Control of Break-Away State Antitrust Litigation: An Issue of Federalism

C. Douglas Floyd

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Recommended Citation
C. Douglas Floyd, Control of Break-Away State Antitrust Litigation: An Issue of Federalism, 35 Hastings L.J. 1 (1983). Available at: https://repository.uchastings.edu/hastings_law_journal/vol35/iss1/1
Antitrust plaintiffs, attempting to avert or circumvent unfavorable results in federal court, have with increasing frequency begun "break-away" state court actions under less restrictive state laws. Defendants have sought to avoid the consequences of such break-away actions through removal of the state action to federal court. This removal tactic was summarily approved by the Supreme Court in 1981 in *Federated Department Stores, Inc. v. Moitie.*

This Article criticizes the Court's disposition of the removal issue in *Moitie* as a departure from accepted notions of concurrent federal and state authority. This new direction, as exemplified in the microcosm of antitrust law, should be rejected by the federal courts in favor of other procedural alternatives.

Part I of the Article describes the origin and nature of the break-away problem. Parts II and III analyze the *Moitie* decision and criticize the Supreme Court's use of the "artful pleading" doctrine as a ground for removal of break-away state actions. Part IV reviews one district court's attempt to reconcile *Moitie* with established law. Part V considers alternative procedural vehicles for the control of such duplicative antitrust proceedings. The Article concludes that the application of res judicata and the use of injunctions, stays, and party joinder are better methods than removal for balancing the interests of federalism and sound judicial administration in the antitrust field and other areas of concurrent federal-state jurisdiction.

**The Origin and Nature of the Break-Away Problem**

As an outgrowth of current restrictive interpretations of the federal
antitrust laws by the United States Supreme Court, private antitrust plaintiffs have with increasing frequency sought to recover damages for their alleged injuries by commencing state court actions under state antitrust, tort, and contract theories. Not infrequently, such state plaintiffs had been plaintiffs in a federal antitrust action based on the same facts, but filed their break-away state law claims in an effort to avoid an unfavorable result in the federal forum.

The replacement of per se rules with the “rule of reason” approach in a broad range of antitrust cases in the federal courts, and the perceived hostility of the current administration to many Warren Court formulations favorable to antitrust plaintiffs, have no doubt played a contributing role in the increase of break-away actions. Yet the most immediate cause has been the Supreme Court’s decision in *Illinois Brick Co. v. Illinois.* In *Illinois Brick* the Court held that, subject to very narrow exceptions, only a “direct purchaser” from an allegedly price-fixing defendant may sue to recover damages under the federal antitrust laws. A remote purchaser will not be permitted to

2. *See infra* notes 4-6 & accompanying text.
4. The “rule of reason” test was designed to determine whether or not a restrictive trade practice imposes an unreasonable restraint on competition. *See Chicago Bd. of Trade v. United States,* 246 U.S. 231, 238 (1918).
prove that part of an anticompetitive overcharge was "passed on" to it by the direct purchaser.\(^8\)

The *Illinois Brick* decision has created difficult questions of application in federal courts,\(^9\) as well as considerable—but as yet unavailing—pressure for legislative modification.\(^10\) In view of this controversy, it is not surprising that not all of the states have followed the federal restriction. Shortly after *Illinois Brick* was decided, for example, the California legislature amended the state antitrust statute, the Cartwright Act,\(^11\) to expressly permit recovery by remote purchasers,\(^12\) an invitation that private antitrust plaintiffs have not hesitated to accept.\(^13\)

The rise of the break-away state antitrust action has created a significant conflict between the need for efficient judicial administration and the precepts of federalism. This problem is evidenced in the rapidly growing body of federal and state antitrust case law,\(^14\) and may be replicated in other areas such as civil rights.\(^15\) The conflict stems from the maintenance of both state and federal actions arising from the same

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8. *Id.* at 736-48.


12. Section 16750(a) was amended in 1978 to provide that "such action [antitrust] may be brought by any person who is injured in his business or property by reason of anything forbidden or declared unlawful by this chapter, regardless of whether such injured person dealt directly or indirectly with the defendant." 1978 Cal. Stat. ch. 536, § 1 (codified at *CAL. BUS. & PROF. CODE* § 16750(a) (West Supp. 1983)).


alleged wrong. Frequently the state plaintiff's action is only one of many similar actions against the same defendants based on identical underlying facts.\textsuperscript{16} If such multiple actions are pending in various federal district courts, they are customarily transferred to a single federal district judge for coordinated or consolidated pre-trial proceedings. Such transfers are made "for the convenience of parties and witnesses" and to "promote the just and efficient conduct of such actions" pursuant to the multidistrict transfer statute.\textsuperscript{17} Coordination and consolidation promote judicial economy and protect defendants from duplicative discovery and other pre-trial demands in multiple forums.\textsuperscript{18} The transfers also alleviate the risk of duplicative recovery and significantly increase the possibility of comprehensive disposition of the litigation through settlement, summary judgment, or trial in a single forum.\textsuperscript{19}

