> (c),<sup>105</sup> (d),<sup>106</sup> (e),<sup>107</sup> and (f)<sup>108</sup> of section 2 of the Robinson-Patman Act, may sue to recover threefold the damages sustained, plus the reasonable cost of the suit.<sup>109</sup> The plaintiff in a private enforcement action must prove actual injury to competition,<sup>110</sup> whereas the government need only prove that the discrimination may substantially lessen competition.<sup>111</sup> The private plaintiff must prove a violation of the Act, injury to his business or property, a causal nexus between the violation and the injury,<sup>112</sup> and measurable damages.

### *Passing-On in the Competitor's Line of Distribution*

Passing-on in cases brought under the Sherman and Robinson-Patman Acts can establish the causal nexus between a violation of either Act and "the fact of legal injury."<sup>113</sup> The Sherman Act plain-

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103. See notes 162-79 *infra* & accompanying text.

104. 15 U.S.C. § 13(a) (1973 & Supp. 1978) (amending Clayton Act § 2(a)) (price discrimination).

105. *Id.* § 13(c) (amending Clayton Act § 2(c)) (brokerage).

106. *Id.* § 13(d) (amending Clayton Act § 2(d)) (prohibits discriminatory payments for services or facilities).

107. *Id.* § 13(e) (amending Clayton Act § 2(e)) (prohibits discriminatory services or facilities directly provided).

108. *Id.* § 13(f) (amending Clayton Act § 2(f)) (buyer liability for receipt of discriminations).

109. A violation of § 3 of the Robinson-Patman Act, 15 U.S.C. § 13(a), is not a violation of the Clayton Act and does not give rise to a private action. *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373 (1958).

110. See note 111 *infra*.

111. *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948) (articulated reasonable possibility test that allows court to rely on broad inference of adverse competitive effects based on price difference). *But see* Gifford, *Assessing Secondary-Line Injury Under the Robinson-Patman Act: The Concept of "Competitive Advantage"*, 44 GEO. WASH. L. REV. 68 (1975).

112. See note 119 *infra*.

113. While injury and damages are the same, the differences between injury and damages must be kept in mind.

The plaintiff must prove the fact of legal injury with certainty, or to state it in conventional tort language, the plaintiff is required to establish with reasonable probability the existence of some causal connection between the defendant's wrongful act and some loss of anticipated revenue. When the fact of legal injury has been established with certainty, then a different standard of proof is applied as to the amount of damages.

tiff must prove that he absorbed the overcharge; under the traditional interpretation of section 2(a) of the Robinson-Patman Act,<sup>114</sup> the plaintiff need not assert offensive passing-on because only a direct purchaser is entitled to press a claim of price discrimination. A passing-on issue does arise, however, if the price-discrimination plaintiff is injured by competition with the customer of a favored purchaser, a third-line injury, or by competition with the customer of a customer of a favored purchaser, a fourth-line injury. In this context, the plaintiff must prove that his competitor received the price favor.

In *Standard Oil Co. v. FTC*,<sup>115</sup> the Supreme Court was presented with the issues of the validity of third-line suits and the use of passing-on; however, it failed to address either question.<sup>116</sup> The Court later permitted third-line actions in *FTC v. Fred Meyer, Inc.*,<sup>117</sup> but did not discuss passing-on because the issue could be avoided on the limited facts of the case.<sup>118</sup> Then, in *Perkins v. Standard Oil Co. of California*,<sup>119</sup> the Court implicitly allowed passing-

Timberlake, *The Legal Injury Requirements and Proof of Damages in Treble Damage Actions Under the Antitrust Laws*, 30 GEO. WASH. L. REV. 231, 236-37 (1961) (footnotes omitted).

114. See notes 162-79 *infra* & accompanying text.

115. 340 U.S. 231 (1951).

116. Standard of Indiana sold gasoline at favored prices to wholesalers who passed a portion of the savings to retailers. The third-line and passing-on issues were avoided because the Court held that Standard had a right under § 2(b) of the Clayton Act to establish a "meeting competition" defense. The Supreme Court reaffirmed its position in *FTC v. Standard Oil Co.*, 355 U.S. 396 (1958), after Standard had established the defense on remand.

117. 390 U.S. 341 (1968). For a detailed discussion of this case, see Note, *The FTC and Promotional Allowances: The Fred Meyer Quagmire*, 55 VA. L. REV. 718, 734-61 (1969).

118. Meyer, a supermarket chain, induced its direct suppliers to grant discriminatory promotional allowances. Meyer competed with indirect customers of the suppliers who, because of size, were forced to purchase through wholesalers. Thus, Meyer's customers, and not Meyer, constituted the third line of competition. The Court held that customers protected by the Act included retailers who buy through wholesalers and compete with direct buyers, because a more limited reading of the Act would frustrate its purpose. 390 U.S. at 352. Although Meyer was decided under the section banning discriminatory promotional allowances, Robinson-Patman Act § 2(d), 15 U.S.C. § 13(d) (1973 & Supp. 1978) (amending Clayton Act § 2(d)), Meyer effectively sanctioned third-level suits brought for price discrimination under § 2(a) because the scope of protection under § 2(a) is broader than that under § 2(d). 390 U.S. at 356-57. Passing-on was not in issue in this case because the promotional allowance was granted directly to Meyer and the disfavored indirect buyers or their wholesalers did not receive any promotion.

