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Restitution on Behalf of Indirect Purchasers: Opening the Backdoor to Illinois Brick

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But, this remedy was not selected.[1]

I. Introduction

In December 1998, the Federal Trade Commission (Commission) charged Mylan Laboratories (Mylan) with restraint of trade, monopolization, and conspiracy to monopolize the markets for two popular anti-anxiety drugs.[2]

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1. *See* Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972) (holding that states could not proceed as *parens patriae* on behalf of their citizens under Clayton Act § 4).

2. *See* Federal Trade Commission, *Mylan, Nation's Second Largest Generic Drug Maker, Charged with Restraint of Trade, Conspiracy & Monopolization* (Dec. 21, 1998), *at*

The Commission alleged that illegal activity by Mylan enabled the company to raise the wholesale price of one of the drugs, Lorazepam, from $7.30 to $190.00 per bottle.[3] The Commission accused the pharmaceuticals company of making excessive profits on drugs used to treat the elderly and the infirm.[4] Attorneys General from nearly a dozen states announced that they too would join in the suit.[5] They asserted both federal[6] and pendant state claims.[7]

The Commission's action against Mylan seems unremarkable given the high number of antitrust enforcement actions in recent years. The front pages of major newspapers now frequently feature stories concerning the latest antitrust cases.[8] These have included civil actions against Microsoft, Intel, Ameri-

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http://www.ftc.gov/opa/1998/9812/mylanpv.htm. The complaint charged that Mylan Laboratories (Mylan) violated Section 5 of the Federal Trade Commission Act by seeking exclusive license agreements for Lorazepam and Clorazepate and, despite no significant increase in its costs, by raising the prices it charged wholesalers, retail pharmacy chains, and other customers by between 2000 and 3000 percent. *Id.* at 2.

3. *Id.* at 1.

4. *See id.* (citing comments of William J. Baer, then Director, Bureau of Competition, Federal Trade Commission).

5. *Id.* Thirty-two states eventually joined the suit. FTC v. Mylan Labs., Inc., 62 F. Supp. 2d 25, 32 (D.D.C. 1999) (order granting in part and denying in part defendants' motions to dismiss).

6. *See Mylan*, 62 F. Supp. 2d at 40 (setting forth states' claims under Clayton Act). The states asserted federal claims for restitution and disgorgement under Section 16 of the Clayton Act, which permits plaintiffs to sue for injunctive relief "against threatened loss or damage by a violation of the antitrust laws." Clayton Act § 16, 15 U.S.C. § 26 (1994). The court noted that the holding in *Illinois Brick* that indirect purchasers are not injured within the meaning of the Clayton Act rested in part on the conclusion that permitting indirect purchasers to sue would create a serious risk of multiple liability for defendants. *Mylan*, 62 F. Supp. 2d at 41. The court dismissed the states' federal claims because disgorgement would raise the specter of multiple liability and allow the states to circumvent *Illinois Brick* through a novel interpretation of Section 16. *Id.* at 41-42.

7. *Mylan*, 62 F. Supp. 2d at 32 (setting forth state claims). The plaintiff states asserted claims for violation of state antitrust statutes as well as state unfair and deceptive practice statutes, variously referred to as consumer protection acts, consumers sales acts, deceptive trade practices acts, consumer fraud acts, or "Little FTC Acts." 1 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 654 n.938 (4th ed. 1997).

8. *See* James V. Grimaldi, *Microsoft Deal Seems Unlikely; Little Progress Seen in Talks to Settle Antitrust Case*, WASH. POST., Feb. 18, 2000, at E1 (reporting that Microsoft unlikely to settle in monopolization case brought by Justice Department); *Justice Department Investigating Newsprint Industry*, N.Y. TIMES, Feb. 18, 2000, at C4 (announcing investigation of possible anticompetitive conduct in newsprint industry); Jim Landers, *Global Mergers Fuel Questions About Need for International Trust Busting*, DALLAS MORNING NEWS, Feb. 14, 2000, at 1D (reporting that multinational companies overwhelm national antitrust agencies); *Tobacco Growers Sue Four Cigarette Makers on Antitrust Grounds*, WALL ST. J., Feb. 17, 2000, at B2 (announcing suit charging tobacco companies of colluding to undermine quota system that protects farmers by regulating how much tobacco is grown).

can Airlines, and Visa and Mastercard.[9] In addition, high-profile criminal prosecutions have led to the indictment of vitamin manufacturers engaged in an international cartel and the trial of executives at Archer Daniels Midland.[10]

The case against Mylan, however, was unique. The Federal Trade Commission sought $120 million in restitution[11] and disgorgement[12] of profits.[13] According to the Commission, this was the amount by which Mylan profited from illegally overcharging for its drugs.[14] The district court in *FTC v. Mylan Laboratories, Inc.*[15] concluded that the Federal Trade Commission Act (FTC Act)[16] gave the Commission authority to seek restitution and disgorgement of profits.[17] This was the first time a court has permitted the Commission to seek such relief in an antitrust case.[18]

Moreover, the Commission sought to recover this money on behalf of indirect purchasers.[19] Mylan sells the drugs it produces primarily to whole-

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9. Stephen M. Axinn, *Looking Back at Antitrust Law: New Model for New Economy*, N.Y. L.J., Nov. 29, 1999, at 6.

10. *Id.*

11. *See* FTC v. Mylan Labs., Inc., 62 F. Supp. 2d 25, 32 (D.D.C. 1999) (noting amount of damage demand). *See generally* 1 DAN B. DOBBS, DOBBS LAW OF REMEDIES § 4.1(1), at 555 (2d ed. 1993) (discussing nature of restitution). Dobbs explains that "[r]estitution measures the remedy by the defendant's gain and seeks to force disgorgement of that gain." *Id.* Restitution "differs in its goal or principle from damages, which measures the remedy by the plaintiff's loss and seeks to provide compensation for that loss." *Id.*

12. *See* SEC v. Huffman, 996 F.2d 800, 802 (5th Cir. 1993) (distinguishing disgorgement from restitution). Disgorgement is not precisely the same as restitution. *Id.* Disgorgement, like restitution, wrests ill-gotten gains from wrongdoers and prevents them from enriching themselves through their wrongs. *Id.* Unlike restitution, disgorgement does not aim to compensate the victims of wrongful acts. *Id.* In antitrust cases, however, the Clayton Act gives injured parties the right to recover the overcharge. Clayton Act § 4, 15 U.S.C. § 15 (1994). Thus, the Commission likely would have to use any disgorgement it recovers to compensate persons injured by the antitrust violation. For the purposes of this Note, the distinction is not significant.

13. Complaint for Injunctive and Other Equitable Relief, Federal Trade Commission v. Mylan Labs., Inc., Cv. 98-3114 (D.D.C. filed Dec. 21, 1998), *at* http://www.ftc.gov/os/1998/9812/mylancmp.htm; *see also* FTC v. Mylan Labs., Inc., 99 F. Supp. 2d 1, 5 n.2 (D.D.C. 1999) (order granting motion for reconsideration).

14. *See* Federal Trade Commission, *supra* note 2, at 1 (asserting that amount sought was "an estimate of the ill-gotten gains resulting from the illegal conduct").

15. 62 F. Supp. 2d 25 (D.D.C. 1999).

16. 15 U.S.C. §§ 41-58 (1994).

17. *See* FTC v. Mylan Labs., Inc., 62 F. Supp. 2d 25, 36-37 (D.D.C. 1999) (concluding that Section 13(b) of FTC Act authorizes Commission to seek equitable monetary relief).

18. *See infra* note 96 and accompanying text (noting that courts have permitted Commission to seek equitable monetary relief only in cases involving unfair or deceptive acts or practices).

19. *See* Federal Trade Commission, *supra* note 2, at 1 ("Where possible, the agency said, it would restore to consumers the monetary harm they have suffered.").

salers and retail pharmacy chains, who in turn sell them to consumers.[20] Thus, the consumers who bought the drugs for which Mylan overcharged were indirect purchasers. While the district court did not expressly permit the Commission to recover on behalf of indirect purchasers, it assumed that the Commission had authority to seek such relief.[21]

In *Illinois Brick Co. v. Illinois*,[22] however, the Supreme Court held that indirect purchasers are not injured within the meaning of the federal antitrust laws.[23] Thus, for over twenty years, *Illinois Brick* has barred indirect purchasers from recovering *damages* in antitrust cases.[24] Now, by permitting the Commission to proceed with its claims for *restitution*, the court in *Mylan* appears to have opened a backdoor through which indirect purchasers may recover for antitrust violations. Opening this door risks giving rise to the very problems that the Supreme Court sought to avoid in *Illinois Brick*: multiple

20. *Id.* at 2.

21. *See* FTC v. Mylan Labs., Inc., 99 F. Supp. 2d 1, 5 n.2 (D.D.C. 1999) (order granting motion for reconsideration) ("[Although] no court has addressed the specific issue of restitution on behalf of indirect purchasers, . . . the Court will assume that the FTC does have the authority to seek such relief."); FTC v. Mylan Labs., Inc., 62 F. Supp. 2d 25, 37 (D.D.C. 1999) (permitting Commission to seek disgorgement or any other form of equitable relief).

22. 431 U.S. 720 (1977).

23. *See* Illinois Brick Co. v. Illinois, 431 U.S. 720, 729 (1977) (holding that indirect purchasers cannot recover damages for violations of federal antitrust laws). In *Illinois Brick*, the Supreme Court considered whether indirect purchasers could recover damages from a manufacturer for antitrust violations on the theory that the direct purchaser "passed on" an illegal overcharge to them. *Id.* at 726. The Court reasoned that it had to either overrule *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), in which it had held that antitrust defendants could not use the pass-on theory as a defense, or bar indirect purchasers from using the theory against an alleged violator. *Illinois Brick*, 431 U.S. at 728-29. Allowing offensive but not defensive use of the theory would subject defendants to multiple liability because even though an indirect purchaser had already recovered for all or part of an overcharge passed on to it, a direct purchaser could still recover the full amount of the overcharge. *Id.* at 730. According to the Court, permitting the use of pass-on theories generally "would transform [antitrust] actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge – from direct purchasers to middlemen to ultimate consumers." *Id.* at 737. Because it concluded that the antitrust laws would be more effectively enforced by allowing direct purchasers to recover the full amount of the overcharge, the Court declined to allow each plaintiff potentially affected by the overcharge to introduce "massive evidence and complicated theories" in an attempt to recover the amount absorbed by it. *Id.* at 741 (quoting *Hanover Shoe*, 392 U.S. at 493) Thus, the Court held that direct purchasers are injured to the full extent of the overcharge paid by them, and that indirect purchasers are not injured by violations of the federal antitrust laws. *Id.* at 746.

24. *See* William H. Page, *The Limits of State Indirect Purchaser Suits: Class Certification in the Shadow of* Illinois Brick, 67 ANTITRUST L.J. 1, 1 (1999) ("The Court has steadfastly protected the *Illinois Brick* barrier from erosion in federal antitrust litigation." (citation omitted)); *see also* Kansas v. Utilicorp United, Inc., 497 U.S. 199, 219 (1990) (barring states from asserting claims on behalf of indirect purchasers under *parens patriae* provision of Clayton Act § 4).

liability for defendants,[25] complexity,[26] and discouraging private antitrust suits.[27]

In addition, the *Mylan* court permitted states with "Little FTC Acts"[28] that prompt courts to follow interpretations of federal law, or that permit the state to seek equitable relief, to seek restitution on behalf of indirect purchasers also.[29] Because the FTC Act gives the Commission authority to seek restitution on behalf of indirect purchasers,[30] the court reasoned that the states also may seek such relief under their Little FTC Acts.[31] In addition, many of the states' Little FTC Acts provide a private right of action.[32] Because these statutes direct courts to follow interpretations of federal law, and because the *Mylan* court assumed that the FTC Act permits the Commission to recover restitution on behalf of indirect purchasers, the *Mylan* decision may additionally provide indirect purchasers in some states with a private right of action under state law for antitrust violations.[33]

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25. *See Illinois Brick*, 431 U.S. at 731 (finding risk of multiple liability unacceptable).

26. *See id.* at 732 (observing that complexity of apportioning injury to indirect purchasers would increase costs of recovery).

27. *See id.* at 745 (noting that apportioning recovery among direct and indirect purchasers would reduce benefits to each plaintiff).

28. *See supra* note 7 (explaining nomenclature of state statutes prohibiting unfair and deceptive acts and practices).

29. FTC v. Mylan Labs., Inc., 99 F. Supp. 2d 1, 4-5 (D.D.C. 1999) (order granting motion for reconsideration) (reinstating claims for restitution and disgorgement on behalf of indirect purchasers by Alaska, Arkansas, Connecticut, Florida, Kentucky, Louisiana, Maine, Ohio, North Carolina, Oklahoma, South Carolina, Utah, Vermont, and West Virginia). Initially, the court had dismissed most of the claims by the plaintiff states for restitution on behalf of indirect purchasers. FTC v. Mylan Labs., Inc., 62 F. Supp. 2d 25, 43 (D.D.C. 1999). The court explained that it was dismissing the claims because restitution raises the same "specter of duplicative recoveries" as damages, which are barred by *Illinois Brick*, and because statutes or case law in each of the states prompts courts to follow federal statutes when interpreting state laws. *Id.* Because federal antitrust laws bar recovery by indirect purchasers, the court dismissed the states' claims. *Id.* On reconsideration, the court said it would look to its interpretation of the FTC Act, which permitted the Commission to recover equitable monetary relief on behalf of indirect purchasers, in interpreting state statutes and reinstated the states' claims. *Mylan*, 99 F. Supp. 2d at 4-5.