If the break-away state case is allowed to proceed independently of the federal action, however, the goals of the federal multidistrict transfer statute may be partially or entirely frustrated. In an attempt to avoid this result, federal defendants have employed an arsenal of procedural weapons to choke off break-away actions. For instance, defendants have attempted to remove the state action to federal district court\textsuperscript{20} (followed by requests to the multidistrict panel to transfer the action to the court hearing the coordinated pre-trial proceedings),\textsuperscript{21} or have moved to stay the state proceedings,\textsuperscript{22} dismiss the state proceeding on res judicata grounds,\textsuperscript{23} enjoin the state proceedings,\textsuperscript{24} or join possi-

\textsuperscript{16} See Three J Farms, Inc. v. Alton Box Board Co., 1979-1 Trade Cas. (CCH) ¶ 62,423 (D.S.C. 1978), rev'd on other grounds, 609 F.2d 112 (4th Cir. 1979), cert. denied, 445 U.S. 911 (1980), in which the court noted that "plaintiffs lift from the unified complaint in M.D.L. No. 310 entire paragraphs without any change of language or even punctuation." Id. at 76,550.

\textsuperscript{17} 28 U.S.C. § 1407 (1976).


\textsuperscript{19} See generally 15 WRIGHT & MILLER, supra note 18, §§ 3861-3868.


bly duplicative claimants as "indispensable parties" to the other actions.25

The petition for removal appears to have become a favored device,26 despite the well-established doctrine that the plaintiff is the master of his own complaint, and may not avoid removal on federal question grounds by electing to ignore an available federal remedy and to proceed instead solely under state law.27 Although removal of a break-away state antitrust action would appear to fly in the face of this principle of federal jurisdiction, such removal received an unexpected boost in 1981 when the Supreme Court, in its customary end-of-term flurry of opinions, announced its decision in *Federated Department Stores, Inc. v. Moitie.*28

As shown below, there are substantial reasons to question the Court's disposition of the removal issue in *Moitie*. Nonetheless, at least one court followed *Moitie* in permitting such removal in antitrust cases.29 If this trend were to result in an entrenched construction of the removal statute,30 it could be applied by analogy to other areas of concurrent federal and state jurisdiction, such as civil rights litigation. The *Moitie* removal doctrine thus portends a significant shift in the allocation of power between federal and state legislative and judicial authority.

Fortunately, removal is not the only vehicle for control of wasteful concurrent state litigation. Several better approaches are available that have not yet received adequate attention by the courts or commentators. Reflection on the questions raised by these alternatives provides insight into the range, power, and flexibility of the modern procedures and jurisdictional doctrines that may be brought to bear on this impor-

24. See, e.g., Alton Box Board Co. v. Esprit De Corp., 682 F.2d 1267, 1271 (9th Cir. 1982) (discussed infra text accompanying notes 232-37).
29. See, e.g., Salveson v. Western States Bankcard Ass'n, 525 F. Supp. 566 (N.D. Cal. 1981), appeal pending, Nos. 82-4067, 82-4113 (9th Cir. argued and submitted Dec. 17, 1982).
tant new conflict between the precepts of federalism and the exigencies of efficient judicial administration.

The **Moitie Decision**

The Case Below

The *Moitie* case arose from a complex background of unusual procedural maneuvering in state and federal courts. In 1976, the United States filed civil and criminal complaints alleging that defendants had conspired to fix the retail price of women's clothing in violation of section 1 of the Sherman Act. Seven private treble-damage actions based on substantially the same allegations promptly followed. Five of these complaints, including the *Brown I* complaint, were filed in the United States District Court for the Northern District of California, and alleged violations of the Sherman Act. Two of the actions, including *Moitie I*, were filed in California superior court. The *Moitie I* state complaint did not allege a violation of federal law, but rather was based entirely on California state antitrust law. Defendants removed, claiming both diversity of citizenship and federal question jurisdiction. Plaintiff Moitie made no motion to remand.

Following removal, the federal district court consolidated all seven actions and granted defendants' motion to dismiss for failure to state a claim upon which relief could be granted. The court dismissed the consolidated action on the theory (later rejected by the United States Supreme Court in *Reiter v. Sonotone Corp.* that plaintiff retail purchasers had failed to show injury to any business in which they were engaged.

The plaintiffs in four of the original federal actions and one of the state actions appealed to the United States Court of Appeals for the Ninth Circuit, but the *Moitie* and *Brown* plaintiffs took a different ap-

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33. *Id.*
35. *Moitie* v. Federated Dep't Stores, Inc., 611 F.2d at 1268.
36. *Id.*
proach. Instead of appealing, they filed new complaints in California municipal court (Moitie II and Brown II) that studiously omitted any mention of federal or state antitrust theories of recovery.\(^4^0\) Although the state complaints in Moitie II and Brown II included the same factual allegations as the previous federal complaints, they were based solely on state law theories of fraud and deceit, unfair business practices, restitution, and “civil conspiracy.”\(^4^1\)

Defendants once again removed on federal question and diversity grounds and moved to dismiss, this time on the theory that the unappealed judgments in Moitie I and Brown I were res judicata in Moitie II and Brown II.\(^4^2\) Plaintiffs countered by moving to remand on the grounds that less than $10,000 was in controversy and that the actions arose solely under state law.\(^4^3\) The federal district court denied the motions to remand, holding that by continuing to rely on allegations modeled on the government complaints in federal court, the Moitie and the Brown plaintiffs had “cast the character”\(^4^4\) of their state complaints as federal:

> Artful pleading by plaintiffs which adds four new state causes of action and deletes specific reference to violations of federal antitrust laws cannot convert their essentially federal law claims into state law claims. From start to finish, plaintiffs have essentially alleged violations by defendants of federal antitrust laws.\(^4^5\)

The district court then granted the motion to dismiss on res judicata grounds.\(^4^6\)

This time the Moitie and Brown plaintiffs appealed,\(^4^7\) but before their appeal was heard by the Ninth Circuit that court had reversed the district court’s dismissal of the original consolidated action on authority of the Supreme Court’s intervening decision in Reiter v. Sonotone.\(^4^8\) In the Moitie II and Brown II appeals, the Ninth Circuit summarily,

\(^{40}\) Order Denying Plaintiff’s Motion to Remand, July 8, 1977, reprinted as Appendix C to Petition for Certiorari at 14a-15a, Federated Dep’t Stores, Inc. v. Moitie, 452 U.S. 394 (1981).

\(^{41}\) Id.

\(^{42}\) Memorandum of Points and Authorities in Support of Defendants’ Motion to Dismiss, July 8, 1977, Joint Appendix at 126-37, Federated Dep’t Stores, Inc. v. Moitie, 452 U.S. 394 (1981).

\(^{43}\) Order Denying Plaintiff’s Motion to Remand, July 8, 1977, reprinted as Appendix C to Petition for Certiorari at 15a, Federated Dep’t Stores, Inc. v. Moitie, 452 U.S. 394 (1981).

\(^{44}\) Id. at 16a.

\(^{45}\) Id. at 17a.

\(^{46}\) Id.

\(^{47}\) Moitie v. Federated Dep’t Stores, Inc., 611 F.2d 1268.

and without citation of authority, affirmed the propriety of removal on the theory that "the court below correctly held that the claims presented were federal in nature, arising solely from price fixing on defendants' part." It then proceeded to reverse the res judicata dismissals. The court held that while "strict application" of the doctrine of res judicata would give preclusive effect to the unappealed dismissals in \textit{Moitie I} and \textit{Brown I}, the positions of the \textit{Moitie II} and \textit{Brown II} plaintiffs were identical with those of the other plaintiffs in the consolidated action who had successfully appealed. Concerns of "public policy and simple justice" therefore required that the non-appealing plaintiffs receive the benefit of the earlier reversal as well.\footnote{Moitie v. Federated Dep't Stores, Inc., 611 F.2d at 1268.}

\textbf{In the Supreme Court}

In this posture the \textit{Moitie} case came before the United States Supreme Court. The sole question presented in the petition for certiorari,\footnote{\textit{Id.} at 1269-70.} and addressed by the Court, was the correctness of the Ninth Circuit’s "novel exception to the doctrine of res judicata."\footnote{Petition for Certiorari at 2, \textit{Federated Dep’t Stores, Inc. v. Moitie}, 452 U.S. 394 (1981).} The \textit{Moitie} and \textit{Brown} plaintiffs filed no cross-petition challenging the court of appeals' summary decision on the propriety of removal. In view of both this fact and the very abbreviated reference to the removal issue contained in the briefs on the merits, it is not surprising that the Supreme Court’s reversal of the Ninth Circuit’s judgment was based almost entirely on the res judicata point. The Court held that the federal dismissal in \textit{Brown I} should be accorded claim preclusive effect in \textit{Brown II}.\footnote{\textit{Moitie}, 452 U.S. at 398.}

Justice Rehnquist's opinion for six members of the Court vigorously condemned the principle of "equitable tempering" of res judicata endorsed by the court of appeals. In his view the Court's "rigorous application" of res judicata in its prior decision in \textit{Reed v. Allen} \footnote{286 U.S. 141 (1932).} "makes clear that this Court recognizes no general equitable doctrine,
such as that suggested by the Court of Appeals."55 Instead, "[t]he doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case,"56 a consideration "even more compelling in view of today's crowded dockets."57

The willingness of a strong majority of the Court to endorse such a sweeping condemnation of the flexible application of res judicata, long assumed by leading commentators and courts58 to be an important safety valve for a potentially harsh doctrine that "renders white black, the crooked straight,"59 is of paramount importance. Yet the Moitie decision contains a number of other peculiarities and ironies. In response to plaintiff's contentions that they had raised only state law claims in Brown II that should not be barred by the Brown I judgment on their federal claims, Justice Rehnquist concluded that it was "unnecessary for [the] Court to reach that issue" because it was sufficient that "Brown I is res judicata as to respondents' federal law claims."60

But as Justice Brennan persuasively pointed out in his dissenting opinion,61 Brown II raised only state law claims of fraud, unfair business practices, restitution, and civil conspiracy. How then could the majority have found it unnecessary to resolve the question of whether the state law claims in Brown II were barred? The answer lies in the Court's cursory and questionable disposition of the latent removal issue.