119. 395 U.S. 642 (1969); see Bridges, *Price Discrimination Trends Under Perkins v. Standard Oil Co. and Fred Meyer, Inc.*, 3 LOY. L. REV. 84 (1970); Note, *Liability for "Fourth Level" Injury Falls Within the Scope of Section 2(a) of the Clayton Act—Perkins v. Standard Oil Company of California*, 68 MICH. L. REV. 773 (1970).

on and explicitly permitted fourth-level suits.

*Perkins*, decided in 1969, afforded the Court a new opportunity to address the passing-on issue. Perkins, an independent service station operator, purchased most of his gasoline directly from Standard Oil. Standard also sold gas at an illegally lower price directly to its own branded dealers who were in competition with Perkins, and to Signal Oil & Gas, which was not in competition with Perkins. Signal then passed the price favor to its subsidiary, Western Hyway Oil, and Western Hyway passed the price favor to its subsidiary, Regal Stations, a competitor of Perkins. Thus, Perkins sustained a fourth-line injury by competing with a customer, Regal, of a customer, Western Hyway, of one who knowingly received the benefit of the price discrimination granted by Signal.<sup>120</sup> The issue was whether Regal was too remote from Standard for Perkins to establish a causal nexus. The district court determined that Regal and Standard were not too remote to establish the causal nexus. The Court of Appeals for the Ninth Circuit reversed, holding that Regal and Standard were too remote.<sup>121</sup> The Supreme Court held that it was immaterial that Regal was two intermediaries removed from Standard if the plaintiff could establish cause-in-fact.<sup>122</sup>

*Perkins* only implicitly sanctioned the use of offensive passing-on. The issue directly addressed by the Court was whether a plaintiff suing under section 2(a) had a cause of action for an injury resulting from competition with a customer of a customer of one who knowingly receives the benefit of a price favor. Section 2(a)<sup>123</sup> prohibits third-line discrimination resulting in a plaintiff's injury from competition with a customer of one who knowingly receives the benefit

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120. See text accompanying note 102 *supra*.

121. *Standard Oil Co. of Cal. v. Perkins*, 396 F.2d 809 (9th Cir. 1968). The Court of appeals did find that Standard was liable under two other counts: injury at the wholesale level and injury at the retail level resulting from Standard's direct discriminatory sales to its branded dealers.

122. 395 U.S. at 648.

123. Robinson-Patman Act § 2(a), 15 U.S.C. § 13 (1973 & Supp. 1978) (amending Clayton Act § 2(a)), provides in pertinent part:

It shall be unlawful for any person engaged in commerce, . . . either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . .

of a discrimination,<sup>124</sup> but the statute does not explicitly prohibit fourth-line discrimination that is passed through an additional intermediary to the plaintiff's competitor. Justice Black, writing for the majority in *Perkins*, stated that a literal interpretation of section 2(a), limiting a cause of action to third-line injury, would be artificial and unwarranted by the purposes of the Act: "[T]o read 'customer' more narrowly . . . would allow price discriminators to avoid the sanctions of the Act by the simple expedient of adding an additional link to the distribution chain."<sup>125</sup> The dissenting Justices did not adopt the fourth-line concept. They felt that *Perkins* could redress his injury only because Signal, Western Hyway, and Regal were members of a controlled group; thus the dissenters viewed the entire group as second-level competitors.<sup>126</sup>

The Court in *Perkins* failed to address passing-on or to cite its previous decision in *Hanover Shoe*. The majority decided simply that section 2(a) encompassed a fourth-line suit and automatically allowed whatever proof, presumably including passing-on, that was necessary to establish the causal nexus. If the Court had disallowed proof of passing-on, it would have negated the section's intended sanction of fourth-line suits; without proof of passing-on a plaintiff could not establish that his indirect purchasing competitor received a price favor. Similarly, passing-on is necessary in third-line suits to prove that the indirect purchasing competitor received a price favor. Because the express language of section 2(a) clearly creates third-line actions and these suits require proof of passing-on, the use of this doctrine to prove Robinson-Patman Act violations should not be at issue in third or fourth-line suits. Disallowance of passing-on would insulate a discriminator from liability in third or fourth-line suits because a plaintiff would be unable to prove the causal nexus between a violation of the Act and injury if he could not prove the price favor inured to the benefit of his competitor. Because of the demonstrated need to deter third and fourth-line illegal price favors, and because multiple suits are not a consideration in price-discrimination claims, *Illinois Brick* should be inapplicable to price-discrimination actions.

Before *Illinois Brick*, the lower courts could have viewed *Perkins* as an enlightened trend toward liberalized passing-on rules and as

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124. See *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968).

125. 395 U.S. at 647.