30. *See supra* note 21 and accompanying text (discussing court's conclusions regarding indirect purchasers).

31. *See* FTC v. Mylan Labs., Inc., 99 F. Supp. 2d 1, 5 n.2 (D.D.C. 1999) (order granting motion for reconsideration) ("As this Court had already held that the FTC could pursue equitable remedies, the Court reasoned that Idaho should be permitted to pursue similar kinds of equitable relief under [its Little FTC Act].").

32. 1 ABA SECTION OF ANTITRUST LAW, *supra* note 7, at 654.

33. *See id.* at n.940 (noting that state laws that defer to interpretations of FTC Act may permit private right of action for violation of FTC standard).

In Part II, this Note examines the authority of the Federal Trade Commission to seek equitable monetary relief.[34] This Note then considers whether *Illinois Brick* bars the Commission from seeking such relief in an antitrust case, and in particular, on behalf of indirect purchasers.[35] In Part III, this Note discusses the implications of the *Mylan* decision for enforcement of state antitrust laws.[36] Finally, this Note concludes that the *Mylan* court wrongly concluded that the Commission could recover equitable monetary relief and erroneously assumed that the Commission could seek such relief on behalf of indirect purchasers.[37]

II. Federal Trade Commission Authority to Seek Restitution

A. Section 13(b) of the Federal Trade Commission Act

In *Mylan*, the Commission sought an injunction, as well as restitution and disgorgement, under Section 13(b) of the FTC Act.[38] Section 13(b) does not expressly provide for equitable monetary relief; it permits the Commission to go into court and seek an injunction to stop ongoing or imminent violations of the FTC Act.[39] The *Mylan* court concluded that by seeking a permanent

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34. *See infra* notes 38-96 and accompanying text (examining whether FTC Act authorizes Commission to seek restitution).

35. *See infra* notes 97-206 and accompanying text (examining whether FTC Act authorizes Commission to seek restitution in antitrust cases).

36. *See infra* notes 207-47 and accompanying text (exploring implications for state antitrust laws of interpreting FTC Act to give Commission authority to seek restitution).

37. *See infra* notes 248-54 and accompanying text (concluding that *Mylan* was wrongly decided).

38. *See* Complaint for Injunctive and Other Equitable Relief, Federal Trade Commission v. Mylan Labs., Inc., Cv. 98-3114 (D.D.C. filed Dec. 21, 1998), *at* http://www.ftc.gov/os/1998/9812/mylancmp.htm (bringing action under Section 13(b) of FTC Act to secure permanent injunction and other equitable relief against Mylan).

39. Federal Trade Commission Act § 13(b), 15 U.S.C. § 53(b) (1994). Section 13(b) provides:

> (b) Temporary restraining orders; preliminary injunctions
> Whenever the Commission has reason to believe –
> that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and
> that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public –
> the Commission . . . may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing

injunction against Mylan, the Commission had invoked the court's "inherent equitable powers," and the court allowed the Commission to proceed with its claims for restitution and disgorgement.[40]

1. Construction

The legislative history of the FTC Act and subsequent amendments to the Act, including Section 13(b) itself, suggest that Congress did not intend Section 13(b) to authorize the Commission to seek equitable monetary relief.[41] The FTC Act prohibits "unfair methods of competition" – the antitrust prong of the Act – as well as "unfair or deceptive acts or practices."[42] When the FTC Act was enacted in 1914, Congress considered, but declined to provide, a private remedy for harm caused by violations of the Act.[43] Opponents of providing a private remedy argued that the vagueness of the prohibition against unfair methods of competition – which permits the Commission to define violations of the FTC Act on a case-by-case basis – made it unfair to penalize people for conduct that they may have had no reason to believe was unlawful at the time.[44] Although the Commission enforces the FTC Act against activities that would constitute per se violations of the federal antitrust

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> the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a *preliminary injunction* may be granted .... Provided further, That in proper cases the Commission may seek, and after proper proof, the court may issue, a *permanent injunction*....

Id. (emphasis added).

40. *See* FTC v. Mylan Labs., Inc., 62 F. Supp. 2d 25, 36-37 (D.D.C. 1999) (concluding, without citing *Illinois Brick*, that FTC may seek equitable monetary relief).

41. *See generally* Peter C. Ward, *Restitution for Consumers Under the Federal Trade Commission Act: Good Intentions or Congressional Intentions?*, 41 AM. U. L. REV. 1139, 1174-79 (1992) (arguing that Congress did not intend Section 13(b) to authorize Commission to seek restitution).

42. Federal Trade Commission Act § 5, 15 U.S.C. § 45(a)(1) (1994). Originally, the FTC Act only contained the prohibition on "unfair methods of competition"; the prohibition on "unfair and deceptive acts" was added in 1938. *See* Ward, *supra* note 41, at 1157-62 (discussing legislative history of FTC Act). This Note will only address "unfair methods of competition," the antitrust prong of the Act.

43. *See* Ward, *supra* note 41, at 1149 (noting that during debate members considered adding private cause of action for treble damages).

44. *See id.* at 1150 (citing remarks of members including Sen. Williams, 51 CONG. REC. 13,119 (1914)). Congress left it to the Commission to decide what practices constitute "unfair methods of competition." *See* Heater v. FTC, 503 F.2d 321, 324 (9th Cir. 1974) (citing remarks of Senator Newlands, principal sponsor of Act, regarding Commission power to define violations of Act, 51 CONG. REC. 13116 (1914)).

laws,[45] that does not change the fact that Congress intended to limit the remedies that the Commission could seek under the FTC Act.

In *Heater v. FTC*,[46] the Court of Appeals for the Ninth Circuit considered whether Commission authority to seek equitable monetary relief was consistent with this legislative history.[47] The Commission had asserted that its authority to issue administrative cease-and-desist orders,[48] the traditional remedy for violations of the FTC Act,[49] included ancillary equitable power to order restitution for consumers.[50] The *Heater* court rejected the Commission's assertion, concluding that such power would permit the Commission to order relief that would be given to private parties for harm caused by acts that occurred before the Commission had determined that those acts violated the statute.[51] The court noted that Congressional debate over the Act had centered on the breadth of the Commission's power to define "unfair" acts and the risk

45. *See infra* note 127 and accompanying text (explaining that Commission may proceed under FTC Act against violation of Clayton, Sherman, and Robinson-Patman Act).

46. 503 F.2d 321 (9th Cir. 1974).

47. *See* Heater v. FTC, 503 F.2d 321, 323-24 (9th Cir. 1974) (concluding that Congress limited consequences of violation of FTC Act to cease-and-desist order). In *Heater*, the Ninth Circuit considered whether the Commission's power to issue a cease-and-desist order included the power to order restitution of moneys obtained by "unfair and deceptive" business practices. *Id.* at 321. The court rejected the Commission's argument that it was an unfair practice for the petitioner to retain monies illegally obtained. *Id.* at 323. Such a construction of the Commission's power to define "unfair and deceptive" practices, the court reasoned, "would permit the Commission to order private relief for harm caused by acts which occurred before the Commission had declared a statutory violation." *Id.* After reviewing the legislative history, the court held that Congress did not give the Commission power to attach consequences retroactively to conduct occurring before it issued a cease-and-desist order. *Id.* at 324.

48. *See* Federal Trade Commission Act § 5(b), 15 U.S.C. § 45(b) (1994) (empowering Commission to issue cease-and-desist orders). Section 5(b) of the FTC Act empowers the Commission, after notice and hearing, to issue an order requiring a person found to have engaged in unfair methods of competition or unfair or deceptive acts or practices to "cease and desist" from such conduct. ABA SECTION OF ANTITRUST LAW, *supra* note 7, at 590.

49. ABA SECTION OF ANTITRUST LAW, *supra* note 7, at 589.

50. *See* Curtis Publ'g Co., 78 F.T.C. 1472, 1516-17 (1971) (asserting that FTC has authority to order refunds to consumers injured by respondent's unfair or deceptive acts). In asserting this power, the Commission relied upon the Supreme Court's assertion in *Jacob Siegel Co. v. FTC*, 327 U.S. 608 (1946), that "courts will not interfere with FTC cease-and-desist orders except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Curtis Publ'g Co.*, 78 F.T.C. at 1513. The remedy, however, must be reasonably related to the purpose of the Act, that is, elimination of the offending practice *in the future*. *See* Ward, *supra* note 41, at 1149 (concluding that Congress intended cease-and-desist power to "stop practices before they injured the public"). Neither the plain language of Section 5 nor the legislative history of the FTC Act supported this assertion of authority. *See id.* at 1145-57 (setting out legislative history of cease-and-desist power).

51. *See Heater*, 503 F.2d at 323 (noting that power to order restitution would permit private parties to receive monetary relief for conduct not yet defined as violation of FTC Act).

that a person would not know whether a particular practice was unlawful.[52] The court concluded that, in an effort to avoid that risk, Congress had limited the consequences of violation of the Act to a cease-and-desist order.[53]

Given this legislative history, it seems likely that, had Congress intended to substantially alter the consequences of violating the FTC Act, it would have done so expressly. Section 13(b), which was added to the FTC Act in 1973 as an amendment to the Trans-Alaska Pipeline Act,[54] does not expressly authorize the Commission to seek equitable monetary relief from those who have violated the Act.[55] It empowers the Commission to go to court and seek a preliminary injunction against anyone it believes "is violating, or is about to violate, any provision of law enforced by the . . . Commission."[56] Congress intended this provision to prevent those who violate the FTC Act or other Commission-enforced law from continuing their activities after the Commission initiates a complaint but before it issues a cease-and-desist order.[57] Section 13(b) also provides that the Commission may seek a permanent injunction in "proper cases."[58] The Senate committee report on the legislation indicates that this provision was intended to make the prosecution of routine fraud cases more efficient by allowing the Commission to seek a permanent injunction rather than issuing a cease-and-desist order.[59] Thus, neither the language nor the legislative history of Section 13(b) indicates that, in granting the Commission

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52. *See id.* at 324 (noting that "the critical issue around which the Congressional debate over the . . . Act centered was the breadth of the Commission's power to define what would constitute 'unfair acts'").

53. *See id.* at 324 ("[T]o reconcile the Commission's broad power with the need for a specific notice to an individual who must conform his behavior to the terms of the Act, Congress limited the consequences of violation of the Act to a cease and desist order.").

54. Trans-Alaska Pipeline Act, Pub. L. No. 93-153, 87 Stat. 576 (1973).

55. *See supra* note 39 (setting out relevant portions of Section 13(b)).

56. Federal Trade Commission Act § 13(b)(1), 15 U.S.C. § 53(b) (1994).

57. *See* 119 CONG. REC. 36,610 (1973) (Conference Committee Report) (explaining that Section 13(b) would authorize Commission to seek preliminary injunctions to halt violations pending issuance of cease-and-desist order); *see also* Ward, *supra* note 41, at 1176 (citing remarks of Representative Smith) ("[It] is only good sense that where there is a probability that the act will eventually be found illegal and the perpetrator ordered to cease, that some method be available to protect innocent third parties while the litigation winds its way through final decision.").

58. Federal Trade Commission Act § 13(b), 15 U.S.C. § 53(b) (1994). "Proper cases" include those in which the FTC relies on established precedent and "does not desire to further expand upon the prohibitions of the Federal Trade Commission Act through the issuance of a cease-and-desist order." FTC v. H.N. Singer, Inc., 668 F.2d 1107, 1111 (9th Cir. 1982) (quoting S. REP. NO. 93-151, at 30-31 (1973)).

59. *See* S. REP. NO. 93-151, at 30-31 (1973) (noting that ability to seek permanent injunction will save resources and allow Commission to dispose of fraud cases more efficiently).

the authority to seek an injunction, Congress intended to grant the Commission authority to seek equitable monetary relief.

The addition of Section 19 to the FTC Act one year after the enactment of Section 13(b) also suggests that Congress did not intend that Section 13(b) give the Commission authority to seek equitable monetary relief.[60] As originally drafted, the legislation would have allowed the Commission to seek consumer redress, including restitution, for injury caused by unfair or deceptive acts or practices that were the subject of a cease-and-desist order.[61] As when Congress first enacted the FTC Act, the bill met with criticism that it would punish people for conduct that they may have had no reason to believe was unlawful.[62] In the end, Congress limited the Commission's authority to seek redress to situations in which the respondent was subject to a cease-and-desist order for engaging in unfair or deceptive acts or practices that "a reasonable man would have known under the circumstances were dishonest or fraudulent."[63] Furthermore, the Commission must seek such redress within three years of when the acts or practices occurred.[64]

2. *Interpretation by the Courts*

The Commission nonetheless has been able to evade the limits imposed on its authority to seek redress under Section 19 by seeking restitution under Section 13(b) instead. After passage of Section 13(b), the Commission brought a number of cases in which courts had to determine what types of ancillary relief the Commission could obtain when seeking a preliminary injunction.[65] In one such case, the Court of Appeals for the D.C. Circuit concluded that a "hold separate" order – which requires an acquiring company to hold separate the assets acquired through a merger pending determination of the merger's legality – was "in form and effect a preliminary restraint."[66] In a similar case,

60. Federal Trade Commission Act § 19, 15 U.S.C. § 57(b) (1994).

61. S. 986, 92d Cong. (1971). Section 13(b) was lifted from this bill, further suggesting that Congress did not contemplate that that section would provide any relief beyond injunction. Ward, *supra* note 41, at 1179-80.