As noted,62 the briefs before the court only tangentially addressed the removal issue.63 At oral argument the Justices evidenced consider-

55. Moitie, 452 U.S. at 400.
56. Id. at 401.
57. Id. However, Justices Marshall and Blackmun, in their concurrence, made clear that they "would not close the door upon the possibility that . . . the doctrine of res judicata must give way to what the Court of Appeals referred to as 'overriding concerns of public policy and simple justice.'" But they found that such "equitable tempering" was inappropriate in the Moitie case because respondents had made a "deliberate tactical decision" to forego a federal appeal. 452 U.S. at 402-03 (Blackmun, J., joined by Marshall, J., concurring). Justice Blackmun further emphasized the "special need for strict application of res judicata in complex multiple party actions of this sort so as to discourage 'break-away' litigation." Id.
59. 1B Moore's Federal Practice, supra note 58, ¶ 0.405[12], at 787 (citing Jeter v. Hewitt, 64 U.S. (22 How.) 352, 364 (1859)).
60. Moitie, 452 U.S. at 402.
61. Id. at 404 (Brennan, J., dissenting).
62. See supra text accompanying notes 51-53.
63. The Moitie majority, however, cannot be faulted for reaching the removal issue.
able confusion as to the basis for removal. With such limited attention given to the issue in the opinions below and in the briefs and arguments, it is not surprising that Justice Rehnquist's opinion brushed aside this important issue in a single footnote expressing agreement with the court of appeals that "at least some of the claims had a sufficient federal character to support removal." Justice Rehnquist also noted the district court finding that respondents "had attempted to avoid removal by 'artfully' casting their 'essentially federal law claims' as state law claims" and that "[w]e will not question here that factual finding." In support of this "artful pleading" doctrine, the Court cited a section of the Wright, Miller, and Cooper treatise and three district court opinions. As discussed in the next section, the Court's reliance on these authorities was misplaced.

Incongruities abound in Moitie. Justice Rehnquist, a dedicated advocate of "Our Federalism" and the need to give free rein to the interests of state sovereignty, in Moitie authored an opinion supporting a questionable extension of federal jurisdiction in derogation of those concepts. Justice Rehnquist, assumed to be a judicial conserva-

Contrary to Justice Blackmun's concurring opinion, 452 U.S. at 402, it did not matter that the Brown II plaintiffs had not cross-petitioned for review of that issue, for it is an appellate court's duty to resolve the issue of subject-matter jurisdiction on its own motion should that issue come to its attention. Mansfield, C. & L.M. Ry. v. Swan, 111 U.S. 379, 382 (1884). See also Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152 (1908). It would also have been inappropriate for the Court to overlook the removal issue on the theory, recognized in American Fire & Casualty Co. v. Finn, 341 U.S. 6, 16-18 (1951), that a party may waive objections to removal jurisdiction if not timely asserted, provided the district court would have had subject-matter jurisdiction over the action if originally commenced in federal court. If the Brown II claims were truly state law claims, then no original subject-matter jurisdiction existed.


65. Moitie, 452 U.S. at 397 n.2.

66. Id.


68. See infra text accompanying notes 89-123.


tive" and an avowed statutory "strict constructionist," was joined by a strong majority of the Supreme Court in an expansive and virtually unprecedented reading of the removal statute, despite the Court's prior admonition that "due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." This result was reached, moreover, by endorsing a purported "factual finding" of the district court that plaintiffs' state law claims had a "federal character," even though in Moitie the determination of the plaintiffs to assert state law claims was clear.

Moreover, as other commentators have pointed out, had the plaintiffs' state law claims truly been "federal in character," then presumably they would have arisen under the federal antitrust laws, as did the Brown I complaint. That being true, the Lambert Run doctrine would have required the district court to dismiss the "federal" claims in Brown II for want of jurisdiction, as jurisdiction over claims arising under the federal antitrust laws lies exclusively in federal court and the district court's jurisdiction on removal is purely derivative from state court jurisdiction.

Although the long-standing criticism of the Lambert Run doctrine might lead the Supreme Court to repudiate it in an appropriate case, the Moitie majority did not cite, much less pur-

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75. Justice Brennan's dissent argued that under these circumstances the character of plaintiff's claims presented a legal question. Moitie, 452 U.S. at 409 n.5 (Brennan, J., dissenting).
76. See 14 WRIGHT AND MILLER, supra note 18, § 3722 (citing cases); State v. American League of Professional Baseball Clubs, 460 F.2d 654 (9th Cir. 1972).
77. Lambert Run Coal Co. v. Baltimore & Ohio R.R., 258 U.S. 377, 382 (1922). According to the Lambert Run doctrine, if a state court lacks jurisdiction, the federal court acquires none since the removal jurisdiction of the federal court is derivative.
80. See 14 WRIGHT & MILLER, supra note 18, § 3721, at 520-24; A.L.I., Study of the Division of Jurisdiction Between State and Federal Courts: Official Draft §§ 1312(d), 1317(b), 1382(e) (1969) (proposing a change in the Lambert Run doctrine to allow retention of such a case).
port to overrule, *Lambert Run* in the course of its footnote affirmance of the district court's assumption of removal jurisdiction.

Justice Brennan addressed his vigorous dissent in *Moitie* almost entirely to the removal issue. He noted that, under the established principle that the plaintiff is the master of his own complaint, "where the plaintiff's claim might be brought under either federal or state law, the plaintiff is normally free to ignore the federal question and rest his claim solely on the state ground" thus precluding federal question removal. The artful pleading doctrine, Justice Brennan argued, was inapplicable because it was limited to situations in which Congress had preempted the field and entirely supplanted state law, leaving plaintiffs no "option" to proceed on a state law theory. As Justice Brennan pointed out, the federal antitrust laws do not generally preempt application of state tort or antitrust theories, and there was no basis for concluding that preemption could be found under the specific facts of the *Moitie* case.