126. *Id.* at 651 (Marshall, J., concurring in part and dissenting in part).

a sign that the Supreme Court implicitly recognized that the passing-on doctrine should take into account the difference between the legal and economic characteristics of Sherman Act and Robinson-Patman Act cases. This view arguably is now incorrect if *Illinois Brick* is viewed as an attempt to mesh the passing-on rules developed for Sherman Act cases with those developed for Robinson-Patman Act cases. The dissenters in *Perkins* noted that the action was allowed only because intermediaries controlled Perkins' competitor. Thus, whether actual passing-on occurred in that artificial situation was irrelevant because the competitor would recoup the benefit of the price discrimination either directly through the pass-on or indirectly through the increased profits of his parent corporations.<sup>127</sup>

In a footnote to *Illinois Brick*, the Court arguably adopted the dissenters' position in *Perkins*. Declaring that the controlled-group context, like the cost-plus contract situation, constituted a possible exception to the normal passing-on rules, the Court noted that "where market forces are superseded," passing-on could be assumed.<sup>128</sup> This cryptic footnote<sup>129</sup> obscures the holding in *Perkins*.<sup>130</sup>

As a result of the footnote, plaintiffs might argue that offensive passing-on is permissible in Robinson-Patman Act cases. They could stress that the majority opinion in *Perkins* did not limit passing-on to *Perkins*' factual setting,<sup>131</sup> that passing-on in

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127. *Id.*

128. 431 U.S. at 736 n.16.

129. Commentators have labeled the footnote in *Illinois Brick* highly ambiguous. *Antitrust Law*, *supra* note 48, at 348; see *The Supreme Court*, *supra* note 41, at 230. The footnote is confusing and ambiguous because its wording inaccurately reflects the meaning the Court intended. The footnote states, "Another situation in which market forces have been superseded and the pass-on defense might be permitted is where the direct purchaser is owned or controlled by its customer. Cf. *Perkins v. Standard Oil Co.*, 395 U.S. 642, 648 (1969); *In re Western Liquid Asphalt Cases*, 487 F.2d at 197, 199." 431 U.S. at 736 n.16. But if the indirect purchaser controls the direct one, as stated by the Court, then passing-on probably will not occur. Moreover, the cases cited refer to situations where the direct purchaser controlled the indirect one.

The apparent inaccuracies of the footnote have sparked considerable comment. See ANTITRUST AND TRADE REG. REP. (BNA), Oct. 27, 1977, at A-3; *The Supreme Court*, *supra* note 41, at 230; *Antitrust Law*, *supra* note 47, at 348 (citing telephone conversation with Henry C. Lind, Ass't Reporter of Decisions (Sept. 23, 1977)).

130. The holding in *Perkins* is incomplete because it allowed passing-on without directly addressing the issue. See text accompanying notes 119-31.

131. The majority in *Perkins* was aware of the dissenters' desire to limit the Court's decision to allow offensive passing-on to controlled-group situations. The dissenters' stance was rejected apparently because the majority failed to limit its decision. Total rejection of the

Robinson-Patman Act cases avoids the pitfalls presented in Sherman Act cases, and that the footnote was only exploring possible exceptions to Sherman Act passing-on rules. Conversely, defendants might argue that when the Court decided *Perkins*, it was unfamiliar with the issues raised by offensive passing-on and understandably avoided those issues. Consequently, after *Illinois Brick* barred offensive passing-on, the Court attempted to conform the anomalous passing-on rules in *Perkins* to those in *Illinois Brick* by limiting *Perkins* to its facts. Moreover, *Illinois Brick* arguably was an interpretation of section 4 of the Clayton Act, which also applies to the Robinson-Patman Act. Each of these arguments has merit. But because a third or fourth-line action would be emasculated by disallowing proof of passing-on in the plaintiff's competitor's line of distribution, one should conclude that this footnote in *Illinois Brick* was not intended to prohibit passing-on under the Robinson-Patman Act. Any other interpretation would result in the Supreme Court dismantling third-line actions, which are sanctioned expressly by Congress. Consequently, the footnote should be construed only to explore possible exceptions to Sherman Act passing-on rules in a Robinson-Patman factual situation.

The legislative response to *Illinois Brick* promises to nullify the effect of *Hanover Shoe* and *Illinois Brick* on the use of the passing-on doctrine to establish the causal nexus in price-discrimination actions. Senator Allen urged that the legislation be limited to price-fixing cases.<sup>132</sup> He cited antitrust scholar Frederick Rowe's caveat that a passing-on bill not limited to price-fixing cases would open "the door to massive pass-on litigation in areas where substantive antitrust law is not at all clear."<sup>133</sup> The Senate Judiciary Committee, however, ensured that the proposed legislation would apply to

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dissenter's argument, however, is not completely convincing. The Court did state that there was "no basis in the language or purpose of the Act for immunizing Standard's price discriminations simply because the product in question passed through an additional formal exchange before reaching the level of Perkins' actual competitor." 395 U.S. at 648. The Court's use of the word "formal" can be interpreted as acknowledging that the basis of this opinion was that the product passed between related companies. See generally Comment, *Trade Regulation—Price Discrimination*, 68 MICH. L. REV. 773, 777-79 (1970).

132. S. REP. NO. 934, *supra* note 55, at 53.

133. *Id.* (citing *Proposed Amendments to Section 4 of the Clayton Act: Hearings on S. 1874 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 81 (1977) (statement of Frederick Rowe) [hereinafter cited as *Proposed Amendments*]).



price-discrimination cases by expressly rejecting Senator Allen's limitation.

