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Antitrust law is designed to protect the market from the anticompetitive activities of businesses and promote competition for the benefit of consumers.\(^1\) However, federal courts traditionally limit standing in antitrust suits to ensure the effective enforcement of the antitrust laws.\(^2\) In *Clayworth v. Pfizer, Inc.*,\(^3\) the California Supreme Court considered whether the Cartwright Act, a California state antitrust law, allowed pharmaceutical manufacturers to use a pass-on defense to defeat liability in an antitrust suit where retail pharmacies alleged that the manufacturers were price-fixing.\(^4\) A pass-on defense is an affirmative defense where a defendant claims that the plaintiff passed on any injury he suffered to his own customers in the form of

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1 *See* 58 C.J.S. *Monopolies* § 7 (2010) (describing the purpose of antitrust regulation in general). Price fixing and monopoly are among the central abusive business practices that antitrust laws are designed to protect against. *See id.; id.* § 99 (price-fixing is generally per-se illegal). A price-fixing contract is illegal even if its purpose is to eliminate competitive imbalances. *Id.* § 99.

2 *See* Todorov v. DCH Healthcare Authority, 921 F.2d 1438, 1448-49 (11th Cir. 1991) (noting antitrust standing understood as “a search for the proper plaintiff to enforce the antitrust laws”); 58 C.J.S. *Monopolies* § 222 (discussing limitations on standing in antitrust cases); *see also infra* notes 24-26 and accompanying text. Courts limit standing to avoid overdeterrence stemming from treble damage awards. *Todorov*, 921 F.2d at 1449. The purpose is to ensure that parties litigate only cases that are consistent with the goals of antitrust law and market participants’ procompetitive behavior is not restricted for fear of antitrust liability. *Id.*

3 233 P.3d 1066 (Cal. 2010).

4 *Id.* at 1072 (setting forth issue of first impression); *see also* Cartwright Act, *Cal. Bus. & Prof. Code* §§ 16600-16770 (West 2008). The Cartwright Act prohibits agreements among competitors that restrain trade or increase the prices of commodities. *Cartwright Act* §§ 16720, 16726.
higher prices, so ultimately, the plaintiff does not suffer any loss and does not have standing to sue.\(^5\) The court held that the manufacturers could not use the pass-on defense under the Cartwright Act, which prohibits agreements that set the price of any commodity, directly or indirectly precluding free and unrestricted competition.\(^6\)

The defendants in *Clayworth* were brand-name pharmaceutical manufacturers (“Manufacturers”), who manufacture, market, or distribute similar brand-name pharmaceutical products in the United States and Canada.\(^7\) The Manufacturers sold the drugs to wholesalers at a price known as the “wholesale acquisition cost”—a price that other entities in the industry use to set the benchmark “average wholesale price.”\(^8\) The wholesalers resold the drugs to the plaintiff retail pharmacies (“Pharmacies”) at prices based on a percentage of the average wholesale price.\(^9\) Thus, any time the Manufacturers raised their prices, the cost of the drugs to the Pharmacies increased by the same percentage.\(^10\) The Pharmacies then sold the drugs to either: (1) customers who had a third party insurer or a drug benefit plan paying on their behalf, or (2) uninsured, cash-paying customers.\(^11\) For customers with insurance, the Pharmacies were reimbursed at a fixed amount, a predetermined percentage of the average wholesale price, plus a

\(^5\) See William C. Holmes, Antitrust Law Handbook § 9:10 (2010) (defining pass-on defense); see also infra notes 29-34 and accompanying text (discussing pass-on defense and indirect purchaser issues).

\(^6\) Cartwright Act §§ 16720, 16726; *Clayworth*, 233 P.3d at 1086 (concluding that pass-on defense generally may not be asserted). Furthermore, the court concluded that the amount of the overcharge the plaintiff paid would be the presumptive measure of damages. *Clayworth*, 233 P.3d at 1086.

\(^7\) Id. at 1070. There were twenty-one defendants, including AstraZeneca LP, Merck & Co., Bristol-Myers-Squibb Company, and Wyeth. Id. at 1070 n.3. Two named defendants, Johnson & Johnson Health Care Systems, Inc. and Pharmaceutical Research and Manufacturers of America, do not manufacture, market, or distribute pharmaceutical products. *Id.*

\(^8\) Id. at 1071. Independent entities calculate and publish the “average wholesale price” based on the “wholesale acquisition cost.” *Id.* The “average wholesale price” is then used across the industry. *Clayworth*, 233 P.3d at 1071.