The *Moitie* majority's characterization of the state claims before it as "federal in nature" created an important weapon for defendants attempting to neutralize, through removal, the threat of break-away state antitrust litigation. Federal district courts cannot be expected to casually brush aside the *Moitie* footnote. For that reason it is essential to examine the artful pleading doctrine as developed prior to *Moitie* to determine whether it supports the Court's decision on the removal issue.

**The Inapplicability of the Artful Pleading Doctrine As A Basis For Removal of Antitrust Actions**

As noted, Justice Rehnquist's cursory treatment of the removal issue in *Moitie* relied on three trial court opinions and a statement in the Wright, Miller & Cooper treatise that courts "will not permit plaintiff to use artful pleading to close off defendant's right to a federal forum.

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82. See supra note 27. See also The Fair v. Kohler Die & Specialty Co., 228 U.S. 22 (1913) (involving original jurisdiction).
84. Id. at 407-08.
85. Id. at 409. See also infra notes 93-98 & accompanying text.
87. See supra note 26 & accompanying text.
88. See, e.g., Iowa v. Binney & Smith, Inc., 1982-2 Trade Cas. (CCH) ¶ 64,781 (S.D. Iowa 1982); Salveson v. Western States Bankcard Ass'n, 525 F. Supp. 566, 572 (N.D. Cal. 1981), appeal pending, Nos. 82-4067, 82-4113 (9th Cir. argued and submitted Dec. 17, 1982).
. . . [and that] occasionally the removal court will seek to determine whether the real nature of the claim is federal, regardless of plaintiff's characterization." On this authority the Moitie majority declined to question the trial court's "factual finding" that "at least some" of the removed claims "had a sufficient federal character" to support removal.90

This analysis constitutes an expansion of the "artful pleading" doctrine as historically developed in the federal courts. The circumstances in which removal is proper under that doctrine were not present in Moitie, and they are not present in the break-away state antitrust context generally. As the next sentences of the Wright, Miller & Cooper treatise explain:

In many contexts plaintiff's claim may be one that is exclusively governed by federal law, so that the plaintiff necessarily is stating a federal cause of action, whether he chooses to articulate it that way or not. If the only remedy available to plaintiff is federal, because of preemption or otherwise, and the state court necessarily must look to the federal law in passing on the claim, the case is removable regardless of what is in the pleadings. If, however, there is a choice between federal and state remedies, the federal courts will not ignore the plaintiff's choice of state law as the basis for the action.91

As discussed below, even this version of the artful pleading doctrine is too broad, although there are cases that could be read to support it.92 The following two subsections demonstrate that 1) the federal antitrust laws do not preempt state laws, and 2) even if there were federal preemption in some circumstances, removal would not be justified.

The Absence of Preemption in the Antitrust Field

Even giving the artful pleading cases their broadest meaning, they do not support removal when the plaintiff has a real choice between state and federal law as a basis for recovery. In the antitrust area, plaintiffs do have such a choice. It is settled that the federal antitrust laws were not intended to displace state antitrust enforcement.93 As Senator Sherman explained in 1890, the Sherman Act was designed to

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89. 14 WRIGHT & MILLER, supra note 18, § 3722, at 564-66.
90. Moitie, 452 U.S. at 397 n.2.
91. 14 WRIGHT & MILLER, supra note 18, § 3722, at 566-69 (emphasis added).
Recognizing this general absence of federal preemption under the antitrust laws, the Ninth Circuit in *In re Sugar Antitrust Litigation* respected the plaintiffs' choice of a state forum. The court held that state indirect-purchaser claims by previously unsuccessful federal plaintiffs are not removable. Defendants had argued that the state plaintiffs were attempting to "circumvent" the unfavorable federal ruling and that the district court had acted to avoid "the chaos that . . . would result from simultaneous prosecution of complex state and federal actions pursuing the same relief." The court of appeals concluded that "[t]o deny remand under these extraordinary circumstances amounts to federal preemption of the antitrust laws by judicial act where it is conceded that there is no congressional preemption."

Thus, removal of concurrent state antitrust proceedings because the state plaintiff is or has been a plaintiff in a federal antitrust action ordinarily cannot be supported. The *Moitie* Court acknowledged neither the legislative intent that federal antitrust laws supplement state law, nor the compelling reasoning of the *Sugar Antitrust* decision.

The three district court decisions relied upon in the *Moitie* footnote provide no better support than the Wright, Miller & Cooper treatise for the Court's broad interpretation of the artful pleading doctrine to allow removal. Two of the cases involved break-away suits brought under the South Carolina antitrust law, which had previously been construed to apply only to purely intrastate commerce. As the break-away complaints concededly involved interstate commerce, it

94. This bill [the Sherman Act] . . . has for its single object to invoke the aid of the courts of the United States to deal with the combinations described . . . and in this way to supplement the enforcement of the established rules of the common and statute law by the courts of the several States in dealing with the combinations that affect injuriously the industrial liberty of the citizens of these States. It is to arm the Federal courts within the limits of their constitutional power that they may cooperate with the State courts in checking, curbing, and controlling the most dangerous combinations that now threaten the business, property, and trade of the people of the United States.