62. *See* 117 CONG. REC. 39,849 (1971) (statements of Sens. Hurska, Magnuson, and Cook).

63. Federal Trade Commission Act § 19, 15 U.S.C. § 57b(a)(2) (1994). Section 19 also provides for redress when respondent has violated an FTC Trade Regulation Rule. 15 U.S.C. § 57b(a)(1). Note that Section 19 does not provide for restitution in cases that involve unfair methods of competition.

64. Federal Trade Commission Act § 19, 15 U.S.C. § 57b(d) (1994).

65. *See* FTC v. Southwest Sunsites, Inc., 665 F.2d 711, 717 (5th Cir. 1982) (freezing assets); FTC v. Weyerhaeuser Co., 665 F.2d 1072, 1084 (D.C. Cir. 1981) (holding assets separate); FTC v. Southland Corp., 471 F. Supp. 1, 4 (D.D.C. 1979) (same).

66. *Weyerhaeuser*, 665 F.2d at 1084 (holding that district court may consider restraints other than injunction under Section 13(b)).

the Court of Appeals for the Fifth Circuit held that courts, in granting a preliminary injunction under Section 13(b), may freeze the assets of a corporation alleged to have engaged in unfair or deceptive acts or practices so that the assets would be available in an action for redress under Section 19.[67] Both courts reasoned that Section 13(b), by giving courts the power to grant a preliminary injunction, also authorizes a court to exercise "the full range of equitable remedies traditionally available to it."[68] They concluded that, in exercising this inherent equitable power, a district court could order relief, ancillary to its power to order an injunction, that would prevent dissipation of assets or funds that might constitute part of the relief eventually ordered.[69]

In concluding that they could issue equitable relief beyond what Section 13(b) expressly provided, these courts relied upon *Porter v. Warner Holding Co.*,[70] in which the Supreme Court held that a district court could order restitution of excess rent charged by Warner Holding Company in violation of the Emergency Price Control Act (EPC Act).[71] The EPC Act provided that when the Price Administrator found that a person was charging prices higher than the Act permitted, the Administrator could seek a temporary or permanent injunction, restraining order, or other order to enforce com-

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67. *See Southwest Sunsites*, 665 F.2d at 722 (holding that Section 13(b) invokes inherent equitable powers of district courts).

68. *Id.* at 718; *see also Weyerhaeuser*, 665 F.2d at 1084 (concluding that by authorizing preliminary injunctive relief Section 13(b) "posts a clear entrance sign for FTC provisional relief applications").

69. *See Southwest Sunsites*, 665 F.2d at 718 (citing SEC v. First Fin. Group, 645 F.2d 429 (5th Cir. 1981) (appointing receiver); Commodity Futures Trading Comm'n v. Muller, 570 F.2d 1296, 1301 (5th Cir. 1978) (freezing defendant's assets); SEC v. Manor Nursing Ctr., 458 F.2d 1082, 1106 (2d Cir. 1972) (freezing assets pending transfer to trustee)); *see also Weyerhaeuser*, 665 F.2d at 1084 (concluding that hold separate order "is not outside the range of relief a 13(b) application may warrant").

70. 328 U.S. 395 (1946).

71. *See* Porter v. Warner Holding Co., 328 U.S. 395, 403 (1946) (holding that district court erred in not considering restitution order). In *Porter*, the Supreme Court considered whether the Emergency Price Control Act of 1942 gave a district court the power to order restitution of rents collected by a landlord in excess of the permissible maximums. *Id.* at 396. The Administrator of the Office of Price Control sought an injunction against, and restitution from, Warner Holding Co. for exceeding the rent ceilings. *Id.* The Court found that by seeking an injunction against Warner, the Administrator had invoked the inherent equitable powers of the court. *Id.* at 398. The Court noted that those equitable powers "assume an even broader and more flexible character" when the public interest is at stake. *Id.* A court could exercise the full scope of its equitable powers unless limited by the statute. *Id.* In framing remedies, the Court explained, courts must act primarily to give effect to the purposes of the Act and the policy of Congress. *Id.* at 400. The Court concluded that neither the language nor the legislative history of the statute restricted the equity powers of the court, and that ordering restitution of illegal gains would encourage future compliance with the Act and thereby further the statute's policy of preventing inflation. *Id.* at 400-01.

pliance with the Act.[72] The Supreme Court concluded that once the Administrator invoked the equitable power of the court by seeking an injunction, "all the inherent equitable powers of the district court are available."[73] Moreover, the Court asserted, "[T]he comprehensiveness of this equitable [power] is not to be denied or limited in the absence of a clear and valid legislative command."[74] The Court found that the language of the EPC Act did not restrict the courts' equitable power and, consequently, concluded that a district court could enter an order requiring disgorgement of profits acquired in violation of the Act.[75]

The Ninth Circuit relied upon *Porter* when it became the first court to hold that Section 13(b), by giving a district court authority to grant a permanent injunction, also gave a court authority to grant equitable monetary relief.[76] In *FTC v. H.N. Singer, Inc.*,[77] the Commission sought restitution of monies obtained through a fraudulent scheme to sell business opportunities.[78] The defendants argued that the Commission could only seek restitution as expressly provided for in Section 19; in cases in which Section 19 did not apply, therefore, the Commission was limited to seeking an injunction under Section

72. *Id.* at 397.

73. *Id.* at 398-99; *see also* Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 296 (1960) (holding that in action to enjoin unlawful discharge, court may order restitution for employees of wages lost due to such discharge). In *Robert DeMario Jewelry*, the Supreme Court reaffirmed its adherence to the doctrine of inherent equitable power set out in *Porter*. The Court held that the Fair Labor Standards Act, which gave district courts the power to enjoin employers from illegally discharging employees who sought enforcement of the Act, also empowered courts to order restitution of wages lost due to such a discharge. *Id.* at 296. In doing so, the Court expanded upon the contention in *Porter* that any limitation on a court's inherent equitable power must be clearly set out by Congress and asserted that "[w]hen Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes." *Id.* at 291-92 (quoting Clark v. Smith, 39 U.S. (13 Pet.) 195, 203).

74. *Porter*, 328 U.S. at 398.

75. *See id.* at 398-99 (noting that "the language of [the statute] admits of no other conclusion"). The Court also concluded that "the term 'other order' contemplates a remedy other than that of an injunction or restraining order." *Id.* at 399. In *Mitchell v. Robert DeMario Jewelry*, 361 U.S. 288, 296 (1960), however, the Court rejected that distinction, noting that "[t]he applicability of this principle is not to be denied [because *Porter*] went on to find in the language of the statute affirmative confirmation of the power to order reimbursement." *Id.*

76. *See* FTC v. H.N. Singer, Inc., 668 F.2d 1107, 1111 (9th Cir. 1982) (relying on *Porter* to hold that Section 13(b) giving court power to grant injunction also gives court power to grant restitution).

77. 668 F.2d 1107 (9th Cir. 1982).

78. *See* FTC v. H.N. Singer, Inc. 668 F.2d 1107, 1109 (9th Cir. 1982) (noting that Commission sought refund of moneys paid by franchisees for pizza distribution franchises sold by defendants).

13(b).[79] The Ninth Circuit rejected the defendant's argument, noting that Section 19 states that the remedies it provides "are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law."[80] Thus, the court concluded that there was no "necessary or inescapable inference" that Congress, in enacting Section 19, intended to restrict the broad equitable power that Section 13(b) apparently granted to the district court.[81]

3. *Applying* Porter

Since *Singer*, four courts of appeals and numerous district courts have permitted the Commission to seek equitable monetary relief under Section 13(b) for violations of the FTC Act that involved unfair or deceptive acts or practices.[82] Despite this apparent consensus, there is reason to doubt that Section 13(b) grants such authority to the courts.[83] In *Porter*, the Supreme Court explained that the inherent equitable power of the district court could be limited by the plain language of the statute or "by a necessary and inescapable inference."[84] Although Section 13(b) does not expressly deny courts the power to grant restitution, Section 19 raises "a necessary and inescapable inference" that Congress did not intend for the Commission to have the authority to seek such relief.[85] As noted earlier, Section 19 authorizes the Commission to seek restitution only under narrowly defined conditions, indicating that

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79. *Id.* at 1113.

80. *Id.*

81. *See id.* at 1112 (quoting Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946)).

82. *See* FTC v. Febre, 128 F.3d 530, 534 (7th Cir. 1997) (granting restitution and disgorgement); FTC v. Gem Merchandising Corp., 87 F.3d 466, 470 (11th Cir. 1996) (concluding that Section 13(b) permits district court to order disgorgement of illegally obtained funds); FTC v. Pantron I Corp., 33 F.3d 1088, 1102 (9th Cir. 1994) (citing with approval FTC v. H.N. Singer, Inc., 668 F.2d 1107 (9th Cir. 1982) (granting restitution)); FTC v. Security Rare Coin & Bullion Corp., 931 F.2d 1312, 1315 (8th Cir. 1991) (holding that Section 13(b) empowers district court to grant equitable monetary relief); *see also* FTC v. US Sales Corp., 785 F. Supp. 737, 752 (N.D. Ill. 1992) (concluding that court's power to issue permanent injunction includes power to order restitution); FTC v. National Bus. Consultants, 781 F. Supp. 1136, 1141 (E.D. La. 1991) (determining that Section 13(b) empowers district court to impose restitution).

83. *See* 119 CONG. REC. 36,611 (1973) (noting that Commission characterized Section 13(b) as "'gap-filling' measure" that would not expand reach of Commission's authority).

84. *See* Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946). The Court asserted:

> Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction."

Id. (quoting Brown v. Swann, 36 U.S. (10 Pet.) 497, 503).

85. *See* Ward, *supra* note 41, at 1191-92 (noting that conclusion that Section 13(b) provides unrestricted means of obtaining restitution creates conflict with Section 19).

Congress intended to limit the Commission's authority to seek such relief.[86] But, Section 19 states that the relief provided is "in addition to, and not in lieu of," other available remedies, suggesting that Congress intended to expand the Commission's authority, not limit authority it had granted a year earlier in Section 13(b).[87] Finally, had Section 13(b) granted the Commission unrestricted authority to seek restitution, the relief provided for in Section 19 – enacted a year after the *same* Congress enacted Section 13(b) – would be superfluous.[88]

Porter also made clear that in framing remedies, courts must "act primarily to effectuate the policy of . . . the Act."[89] The Court explained that courts exercising their inherent equitable powers must give effect to the statutory purpose and the policy of Congress.[90] By allowing the Commission to seek unrestricted restitution under Section 13(b), courts would undermine the

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86. *See supra* text accompanying notes 61-64 (describing limitations on FTC's authority to seek redress under Section 19).

87. *See* Federal Trade Commission Act § 19(e), 15 U.S.C. § 57(b)(e) (1994) ("Remedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law."). In addition, the legislative history of Section 19 clearly indicates that Congress thought it was granting the Commission new authority. During debate on Section 19, Senator Magnuson, the bill's sponsor, declared:

> No longer will the . . . Commission be confined to slapping wrists of persons who engage in unfair or deceptive acts or practices and telling them not to do it again. The bill authorizes the . . . Commission to not only bring a halt to unfair or deceptive acts or practices but also to go into court and ask a judge to order consumer redress for those people who have been injured by such acts or practices.

120 CONG. REC. 40,711-12 (remarks of Senator Magnuson). That the bill's chief sponsor believed Congress was expanding the Commission's remedial authority when it enacted Section 19 negates the argument made by the *Singer* court that Section 19(e), which provides that "[n]othing in this section shall be construed to affect any authority of the Commission under any other provision of law," 15 U.S.C. § 57(b)(e), meant that relief provided in Section 13(b) was not to be limited by Section 19. FTC v. H.N. Singer, Inc., 668 F.2d 1107, 1113 (9th Cir. 1982).

88. *See* Reply Memorandum of Points and Authorities in Further Support of Defendants' Motion to Dismiss at 8, FTC v. Mylan Labs., Inc., 62 F. Supp. 2d 25 (D.D.C. 1999) (Cv. 98-03114) (noting that nothing in language or legislative history of statute indicates Congress intended Section 19 relief to be duplicative); *see also* Ward, *supra* note 41, at 1192 (concluding that "what Congress did so specifically in one section, it would not have left for implication in another").

89. *Porter*, 328 U.S. at 400; *see also* Ward, *supra* note 41, at 1190 (noting that application of *Porter* doctrine requires that two criteria be met); Michael S. Kelly & Bilal Sayyed, *FTC's Quest for Money Damages: An Unauthorized Power Grab*, LEGAL BACKGROUNDER (Washington Legal Foundation, Washington, D.C.), July 11, 1999, at 3 (same).