\(^9\) Id. The published average wholesale price is a fixed percentage above the price the Manufacturers charge to the wholesalers. *Id.*

\(^10\) Id. (explaining why rise in wholesale acquisition cost caused proportional rise in price paid by the Pharmacies). When the Manufacturers increase prices, the average wholesale price increases. *Id.* Because the wholesalers base the price they charge the Pharmacies on a percentage of the average wholesale price, the cost of drugs to the Pharmacies increases by the same percentage as the Manufacturers’ increase. *Id.*

\(^11\) *Clayworth*, 233 P.3d at 1071. Third party payers cover most of the Pharmacies’ customers. *Id.* Drug benefit plans include both private entities and the government. *Id.* No specific drugs were listed as the trial judge only permitted the defendants to conduct discovery relevant to the pass-on defense. See *Clayworth v. Pfizer*, Inc., 83 Cal. Rptr. 3d 45, 48 (2008), rev’d, 233 P.3d 1066 (Cal. 2010).
dispensing fee—a total greater than their acquisition costs.\textsuperscript{12} For cash-paying customers, the Pharmacies established retail prices unilaterally, although such prices are traditionally a set percentage of the average wholesale price, plus in some instances, an additional dispensing fee.\textsuperscript{13}

The Pharmacies alleged that the Manufacturers conspired to fix the prices of their pharmaceuticals in the United States market, including California, by restraining “re-importation of [the Manufacturers’] lower-priced foreign drugs into the United States” and by restricting “price competition from generics.”\textsuperscript{14} These actions allegedly allowed the Manufacturers to charge fifty to four-hundred percent more for their drugs in the United States, compared to charges for the same drugs outside the United States, thus forcing the Pharmacies to pay an overcharge.\textsuperscript{15} The Manufacturers asserted the affirmative defense that the Pharmacies did not suffer an injury because they passed on the alleged overcharge.\textsuperscript{16} The Pharmacies moved for summary adjudication on the pass-on defense, claiming it was not available under the Cartwright Act.\textsuperscript{17} In response, the Manufacturers filed a cross-motion for summary judgment, claiming the defense was available and that it defeated the Pharmacies’ claim.\textsuperscript{18}

The Alameda County Superior Court granted the Manufacturers’ summary judgment cross-motion, finding that the pass-on defense was available under the Cartwright Act.\textsuperscript{19} In finding for the Manufacturers, the Superior Court reasoned that the Pharmacies did not suffer any damage because they increased their prices by at least the same dollar amount as the overcharge.\textsuperscript{20} The California First District Court of Appeal affirmed, concluding that the Cartwright Act’s phrase “three times damages sustained” requires that the plaintiff suffer actual monetary loss, so the Manufacturers could use the pass-on defense to defeat the Pharmacies’ claim.\textsuperscript{21} The California Supreme Court, however, reversed, holding that generally no pass-on

\textsuperscript{12} Clayworth, 233 P.3d at 1071 (describing how third party payers reimburse the Pharmacies). Contract or statute set the fixed reimbursement rate. \textit{Id.}
\textsuperscript{13} \textit{Id.} (noting how the Pharmacies charge cash-paying customers).
\textsuperscript{14} \textit{Id.} at 1070.
\textsuperscript{15} \textit{Id.} at 1070-1071.
\textsuperscript{16} \textit{Id.} at 1071 (describing the Manufacturers’ affirmative defense). The Manufacturers also denied the Pharmacies’ price-fixing allegations. \textit{Clayworth}, 233 P.3d at 1071.
\textsuperscript{17} \textit{Id.} (detailing the Pharmacies’ motion for summary judgment).
\textsuperscript{18} \textit{Id.} (noting the Manufacturers’ response to the Pharmacies’ motion for summary judgment). The court assumed arguendo that the Manufacturers engaged in price-fixing for the motion. \textit{Id.} at 1071 n.4.
\textsuperscript{19} \textit{Id.} at 1071 (discussing trial court’s holding).
\textsuperscript{20} Clayworth v. Pfizer, Inc., 83 Cal. Rptr. 3d 45, 50 (2008), \textit{rev’d}, 233 P.3d 1066 (Cal. 2010) (discussing trial court’s findings). By increasing their own prices, the Pharmacies effectively recovered what they may have lost due to the overcharge. \textit{See id.} Thus, they ultimately did not suffer any financial loss. \textit{See id.}
\textsuperscript{21} \textit{Id.} at 63 (interpreting the language of the Cartwright Act). The Court of Appeal noted that this
defense is allowed under the Cartwright Act and noting the clear legislative preference for such a rule.  

Both federal and California state antitrust laws permit anyone who is injured in his business or property to sue for treble damages for a violation of their respective antitrust laws.  

Despite this broad power, courts have limited this right by placing restrictions on individuals with the requisite standing.  

In federal courts, a two-pronged test has developed whereby a plaintiff must first show that he has suffered an “antitrust injury,” and second, that he fits the additional standing criteria.  

The directness or remoteness of the plaintiff’s asserted injury is a factor in language analysis was all that was needed to affirm the trial court, but it continued on to discuss the legislative history and public policy arguments.  

Clayworth, 233 P.3d at 1070 (summarizing the court’s conclusions).  The court concluded that this rule was most consistent with the legislature’s goals of “maximizing effective deterrence of antitrust violations, enforcing the state’s antitrust laws against those violations that do occur, and ensuring disgorgement of any ill-gotten proceeds.”  

The court also identified two instances when the pass-on defense may still be available: “cost-plus” contracts and situations where application of the rule may raise the potential for duplicative recovery.  

Neither exception applies to this case.  