In their rejection of Senator Allen's position, however, neither the House nor the Senate Judiciary Committees demonstrated that they understood the impact of the amendment on the Robinson-Patman Act. One aide to the Senate committee admitted that he was unable to find any cases brought under Robinson-Patman by an indirect purchaser.<sup>134</sup> Moreover, counsel for the House committee explained that the legislation was aimed primarily at the Sherman Act and that the Robinson-Patman Act was only tangentially a target.<sup>135</sup> Consequently, the House committee did not explore the legislation's possible effects on passing-on under the Robinson-Patman Act. Counsel concluded that the legislation would return Robinson-Patman passing-on to its pre-*Illinois Brick* status, whatever that was.<sup>136</sup>

Although the legislation will reverse *Illinois Brick*, its effect will probably be more complex than simply to return the passing-on doctrine to a pre-*Illinois Brick* state.<sup>137</sup> The legislation arguably could restrict passing-on under the Robinson-Patman Act. In the *Perkins*' situation the plaintiff would not have to prove that the high price was passed to him because he purchased directly from the violator; however, he must prove that the low price was passed to his indirect purchasing competitor. Defendant's counsel could argue that the proposed legislation does not enable a price-discrimination plaintiff to prove passing-on to his competitor. The amendment states that "the fact that a [plaintiff] or the United States has not dealt directly with the defendant shall not bar or otherwise limit recovery."<sup>138</sup> Interestingly, the amendment does not state that the plaintiff's recovery shall not be barred because a plaintiff's competitor has not dealt directly with the defendant. In other words, the amendment allows proof of passing-on in the plaintiff's line of distribution, which benefits Sherman Act plaintiffs, but does not explicitly allow proof of passing-on in the plaintiff's competitor's line

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134. *Proposed Amendments*, *supra* note 133, at 265 (letter from Daniel Berger).

135. Telephone conversation with Tom Runge, Counsel for House of Representatives Judiciary Committee (June 21, 1978).

136. *Id.*

137. See Note, *Recovery By Indirect Purchasers: Illinois Brick and the Congressional Response*, 39 U. PITT. L. REV. 537, 558-59 (1978).

138. S. REP. NO. 934, *supra* note 55, at 36. See also note 58 *supra*.

of distribution, which is crucial to the third or fourth-line price-discrimination actions. If defendant's counsel argues for a strict interpretation of the amendment and asserts successfully that *Illinois Brick* limited the use of passing-on in *Perkins* to controlled-group situations, then, except in limited circumstances, price-discrimination plaintiffs would be unable to sue for price favors passed on to their indirect purchasing competitors, even if the amendment becomes law. The better view, however, would permit proof of passing-on in the competitor's line of distribution, because a strict interpretation of the amendment would defeat its purpose of allowing injured parties to use passing-on to prove injury.

### *Passing-On in Measurement of Damages*

In Sherman Act cases, general damages equal to the amount of the overcharge<sup>139</sup> are presumed, and passing-on is used to apportion damages among the plaintiffs who may have received a portion of the overcharge in the vertical chain of distribution.<sup>140</sup> In Robinson-Patman Act cases, apportionment of damages is unnecessary because generally only the direct purchaser may sue. The passing-on doctrine, however, must be used in a complex manner to measure loss of profits in the majority of circuits that require proof of consequential damages. In the minority of circuits that presume general damages are equal to the amount of the discrimination, the use of passing-on is not complex, and the measurement of damages is not burdensome. A Senate proposal to measure damages by the pecuniary amount of the illicit discrimination would have eliminated the conflict among the circuits on the measurement of damages under the Robinson-Patman Act.<sup>141</sup> The proposal, however, was withdrawn

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139. *Thomsen v. Cayser*, 243 U.S. 66 (1917); *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U.S. 390 (1906).

140. See note 82 & accompanying text *supra*. For other distinctions between the calculation of damages in Robinson-Patman and Sherman cases, see notes 80-87 *supra* & accompanying text.

141. S. REP. NO. 1502, 74th Cong., 2d Sess. 2 (1936). The report states:

The measure of damages provided in section (d) is the amount of the forbidden discrimination or allowance found to have been granted, limited however to the volume of the plaintiff's business in the goods concerned, or to the amount which he would have received had the allowance been granted to all on the equal basis which the bill requires. The underlying principle of the bill is the suppression of unjust discriminations, and it seems both fair and just, and in harmony with that principle, to enable those victimized by its violation to restore themselves, through the recovery of damages, to the equal position which they would have

in conference, not because the committee rejected this damage formula, but because the legislators believed that a damage formula could best be developed by the courts.<sup>142</sup>

The leading case holding that damages in Robinson-Patman actions are presumed to be the amount of the discrimination is the Ninth Circuit's decision in *Fowler Manufacturing Co. v. Gorlick*.<sup>143</sup> In *Fowler*, a price-discrimination suit, the district court awarded damages of three times the amount of the discrimination.<sup>144</sup> The defendant appealed, asserting that a general damages award was not allowed and that the plaintiff had to prove consequential or special damages to his business, specifically the loss of customers or profits. The appellate court affirmed, stating that, although the Supreme Court had not addressed the issue directly, dictum in the Court's decision in *Bruce's Juices, Inc. v. American Can Co.*<sup>145</sup> suggested that damages at least equal to the amount of the discrimination could be presumed without the need for further proof of consequential damages.<sup>146</sup> In *Fowler* the court reasoned that the insuperable difficulties of establishing consequential damages, including the use of the passing-on doctrine, would impede private enforcement actions and frustrate deterrence policy.<sup>147</sup>

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occupied had the violation not been committed. Confronting the intending violator, as it also does, with the prospect that he will be liable to restore to others in damages tomorrow the discrimination which he grants to some today, it robs such arrangements of their business advantage, and so may well be expected to serve as a wholesome and self-enforcing deterrent against violations of the principle of equal treatment which the bill as a whole exemplifies.