21 CONG. REC. 2457 (1890) (statement of Senator Sherman) (emphasis added).

95. 588 F.2d 1270 (9th Cir. 1978), cert. denied, 441 U.S. 932 (1979).

96. Id. at 1273-74.

97. Id. at 1272.

98. Id. at 1273.


100. *In re Wiring Device Antitrust Litig.*, 498 F. Supp. at 82; Three J Farms, Inc. v. Alton Box Board Co., 1979-1 Trade Cas. (CCH) at 76,550.
was clear that no state claim existed: there was no substantial, non-frivolous state law claim upon which plaintiff could choose to rely.\textsuperscript{101} In the third case, the wording of the complaint virtually tracked the language of the Sherman Act and section 303 of the Labor Management Relations Act, and the complaint asserted violations not only of state law but also of "such other [applicable] provisions of law, both under \textit{federal} and state mandate."\textsuperscript{102} The theory of the case was thus highly ambiguous. When a plaintiff does not clearly assert his determination to stand on his concurrent state rights, there seems little reason for a federal court to be unduly indulgent in respecting his choice of forum.\textsuperscript{103}

Neither the Wright, Miller, & Cooper treatise nor the three district court cases cited in the \textit{Moitie} removal footnote justify invoking the artful pleading doctrine as a ground for removal on the facts of \textit{Moitie}. The circumstances in which the artful pleading doctrine does justify removal involve clear and complete federal preemption. These circumstances are not generally present in antitrust cases. To be sure, in a few cases, most involving professional sports, state antitrust regulation has been held to be inconsistent with the commerce clause because the dominant interstate character of such businesses requires uniform national regulation.\textsuperscript{104} But such decisions fall far short of establishing any general preemption doctrine in the antitrust field, and no such commerce clause conflict was involved in \textit{Moitie} itself.

A more difficult preemption issue is presented when the break-

\textsuperscript{101} In re Wiring Device Antitrust Litig., 498 F. Supp. at 83; Three J Farms, Inc. v. Alton Box Board Co., 1979-1 Trade Cas. (CCH) at 76,550-51.

\textsuperscript{102} Prospect Dairy v. Dellwood Dairy Co., 237 F. Supp. at 178 (emphasis added).

\textsuperscript{103} See, e.g., Vitarroz Corp. v. Borden, Inc., 644 F.2d 960, 964 (2d Cir. 1981). \textit{Vitarroz} involved a trademark infringement and unfair competition suit brought in the New York Supreme Court. Defendant removed the case to United States District Court. Vitarroz made no motion to remand. On that basis, the Second Circuit Court of Appeals concluded that removal was proper, reasoning that "by not contesting jurisdiction at an early stage, we think the plaintiff permitted the District Court to exercise jurisdiction, since the Court was entitled to conclude that the plaintiff was willing to see its trademark infringement claim treated as one based on federal law." The court also noted that "[h]ad the plaintiff resisted removal . . . we think federal jurisdiction would have been defeated . . . . We acknowledge that this approach is a slight departure from the usual rule of testing whether a claim arises under federal law strictly from the face of the complaint." \textit{Id.} at 964.

away state plaintiffs are indirect purchasers who have no federal claim under the *Illinois Brick* rule. Section 4 of the Clayton Act, as construed in *Illinois Brick*, is at odds with state laws permitting recovery by indirect purchasers. However, in light of the legislative history cited above, such inconsistency is no ground for federal preemption.

The Impropriety of Removal Even if There Were Preemption

Even assuming that the *Illinois Brick* rule might ultimately be held to preempt some applications of state antitrust laws on policy grounds, removal should be denied. The assertion of Professors Wright, Miller, and Cooper that federal preemption may provide a basis for removal because the plaintiff would then have no “choice” to ground his complaint in state law ignores their previous recognition that whether a case “arises under” federal law for the purpose of the removal statute is governed by the same principles that apply to original federal question jurisdiction. In order for federal question jurisdiction to exist, a federal question must be an essential part of the plaintiff’s own claim for relief, and the assertion of a federal defense—such as preemption—does not convert a state law claim into a federal one.

105. *See supra* notes 7-8 & accompanying text.

106. *See supra* note 94 & accompanying text.

107. It could be asserted that enforcement of state indirect-purchaser statutes would stand “as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” Hines v. Davidowitz, 312 U.S. 52, 67 (1941), in enacting the federal antitrust laws, and is preempted on that ground. *See*, e.g., Doe v. Plyler, 457 U.S. 202, 225-26 (1982); Ray v. Atlantic Richfield Co., 435 U.S. 151, 157 (1978). This contention, while not entirely without foundation, should probably be rejected. The primary basis for the Supreme Court’s narrow gloss on section 4 of the Clayton Act in *Illinois Brick* was its fear that permitting complex “pass-on” theories of recovery in federal court would unduly complicate, and thus undermine, the deterrent effect of the federal private treble damage remedy. *Illinois Brick* Co. v. Illinois, 431 U.S. 720, 725 (1977). The fact that a state court may be willing to entertain such complex litigation does not present the same danger of complicating the federal proceedings.