90. *See* Porter v. Warner Holding Co., 328 U.S. 395, 400 (1946) (noting that inherent equitable power authorizes court "to decree restitution . . . to give effect to the policy of Congress" (quoting Clark v. Smith, 39 U.S. (13 Pet.) 195, 203)).

policy of the FTC Act that the Commission provide prospective guidance as opposed to seeking redress for past wrongs.[91] As discussed above, Congress reconciled the Commission's broad power to declare conduct illegal with the need to provide notice by limiting the consequences of violating the FTC Act to a cease-and-desist order.[92] Nothing in the language or legislative history of Section 13(b) suggests that its enactment changed this policy against retroactive relief.[93] Moreover, when Congress authorized the Commission to seek redress in Section 19, it responded to precisely the same concerns regarding retroactive relief by allowing the Commission to seek redress only when a reasonable person would have known that the conduct was dishonest or fraudulent.[94]

Thus, despite the apparent consensus among courts, *Porter* does not necessarily support the holding in *Singer* that the Commission may seek restitution under Section 13(b). Furthermore, in *Mylan*, the Commission alleged that the company had engaged in unfair methods of competition.[95] *Singer* and all of the cases in which courts have followed *Singer* involved unfair or deceptive acts or practices, not unfair methods of competition.[96] Thus, the cases are distinguishable.

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91. *See* 51 CONG. REC. 13116 (1914) (remarks of Senator Newlands). Senator Newlands, the principal sponsor of the Act, stated that Congress wanted "not to punish, but to secure higher standards of conduct, by rules that will be laid down by this commission and sustained by the court, and which will have an educational effect upon the commerce of the country." *Id.*

92. *See* FTC v. Heater, 503 F.2d 321, 324 (9th Cir. 1974) (asserting that cease-and-desist authority does not empower Commission to seek retroactive relief); *see also* FTC v. Ruberoid Co., 343 U.S. 470, 473 (1952) ("Orders of the . . . Commission are not intended to . . . exact compensatory damages for past acts, but to prevent illegal practices in the future."); FTC v. Cement Inst., 333 U.S. 683, 706 (1948) (asserting that purpose of Commission is "not to punish or to fasten liability on respondents for past conduct but to ban specific practices for the future in accordance with the general mandate of Congress").

93. *See supra* notes 57-59 (describing purpose for enacting Section 13(b)).

94. *See supra* notes 63-64 and accompanying text (noting that Commission can seek redress only when conduct violates rule or reasonable person would have known conduct was "dishonest or fraudulent").

95. Complaint for Injunctive and Other Equitable Relief, Federal Trade Commission v. Mylan Labs., Inc., Cv. 98-3114 para. 18 (D.D.C. filed Dec. 21, 1998), *at* http://www.ftc.gov/os/1998/9812/mylancmp.htm.

96. *See* FTC v. H.N. Singer, Inc., 534 F. Supp. 24, 25 (N.D. Cal. 1981) (alleging fraudulent scheme to sell business opportunities); *see also* FTC v. Febre, 128 F.3d 530, 530 (7th Cir. 1997) (charging unfair and deceptive practices in advertising, promoting, and selling work-at-home opportunities and financial services); FTC v. Gem Merchandising, 87 F.3d 466, 467 (11th Cir. 1996) (alleging unfair practices in telemarketing medical alert devices); FTC v. Security Rare Coin & Bullion Corp., 931 F.2d 1312, 1313 (8th Cir. 1991) (alleging fraudulent marketing of rare coins).

B. In Antitrust Cases

Until *Mylan*, no court had considered whether the Commission could seek equitable monetary relief in a case involving unfair methods of competition.[97] In concluding that the Commission could proceed with its claims for restitution and disgorgement, the *Mylan* court relied upon the progeny of *Singer*,[98] observing that "five courts of appeals and numerous district courts have permitted the FTC to pursue monetary relief under Section 13(b) . . . [b]ased on the principle of statutory construction set forth in *Porter*."[99] Cases involving unfair methods of competition (antitrust cases), however, raise additional questions about the Commission's authority to seek restitution.

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97. *See* FTC v. Mylan Labs., Inc., 99 F. Supp. 2d 1, 4-5 (D.D.C. 1999) (order granting motion for reconsideration) (noting that "no court has addressed the specific issue of restitution on behalf of indirect purchasers"). *But see* 1 ABA SECTION OF ANTITRUST LAW, *supra* note 7, at 604 (suggesting that one court has granted restitution in two antitrust cases). In *FTC v. Abbott Labs.*, 1992-2 Trade Cas. (CCH) ¶ 69,996 (D.D.C. 1992) (Gesell, J.), *dismissed on other grounds*, 853 F. Supp. 526 (D.D.C. 1994), the district court denied a motion to dismiss the Commission's claims for a permanent injunction and restitution, noting that "[w]hether or not the Court should issue a permanent injunction and/or order restitution must await trial." *Id.* at 69,996. In a subsequent ruling in the case, however, the court said that "the FTC's prayer for restitution may prove to be beyond the Court's equitable authority since the FTC seeks to vindicate the public interest, not to restore to the agency its losses due to alleged misconduct." *Id.* at ¶ 70,087. The court seemed to draw the distinction made *infra* Part II B, that is, quite apart from whether the Commission has authority to seek restitution, it may not seek such a remedy on behalf of indirect purchasers in an antitrust case. In any case, *Abbott Labs.* did not resolve the issue of whether the FTC could seek restitution in an antitrust case. In *American Home Products Corp.*, 5 Trade Reg. Rep. (CCH) ¶ 23,209 (D.D.C. June 11, 1992), two infant formula manufacturers agreed to settle bid rigging charges. The settlement agreement required the companies to deliver 3.6 million pounds of infant formula to the Department of Agriculture. American Home Products Corp., 5 Trade Reg. Rep. (CCH) ¶ 23,209 (D.D.C. June 11, 1992). Although the district court was required to approve the settlement agreement, its approval does not constitute resolution of any legal issues, including whether the Commission has authority to seek restitution in an antitrust case.

98. *See Mylan*, 99 F. Supp. 2d at 4-5 (citing FTC v. Febre, 128 F.3d 530, 534 (7th Cir. 1997); FTC v. Gem Merchandising, 87 F.3d 466, 470 (11th Cir. 1996); FTC v. Patron, 33 F.3d 1088, 1102 (9th Cir. 1994); FTC v. Security Rare Coin & Bullion Corp., 931 F.2d 1312, 1313 (8th Cir. 1991)).

99. FTC v. Mylan Labs., Inc., 62 F. Supp. 2d 25, 37 (D.D.C. 1999). The court included in its count the Fifth Circuit's decision in *FTC v. Southwest Sunsites Inc.*, 665 F.2d 711 (5th Cir. 1982). In that case, however, the Commission sought an asset freeze in conjunction with a preliminary injunction. *Southwest Sunsites*, 665 F.2d at 714. The court granted the asset freeze, reasoning that it would preserve the possibility of an action for consumer redress under Section 19. *Id.* at 718. Thus, the Fifth Circuit has not held in *Southwest Sunsites* or any other case that the Commission may seek equitable monetary relief.

1. "Necessary and Inescapable Inference"

The elaborate enforcement provisions for remedying antitrust violations would seem to give rise to a "necessary and inescapable inference"[100] that Congress did not intend to authorize the Commission to recover equitable monetary relief under Section 13(b). Recent Supreme Court precedent indicates the Court will draw such an inference "where Congress has provided 'elaborate enforcement provisions' for remedying the violation of a federal statute."[101] In *Meghrig v. KFC Western, Inc.*,[102] the Court concluded that when elaborate remedial provisions are in place, "it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under the statute."[103]

In antitrust cases, Congress has provided such "elaborate enforcement provisions." As discussed above, under Section 13(b), the Commission may ask a court to temporarily enjoin unfair methods of competition, and in "proper cases" may also seek a permanent injunction.[104] The Commission also

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100. Porter v. Warner, 328 U.S. 395, 398 (1946).

101. Meghrig v. KFC W., Inc., 516 U.S. 479, 487-88 (1996) (quoting Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 14 (1981)); *see also* Mertens v. Hewitt Assocs., 508 U.S. 248, 254 (1993) (declining to infer action for restitution because "statute's carefully crafted and detailed enforcement scheme provide[d] strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly").

102. 516 U.S. 479 (1996).

103. *See* Meghrig v. KFC W., Inc., 516 U.S. 479, 488 (1996) (concluding that Resource Conservation and Recovery Act does not permit recovery of prior cost of cleaning up toxic waste). In *Meghrig*, the Supreme Court considered whether the citizen suit provision of the Resource Conservation and Recovery Act of 1976 (RCRA) permits the recovery of past costs for toxic waste cleanup. 516 U.S. at 481. The plain language of the statute permits citizens to seek a mandatory injunction that orders a responsible party to undertake cleanup, or a prohibitory injunction that restrains further RCRA violations. *Id.* at 484. Because RCRA expressly provides for these remedies, the Court concluded that the statute did not contemplate other remedies, including the award of past cleanup costs. *Id.* Moreover, because RCRA permits a party to bring suit only if the waste at issue "may present an imminent and substantial endangerment," the Court concluded that the statute provides a remedy for present or future harms, but not for past cleanup costs. *Id.* at 485-86. The Court rejected an argument by the Government, as amicus, that had the suit been brought while the waste posed an imminent endangerment, plaintiff could seek restitution. *Id.* at 487 (citing Porter v. Warner Holding Co., 328 U.S. 395 (1946) (holding that courts retain inherent authority to award any equitable remedy that Congress has not expressly taken away from them)). "[W]here Congress has provided 'elaborate enforcement provisions' for remedying the violation of a federal statute" the Court asserted, "'it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under' the statute." *Meghrig*, 516 U.S. at 487-88 (quoting Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 14-15 (1981)). Consequently, the Court concluded that RCRA does not permit a private party to recover the costs of prior cleanup. *Id.* at 488.

104. Federal Trade Commission Act § 13(b), 15 U.S.C. § 53(b) (1994).

may issue an administrative cease-and-desist order against those who engage in unfair methods of competition.[105] For violations of cease-and-desist orders, district courts may impose a civil penalty and "such other and further equitable relief as they deem appropriate."[106] The Department of Justice may seek to enjoin violations of the Sherman and Clayton Acts.[107] The Department also may seek other types of equitable relief, including preliminary injunctive relief, divestiture, rescission, and forfeiture (but not monetary relief), "to prevent and restrain" Sherman and Clayton Act violations.[108] It may enter consent decrees to end antitrust violations and seek fines for violations of such decrees.[109] The Department also may seek criminal sanctions for clear, purposeful antitrust violations,[110] including imprisonment and fines as set out in the United States Sentencing Commission's Sentencing Guidelines.[111] Finally, and perhaps most importantly, Section 4 of the Clayton Act gives the United States, private plaintiffs, and state and local governments the right to recover treble damages for injury to their "business or property" caused by an antitrust violation.[112]

In *Meghrig*, the language of the statute at issue, the Resource Conservation and Recovery Act (RCRA), provided for prospective relief; it permitted private citizens to seek to enjoin further violations of the Act when the contam-

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105. Federal Trade Commission Act § 5(b), 15 U.S.C. § 45(b) (1994).

106. Federal Trade Commission Act § 5(*l*), 15 U.S.C. § 45(*l*) (1994).

107. *See* Sherman Act §§ 1-7, 15 U.S.C. §§ 1-7 (1994) (prohibiting contracts, combinations, conspiracies in restraint of trade and monopolization); Clayton Act §§ 1-20, 15 U.S.C. §§ 12-27 (1994) (barring price discrimination and mergers that lessen competition).

108. Clayton Act § 15, 15 U.S.C. § 25 (1994).

109. ABA SECTION OF ANTITRUST LAW, *supra* note 7, at 692-93.

110. *Id.* at 662.

111. *See* 18 U.S.C. §§ 3571-3572 (1994) (setting out factors courts should consider when imposing prison terms and fines).

112. Clayton Act § 4, 15 U.S.C. § 15(a) (1994); *see also* Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972) (holding that states could not recover damages as *parens patriae* on behalf of their citizens under Section 4). In *Hawaii v. Standard Oil Co.*, the Supreme Court asserted that the legislative history of Section 4 "makes it quite plain that the United States was authorized to recover . . . only for those injuries suffered in its capacity as a consumer of goods and services." 405 U.S. at 265. When Congress amended Section 4 in 1955 to permit the United States to seek damages for injury to "its business or property," the Senate Committee Report on the legislation noted that "[t]he United States is, of course, amply equipped with the criminal and civil process with which to enforce the antitrust laws." *Id.* (quoting S. REP. NO. 84-422, at 3 (1955)). "The proposed legislation, quite properly, treats the United States solely as a buyer of goods and permits the recovery of actual damages suffered." *Id.* (quoting S. REP. NO. 84-422, at 3 (1955)). Moreover, nothing in the legislative history of Section 13(b) indicates Congress intended to alter this remedial scheme limiting the extent to which the federal government could seek monetary relief to damages to its own "business and property." *See supra* notes 54-59 and accompanying text (discussing legislative history of Section 13(b)).

ination at issue "may present an imminent and substantial endangerment."[113] Like the RCRA provision at issue in *Meghrig*, the language of Section 13(b) provides for prospective relief, authorizing the Commission to seek injunctive relief when a person "is violating, or is about to violate," the laws enforced by the Commission.[114] Nonetheless, in *Meghrig*, as in *Mylan*, the Government invoked *Porter* in an effort to persuade the court to imply a remedy for a past violation.[115] After examining the complex remedial schemes in RCRA and the Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA), the Supreme Court held that a private citizen could not seek to recover the costs of past cleanup under RCRA.[116] This holding suggests that, given the "elaborate enforcement provisions"[117] for remedying antitrust violations, the Court might infer that Congress, by permitting the government to obtain an injunction under Section 13(b), did not "intend[ ] to authorize by implication"[118] additional remedies, including restitution and disgorgement.[119]

The plaintiffs in *Meghrig*, however, could not seek an injunction because, at the time of the suit, the contamination did not "present an imminent and substantial endangerment."[120] The *Meghrig* Court declined to decide whether RCRA permitted private parties seeking an injunction to recover cleanup

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113. Meghrig v. KFC W., Inc., 516 U.S. 479, 481-82 (1996) (quoting 42 U.S.C. § 6972(a)(1)(B) (1994)).