*Id.* at 8.

142. H. R. REP. NO. 2951, 74th Cong., 2d Sess. 8 (1936); see *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 751 (1947); *Enterprise Indus., Inc. v. Texas Co.*, 240 F.2d 457, 460 (2d Cir. 1957).

143. 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970). See also *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F.2d 988 (8th Cir.), *cert. denied*, 326 U.S. 773 (1945) (general damage allowed in discriminatory allowance action).

144. 415 F.2d at 1250.

145. 330 U.S. 743 (1947). For an analysis of *Bruce's Juices*, see notes 151-53 & accompanying text *infra*.

146. 415 F.2d at 1250-51. The court in *Fowler* noted that the Supreme Court in *Bruce's Juices* had stated, "If the prices are illegally discriminatory, petitioner had been damaged, in the absence of extraordinary circumstances at least in the amount of the discrimination." *Bruce's Juices*, 330 U.S. at 757. Although the statement in *Bruce's Juices* was dictum, the court in *Fowler* regarded the dictum as "a considered, intended and indicative expression on the nature of the damage right under the Robinson-Patman Act." 415 F.2d at 1251.

147. 415 F.2d at 1251-52. The court's concern in *Fowler* parallels that of the Supreme Court in *Illinois Brick*.

In second-line cases the measurement of damages under the rule in *Fowler* equals the difference between the low and high price granted by the discriminator times the number of units bought.<sup>148</sup> In third or fourth-line cases damages under the rule in *Fowler* equal the difference between the high price and the portion of the low price that is passed to the competitor times the number of units bought. For example, if the discriminator grants the purchaser a one dollar advantage, but the purchaser absorbs fifty cents of the advantage as excess profit margin before selling to the competitor of the plaintiff, damages are fifty cents times the number of units bought. Thus, the rule in *Fowler* uses passing-on theory solely to establish the price differential received by the competitor.

The consequential damage rule used passing-on theory more extensively in the complex task of establishing loss of profits as reflected in either a loss of profit margin or loss of sales. The leading case holding that damages in Robinson-Patman Act private enforcement actions are restricted to consequential damages is the Second Circuit's decision in *Enterprise Industries, Inc. v. Texas Co.*<sup>149</sup> In *Enterprise*, a second-line price-discrimination suit, the district court allowed general damages of three times the amount of the discrimination.<sup>150</sup> The defendant appealed, claiming that a price-discrimination plaintiff must prove actual damages. Judge Learned Hand, speaking for the appellate court, reversed. Judge Hand discounted the dictum in *Bruce's Juices* cited in *Fowler* as precedent

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148. Even in the circuits that embrace the general damages rule, application is uncertain. Theoretically, damages can be calculated by multiplying the discrimination times the quantity of products bought by either the disfavored or favored purchaser. Although this question has not been answered by many courts, *Sano Petroleum Corp. v. American Oil Co.*, 187 F. Supp. 345 (E.D.N.Y. 1960), expressed the better view by holding that damages should be calculated by multiplying the discrimination times the quantity of products bought by the favored purchaser. The plaintiff is injured only to the extent of his competitor's actual, not potential, advantage. Other uncertainties exist in the calculation of general damages. The measurement of general damages could be viewed as either a ceiling for the plaintiff's possible recovery, *Sun Cosmetic Shoppe, Inc. v. Elizabeth Arden Sales Corp.*, 178 F.2d 150, 153 (2d Cir. 1949), or a floor. *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743 (1947); *Reid v. Doubleday & Co.*, 136 F. Supp. 337 (N.D. Ohio 1955).

149. 240 F.2d 457 (2d Cir.), cert. denied, 353 U.S. 965 (1957). See also *Kidd v. Esso Standard Oil Co.*, 295 F.2d 497 (6th Cir. 1961); *American Can Co. v. Russellville Canning Co.*, 191 F.2d 38 (8th Cir. 1951); *Guyott Co. v. Texaco, Inc.*, 261 F. Supp. 942 (D. Conn. 1966); *State Wholesale Grocers v. Great Atl. & Pac. Tea Co.*, 202 F. Supp. 768 (D. Ill. 1961); *Sano Petroleum Corp. v. American Oil Co.*, 187 F. Supp. 345 (E.D.N.Y. 1960); *Alexander v. Texas Co.*, 165 F. Supp. 53 (W.D. La. 1958).

150. *Enterprise Indus., Inc. v. Texas Co.*, 136 F. Supp. 420 (D. Conn. 1955).

for granting an award of general damages. In *Bruce's Juices* the defendant was injured because it had to pay a five percent higher price for the cost of the plaintiff's cans than its competitors.<sup>151</sup> Although the defendant breached the sales contract for the cans, it argued that the plaintiff could recover only in quantum meruit, not on the price for the discriminatory contract. The defendant feared that a later antitrust action against the plaintiff would be thwarted by the difficulty of proving damages. The Supreme Court asserted in dictum<sup>152</sup> that this fear was unfounded: "If the prices are illegally discriminatory, petitioner has been damaged, in the absence of extraordinary circumstances, at least in the amount of that discrimination."<sup>153</sup>

The court in *Enterprise* believed that the Supreme Court had spoken inaccurately. Judge Hand reasoned that damages should only equal the amount of the discrimination if the injured party proves that he did not pass-on the overcharge. Hand explained that in *Bruce's Juices* the Supreme Court had assumed merely that the passing-on of the discriminatory portion of the can price did not occur, presumably because the demand for the canned product was elastic.<sup>154</sup> According to the rationale of *Enterprise*, proof of actual damages could be measured as follows: if the injured party did not pass-on the overcharge, damages would equal the amount of discrimination; if the injured party passed-on the entire discrimination, damages would equal the amount of net profits lost from reduced sales volume; or if the injured party passed-on only a portion of the discrimination, damages would be apportioned between the combination of the two foregoing measures.