One residual concern remains, however. If a concurrent state indirect-purchaser action were to proceed to judgment before the federal direct-purchaser case, it is possible that a federal court might deny recovery to direct-purchaser plaintiffs on the theory that section 4 of the Clayton Act or due process of law prohibits duplicative recovery for the same overcharge. *See* Western Union Tel. Co. v. Pennsylvania, 368 U.S. 71, 73-77, 80 (1961); Union Carbide Corp. v. Superior Court, 133 Cal. App. 3d 443, 448-54, 183 Cal. Rptr. 318, 322-23 (1982). This possibility might deter some federal direct-purchaser actions. However, this concern seems somewhat removed from the immediate focus of the *Illinois Brick* rule concerning the adverse consequences of additionally complicating the federal proceeding itself.

108. *See supra* text accompanying note 91.

one. On just that ground, several of the federal courts of appeals have rejected the artful pleading doctrine as a ground for permitting removal on the basis of a federal preemption defense to the asserted state law claims.

One line of decisions, however, has permitted removal of supposed state claims when a federal cause of action clearly supplants state causes of action. In AVCO Corp. v. Aero Lodge 735, International Association of Machinists, the Supreme Court upheld the removal of a state contract law action seeking an injunction to enforce a no-strike clause in a collective bargaining agreement. The Court noted that, under its decision in Textile Workers v. Lincoln Mills, the Labor Management Relations Act mandates that claims under that act are governed by federal law, not state law. The Court concluded that "[i]t is thus clear that the claim under this collective bargaining agreement is one arising under the 'laws of the United States' within the meaning of the removal statute," and that the federal district court thus had "original jurisdiction" over the suit. The AVCO Court apparently based its approval of removal upon the clarity of the exclusively federal character of the plaintiff's artfully pleaded state claim.

In Franchise Tax Board v. Construction Laborers Vacation Trust (FTB), the Supreme Court distinguished AVCO in rejecting the defendant's argument that federal preemption justified removal. The de-

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fendants claimed that ERISA\textsuperscript{117} preempted enforcement of California state income tax laws with respect to the assets of a trust subject to ERISA.\textsuperscript{118} The \textit{FTB} Court confirmed that "a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption."\textsuperscript{119} The Court stated that

\begin{quote}
{[t]he necessary ground of decision [in \textit{AVCO}] was that the preemptive force of [the labor statute] is so powerful as to displace entirely any state cause of action . . . . Any such suit is purely a creature of federal law . . . . \textit{AVCO} stands for the proposition that if a federal cause of action completely preempts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily "arises under" federal law.\textsuperscript{120}
\end{quote}

Since ERISA "does not purport to reach every question relating to plans covered by ERISA," and since ERISA "makes clear that Congress did not intend to preempt entirely every state cause of action relating to such plans,"\textsuperscript{121} \textit{AVCO} was distinguished, and the Court held that removal was improper.

The Supreme Court's emphasis on the clarity of an exclusively federal cause of action as the basis for removal supplies the proper link with traditional artful pleading doctrine. Just as a diverse plaintiff may not avoid removal by fraudulently concealing his status, so a party whose only substantial, non-frivolous claim is federal may not avoid a federal forum by deleting all references to the only law that could accord him relief. As Justice Brandeis stated in the \textit{Lambert Run} case:

\begin{quote}
[W]hile it is true that a plaintiff by his first pleading determines what right he will sue on and that the defense[s] set up . . . can not affect the jurisdiction when it depends on that right, yet the plaintiff may not, by alleging a frivolous claim or a fictitious situation, confer upon a court jurisdiction which, as determined by the plaintiff's real cause of action, it has not.\textsuperscript{122}
\end{quote}

To permit a litigant to bypass what is clearly an exclusive federal remedial scheme by maintaining a frivolous state court action would undermine the very purpose of the federal statute.

\begin{itemize}
\item \textsuperscript{118} \textit{FTB}, 103 S. Ct. at 2845.
\item \textsuperscript{119} \textit{Id.} at 2848 (emphasis added).
\item \textsuperscript{120} \textit{Id.} at 2853-54 (emphasis added).
\item \textsuperscript{121} \textit{Id.} at 2855. It should be noted that, to the extent that this language suggests that the merits of the preemption claim must be resolved in order to determine whether removal jurisdiction exists, the \textit{FTB} Court departed from the approach generally taken to determine federal subject-matter jurisdiction. See cases cited infra at note 123. The \textit{FTB} Court should have reached the conclusion it did simply on the ground that there was a colorable state claim and therefore no clear federal preemption.
\item \textsuperscript{122} \textit{Lambert Run Coal Co. v. Baltimore & Ohio R.R.}, 258 U.S. 377, 383 (1922).
\end{itemize}
In other words, the artful pleading doctrine should be invoked to support removal only when the state law claims are frivolous. This limitation comports with prevailing doctrine in analogous areas. For example, an insubstantial or frivolous federal question has been held to be insufficient to bring an essentially state law case into federal court for resolution on the merits;\textsuperscript{123} likewise, a frivolous assertion of rights grounded in state law should be insufficient to avoid a federal forum and force the defendant to raise the primacy of federal law by way of defense in state courts.