See Clayton Act § 4, 15 U.S.C. § 15(a) (2006) (granting standing to private citizens under all federal antitrust laws); Cartwright Act, CAL. BUS. & PROF. CODE § 16750(a) (West 2008) (granting right of private citizens to bring suit under state competition regulation laws).  Treble damages statute allow courts to impose damages three times the amount that the fact-finder determines the defendant owes the plaintiff; treble damages are also often a penalty for some evil that entered into the act.  

A plaintiff must have constitutional standing; however, if the plaintiff can show antitrust standing, he will also have constitutional standing because the standards for antitrust standing are more demanding than constitutional standing.  

An antitrust injury is “an injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants’ acts unlawful.”  

While showing an antitrust injury is necessary, it is not always sufficient to gain standing.  

The Todorov court described the second prong as a determination of whether the plaintiff was an “efficient enforcer of the antitrust laws,” noting that includes an analysis of the directness or remoteness of the plaintiff’s injury.  

Other considerations include an actual intent to cause harm, the existence of more direct victims, the speculative nature of the plaintiff’s injury, and the potential for duplicative injury or complex apportionment of damages.
the antitrust standing criteria, which poses challenges for indirect purchasers attempting to bring antitrust suits because they are at least one link removed in the supply chain from the allegedly illegal action. Federal law has addressed this issue by generally not allowing indirect purchasers to bring an antitrust claim and also by barring the defendant seller from using the pass-on defense.

The Supreme Court of the United States first addressed the pass-on issue in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.* and held that the defendant is barred from asserting a pass-on defense because the plaintiff is injured by a higher price, no matter the plaintiff’s response to the overcharge, including raising the plaintiff’s own prices. The Court also reasoned that allowing the pass-on defense would lead to questions that are practically impossible to determine and introduce the risk that no one would suffer a significant enough injury to bring a suit. In *Illinois Brick Co. v. Illinois*, the Court addressed the corollary to *Hanover Shoe*, the

at § 9:9; see also Associated Gen. Contractors of Cal. v. California State Council of Carpenters, 459 U.S. 519, 538-44 (1983) (evaluating plaintiff’s antitrust standing since plaintiff was neither a consumer nor competitor of the defendant).

26 HOLMES, supra note 5, at § 9:10 (discussing indirect purchaser doctrine); see Associated Gen. Contractors of Cal., 459 U.S. at 540 (including “directness or indirectness” of the injury as factor in determining antitrust standing).

27 See Illinois Brick Co. v. Illinois, 431 U.S. 720, 730 (1977) (holding indirect purchasers cannot sue for antitrust injuries); Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 488 (1968) (rejecting defendant’s use of the pass-on defense); see also infra notes 29-32 and accompanying text.


29 *Hanover Shoe, Inc.*, 392 U.S. at 489. The court discussed a buyer’s potential three responses to an illegal overcharge: do nothing and absorb the loss, maintain own price and increase volume, or raise own price. *Id.* It concluded that in all three cases the price the buyer pays is still illegally high, and his profits would be greater if his costs were lower. *Id.* The Court supported its conclusion with a line of precedential cases dating back to 1906. *Id.* at 489-90; see Adams v. Mills, 286 U.S. 397, 407 (1932) (holding claim arose at time of overcharge and plaintiff’s subsequent actions do not concern defendants); Southern Pacific Co. v. Darnell-Taenzer Lumber Co., 245 U.S. 531, 534 (1918) (noting once claim accrues, it does not inquire into later events); Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 396 (1906) (“A person whose property is diminished by a payment of money wrongfully induced is injured in his property”).

30 See *Hanover Shoe, Inc.*, 392 U.S. at 492-94 (responding to defendant’s argument that law of economics requires recognition of pass-on defense). The Court noted that it would be exceedingly difficult to determine whether plaintiffs would have chosen a different price if defendants had not overcharged them, what effect a change in price would have on total sales, and how the cost per unit would change in light of a different volume of total sales. *Id.* at 492-93. The Court also noted that a pass-on defense could be asserted until the ultimate consumers, who would only have a tiny interest in joining an antitrust suit. *Id.* at 494. Thus, the effectiveness of
offensive use of the pass-on defense, and held that indirect purchasers were not permitted to sue for a violation of antitrust law, noting its concern with the risk of duplicative recovery among plaintiffs. In response to *Illinois Brick*, California and many other states passed *Illinois Brick* “repealer statutes,” amending their state antitrust laws specifically to allow indirect purchasers to sue. While the California Supreme Court had not ruled directly on the pass-on defense after *Hanover Shoe*, the California Legislature amended the Cartwright Act and adopted language identical to the federal Hart-Scott-Rodino Antitrust Improvements Act, which addresses the duplicative recovery issue by allowing state attorneys general to bring suits on behalf of consumers. Additionally, California courts have interpreted antitrust laws as primarily serving the law would be reduced because no one would bother to sue the antitrust violator. 


32 *Illinois Brick Co.*, 431 U.S. at 730-32 (reasoning that risk of multiple liability for defendants was too great and unequal treatment of plaintiffs and defendants would be unfair). The Court noted that the complicated proceedings and difficult determinations warned against in *Hanover Shoe* would similarly arise in the indirect purchaser context. See id. at 731-32. Both a direct and indirect purchaser would be entitled to recover the full amount of the overcharge; thus, defendants could be liable to multiple plaintiffs for the same violation. See id. at 730. The Court noted that “cost-plus contracts” were an exception to the general rule that indirect purchasers cannot sue. Id. at 736.