114. Federal Trade Commission Act § 13(b), 15 U.S.C. § 53(b) (1994).

115. *Meghrig*, 516 U.S. at 487 (arguing as *amicus curiae*).

116. *Id.* at 488.

117. *Id.* at 487.

118. *Id.* at 488.

119. *See also* Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972) (holding that Clayton Act did not permit states to sue for damages on behalf of their citizens for antitrust violations). In *Hawaii v. Standard Oil Co.*, the Supreme Court declined to read additional remedies into the antitrust laws, asserting that Congress had particular purposes for enacting the remedies that it did. 405 U.S. at 262. The Court asserted:

> In enacting these laws, Congress had many means at its disposal to penalize violators. It could have, for example, required violators to compensate federal, state, and local government for the estimated damage to their respective economies caused by the violations. But, this remedy was not selected. Instead, Congress chose to permit all persons to sue to recover three times their actual damages every time they were injured in their business or property by an antitrust violation. By offering potential litigants the prospect of a recovery in three times the amount of their damages, Congress encouraged these persons to serve as "private attorneys general."

Id. The Court further noted that it would "insist upon a clear expression of a congressional purpose" before permitting additional remedies for antitrust violations. *Id.* at 264.

120. *See* Meghrig v. KFC W., Inc., 516 U.S. 479, 482 (1996) (reciting plaintiff's claim that contamination had *previously* posed danger and that defendants were responsible for "equitable restitution").

costs that arise when contamination still presents an imminent and substantial endangerment.[121] In *Mylan*, by contrast, the Commission was seeking an injunction, in addition to restitution and disgorgement, and thus was invoking the equitable powers expressly provided for in the statute.[122] Thus, the question of whether the Court, given the "elaborate enforcement provisions" for remedying antitrust violations, would infer that Congress did not "intend[ ] to authorize by implication" remedies not expressly provided for remains unanswered.[123]

2. *"The Policy of the Act"*

Section 5 of the FTC Act contains the prohibition on unfair methods of competition.[124] As noted above, Congress left it to the Commission and the courts to determine what conduct constitutes unfair competition.[125] The Commission may proceed under Section 5 against violations of the Clayton, Sherman, and Robinson-Patman Acts[126] (the antitrust laws).[127] In *Mylan*, for example, the Commission alleged that Mylan had violated Section 5 by monopolizing and conspiring to monopolize the markets for two of its drugs,[128]

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121. *See id.* at 488 (noting that Court had not "consider[ed] whether a private party could seek to obtain an injunction requiring another party to pay cleanup costs which arise after a RCRA citizen suit has been properly commenced").

122. *See* FTC v. Mylan Labs., Inc., 62 F. Supp. 2d 25, 32 (D.D.C. 1999) (noting that Commission sought "a permanent injunction and other relief").

123. *See Meghrig*, 516 U.S. at 487 (noting limited remedies provided in RCRA for private parties to recover cleanup costs). In *Porter*, the Supreme Court asserted that where the public interest was involved, a court's equitable power "assumes an even broader and more flexible character than when only a private controversy is at stake." Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946). In *Meghrig*, the plaintiffs sought to recover cleanup costs in context of private controversy, 516 U.S. at 481-82, whereas the Commission in *Mylan* asserted authority to seek restitution in the public interest, 62 F. Supp. 2d 25, 36-37. This distinction suggests that, in *Mylan*, the Court might be less willing to conclude that Congress did not authorize restitution by implication.

124. Federal Trade Commission Act § 5, 15 U.S.C. § 45(1) (1994).

125. *See* 51 CONG. REC. 13116 (1914) (remarks of Senator Newlands) (noting that "[the C]ommission, and ultimately the courts, will be called upon to . . . determin[e] what set of facts and circumstances constitute unfair competition").

126. *See* Clayton Act § 2, 15 U.S.C. § 13(a) (1994) (barring price discrimination).

127. *See* Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 609 (1953) (finding that Section 5 "registers violations of the Clayton and Sherman Acts"); FTC v. Motion Picture Adver. Servs. Co., Inc., 344 U.S. 392, 395 (1953) (holding that conduct prohibited by Sherman Act automatically violates Section 5); Grand Union Co. v. FTC, 300 F.2d 92, 99 (2d Cir. 1962) (assuming discriminatory acts barred by Robinson-Patman also violate Section 5). Although the FTC Act is a conduit through which the government may enforce the antitrust laws, given its broader coverage, the Act is generally referred to as a consumer protection statute.

128. *See supra* note 2 and accompanying text (discussing charges against Mylan).

conduct that also violates Section 2 of the Sherman Act.[129] Section 5 also reaches conduct that conflicts with the policies of the antitrust laws even though such conduct might not actually violate those laws.[130] For example, the Commission may act to stop in its incipiency conduct that would violate the antitrust laws only when full blown.[131]

In exercising their inherent equitable powers, *Porter* directs courts to give effect to the policies of the FTC Act and of Congress.[132] Because the prohibition on unfair methods of competition in Section 5 of the FTC Act incorporates the antitrust laws and the spirit or policies represented by those laws,[133] the policy of the FTC Act encompasses the policies of those other laws. Thus, in determining whether the policy of the FTC Act restricts the authority of the Commission to seek restitution, courts also must take into account the policies of the antitrust laws.[134]

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129. Sherman Act § 2, 15 U.S.C. § 2 (1994). Section 2 makes it a felony to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce." *Id.*

130. *See* FTC v. Brown Shoe Co., 384 U.S. 316, 320-21 (1966) (holding that Commission acted within its authority in declaring franchise program unfair whether or not it violated antitrust laws); 1 ABA ANTITRUST SECTION, MONOGRAPH NO. 5, THE FTC AS AN ANTITRUST ENFORCEMENT AGENCY: THE ROLE OF SECTION 5 OF THE FTC ACT IN ANTITRUST 40 (1981) (describing FTC authority to proceed against conduct "contrary to the 'spirit' or 'policy' of the antitrust laws as an unfair method of competition"); *see also* FTC v. Beech-Nut Packing Co., 257 U.S. 441, 453 (1922) (holding that resale price-maintenance scheme violated Section 5 despite absence of agreement required to prove Sherman Act § 1 violation). In *Beech-Nut Packing Co.*, the Supreme Court asserted that "[t]he Sherman Act is not involved here except insofar as it shows a declaration of public policy." *Id.*

131. *See* Fashion Originators' Guild of Am. v. FTC, 312 U.S. 457, 467 (1941) ("[The] purpose and object of this combination, its potential power, its tendency to monopoly, the coercion it could and did practice upon a rival method of competition, all brought it within the policy of the prohibition declared by the Sherman and Clayton Acts.").

132. *See* Porter v. Warner, 328 U.S. 395, 400 (1946) (concluding that court may order restitution of excessive charges "in order to give effect to the policies of Congress").

133. *See supra* note 130 and accompanying text (explaining that FTC Act encompasses policies and spirit of antitrust laws).

134. This inference draws on much the same reasoning that the district court in *Mylan* employed in analyzing the effect that its interpretation of the FTC Act would have on interpretation of state Little FTC Acts. The court reasoned that because the state Little FTC Acts prompted courts to follow federal law, they would permit the states to seek restitution as well. FTC v. Mylan Labs., Inc., 99 F. Supp. 2d 1, 5 (D.D.C. 1999) (order granting motion for reconsideration). Here, interpretation of the FTC Act is guided by the antitrust laws, which would bar restitution. *See infra* notes 151-206 and accompanying text (contending that restitution contravenes policies of antitrust laws); *see also* Doug Rendleman, *Common Law Restitution in the Mississippi Tobacco Settlement: Did Smoke Get in Their Eyes?*, 33 GA. L. REV. 847, 886 (1999) (discussing state's attempt to obtain restitution after several failed attempts to recover under products liability). Rendleman explains that when a plaintiff seeks restitution because he could not recover damages at law, the court must ask: If the court finds defendant

For over twenty years, the Supreme Court's opinion in *Illinois Brick* has stood as the policy of the antitrust laws with regard to who can recover money for violations of those laws.[135] The plaintiffs in *Illinois Brick* were indirect purchasers of concrete blocks, and they claimed that price fixing by the manufacturers had injured them because builders had passed the overcharges on to them.[136] They sought to recover under Section 4 of the Clayton Act,[137] which permits persons who are injured "in their business or property" by violations of the antitrust laws to seek treble damages.[138] The Court held that direct purchasers are injured to the full extent of the overcharge paid by them, and thus the indirect-purchaser plaintiffs were not injured within the meaning of the Clayton Act.[139]

The Court offered three reasons for its conclusion. First, it was unwilling to introduce additional complexity into antitrust suits by forcing courts to determine the effect of the overcharge on the direct purchaser's decisions concerning prices and whether the direct purchaser would have behaved differently absent the overcharge.[140] Second, allowing all the indirect purchasers who purchased from a particular direct purchaser to recover would lead to fewer antitrust suits because their stake in the recovery would be so small that it would not provide an incentive to sue.[141]

Third, the *Illinois Brick* Court did not want to impose multiple liability on defendants. In a previous case, *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*,[142] the Court had rejected the defendant's argument that the plaintiff was not actually injured by an illegal overcharge because it had passed on the overcharge to its customers.[143] The *Hanover Shoe* Court instead held that the plaintiff had been injured by the full amount of the illegal overcharge, and, as

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unjustly enriched and grants plaintiff restitution, would that undermine the reason to deny recovery of damages at law? Rendleman, *supra*. The same question must be asked here: If a court were to find an antitrust defendant unjustly enriched and granted the Commission restitution on behalf of indirect purchasers, would that undermine the reasons that indirect purchasers are denied damages at law?

135. *See* Illinois Brick Co. v. Illinois, 431 U.S. 720, 726 (1977) (holding that only direct purchasers can recover for violations of antitrust laws).

136. *Id.*

137. Clayton Act § 4, 15 U.S.C. § 15 (1994).

138. *Illinois Brick*, 431 U.S. at 726-27.

139. *Id.* at 746.

140. *Id.* at 492-93.

141. *Id.* at 494.

142. 392 U.S. 481 (1968).

143. *See* Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968) (holding that direct purchasers are injured by full amount of illegal overcharge paid by them and that antitrust defendant may not raise defense that overcharge was passed on to indirect purchasers).

a result, the defendant could not avoid liability by showing that plaintiff had passed on the overcharge.[144] Because *Hanover Shoe* already prevented a defendant from avoiding liability by showing that a direct-purchaser plaintiff had passed on an illegal overcharge to its customers, the *Illinois Brick* Court did not want to adopt a rule permitting indirect-purchaser plaintiffs to establish liability by proving that a direct purchaser had passed on an illegal overcharge to them.[145] Such a rule would impose multiple liability on defendants, making them liable to both indirect and direct purchasers.[146] Once indirect purchasers had recovered some or all of the overcharge passed on to them, direct purchasers still would be permitted to recover the full amount of the overcharge because, under *Hanover Shoe*, a defendant could not show that they had passed it on to their customers, the indirect purchasers.

Because the *Illinois Brick* Court accepted the reasoning of *Hanover Shoe*, it declined to overrule the case.[147] Furthermore, the Court reasoned, even if direct and indirect purchasers asserted claims only for the portion of the overcharge that they absorbed, inconsistent judgments could still impose multiple liability on the defendant.[148] Thus, the Court held that direct purchasers sustain injury to the full extent of any overcharge paid by them.[149] As a result, indirect purchasers do not suffer injury within the meaning of Section 4 and cannot recover damages by proving that a direct purchaser has passed on an overcharge to them.[150]

a. "Avoid Multiple Liability"

Although the plaintiffs in *Illinois Brick* sought damages under Section 4 of the Clayton Act,[151] the Court's reasons for barring indirect purchasers from seeking damages applies equally to an award of restitution.[152] In *Illinois*

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144. *Id.*

145. *See* Illinois Brick Co. v. Illinois, 431 U.S. 720, 730-32 n.11 (1977) ("We do not find this risk acceptable.").

146. *See id.* at 730 (noting as well that "following an automatic recovery of the full overcharge by the direct purchaser, the indirect purchaser could sue to recover the same amount").

147. *See id.* at 729 (declining to abandon *Hanover Shoe*).

148. *See id.* at 738 n.18 (noting that possibly inconsistent judgments obtained by conflicting claimants remain nonetheless).

149. *Id.* at 746.

150. *Id.*

151. *Id.* at 726-27.