The use of passing-on in the consequential damages formula is even more complex than that foreseen by the court in *Enterprise*. Consequential damages depend not only on whether the disfavored purchaser passes on the price disadvantage, but also on whether the

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151. 330 U.S. at 745.

152. The only issue before the Court was whether price discrimination was a defense to a contract action.

153. 330 U.S. at 757.

154. 240 F.2d at 459. Judge Hand's analysis of *Bruce's Juices* was inaccurate. If the Supreme Court had intended to qualify its articulated damage rule in *Bruce's Juices* with the passing-on restriction, it would have so decided rather than holding that the petitioner was damaged in an amount at least equal to the measure of the price discrimination. Furthermore, the Court would not assume that the demand for the canned product was elastic and supply inelastic without expert testimony to that effect.

favored purchaser passes on the price advantage. Courts have held in government enforcement actions that competition is not injured if the favored purchaser does not pass on the purchase price advantage but, instead, retains the favor as excess profit margin.<sup>155</sup> For a plaintiff to have a claim, the favored purchaser must pass on at least a portion of his advantage. The requisite damage, then, is found if the disfavored purchaser reduces his resale price and loses profits through lower profit margins, or maintains his price and loses profits through lower sales.<sup>156</sup> Thus, proof of actual damages in second-line cases turns on the extent to which the favored purchaser passes the low price and the extent to which the plaintiff passes the high price. The calculations are even more complex in third or fourth-line cases because the plaintiff must prove the extent to which the price advantage granted by the discriminator was passed to and received by the competitor.

One commentator has concluded that the difficulty of proving consequential damages is the most important factor contributing to the failure of the private enforcement action under the Robinson-Patman Act as a deterrent to antitrust violations.<sup>157</sup> A plaintiff should establish with certainty the causal connection between the violation and his injury.<sup>158</sup> Passing-on theory allows the plaintiff in a third or fourth-level action to establish this connection by showing that his indirect purchasing competitor received the lower price granted by the discriminator. The price discrimination received by the indirect purchaser can then be used easily in a calculation of general damages. Once the injury is proved to have occurred and to

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155. Gifford, *supra* note 111, at 59 n.45. This rule has not been articulated in private enforcement actions, but the logic applies equally. A disfavored purchaser is not injured if his competitor makes more profit. The disfavored purchaser is injured only if he makes less profit. The favored purchaser can effect his competitor adversely only by reducing his resale price and thereby forcing his competitor to cut his profit margin or reduce sales.

156. *Id.* at 62-63. If the disfavored purchaser reduces his resale price—that is, does not pass on the high price—then the damage of lost profits is equal to the discrimination. If he does not reduce his resale price—that is, he passes on the entire discrimination—then the damage of lost profits is more complex. In such a situation, lost sales depend upon the elasticity of demand. If demand is inelastic, no damage results because no sales are lost. A complex damage calculation arises if the disfavored purchaser passes on only a portion of the discrimination. His reduction in profit margin is less than the amount of the discrimination, but his lost sales are less than if he had passed on the entire overcharge.

157. Barber, *Private Enforcement of the Antitrust Laws: The Robinson-Patman Experience*, 30 GEO. WASH. L. REV. 181, 210 (1961).

158. See note 13 *supra*.

have resulted from the violation, the precise damage calculation should not be so complex, unascertainable, and costly that valid actions are discouraged. The Supreme Court has concurred: "The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount."<sup>159</sup>

The consequential damage rule, which requires complex proof of passing-on at the purchase and resale level for both the favored and disfavored purchaser, leads to theoretical and uncertain calculations, protracted litigation, and less effective antitrust enforcement. These were the fears expressed by the Court in *Hanover Shoe* and *Illinois Brick*, and the bar against the passing-on doctrine expressed in those cases could destroy the consequential damage rule, which depends on passing-on theory.<sup>160</sup> But legislation overruling *Illinois Brick* may resurrect the consequential damage rule and its use of passing-on because the legislation proclaims that "the defendant shall be entitled to prove as partial or complete defense to a damage claim . . . that the plaintiff has passed-on to others . . . what would otherwise constitute plaintiff's damage."<sup>161</sup>

### *A Possible Future Use of Passing-On in the Plaintiff's Line of Distribution*

Two factors prevent indirect purchasers from suing under the Robinson-Patman Act. Because passing-on is a necessary element of these suits, *Illinois Brick*<sup>162</sup> presumably precludes price-discrimination actions by indirect purchasers. Although the rationale of *Illinois Brick* is inapplicable to price-discrimination actions

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159. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931).