33 Cartwright Act, CAL. BUS. & PROF. CODE § 16750(a) (West 2008) (amended 1978) (adding the second paragraph to subdivision (a)); see HOLMES, supra note 5, at § 9:10 (noting a number of state legislatures enacted state antitrust laws allowing indirect purchasers to sue). The Cartwright Act added language that any injured person can sue “regardless of whether such injured person dealt directly or indirectly with the defendant.” Cartwright Act § 16750(a). These amendments became commonly referred to as *Illinois Brick* “repealer statutes.” See Daniel A. Karon, “Your Honor Tear Down that Illinois Brick Wall!” The National Movement Toward Indirect Purchaser Antitrust Standing and Consumer Justice, 30 WM. MITCHELL L. REV. 1351, 1361 (2004). Twenty-five states and the District of Columbia have antitrust statutes allowing indirect purchasers to sue for price-fixing. Id. Combining those antitrust statutes, consumer protection statutes, and state court rulings, thirty-three states and the District of Columbia allow for indirect purchasers to bring some claim. Id. at 1362; see also California v. ARC America Corp., 490 U.S. 93, 101-02 (1989) (holding federal antitrust laws do not preempt state laws permitting indirect purchaser recovery). There, the Court noted, “Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies.” ARC America Corp., 490 U.S. at 102.

34 Compare Cartwright Act § 16760(a)(1)(A) (stating award must exclude damages “which duplicate amount which have been awarded for the same injury”), with Clayton Act, 15 U.S.C. § 15c(a)(1)(A) (2006) (stating award must exclude damages “which duplicate[] amount which have been awarded for the same injury”). In 1977, Congress passed the Hart-Scott-Rodino Antitrust Improvements Act, which amended the Clayton Act to allow state attorneys general to file suits on behalf of consumers for violations of the Sherman Act. See Clayton Act, 15 U.S.C. § 15c. The amendment to California’s Cartwright Act passed in 1978 and afforded its state attorney general the same power under the Cartwright Act. See Cartwright Act § 16760. It is critical to note that Congress passed the Hart-Scott-Rodino Act after *Hanover Shoe*, thus, they must have
to promote free competition; they are secondarily concerned with treble damages awards.\footnote{35}

The nature of the pharmaceutical industry makes collusion and high prices easy to achieve, thus creating difficulty for antitrust enforcement.\footnote{36} The pharmaceutical industry is an innovation market and has a distribution chain, making it difficult for consumers to gain standing, which results in antitrust agencies bringing most legal challenges.\footnote{37} In a 1994 case, \textit{In re Brand Name Prescription Drugs Antitrust Litigation},\footnote{38} pharmaceutical retailers brought a suit in federal court against pharmaceutical manufacturers and wholesalers, alleging a two-tiered vertical

\footnote{35} See Cal-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel., 973 P.2d 527, 544 (Cal. 1999) (noting antitrust laws are generally about protecting competition, not competitors); Milton v. Hudson Sales Corp., 313 P.2d 936, 952 (Cal. Ct. App. 1957) (quoting Schwing Motor Co. v. Hudson Sales Corp., 138 F. Supp. 899, 903 (D. Md. 1956)) ("The main purpose of the anti-trust laws is to protect the public from monopolies and restraints on trade, and the individual right of action for treble damages is incidental and subordinate to that main purpose.").

\footnote{36} See Herbert Hovenkamp, \textit{Symposium: Soaring Prices for Prescription Drugs: Just Rewards for Innovations or Antitrust Violations?}, 39 U.S.F. L. Rev. 11, 11-12 (2004) (discussing unique features of pharmaceutical industry). The pharmaceutical industry’s low elasticity of demand, high degree of product differentiation, and the insulation of ultimate consumers from drug costs historically has made it easy for the industry to achieve collusion and high prices. \textit{Id.} at 11. The technological complexity and high degree of innovation also creates a difficult balance. \textit{See id.} at 11-12. Additionally, antitrust is always in tension with a regulatory regime, and the Food and Drug Administration ("FDA") and intellectual property laws heavily regulate the pharmaceutical industry. \textit{Id.} at 14-15. When regulatory agencies consider competition polices in making decisions, a potential antitrust defendant may have immunity in regard to the specified conduct, although it is also important to note that the few decisions involving the pharmaceutical industry have found an immunity to exist. \textit{Id.} at 14-15. When there is a loosening of regulation, antitrust law’s role may increase. \textit{Id.} With regard to antitrust law’s relationship to patents, courts look leniently at patent settlements that are challenged as antitrust violations. Herbert Hovenkamp \textit{et al.}, \textit{IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW} \S 7.1c (2d ed. 2010).


\footnote{38} 123 F.3d 599 (7th Cir. 1997).
price-fixing conspiracy. When the manufacturers sought summary judgment on the basis that the retailers were indirect purchasers, the district court held that Illinois Brick was inapplicable because the policy reasons behind that holding did not fit the alleged conspiracy. The Seventh Circuit, however, reversed, holding that Illinois Brick did apply, and the retailer’s redress is only against the wholesalers. While federal courts make it extremely difficult for pharmaceutical retailers to gain standing, state courts are generally more hospitable to their claims.