152. *See supra* note 11 (discussing differences between damages and restitution); *see also* Ohio v. Kovacs, 469 U.S. 274, 284 (1985) (holding that obligation under injunction to clean up hazardous waste was dischargeable in bankruptcy just as money damages would have been). In *Ohio v. Kovacs*, the Supreme Court concluded that an injunctive obligation costing money was largely equivalent to a money obligation that would be discharged. *Id.* at 284; *see also* 1

Brick, the Court declined to allow indirect purchasers to recover because it would create a serious risk of multiple liability for the defendant.[153] In *Mylan*, the district court permitted the Commission to seek restitution for the full amount of the illegal overcharge.[154] Notwithstanding what the Commission recovers in its suit for restitution, direct purchasers may still sue for treble damages under Section 4 of the Clayton Act for the full amount of the overcharge.[155] Indeed, over twenty private plaintiffs have filed suit against Mylan.[156] Were the Commission and direct purchasers to recover overlapping amounts of the overcharge, the former in restitution and the latter in damages, defendants would face multiple liability.

As a general rule, multiple liability for the same wrongful act is not permitted even where two different types of remedies are claimed.[157] For example, in his noted treatise, *Law of Remedies*, Dobbs noted:

> [R]estitution may not be combined with damages if the combination will produce an excess recovery. The familiar principle of *damages* law is that the remedy should not provide more than one full compensation. The anal-

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DOBBS, *supra* note 11, § 1.8, at 35 (noting that "[r]emedial equivalence may be ground for denying one remedy if its equivalent would be denied").

153. *See* Illinois Brick Co. v. Illinois, 431 U.S. 720, 730-32 (1977) ("[W]e are unwilling to open the door to duplicative recoveries." (quoting Hawaii v. Standard Oil Co., 405 U.S. 251, 264 (1972))).

154. FTC v. Mylan Labs., Inc., 62 F. Supp. 2d 25, 36-37 (D.D.C. 1999).

155. Clayton Act § 4, 15 U.S.C. § 15 (1994). Section 4 provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorneys fee.

Id.

156. *See* Kelly & Sayyed, *supra* note 89, at 4 (noting approximately 20 private antitrust suits pending in *Mylan* case).

157. *See* 1 DOBBS, *supra* note 11, § 3.3(7), at 316 (asserting that "[w]hen more than one basic remedy is used, care must be taken to avoid excessive or duplicative relief"). Dobbs notes that "two different measures [of recovery] should not be used to compensate for the same underlying loss, even though the two measures produce different figures or used different calculations." *Id.* at 316; *see* Edelman v. Jordan, 415 U.S. 651, 668 (1974) (asserting that restitution "is in practical effect indistinguishable in many aspects from an award of damages"); Patton v. Mid-Continent Sys., Inc., 841 F.2d 742, 748 (7th Cir. 1988) (denying restitution and damages for same injury); *supra* note 11 (distinguishing between restitution and damages).

Moreover, the court's power to order restitution extends only to the amount by which the defendant profited from his wrongdoing because any further sum would constitute a penalty. SEC v. Blatt, 583 F.2d 1325, 1335 (5th Cir. 1978). The purposes of the FTC Act do not include punishment. *See* Federal Trade Commission Act § 5, 15 U.S.C. § 45(a)(2) (1994) ("The Commission is empowered and directed to *prevent* persons . . . from using unfair methods of competition . . . ." (emphasis added)).

> ogous principle of *restitution* law is that restitution should not force disgorgement of more than the unjust enrichment. If the two remedies are to be combined . . . those limiting principles require that the combined recovery must not exceed the greater of (a) full compensation or (b) full disgorgement.[158]

The *Mylan* court itself acknowledged this principle when it dismissed a separate claim by the states for equitable monetary relief under the Clayton Act.[159] The court concluded that permitting disgorgement when damages are also available risks multiple liability.[160] The court noted:

> While disgorgement would have the additional benefit of permitting the States to compensate indirect purchasers who are excluded from recovery under current law, the Supreme Court [in *Illinois Brick*] weighed this interest against the threat of duplicative recovery and determined that only direct purchasers have standing under the Clayton Act.[161]

In expressly rejecting multiple liability for antitrust defendants, the *Illinois Brick* Court relied upon its *Hawaii v. Standard Oil Co.*[162] opinion.[163] In that case, the State of Hawaii sought damages and an injunction as *parens patriae* on behalf of its citizens for injury to the state's economy.[164] The Supreme Court concluded that were it to hold that Congress intended for the state to recover damages for injury to its economy, it would open the door to multiple liability for defendants.[165] The Court noted that damages in a suit under Section 4 are established by the amount of the overcharge.[166] Courts will not go beyond the fact of this injury to determine whether victims of the overcharge have partially recouped their losses in some other way, such as a suit brought by the state.[167] In other words, if a state had already recovered for

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158. 1 DOBBS, *supra* note 11, § 4.5(5), at 654.

159. *See Mylan*, 62 F. Supp. at 25, 42 (dismissing states' claims for restitution and disgorgement under Clayton Act § 16). Section 16 of the Clayton Act permits any person, including a state, "to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws." Clayton Act § 16, 15 U.S.C. § 26 (1994).

160. *See* FTC v. Mylan Labs., Inc., 62 F. Supp. 2d 25, 41 (D.D.C. 1999) (noting that disgorgement "raise[s] the specter of duplicative recoveries").

161. *Id.*

162. 405 U.S. 251 (1972).

163. *See* Illinois Brick Co. v. Illinois, 431 U.S. 720, 731 (1977) ("As in *Hawaii v. Standard Oil Co.*, . . . we are unwilling to 'open the door to duplicative recoveries.'").

164. Hawaii v. Standard Oil Co., 405 U.S. 251, 254-55 (1972).

165. *Id.* at 263-64.

166. *Id.* at 262 n.14.

167. *See id.* (citing Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 489 (1968) (holding that antitrust defendants could not defend by claiming plaintiff had passed on overcharge to customers)).

damage to its citizenry, the state's citizens still could recover individually for those same damages because, under *Hanover Shoe* and *Illinois Brick*, the defendant could not raise as a defense the fact that the state had already recovered on their behalf.[168]

The claim for restitution by the Commission in *Mylan* is in many ways the same as that made by the State of Hawaii. The restitution sought by the Commission is "no more than a reflection of injuries to the 'business or property'" of private parties, for which they may recover themselves under Section 4.[169] Were the Commission to recover restitution for the full amount of the overcharge, direct purchasers still could recover damages for the same overcharge.[170] Thus, the court in *Mylan* has opened the door to multiple liability, a result *Illinois Brick* squarely rejected.[171]

b. "Avoid Complexity"

If multiple liability is to be avoided, any restitution recovered by the Commission would have to be adjusted for claims by direct purchasers for damages under Section 4.[172] Moreover, if the Commission permits indirect

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168. Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 489 (1968).

169. Hawaii v. Standard Oil Co., 405 U.S. at 265. It has been suggested that the Commission should seek restitution where victims are unlikely to "recover themselves." *See* Andrew J. Strenio, Jr., *Why Thirteen Should Be a Lucky Number for Victims of Price-Fixing*, 57 ANTITRUST L.J. 149, 155 (1988) (suggesting that Commission would consider ability of victims to help themselves in deciding when to seek restitution); Kelly & Sayyed, *supra* note 89, at 4 (noting that Commission would only seek restitution where likelihood of successful private suits is low). In *Hawaii v. Standard Oil Co.*, however, the State of Hawaii made a similar argument that it should be allowed to sue as *parens patriae* because the costs and other burdens of protracted litigation would render private parties impotent to bring damages actions. Hawaii v. Standard Oil Co., 405 U.S. 251, 265-66 (1972). The Court responded:

> Private Parties are not as powerless, however, as the State suggests. Congress has given private citizens rights of action for injunctive relief and damages for antitrust violations without regard to the amount in controversy. Federal Rules of Civil Procedure provides for class actions that may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture. . . . The fact that a successful antitrust suit for damages recovers not only the costs of litigation, but also attorney's fees, should provide no scarcity of members of the Bar to aid prospective plaintiff in bringing these suits.

Id.

170. *See supra* notes 159-61 and accompanying text (noting that *Mylan* court admitted equitable monetary relief would raise specter of multiple liability).

171. *See supra* text accompanying notes 146-47 (explaining Court's rejection of multiple liability in *Illinois Brick*).

172. *See* Illinois Brick Co. v. Illinois, 431 U.S. 720, 737 (1977) (asserting that court would have to allocate overcharge among all potential claimants if indirect purchasers were permitted to recover).

purchasers to assert claims to any overcharges that it recovers, courts would have to reconcile the claims of direct and indirect purchasers.[173] In such a situation, direct purchasers, in private damages suits, and the Commission, on behalf of indirect purchasers, are in a position to assert conflicting claims to the overcharge by contending that overlapping amounts were absorbed at a particular level in the distribution chain.[174]

In *Porter*, the Supreme Court anticipated such a conundrum when it considered whether the Price Control Administrator could seek restitution for rent overcharges although tenants also had a private cause of action.[175] The Court concluded, however, that "[s]hould there appear to be conflicting claims and counterclaims . . . the court has inherent power to bring in all the interested parties and settle the controversies or to retain the case until the matters are otherwise litigated."[176] It noted that even "persons not originally connected with the litigation may be brought before the court so that their rights in the subject matter may be determined and enforced."[177]

In *Illinois Brick*, however, the Court considered the possibility that use of compulsory joinder and interpleader – procedures very similar to that advocated in *Porter* – could resolve conflicting claims to a common fund in an antitrust case.[178] The Court concluded that even if courts could find a way to bring all potential parties together in one huge action, the resulting complexity argued strongly for barring recovery by indirect purchasers.[179] Showing that a direct purchaser had passed on an overcharge would require "attempts to trace the effects of the overcharge on the purchaser's prices, sales, costs, and profits, and . . . showing that these variables would have behaved differently without the overcharge."[180] The uncertainties and difficulties in-

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173. *See* Ronald W. Davis, *Indirect Purchaser Litigation:* ARC America*'s Chickens Come Home to Roost on the* Illinois Brick *Wall*, 65 ANTITRUST L.J. 375, 397 (1999)(asserting that "as a matter of logic," avoiding duplicative liability would require direct purchaser to share recovery with indirect purchaser); *see also* Kelly & Sayyed, *supra* note 89, at 4 (noting approximately 20 private antitrust suits pending in *Mylan* case).

174. *See Illinois Brick*, 431 U.S. at 737 (noting that potential plaintiffs at each level of distribution chain could assert conflicting claims to overcharge).

175. *See* Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946) (noting that court "may act so as to adjust and reconcile competing claims and so as to accord full justice to all the real parties in interest").

176. *Id.* at 403.

177. *Id.* at 398.

178. *See* Illinois Brick Co. v. Illinois, 431 U.S. 720, 737 (1977) (recognizing need for compulsory joinder and interpleader in absence of *Hanover Shoe* rule).

179. *Id.* at 731 n.11.

180. *See id.* at 725 (quoting Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 492-93 (1968)); *see also* William M. Landes & Richard A. Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of*

volved in determining whether and how much of an illegal overcharge a direct purchaser passed on to its customers led the Court in *Illinois Brick* to bar indirect purchasers from recovering damages.[181]

In *Mylan*, reconciling the competing claims of direct and indirect purchasers to restitution obtained by the Commission would require both sets of claimants to present to the court evidence showing the extent to which, if at all, direct purchasers had passed on the illegal overcharge to indirect purchasers.[182] Such proof would introduce into antitrust cases precisely the type of complexity that *Illinois Brick* sought to prevent.[183] Furthermore, the procedure advocated in *Porter* would turn cases in which the Commission sought restitution into "massive efforts to apportion recovery" among all purchasers who could have absorbed part of the overcharge, a result that *Illinois Brick* expressly rejected.[184]

Even were the Commission to retain the disgorged overcharge rather than trying to distribute it to indirect purchasers,[185] this would not solve the problem of apportioning recovery to direct purchasers.[186] While the Commission can only seek restitution of the amount of the overcharge, direct purchasers

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Illinois Brick, 46 U. CHI. L. REV. 602, 615-25 (1979) (providing classic analysis of mechanics of apportioning antitrust overcharge among multiple levels of distribution). *But see* Robert G. Harris & Lawrence A. Sullivan, *Passing On the Monopoly Overcharge: A Comprehensive Policy Analysis*, 128 U. PA. L. REV. 269, 274 (1979) (countering Landes and Posner by arguing extent of passing on is high and businesses employ one of two methods of pricing).

181. *Illinois Brick*, 431 U.S. at 731.

182. *See* George J. Benston, *Indirect Purchasers' Standing to Claim Damages in Price Fixing Antitrust Actions: A Benefit/Cost Analysis of Proposals to Change the* Illinois Brick *Rule*, 55 ANTITRUST L.J. 213, 220 (1986) (observing that such action must include assessment of amount of overcharge parties incurred).

183. *See Illinois Brick*, 431 U.S. at 731-32 (noting that principal basis for *Hanover Shoe* decision was complexity it would introduce into antitrust cases).

184. *Id.* at 732.

185. There appears to be some question about whether the Commission would be permitted to decide not to distribute funds. The Court in *Illinois Brick* noted that the Clayton Act *parens patriae* provision permits recovered funds to be deposited with the state as general revenues. *Id.* at 747 n.31. "That Congress chose to provide such innovative methods of distributing damages awarded in *parens patriae* action," the Court observed, "does not eliminate the obstacles to compensating indirect purchasers [in other types of suits]." *Id.*; *see* Citronelle-Mobile Gathering, Inc., v. Edwards, 669 F.2d 717, 723 (Temp. Emer. Ct. App. 1982) (concluding that "the Government has a duty to try to ascertain those overcharged, and refund them, with interest, from the restitution funds"). *But see* United States v. Exxon Corp., 561 F. Supp. 816, 855 (D.D.C. 1983) (distinguishing *Citronelle* on its facts and concluding that when identification of victims is impossible court may order defendant to make restitution to Treasury).