160. The holdings in these two cases are applicable directly to the use of passing-on to measure consequential damages because the fears expressed in the two cases have been manifested by the history of the consequential damage rule. Other writers agree: "Insofar as the rule of *Enterprise* . . . requiring proof of 'consequential damages' is based on the proposition that a discriminatory price is an overcharge that may have been 'passed on', it would not seem to survive the Supreme Court's decision in *Hanover Shoe* . . ." ANTITRUST ADVISER, *supra* note 81, at 767. Similarly, *Hanover Shoe* "raises the question of whether the fact that a disfavored purchaser passes on his higher prices to his customers immunizes the supplier from legal liability to that disfavored purchaser." E. KINTNER, A ROBINSON-PATMAN PRIMER 300-01 (1970).

161. S. REP. NO. 934, *supra* note 55, at 36.

162. See notes 32-66 *supra* & accompanying text.

brought by direct purchasers who are injured by competition with favored indirect purchasers,<sup>163</sup> it is applicable to actions by indirect purchasers.<sup>164</sup>

The other obstacle to suits by indirect purchasers under section 2(a) of the Robinson-Patman Act is the judicial interpretation of the statute's language. In *Klein v. Lionel Corp.*,<sup>165</sup> for example, the court held that the express provisions of this section barred suits by indirect purchasers. The plaintiff had purchased Lionel electric trains from a wholesaler who purchased from the defendant at a higher price than Klein's direct purchasing competitors. The Court of Appeals for the Third Circuit denied standing to the plaintiff, stating that only direct purchasers are given a cause of action under section 2(a) because the "term purchasers means simply one who purchases, a buyer, a vendee. Klein did purchase Lionel products, but not [directly] from Lionel."<sup>166</sup>

Klein argued that, despite the court's interpretation of section 2(a), he had standing under the indirect purchaser doctrine. This doctrine states that section 2(a) sanctions an indirect purchaser's action if the discriminator controls the disfavored price received by the plaintiff.<sup>167</sup> The Federal Trade Commission has approved the doctrine since 1937<sup>168</sup> in the context of cease and desist orders. The court rejected the doctrine, however, on the basis of the facts in

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163. The fear expressed in *Illinois Brick* that offensive passing-on would result in inconsistent adjudications and multiple liability is inapplicable to direct purchaser suits that use passing-on to establish only that a price favor was received by an indirect competitor. See notes 76-77 *supra* & accompanying text. Similarly, the deterrence rationale of *Illinois Brick* would be frustrated if a price discriminator could insult himself from liability, knowing that passing-on is barred, by granting price favors to an intermediary who is not in competition with potential plaintiffs. See notes 78-79 *supra* & accompanying text.

164. In *Illinois Brick* the Court reasoned that if more than one plaintiff could bring an action, then inconsistent adjudications, multiple liability, and protracted litigation would be as likely to occur in the Robinson-Patman Act context as in the Sherman Act context. These fears, however, may have been exaggerated by the Court in *Illinois Brick*. See notes 41, 43, & 47 *supra*.

165. 237 F.2d 13 (3d Cir. 1956).

166. *Id.* at 15. Klein was suing under § 3 not § 2(a), but the court construed the term "purchaser" to be the same under both sections. *Id.*

167. The requisite control is supplied if the discriminator personally solicits the indirect purchasing plaintiffs and effectively controls their purchase price, Kraft-Phenix Cheese Corp., 25 F.T.C. 537 (1937); controls their resale price, Luxor Ltd., 31 F.T.C. 658, 662-63 (1940); or approves the customers of the intermediary, Champion Spark Plug Co., 50 F.T.C. 30, 44-45 (1953).

168. Kraft-Phenix Cheese Corp., 25 F.T.C. 537 (1937). See also Champion Spark Plug Co., 50 F.T.C. 30 (1953); Luxor Ltd., 31 F.T.C. 658 (1940).



*Lionel*<sup>169</sup> and questioned its validity in any treble-damage action.<sup>170</sup>

Courts subsequently have approved the use of the indirect purchaser doctrine in treble-damage actions, despite the dictum in *Lionel*.<sup>171</sup> Complete offensive passing-on can be assumed in the indirect purchaser doctrine situation because the defendant effectively controls the terms of the indirect plaintiff's purchase.<sup>172</sup> This reasoning is analogous to the rationale of the controlled-group exception to the holding in *Illinois Brick*.<sup>173</sup> Similarly, the rule in *Perkins*, the indirect purchaser doctrine, and the controlled-group exception to the holding in *Illinois Brick* attempt to forestall an evasion of the antitrust laws.<sup>174</sup>

Although the indirect purchaser doctrine is a welcome amelioration of the rule that indirect purchasers cannot sue under the Robinson-Patman Act, its premise that section 2(a) precludes suits by indirect purchasers is unsound. The purpose of the Robinson-Patman Act was to protect independent merchants, many of whom purchased indirectly from wholesalers, from exploitation by chain competitors who could demand price concessions.<sup>175</sup> The intent of the Act is frustrated if the beneficiaries of the Act's protection, indirect purchasing merchants, are denied a cause of action. Indeed, the judicial interpretation of the Act may conflict with the statutory language. Section 2(a) protects purchasers but does not specify either direct or indirect purchasers. The courts have construed the statute to embrace direct, but not indirect, purchaser actions. This

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169. In *Lionel* the control exercised by the defendant over the plaintiff's business that arguably invoked the doctrine was pursuant to the mandate of a fair trade statute. The court would not use compliance with the statute as a basis for suing Lionel because the purpose of the statute was to benefit, not injure, the defendant. 237 F.2d at 16.