In Clayworth v. Pfizer, Inc., the California Supreme Court first addressed the Hanover Shoe rule and its underlying reasoning with a particular focus on the potential that a pass-on defense could compromise the enforcement of antitrust laws. The court combined the Hanover Shoe reasoning with its statutory analysis of the Cartwright Act and concluded that adopting the Hanover Shoe rule, thus barring the pass-on defense, is most consistent with the legislative history.

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39 In re Brand Name Prescription Drugs Antitrust Litigation, 867 F. Supp. 1338, 1344 (N.D. Ill. 1994) (detailing issue before the court). A vertical price-fix occurs “when firms at different levels of the market structure (e.g., a manufacturer and one of its dealers) agree to fix prices at one or both market levels at a set amount or within a prescribed range.” HOLMES, supra note 5, at §2:12. The plaintiffs alleged that the conspiracy to raise the prices involved both manufacturers and wholesalers. In re Brand Name Prescription Drugs Antitrust Litigation, 867 F. Supp. at 1344. They attempted to distinguish Illinois Brick on these facts by claiming they were not just indirect purchasers with an illegal overcharge passed down, but the overcharges were directly imposed because the conspiracy encompassed multiple levels of the distribution chain. Id.

40 See In re Brand Name Prescription Drugs Antitrust Litigation, 867 F. Supp. at 1345-46. The court concluded that the risk of multiple liabilities, a major policy concern in Illinois Brick, was “virtually eliminated,” and the complexity of tracing damages is diminished when the seller and intermediary are co-conspirators. Id.; see supra note 32 and accompanying text (discussing Illinois Brick reasoning); see also Jacobs, supra note 37, at 71-76 (discussing district court opinion).

41 See In re Brand Name Prescription Drugs Antitrust Litigation, 123 F.3d at 606. The court noted that the plaintiff retailers did not have contracts with the manufacturers and the wholesalers were not parties to the litigation against the manufacturers. Id. Had the wholesalers been parties and the retailers were awarded damages for the overcharge, the court would have had to apportion damages between the wholesalers and the retailers, which is precisely what Illinois Brick and Hanover Shoe instructed courts not to do. Id.; see also Jacobs, supra note 37, at 76-79 (discussing Court of Appeals opinion).

42 Jacobs, supra note 37, at 86 (noting shift of cases from federal to state courts). Jacobs notes three different ways that states have dealt with the indirect purchaser issue: not allow indirect plaintiffs to sue, permit everyone including ultimate consumers to sue, or manipulate standing to fit the suit’s needs. Id. at 83. He argues that these divergent views of antitrust federalism encourages forum shopping and would likely result in “a disparate and arbitrary pattern of private enforcement and recovery.” Id.

43 Clayworth v. Pfizer, Inc., 233 P.3d 1066, 1071-74 (Cal. 2010) (emphasizing difficulty in tracking ultimate consequence of antitrust violation); see Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 492-93 (1968) (discussing practical difficulties in determining what a company would have done absent antitrust violation and its subsequent effect on profit).
of the Cartwright Act.\textsuperscript{44} To support this finding, the court addressed the California legislature’s reaction to both the federal Hart-Scott-Rodino Act and the United States Supreme Court’s ruling in \textit{Illinois Brick}.\textsuperscript{45} The court concluded that the Hart-Scott-Rodino Act shared characteristics with \textit{Hanover Shoe} because it reflected Congress’ preference for over-detering, rather than under-detering, antitrust violations, and it addressed the problem of duplicative recovery in light of the \textit{Hanover Shoe} rule.\textsuperscript{46} The court concluded that the California Legislature must have presumed that the federal \textit{Hanover Shoe} rule would apply to the state Cartwright Act because the state legislature adopted the damages provision of the federal Hart-Scott-Rodino Act word-for-word into the state Cartwright Act.\textsuperscript{47} Additionally, when the California Legislature unanimously passed its \textit{Illinois Brick} “repealer statute,” the Judiciary Committee’s analysis recognized that courts would have to reconcile indirect purchasers’ suits with the no pass-on defense rule; thus, the court concluded that “the existence of the \textit{Hanover Shoe} rule was taken for a given.”\textsuperscript{48}

The court also considered broader legislative policy on antitrust in its ruling.\textsuperscript{49} Because the Cartwright Act’s primary concern is eliminating restraints of trade and the court should adopt a damages rule most consistent with that focus, the court concluded that it is more important to maximize deterrence than to be concerned with overcompensating plaintiffs.\textsuperscript{50} In recognizing the difficulty in proving precise amounts of other forms of injury, the court said the overcharge should be the measure of damages because it is the most readily measured and best serves the