186. *See* Davis, *supra* note 173, at 399 (noting that government can eliminate difficulty and cost of identifying injured consumers but still must distribute damages to indirect purchasers).

are entitled to receive trebled damages from violators.[187] In addition, a direct purchaser is entitled to claim damages for a reduction in the volume of its sales caused by higher prices it charged in response to the overcharge.[188] It seems likely that direct purchasers would have to undertake separate litigation under Section 4 to obtain these additional damages.[189]

c. "Do Not Discourage Private Suits"

The concern in *Illinois Brick* for injecting complexity into antitrust suits by permitting indirect purchasers to introduce evidence that direct purchasers had passed on an overcharge to them was prompted in part by concern that increased complexity would deter antitrust suits.[190] Apportioning recovery among direct and indirect purchasers would inject extremely complex issues into a case, increasing the costs of recovery.[191] It also would create uncertainty about how the overcharge would be apportioned.[192] Increased costs and uncertainty, the *Illinois Brick* Court concluded, would substantially reduce the incentives to sue.[193] Moreover, apportionment would reduce the recovery afforded to direct purchasers.[194] At the same time, the small recovery at stake for each indirect purchaser would not offset the reduced incentive of direct purchasers to sue.[195]

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187. *See* Clayton Act § 4, 15 U.S.C. § 15 (1994) (any person injured "shall recover threefold the damages by him sustained").

188. *See* Illinois Brick Co. v. Illinois, 431 U.S. 720, 733 n.13 (1977) (noting that "even if the defendant shows that as a result of the overcharge the direct purchaser increased its price by the full amount of the overcharge, direct purchaser may still claim injury from a reduction in the volume of its sales caused by its higher prices").

189. *See* Federal Trade Commission Act § 5, 15 U.S.C. § 45 (1994) (empowering Commission to "prevent persons . . . from using unfair methods of competition"). Because Section 5 provides no private cause of action for violations of its prohibitions, Holloway v. Bristol-Myers Corp., 485 F.2d 986, 991 (D.C. Cir. 1973), direct purchasers presumably would have to separately prove a violation of the Sherman Act in order to receive these additional damages. *See* Strenio, *supra* note 169, at 155 (suggesting that private plaintiffs would have to bring their own lawsuit).

190. *See Illinois Brick*, 431 U.S. at 745 (noting Court's concern that complexity would reduce effectiveness of suits if brought by indirect purchasers).

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *See id.* (concluding that small stake indirect purchasers would have in outcome of suit would reduce effectiveness of antitrust suits); *see also* Landes & Posner, *supra* note 180, at 615 (concluding that indirect purchaser suit necessarily weakens incentive of direct purchaser to sue by reducing his recovery).

The Court's desire to preserve incentives to sue was premised on the assumption that the threat of antitrust suits deters antitrust violations.[196] The Court reasoned that adhering to "the longstanding *policy* of encouraging vigorous private enforcement of the antitrust laws" meant sparing direct purchasers the burden of litigating the complexities of indirect purchaser claims and permitting them to recover the full amount of the overcharge.[197] It concluded that "the *legislative purpose* in creating a group of 'private attorneys general' to enforce the antitrust laws . . . is better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them."[198]

Allowing the Commission to seek restitution, particularly since it does so on behalf of indirect purchasers, would increase the costs and uncertainty of proving damages for direct purchasers.[199] As a consequence, the incentives for direct purchasers to sue would decrease.[200] On the other hand, the Commission certainly would be a more efficient plaintiff than a multitude of indirect purchasers.[201] However, government suits for restitution probably would be infrequent relative to private antitrust suits.[202] Moreover, the threat of trebled damages is much greater than the single overcharge that can be recovered in a suit for restitution.[203] These factors suggest that the Commis-

196. *See Illinois Brick*, 431 U.S. at 745 (noting that increasing costs and diffusing benefits of private antitrust actions would impair "important weapon of antitrust enforcement").

197. Illinois Brick Co. v. Illinois, 431 U.S. 720, 745-46 (1977); *see* Porter v. Warner Holding Co., 328 U.S. 395, 401 (1946) (noting that equity courts should be responsive to "statutory *policy*" (emphasis added)).

198. *Illinois Brick*, 431 U.S. at 746; *see Porter*, 328 U.S. at 400 (1946) (suggesting restitution is appropriate "to give effect to [the Act's] *purposes*" (emphasis added)).

199. The Commission, by going to court, substantially has reduced the direct purchaser's burden of proving liability. *See* Edward A. Snyder, *Efficient Assignment of Rights to Sue for Antitrust Damages*, 28 J.L. & ECON. 469 (1985) (including presence of government enforcement action as factor explaining number of private antitrust suits initiated). Of course, the direct purchaser's burden would be lightened similarly were the Commission limited to seeking a permanent injunction.

200. *Illinois Brick*, 431 U.S. at 745.

201. *See* Benston, *supra* note 182, at 226-230 (discussing benefits as well as costs of similar situation in which state sues in *parens patriae* on behalf of indirect purchasers).

202. *See* Strenio, *supra* note 169, at 152 (suggesting that shortage of resources would limit extent to which Commission could seek restitution); *see also* FTC v. Mylan Labs., Inc., 99 F. Supp. 2d 1, 5 n.2 (D.D.C. 1999) (noting that no court had ever addressed issue of restitution on behalf of indirect purchasers); FTC v. Mylan Labs., Inc., 62 F. Supp. 2d 25, 41 (D.D.C. 1999) (concluding that government cannot seek restitution under Clayton Act).

203. *See* Clayton Act § 4, 15 U.S.C. § 15 (1994) (permitting persons injured in their business or property to seek "threefold" their damages); *supra* note 158 and accompanying text (asserting that "restitution should not force disgorgement of more than the unjust enrichment").

sion should not be permitted to seek restitution at the cost of reducing the incentives for direct purchasers to sue.

Thus, allowing the Commission to seek restitution in an antitrust case on behalf of indirect purchasers would contravene all three of the policies that the Supreme Court ascribed to the antitrust laws in *Illinois Brick*.[204] In *Illinois Brick*, the Court concluded that the antitrust laws should be interpreted to avoid imposing multiple liability and injecting complexity into antitrust cases, as well as to preserve the incentives for antitrust victims to sue.[205] In *Porter*, the Court exhorted courts of equity that, in exercising their inherent equitable powers, they should give effect to the policy and purposes of the statute.[206] Were courts to give effect to the policy and purposes of the FTC Act, which incorporates the policies of the antitrust laws, they would not permit the Commission to seek restitution in antitrust cases.

III. Implications for Enforcement of State Antitrust Laws

Twelve years after *Illinois Brick*, the Supreme Court in *California v. ARC America Corp.*[207] held that *Illinois Brick* did not preempt states from permitting indirect purchasers to recover for violations of state antitrust law.[208]

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204. *See supra* notes 143-50 and accompanying text (discussing policies of antitrust law identified in *Illinois Brick*).

205. *See supra* notes 143-50 and accompanying text (discussing policies of antitrust law identified in *Illinois Brick*).

206. *See* Porter v. Warner Holding Co., 328 U.S. 395, 400 (1946) (asserting that courts must frame remedies to effectuate policy of Act).

207. 490 U.S. 93 (1989).

208. *See* California v. ARC Am. Corp., 490 U.S. 93, 101 (1989) (holding that state indirect purchaser laws are not preempted by federal antitrust laws). In *ARC America*, the Supreme Court considered whether the rule limiting federal antitrust recoveries to direct purchasers preempts states from permitting indirect purchasers to recover under state antitrust laws. *Id.* at 100. The Court first concluded that Congress had not expressly preempted state law, nor had it occupied the field. *Id.* at 101. Second, because Congress intended the federal antitrust statutes to supplement state antitrust statutes, not displace them, federal antitrust laws generally do not preempt state antitrust law. *Id.* at 102. The Court reasoned that because many state indirect purchaser claims would be brought in state court, and because federal courts have discretion to decline exercise of pendent jurisdiction over state indirect purchaser claims, any complexity introduced into federal direct purchaser actions would be minimal. *Id.* at 104. The Court also concluded that claims under state statutes will not reduce the incentives of direct purchasers to bring private federal antitrust actions by reducing their potential recoveries. *Id.* at 104-05. Finally, the Court rejected the Circuit Court's contention that state indirect purchaser claims would impose multiple liability rejected by *Illinois Brick*, noting that state causes of action are not preempted solely because they impose liability over and above that authorized by federal law. *Id.* at 105. Because state laws permitting indirect purchaser recoveries do not impede Congressional objectives identified in *Illinois Brick*, the Court concluded that such laws are not preempted by federal antitrust law. *Id.* at 105-06.

Since *ARC America*, some state legislatures have enacted legislation expressly permitting indirect purchasers to recover.[209] One state permitted only the state attorney general to recover on behalf of indirect purchasers.[210] In states where no such legislation had been passed, most state appellate courts that have addressed the question have followed *Illinois Brick* and decided that state statutes barred indirect purchasers from recovering.[211] In many states, neither the legislature nor the courts have addressed the question of whether indirect purchasers are permitted to recover.[212]

In *Mylan*, the court initially barred claims by states on behalf of indirect purchasers unless the state statutes specifically permitted recovery for indirect purchasers.[213] The court reasoned that because federal antitrust law bars damages claims by or on behalf of indirect purchasers, and because each of the state statutes or case law interpreting such statutes required or prompted courts to follow federal law in interpreting state antitrust law, the state could not recover on behalf of indirect purchasers unless specifically permitted to do so by state law.[214] The court extended this reasoning to deny

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209. *See, e.g.*, CAL. BUS. & PROF. CODE § 16750(a) (West 1997) (permitting any person injured to bring action, "regardless of whether such injured person dealt directly or indirectly with the defendant"); D.C. CODE ANN. § 28-4509(a) (1981) ("Any indirect purchaser in the chain of manufacture . . . shall be deemed to be injured within the meaning of this chapter"); MINN. STAT. § 325D.57 (1995) (permitting any person "injured directly or indirectly" to recover damages); N.M. STAT. ANN. § 57-1-3 (Michie 1978) (allowing any person injured directly or indirectly to bring action); S.D. CODIFIED LAWS ANN. § 37-1-33 (Michie 1994) (preserving right to sue for person injured directly or indirectly); WIS. STAT. § 133.18 (1989) (permitting any person injured directly or indirectly to recover). Other states had indirect purchaser remedies which pre-dated the decision in *Illinois Brick*. *See* MISS. CODE ANN. § 75-21-9 (1972) (permitting any person injured by direct or indirect effects of trust or combination to recover damages).

210. *See* 740 ILL. COMP. STAT. § 10/7(2) (West 1993) (permitting only state Attorney General to bring indirect purchaser class action).

211. *See, e.g.*, Blewett v. Abbott Labs., 938 P.2d 842, 845-46 (Wash. Ct. App. 1997) (following *Illinois Brick* in holding that indirect purchasers cannot recover under state antitrust law); Stifflear v. Bristol-Myers Squibb Co., 931 P.2d 471, 475-76 (Colo. Ct. App. 1996) (holding that indirect purchasers lack standing to sue for damages or injunctive relief under state antitrust law). *But see* Hyde v. Abbott Labs., Inc., 473 S.E.2d 680, 685-86 (N.C. 1996) (holding that indirect purchaser may sue under state antitrust law).

212. *See* 3 ABA ANTITRUST SECTION, STATE ANTITRUST PRACTICE AND STATUTES, 37-35 (2d ed. 1999) (noting that Ohio courts have not yet addressed limitation on standing set forth in *Illinois Brick*); *id.* at 38-17 (noting that Oklahoma has no indirect purchaser statute); *id.* at 47-17 (noting that Utah has not enacted indirect purchaser statute and no Utah cases construe *Illinois Brick* indirect purchaser doctrine).

213. *See* FTC v. Mylan Labs., Inc., 62 F. Supp. 2d 25, 43 (D.D.C. 1999) (holding that "unless a state has specifically instituted a right of action for indirect purchasers, that state cannot sue on behalf of indirect purchasers").

214. *See id.* (citing Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977)).

claims by states for restitution and disgorgement on behalf of indirect purchasers.[215]

The *Mylan* court departed from this reasoning in addressing the claims of Idaho. The court dismissed Idaho's claim for damages on behalf of indirect purchasers under the Idaho Antitrust Law because neither the statute nor case law interpreting that statute permitted recovery by indirect purchasers, and because interpretation of Idaho antitrust law is guided by federal law.[216] However, the court permitted Idaho to assert claims for restitution and disgorgement on behalf of indirect purchasers under the Idaho Consumer Protection Act, the state's Little FTC Act.[217] The court noted that Idaho law gives great weight to the Federal Trade Commission's interpretation of the FTC Act in construing Idaho's Consumer Protection Act.[218] Because it had found that the FTC Act authorizes equitable monetary relief, the court reasoned, it would permit Idaho to assert similar claims under its Little FTC Act.[219]

This ruling prompted several states to seek reconsideration of their claims for equitable monetary relief on behalf of indirect purchasers under their Little FTC Acts.[220] The court granted this motion with regard to fourteen states.[221] Based on its holding that the Federal Trade Commission could seek equitable monetary remedies, the court permitted states with Little FTC Acts that prompt courts to consider the FTC Act when interpreting those state statutes to seek restitution on behalf of indirect purchasers.[222] The court also allowed states with consumer protection acts, the structure and purpose of

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215. *See id.* (denying restitution claims because providing monetary relief to indirect purchasers increases risk of duplicative recovery).