170. *Id.* at 15 (without discussion). *But cf.* *K.S. Corp. v. Chemstrand Corp.*, 198 F. Supp. 310, 312-13 (S.D.N.Y. 1961).

171. *Hiram Walker, Inc. v. A & S Tropical, Inc.*, 407 F.2d 4 (5th Cir.), *cert. denied*, 396 U.S. 901 (1969).

172. The difficulties of establishing offensive passing-on may be the unstated reason that the courts have required the price-discrimination plaintiff to be in privity with the defendant, although the requirement has been couched in terms of an interpretation of the express language of § 2(a).

173. See notes 127-31 *supra* & accompanying text.

174. The *Perkins* holding prevents a discriminator from avoiding liability by placing an intermediary between it and the favored customer who is in competition with the plaintiff. See notes 119-30 *supra* & accompanying text. The indirect purchaser doctrine prevents a discriminator from avoiding liability by placing a controlled intermediary between the disfavored customer and him.

175. See note 92 *supra* & accompanying text.

is in apparent conflict with the section's prohibition of both direct and indirect discrimination.<sup>176</sup>

*FLM Collision Parts, Inc. v. Ford Motor Co.*<sup>177</sup> expresses the better view that section 2(a) embraces actions by indirect purchasers regardless of the discriminator's control over the plaintiff's price. In *Collision Parts* the district court granted standing to an indirect purchaser of auto parts, noting that although *Perkins* did not address the indirect purchasing plaintiff issue, *Perkins* did hold that section 2(a) should be construed to cover injuries at levels of distribution beyond the level of purchasers from the defendant, at least in the favored chain of distribution.<sup>178</sup> *Collision Parts* extended the coverage of section 2(a) to include injuries at levels of distribution beyond the level of purchasers from the defendant, at least in the disfavored chain of distribution.<sup>179</sup> The indirect purchasing plaintiff, however, must establish the causal nexus by showing that the high price granted by the discriminator to the wholesaler was passed to him. *Illinois Brick* would probably bar this use of passing-on; but if the interpretation of section 2(a) in *Lionel* falls and the rule in *Illinois Brick* is overruled by the proposed legislation, the use of offensive passing-on in Robinson-Patman Act cases will be extended to trace the effects of the high price in the disfavored line of distribution and allow actions by indirect purchasing plaintiffs.

### CONCLUSION

Passing-on is a crucial element in establishing injury-in-fact and the amount of damage in the traditional price-discrimination cause of action. The plaintiff in a third or fourth-line suit must prove injury-in-fact by showing that a price favor was passed to his indirect purchasing competitor. Passing-on also is used to establish damages in a second, third, or fourth-line action requiring consequential damages or in a third or fourth-line suit requiring general damages. Despite the implicit role passing-on has played in past price-discrimination litigation, the future use of passing-on in this context is uncertain because of the Supreme Court's disallowance of passing-on in Sherman Act adjudication.

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176. See text accompanying note 96 *supra*.

177. 406 F. Supp. 224 (S.D.N.Y. 1975).

178. *Id.* at 238.

179. *Id.*

Because *Hanover Shoe* and *Illinois Brick* abolished passing-on in a Sherman Act context, there is a danger that courts will apply summarily the rule in *Illinois Brick* and *Hanover Shoe* to Robinson-Patman Act cases. Commentators have argued that *Hanover Shoe* and *Illinois Brick* eliminated consequential damages in price-discrimination suits because this damage measure requires passing-on analysis. Moreover, footnote sixteen in *Illinois Brick*, which cited the controlled-group factual setting in the Robinson-Patman action in *Perkins* as an example of a possible exception to the rule that passing-on could not be used in Sherman Act cases, may have been designed to mesh Sherman Act and Robinson-Patman Act passing-on rules by implying that passing-on was only allowed in *Perkins* because of the case's unique facts.

A summary application of the rule in *Illinois Brick* to Robinson-Patman actions, however, is misguided. The legal and economic characteristics of passing-on used in actions brought under price-discrimination law are unique. Passing-on used in a Robinson-Patman Act suit to establish that a price favor was passed to a plaintiff's indirect purchasing competitor should not be equated with passing-on used in a Sherman action to establish that a plaintiff received an overcharge. Passing-on in the former context does not create multiple liability. Moreover, failure to permit passing-on in the Robinson-Patman Act context would insulate violators from liability to direct purchasers who are injured by indirect purchasing competitors; in the Sherman Act context, violators could be insulated only from liability to an indirect, but not a direct, plaintiff. On the other hand, the second use of passing-on in Robinson-Patman Act cases—in consequential damage measurement—unduly protracts and complicates a plaintiff's case. As a result, proof of consequential damages, with its attendant use of passing-on, is inconsistent with the rationale of *Hanover Shoe* and *Illinois Brick*.

Although the future status of Robinson-Patman Act passing-on is uncertain, the passing-on controversy in the Sherman Act context has assured that Robinson-Patman Act passing-on will receive increasing judicial attention. With more analysis, it is hoped that the courts will not apply summarily Sherman Act passing-on rules to Robinson-Patman Act cases.

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