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\textsuperscript{44} \textit{Clayworth}, 233 P.3d at 1078. The court first determined that the “damages sustained” language of the Cartwright Act is ambiguous because there are a number of ways that damages could be measured in the antitrust context. \textit{Id.} at 1074-75.
\textsuperscript{45} \textit{Id.} at 1078-83; \textit{see infra} notes 46-48 and accompanying text.
\textsuperscript{47} \textit{See Clayworth}, 233 P.3d at 1080, compare Cartwright Act, CAL. BUS. \& PROF. CODE § 16760(a)(1)(A) (West 2008) (stating award must exclude damages “which duplicate[] amount which have been awarded for the same injury”), \textit{with} Clayton Act, 15 U.S.C. 15c(a)(1)(A) (2006) (stating award must exclude damages “which duplicate[] amounts which have been awarded for the same injury”).
\textsuperscript{48} \textit{Clayworth}, 233 P.3d at 1083. The court noted that the Judiciary Committee expressed approval of the procedural reconciliation methods described in the \textit{Illinois Brick} dissent. \textit{Id.} at 1082-83; \textit{see} Illinois Brick Co. v. Illinois, 431 U.S. 720, 761-65 (1977) (Brennan, J., dissenting) (discussing procedural safeguards against multiple liability). In a separate dissent, Justice Blackmun said he was “positive” that the Court would have allowed indirect purchasers to sue if \textit{Hanover Shoe} had not preceded \textit{Illinois Brick}. \textit{Illinois Brick Co.}, 431 U.S. at 765 (Blackmun, J., dissenting).
\textsuperscript{49} \textit{Clayworth}, 233 P.3d at 1083-86.
\textsuperscript{50} \textit{Id.} at 1083-84 (detailing priorities of Cartwright Act). The court also noted the concerns are the same for antitrust law generally. \textit{Id.} at 1083-86.
goals of antitrust law.\textsuperscript{51} Therefore, the court held that a pass-on defense may not be asserted even though indirect purchasers can sue; thus, the Pharmacies can bring their price-fixing claim against the Manufacturers.\textsuperscript{52}

Although the California Supreme Court adopted the federal \textit{Hanover Shoe} rule, it actually expanded standing in state antitrust suits well beyond standing under federal law because California allows the additional indirect purchaser class to sue.\textsuperscript{53} Rejecting the \textit{Hanover Shoe} rule would have been more consistent with the federal law’s policy of applying pass-on issues symmetrically, given that the Cartwright Act grants standing to indirect purchasers and \textit{Illinois Brick} does not.\textsuperscript{54} In attempting to show the California Legislature’s specific approval of the \textit{Hanover Shoe} rule, the court draws questionable inferences by claiming the California Legislature’s adoption of the Hart-Scott-Rodino Act and its rejection of \textit{Illinois Brick} demonstrate that the \textit{Hanover Shoe} rule was already accepted as part of California law.\textsuperscript{55} While it is possible that the legislature was expressing tacit acceptance of the \textit{Hanover Shoe} rule, drawing approval of one thing while explicitly doing another is questionable; particularly when the legislature could have statutorily acknowledged the \textit{Hanover Shoe} rule.\textsuperscript{56} In granting standing to the Pharmacies,\

\textsuperscript{51} Id. at 1084 (responding to the Manufacturers’ argument that adopting a no pass-on defense rule would allow a windfall to undamaged plaintiffs).

\textsuperscript{52} See \textit{id.} at 1086. The court recognized two possible exceptions to the general rule against the pass-on defense: “cost-plus” contracts and cases that raise the prospect of duplicative recovery. \textit{Id.} The court declined to address the scope of these exceptions, however, as neither applied in this case. \textit{Clayworth}, 233 P.3d at 1086.

\textsuperscript{53} \textit{Compare Illinois Brick Co.}, 431 U.S. at 730 (holding indirect purchasers cannot sue for antitrust injuries), \textit{with Cartwright Act, CAL. BUS. \\ & PROF. CODE § 16750(a) (West 2008)} (allowing indirect purchasers to bring antitrust suits). While both federal and California law now bar the pass-on defense, California’s allowance of indirect purchaser suits creates many more potential plaintiffs. \textit{See Cartwright Act § 16750(a)}.

\textsuperscript{54} \textit{See Illinois Brick Co.}, 431 U.S. at 729 (“the rule should apply equally to plaintiffs and defendants”); \textit{Jacobs, supra} note 37, at 68 (discussing Court’s ruling that a symmetrical rule is fair). Rejecting the \textit{Hanover Shoe} rule would have allowed both offensive and defensive use of the pass-on defense, while federal law bars both its offensive and defensive use. \textit{See Illinois Brick Co.}, 431 U.S. at 730; \textit{Clayworth}, 233 P.3d at 1086. The Cartwright Act allows its offensive use, but the \textit{Clayworth} holding bars its defensive use. \textit{See Cartwright Act § 16750(a)}; \textit{Clayworth}, 233 P.3d at 1086.

\textsuperscript{55} \textit{See Clayworth}, 233 P.3d at 1079-83; \textit{see also supra} notes 34, 47-48 and accompanying text. In adopting the federal Hart-Scott-Rodino Act, the California legislature adopted protections against duplicative recovery when the state brings a suit as \textit{pares patriae}. \textit{Clayworth}, 233 P.3d at 1081. The Judiciary Committee approved of the \textit{Illinois Brick} dissent when passing its \textit{Illinois Brick} repealer statute. \textit{Id.} at 1082. The \textit{Illinois Brick} dissent concluded that problems arising from indirect purchasers suing, while not allowing the pass on defense, could be cured by procedural requirements. \textit{Id.} The \textit{Clayworth} court concluded that this sequence of events meant that the \textit{Hanover Shoe} rule was a given under the Cartwright Act. \textit{Id.} at 1082-83.