216. *See id.* at 46 (citing Pope v. Intermountain Gas Co., 646 P.2d 988, 994 n.11 (Idaho 1982) (noting that interpretations of federal law are persuasive in interpreting Idaho statute)).

217. *Id.* at 48; *see supra* note 7 (explaining terminology used to refer to state consumer protection laws).

218. *Id.* at 48 (citing IDAHO CODE § 48-604(a) (1998)).

219. *Id.*

220. *See* FTC v. Mylan Labs., Inc., 99 F. Supp. 2d 1, 5 (D.D.C. 1999) (order granting motion for reconsideration) (observing that states were correct in noting internal inconsistency in court's opinion).

221. *See id.* at 6-16 (granting motion with regard to Alaska, Arkansas, Connecticut, Florida, Kentucky, Louisiana, Maine, North Carolina, Ohio, Oklahoma, South Carolina, Utah, Vermont, and West Virginia).

222. Most of these statutes give deference specifically to interpretations of Section 5 of the FTC Act, the substantive provision of the Act making "unfair methods of competition" unlawful. 15 U.S.C. § 45 (1994). In *Mylan*, the court essentially concludes that Section 5 imports the remedial provisions it has read into Section 13(b) into the state Little FTC Acts. As observed *supra* note 134, the court appears somewhat inconsistent in contending that Section 5 does not import the restrictions on remedies available to indirect purchasers encompassed in the federal antitrust laws.

which suggest that they should be interpreted in light of the FTC Act, to assert equitable claims on behalf of indirect purchasers.[223] Finally, the court also permitted states with statutes that permitted the state to proceed in equity to seek such relief even though the statutes did not explicitly reference the FTC Act.[224]

State laws enacted pursuant to *ARC America* permitting indirect purchasers to recover for violations of state antitrust laws have had the benefit of compensating indirect purchasers. States that have enacted such laws, however, have confronted many of the problems that the Court in *Illinois Brick* anticipated. Injury among indirect purchasers often is widely dispersed and individual claims often are relatively small, making indirect purchaser claims well suited for class actions.[225] State courts usually find that indirect purchasers do not meet the requirements for class certification.[226] This fact appears to reflect the magnitude of the difficulty and cost of proving injury to indirect purchasers, the very problems *Illinois Brick* foresaw.[227] State laws permitting indirect purchasers to recover also have presented problems in the context of the dual state-federal system of antitrust enforcement permitted by *ARC America*. Under *Illinois Brick*, direct purchasers may sue in federal court for the full amount of an illegal overcharge, whether or not they passed on the overcharge to their customers.[228] At the same time, indirect purchasers suing in state court also may recover a portion of the overcharge,[229] leaving states with the question of whether to impose multiple liability on defendants or to allow them to argue that they are not liable for any portion of an overcharge that direct purchasers passed on.[230]

If the decision in *Mylan* stands, it may, in effect, foist these quandaries on states that do not have statutes permitting indirect purchasers to recover for

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223. *Mylan*, 99 F. Supp. 2d at 5.

224. *Id.*

225. *See* William H. Page, *The Limits of State Indirect Purchaser Suits: Class Certification in the Shadow of* Illinois Brick, 67 ANTITRUST L.J. 1, 3 (1999) (noting that indirect purchaser statutes now provide fora in which classes of indirect purchasers can challenge national price-fixing conspiracies).

226. *See id.* at 5 (noting that most state courts have concluded that issues in common to indirect purchaser classes did not predominate over individual issues).

227. *See id.* (arguing that results in indirect purchaser class actions confirm magnitude of problems of proof referred to in *Illinois Brick*).

228. *See* Illinois Brick Co. v. Illinois, 431 U.S. 720, 746 (1977) (holding direct purchasers to be injured to full extent of overcharge paid by them).

229. *See* Davis, *supra* note 173, at 376 (noting that state indirect purchaser class actions often follow in wake of federal direct purchaser suits).

230. *See id.* at 380 (noting that some state court decisions suggest defendant may not raise defense).

state antitrust violations. Moreover, the decision may create inconsistencies in some states between state antitrust laws and state Little FTC Acts. Many state antitrust laws bar indirect purchasers from recovering for antitrust violations,[231] but *Mylan* would permit recovery by indirect purchasers under state Little FTC Acts for the very same illegal conduct.[232] The case of Connecticut, one of the states that the court permitted to seek restitution on behalf of indirect purchasers, is illustrative.[233] The Connecticut Antitrust Act contains no express provision indicating the extent to which a defendant's liability for antitrust overcharges extends to indirect purchasers, and Connecticut courts have not yet passed on this issue.[234] Because the Connecticut Antitrust Act directs that interpretations given by federal courts to federal antitrust statutes should guide courts in construing its provisions,[235] it is likely that courts applying Connecticut law would follow *Illinois Brick* and bar indirect purchasers from recovering for violations of the Connecticut statute.[236] Moreover, the Supreme Court of Connecticut has held that the Connecticut Unfair Trade Practices Act (CUTPA), the state's Little FTC Act, requires privity between plaintiff and defendant in private suits,[237] in effect barring indirect

231. *See supra* note 211 (citing some states that bar indirect purchasers from recovering under state antitrust laws).

232. *Cf.* Mack v. Bristol-Myers Squibb Co., 673 So. 2d 100, 101 (Fla. Dist. Ct. App. 1996) (holding that Florida's Deceptive Trade Practices Act permitted indirect purchasers to recover damages though state antitrust law barred such recovery). While a state antitrust law barring indirect purchaser recovery would be inconsistent with a Little FTC Act that permitted indirect purchasers to recover for antitrust violations, they would not necessarily be incompatible. *See id.* at 110 (finding "no plain inconsistency or repugnancy" between Florida Little FTC Act and Antitrust Act).

233. *See* FTC v. Mylan Labs., Inc., 99 F. Supp. 2d 1, 7 (D.D.C. 1999) (order granting motion for reconsideration) (reinstating state's claim for restitution on behalf of indirect purchasers).

234. 1 ABA ANTITRUST SECTION, *supra* note 7, at 8-18.

235. *See* CONN. GEN. STAT. § 35-44b (1997) ("It is the intent of the general assembly . . . that courts of this state shall be guided by interpretations given by the federal courts to federal antitrust statutes.").

236. 1 ABA ANTITRUST SECTION, STATE ANTITRUST PRACTICE AND STATUTES, 8-18 (2d ed. 1999). In addition, the provision creating a private right of action for violations of the Act a plaintiff suing to be "injured in its business or property," CONN. GEN. STAT. § 35-35 (1997), language which parallels Section 4 of the Clayton Act, 15 U.S.C. § 15 (1994). *Illinois Brick* held that indirect purchasers were not injured within the meaning of Section 4. Illinois Brick Co. v. Illinois, 431 U.S. 720, 746 (1977). The provision granting the state authority to recover as *parens patriae* on behalf of its citizens, CONN. GEN. STAT. § 35-32, also parallels the Clayton Act's *parens patriae* provision, Clayton Act § 4, 15 U.S.C. § 15c, which the Supreme Court has held does not permit states to recover on behalf of indirect purchasers. Kansas v. Utilicorp United, Inc., 497 U.S. 199, 219 (1990).

237. *See* Waterbury Petroleum Prods., Inc. v. Canaan Oil and Fuel Co., 477 A.2d 988,

purchasers from recovering damages or equitable relief under that provision of CUTPA.[238] The court so held despite CUPTA's deference clause, which directs that interpretations of Section 5 of the FTC Act should guide courts in construing CUTPA.[239] The court in *Mylan*, however, relied upon the deference clause in permitting the state to assert claims for restitution on behalf of indirect purchasers under CUTPA.[240]

The decision in *Mylan* will force other states to grapple with similar problems. For example, a federal district court has held that indirect purchasers could not recover damages under South Carolina antitrust law.[241] The *Mylan* court concluded that the state could assert claims for restitution on behalf of indirect purchasers under the South Carolina Unfair Trade Practices Act (SCUTPA).[242] The court relied upon provisions of SCUTPA that direct that interpretations of the FTC Act guide courts in construing SCUTPA,[243] and that authorize the state Attorney General to proceed in equity.[244] In an action in equity by the state Attorney General, a "court may make such additional orders or judgments as may be necessary to restore *any person who has suffered any ascertainable loss* [of] moneys or property" suffered due to a violation of SCUTPA.[245] The court in *Mylan* concluded that this provision permits the state to seek restitution on behalf of indirect purchasers.[246] The South Carolina statute also creates a private right of action that gives standing to sue for damages to "*any person who suffers any ascertainable loss* of money or property."[247] The two provisions appear to give standing to exactly the same set of plaintiffs. Because under *Mylan*, these plaintiffs include

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1002 (Conn. 1984) (holding that reference to "such seller or lessor" contained in 1975 amendment maintained privity requirement of original).

238. *See* CONN. GEN. STAT. § 42-110g(a) (1997) (providing private right of action for violation of Act).

239. CONN. GEN. STAT. § 42-110b(b) (1997).

240. *See* FTC v. Mylan Labs., Inc., 99 F. Supp. 2d 1, 7 (D.D.C. 1999) (order granting motion for reconsideration) (noting deference clause and asserting that "[t]he Court will therefore reinstate Connecticut's claim for restitution on behalf of indirect purchasers").

241. *See In re* Wiring Device Antitrust Litig., 498 F. Supp. 79, 88 (E.D.N.Y. 1980) (following rule of *Illinois Brick* limiting recovery under South Carolina antitrust statute to direct purchasers).

242. *See* FTC v. Mylan Labs., Inc., 99 F. Supp. 2d 1, 13 (D.D.C. 1999) (reinstating claims for restitution on behalf of indirect purchasers).

243. *See id.* (citing S.C. CODE ANN. § 39-5-20(b) (Law. Co-op. 1985)).

244. *See id.* (citing S.C. CODE ANN. § 39-5-50 (Law. Co-op. 1985)).

245. S.C. CODE ANN. § 39-5-50(b) (Law. Co-op. 1985) (emphasis added).

246. *See Mylan*, 99 F. Supp. 2d at 13 ("The court will therefore reinstate South Carolina's claim for restitution on behalf of indirect purchasers.").

247. S.C. CODE ANN. § 39-5-140(a) (Law. Co-op. 1985) (emphasis added).

indirect purchasers, the *Mylan* decision may have given indirect purchasers a private right of action for antitrust violations that they would not otherwise have had. The implications of the *Mylan* decision, then, extend well beyond the risk of multiple liability and complexity that may be introduced into federal antitrust cases in which the Federal Trade Commission seeks equitable monetary relief.

IV. Conclusion

Section 13(b) of the FTC Act has developed from an incidental and non-germane amendment to the 1973 Trans-Alaska Pipeline Act into a powerful tool for the Federal Trade Commission, and indirectly, for state attorneys general.[248] The *Mylan* decision's interpretation of the provision does not purport to determine what Congress intended when it enacted Section 13(b). Instead, the court merely states that "Congress must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes."[249]

In *Porter v. Warner*, the Supreme Court explained that courts should not grant equitable remedies when the statute gives rise to a necessary and inescapable inference that Congress did not intend such remedies.[250] Moreover, the Court asserted, courts should exercise their equitable powers to give effect to the purposes of Congress.[251] The Court based its decision in *Illinois Brick* on what it thought were the purposes of Congress in enacting the federal antitrust laws.[252] The FTC Act incorporates these purposes by empowering the Commission to enforce the antitrust laws, as well as the policies that drive them.[253] The *Mylan* decision interprets Section 13(b) of the Act in a way that directly contravenes those purposes, implicating all of the concerns the Supreme Court raised in *Illinois Brick*. For these reasons, *Mylan* was wrongly decided.[254] Moreover, decided differently, *Mylan* would

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248. *See supra* notes 54-59 and accompanying text (discussing legislative history of Section 13(b)).

249. FTC v. Mylan Labs., Inc., 62 F. Supp. 2d 25, 37 (D.D.C. 1999) (quoting Mitchell v. DeMario Jewelry, Inc., 361 U.S. 288, 291-92 (1960) (affirming Porter v. Warner Holding Co., 328 U.S. 395 (1946)).

250. *See supra* note 70-81 and accompanying text (discussing *Porter*).

251. *Id.*

252. *See* California v. ARC Am. Corp., 490 U.S. 93, 105-06 (1989) (referring to "congressional purposes" on which *Illinois Brick* was based).

253. *See supra* notes 126-31 and accompanying text (discussing laws and policies encompassed in FTC Act's prohibition on "unfair methods of competition").

254. On July 12, 2000, the parties announced that they had agreed to a settlement in which Mylan would pay $135 million but admit to no wrongdoing. Sharon Bernstein, *Drug Maker*

have provided a consistent federal policy from which states could draw in interpreting their Little FTC Acts.

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to Settle Case for $135 Million, L.A. TIMES, July 13, 2000, at C1. Thus, the *Mylan* decision will remain good law until the Commission once again seeks restitution in an antitrust case and its authority to do so is challenged.

ARTICLES