\textsuperscript{56} \textit{See Cartwright Act § 16750(a)} (granting indirect purchasers standing but not acknowledging
However, the court properly abided the California Legislature’s clear general policy preference for broad deterrence of antitrust violations and promotion of free competition.\(^{57}\)

In holding for the Pharmacies, California now joins the many states that have significantly different antitrust standing laws than the federal antitrust standing laws.\(^{58}\) While the Supreme Court of the United States has held that federal antitrust laws do not preempt state antitrust laws, the increasingly indirect purchaser-friendly state courts make forum shopping more likely.\(^{59}\) The divergence between state and federal antitrust laws is a particularly heightened issue in the pharmaceutical industry, as the Food and Drug Administration heavily regulates drug companies’ production and intellectual property laws affect such companies’ patents.\(^{60}\) Thus, it is now easier for indirect purchasers, such as retail pharmacies, to bring a plausible state antitrust claim despite the pharmaceutical manufacturer’s compliance with other federal laws.\(^{61}\) For example, a manufacturer engaged in a patent dispute could enter into a

\footnotesize{Hanover Shoe rule}); \textit{supra} note 55 and accompanying text (discussing inferences drawn in \textit{Clayworth}).\(^{57}\) See \textit{Clayworth}, 233 P.3d at 1083-86 (discussing broader legislative policy considerations); \textit{supra} note 35 and accompanying text (detailing interpretation of state antitrust laws).

\footnotesize{Jacobs}, \textit{supra} note 37, at 79-83 (detailing differences among federal antitrust laws and various states’ antitrust laws).

\footnotesize{See California v. ARC America Corp., 490 U.S. 93, 101-02 (1989) (holding federal antitrust laws do not preempt state antitrust laws); Jacobs, \textit{supra} note 37, at 86 (“state courts have proven increasingly hospitable to [indirect purchaser’s] claims”); \textit{supra} note 33 and accompanying text (discussing states’ \textit{Illinois Brick} “repealer statutes”). In the immediate wake of \textit{ARC America Corp.}, the American Bar Association raised three options for addressing the inconsistent antitrust standing rules: “(1) retain the status quo; (2) Congressional legislation preempting state indirect purchaser laws; (3) Congressional adoption of the complex allocative approach rejected in \textit{Illinois Brick}, coupled with federal preemption.” Jacobs, \textit{supra} note 37, at 83. Congress took no action on the recommendations. Id. Commentators have suggested that the federal rule barring indirect purchaser suits should be reconsidered. See \textit{id.} at 84 (concluding that the Supreme Court should reconsider and reevaluate its reasoning in the holding of \textit{Illinois Brick}); Karon, \textit{supra} note 33, at 1401-02 (advocating for indirect purchaser standing).

\footnotesize{Hovenkamp, \textit{supra} note 36, at 15 (describing regulatory environment in pharmaceutical industry); see also \textit{supra} note 36 and accompanying text (discussing difficulties of antitrust law in pharmaceutical industry). The more competition is taken into account in the regulation, the more it supplants antitrust. See Hovenkamp, \textit{supra} note 36, at 14. Thus, the FDA regulations do not frequently grant antitrust immunity, but intellectual property laws are concerned with competition and can have that effect. See \textit{id.} at 15.

\footnotesize{See \textit{supra} notes 33, 59-60 and accompanying text (noting increased number of potential plaintiffs under state law and relationship between federal antitrust law and federal regulation). Plaintiffs, however, would still have to show that the antitrust violation proximately caused the alleged injury. \textit{Holmes}, \textit{supra} note 5, at § 9:8. Price-fixing cases would not be particularly affected by the difference between state and federal law as the practice is per se illegal, but other
settlement agreement, which has anticompetitive effects. Federal courts have been deferential to these agreements, but if a state court is not, an additional class of retailers may be able to bring the suit in California state court under Clayworth.

Courts, however, need to liberally grant antitrust standing in pharmaceutical antitrust cases because the nature of the industry makes collusion and high prices easy to achieve. Antitrust law seeks maximum deterrence over secondary concerns, so it should reflect that goal most strictly in instances where the problems it is designed to prevent are most easily achieved, and barring the pass-on defense in a pharmaceutical context helps achieve maximum deterrence. Direct-purchaser wholesalers do not have an incentive to sue because they pass-on any overcharge by the same percentage. The ultimate consumers also have little incentive to sue because their third party payers shield them from the actual costs of the drugs and make prices less transparent. Thus, courts must reject the pass-on defense or risk pharmaceutical manufacturers retaining overcharges from illegal activity because no customer suffers a significant enough injury to sue at any level of the supply chain. Additionally, twelve years after In re antitrust violations likely would be affected. See 58 C.J.S. Monopolies § 7 (2010) (preventing price-fixing is a central aim of antitrust law); id. § 99 (price-fixing is generally per-se illegal).

Hovenkamp, supra note 36, at 23 (discussing patent settlements). Settlements in patent disputes go back as far as the patent laws and most commonly involve the infringement defendant paying a fee for a restricted license. Id. Exit or non-entry payments, however, are a relative novelty. Id. at 24.

Hovenkamp, supra note 36, at 23 (describing treatment of patent settlement antitrust cases); see Clayworth v. Pfizer, Inc., 233 P.3d 1066, 1086 (Cal. 2010) (holding that defendant generally may not assert pass-on defense). In some instances, courts have been deferential because paying a fee for a license is competitively preferable to a valid patent excluding an infringement defendant from the market. Hovenkamp, supra note 36, at 23. When each party's underlying patent claim is reasonably legitimate but also subject to a reasonable risk of failure, “courts have responded leniently to settlements.” HOVENKAMP ET AL., supra note 36, § 7.1c. The authors argue that even when the patents are valid, courts should address the antitrust issue without considering the relationship of the settlement to an intellectual property claim. Id. § 7.2b.

See supra note 36 (noting pharmaceutical industry characteristics facilitate potential collusion).

See supra note 35 and accompanying text (noting California's interpretation of antitrust laws); supra note 36 (discussing ease of collusion in pharmaceutical industry); supra note 46 and accompanying text (noting preference for overdeterrence rather than underdeterrence antitrust violations).

See supra note 10 and accompanying text (detailing wholesalers' proportional price increase when Manufacturers raise their prices).

See Hovenkamp, supra note 36, at 11 (noting health insurance insulates consumers from drug costs and shields them from the full impact); supra notes 11-12 and accompanying text (describing how Pharmacies receive payment for most drugs).

See Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 494 (1968) (discussing potential effects of allowing a pass-on defense); supra notes 66-67 and accompanying text.
Brand Name Prescription Drugs Antitrust Litigation, Clayworth illustrates that there are ongoing concerns about price-fixing in the pharmaceutical industry because the allegations are very similar and six of the same pharmaceutical companies are defendants in both cases. Clayworth could be the first step toward addressing those price-fixing concerns in California.

In Clayworth v. Pfizer, Inc., the California Supreme Court considered whether pharmaceutical manufacturers could use a pass-on defense to defeat liability in a state antitrust suit. The court barred the Manufacturers from using the defense, which expanded California’s antitrust standing beyond the federal law because the state also allows indirect purchasers to bring suits. The Clayworth holding relies on questionable inferences regarding the California Legislature’s specific acceptance of the federal Hanover Shoe rule, but the holding stands firmly on the state’s general antitrust policies. This case also illuminates the growing number of states with antitrust standing rules that differ from federal law, a disparity which makes forum shopping likely and could greatly affect the pharmaceutical industry by creating a new class of potential plaintiffs for all antitrust claims in California. Nevertheless, courts should follow the California Supreme Court’s lead in Clayworth and liberally grant standing for antitrust claims in the pharmaceutical industry due to the nature of the industry and its history of price-fixing allegations.

Ultimate consumers would even have little incentive to join a class action. Hanover Shoe, Inc., 392 U.S. at 494.

69 Compare In re Brand Name Prescription Drugs Antitrust Litigation, 867 F. Supp. 1338, 1344 (N.D. Ill. 1994) (nothing plaintiffs alleged price-fixing between pharmaceutical manufacturers and wholesalers), with Clayworth v. Pfizer, Inc., 233 P.3d 1066, 1070 (Cal. 2010) (noting plaintiffs alleged price-fixing among pharmaceutical manufacturers). Their respective trial courts ruled on Clayworth in 2006 and In re Prescription Drugs in 1994. Compare Clayworth v. Pfizer, Inc., 83 Cal. Rptr. 3d 45, 50 (2008), rev’d, 233 P.3d 1066 (Cal. 2010), with In re Brand Name Prescription Drugs, 867 F. Supp. at 1338. The following companies were defendants in both In re Brand Name Prescription Drugs and Clayworth: Abbott Laboratories, Bristol Myers-Squibb Company, Merck & Co., Inc., Eli Lilly & Company, Johnson & Johnson, and Pfizer. Compare In re Brand Name Prescription Drugs, 867 F. Supp. at 1340 n.2 (listing defendants), with Clayworth, 233 P.3d at 1070 n.3 (listing defendants). The major difference between the cases is that the plaintiffs in In re Brand Name Prescription Drugs alleged that the wholesalers were part of the price-fixing conspiracy, while in Clayworth, the plaintiffs did not. Compare In re Brand Name Prescription Drugs, 867 F. Supp. at 1344 (plaintiffs alleged price-fixing between pharmaceutical manufacturers and wholesalers), with Clayworth, 233 P.3d at 1070 (plaintiffs alleged price-fixing among pharmaceutical manufacturers).

70 See Clayworth, 233 P.3d at 1086 (allowing suit against Manufacturers to proceed).

71 Id. at 1072.

72 See supra notes 53-54 and accompanying text.

73 See supra notes 55-57 and accompanying text.

74 See supra notes 58-63 and accompanying text.

75 See supra notes 64-70 and accompanying text.