Clearly, cases such as \textit{AVCO} are inapposite in the antitrust context because such cases involve federal statutes that, unlike the antitrust laws, clearly create exclusively federal causes of action. Further, legitimate antitrust claims arising under state law are neither insubstantial nor frivolous, and thus should not be removable on the basis of the artful pleading doctrine.

In summary, the \textit{Moitie} majority had little or no support for its cursory removal analysis. The Court failed to consider the history of the artful pleading doctrine, the lack of federal preemption of state antitrust laws generally, and the decisions holding that a defense of federal preemption provides no basis for removal. Viewed in this light, the lower federal courts should not treat the \textit{Moitie} footnote as the last word on the question of artful pleading and the removability of breakaway state antitrust actions.

\textit{Salveson v. Western States Bankcard Association}: One Court's Attempt to Reconcile \textit{Moitie} with Established Law

The most thoughtful judicial analysis to date of the \textit{Moitie} Court's application of the artful pleading doctrine is Judge Schwarzer's opinion in \textit{Salveson v. Western States Bankcard Association},\textsuperscript{124} now pending on appeal before the Ninth Circuit Court of Appeals.\textsuperscript{125} In \textit{Salveson}, Judge Schwarzer considered motions to remand two unrelated cases that had been removed from California state courts solely on the theory that the state claims were federal in nature. In one of the cases, \textit{Allied Finance Adjusters},\textsuperscript{126} plaintiffs had originally brought suit in California superior court alleging that defendant repossession companies had en-

\begin{footnotesize}
\begin{itemize}
\item[125.] Nos. 82-4067, 82-4113 (9th Cir. argued and submitted Dec. 17, 1982).
\item[126.] \textit{R.C.I.A. Local 1228 Credit Union v. Allied Fin. Adjusters Conference, Inc.}, 525 F.
tered into a conspiracy in restraint of commerce in violation of California state antitrust law and the California Unfair Practices Act. The removal petition was based on plaintiffs' reliance on the federal antitrust claims by the United States against the same defendants and the interstate nature of defendants' activities. In the other case, Salveson, plaintiffs had originally filed a federal antitrust action alleging that the defendants had unlawfully conspired to exclude plaintiffs from the national credit card market. The federal district judge in that original action granted summary judgment for the defendants on the ground that the statute of limitations had run. Plaintiffs thereupon commenced an action in California superior court, alleging seven counts based on the Cartwright Act and common law theories of fraud, fraudulent inducement to contract, misappropriation of plaintiffs' programs and ideas, interference with business relations, and breach of contract. Defendants removed.

In resolving the removal question in both Allied Finance Adjusters and Salveson, Judge Schwarzer narrowly interpreted the Moitie footnote. He recognized that "the removal statute is strictly construed," that the "plaintiff is master of his claim, and may choose what law to rely on," that "federal jurisdiction does not exist . . . simply because the subject matter of the action could give rise to a federal law claim as well as a state law claim," and that "the court is not free to recharacterize plaintiff's complaint or to implement policies, such as coordination with pending multidistrict litigation, which, though desirable, lie beyond the scope of the removal statute." This was true even if plaintiff's state claims "were copied from other parties' pleadings grounded on federal law."

In Judge Schwarzer's view, the artful pleading doctrine as applied

127. Id. at 570. The Unfair Practices Act, CAL. BUS. & PROF. CODE §§ 17000-17101 (West 1964 & Supp. 1983), prohibits unfair, dishonest, deceptive, destructive and discriminatory business practices, including "locality discrimination," "below cost sales," use of "loss leaders," and secret rebates, as defined in the Act.

128. Salveson, 525 F.Supp. at 570.
129. Id. at 577-78.
130. Id. at 578.
131. Id. at 570, 578.
132. Id. at 570.
133. Id. at 571.
134. Id.
135. Id. at 574.
136. Id. at 575.
137. Id.
to state antitrust actions was consistent with established principles in only two situations: when plaintiff's allegations plainly exceeded the scope of the state statute relied upon, and thus necessarily arose under federal law if they arose at all, and more importantly, when "plaintiff has previously asserted substantially the same claim as a federal antitrust claim." Noting that the Supreme Court had been primarily concerned with the res judicata issue in *Moitie* and that "the Court did not explain why plaintiff's state court complaint could be characterized as artful pleading," Judge Schwarzer concluded that "more was involved than simply that the claim made under state law could also have been made under federal law." Indeed, the critical element in *Moitie* was that Brown had previously filed the identical claims as federal claims in the federal court. Having once exercised his option to assert these claims as federal rather than state claims, Brown could not later retreat from that decision to the prejudice of defendants. For the effect of permitting Brown to prosecute the same claims under state law in the second action would have been to impair the ability of defendants to assert the federal *res judicata* defense against those claims.

According to Judge Schwarzer, this limited construction of *Moitie* was "the only one that could be squared with the established law . . . governing plaintiff's control over his pleadings." He then remanded the *Allied Finance Adjusters* case on the ground that the plaintiffs had not previously asserted the federal claim and thus "have a right to assert their antitrust claims, even if they affect interstate commerce, under the Cartwright Act, regardless of whether they could also have been asserted under the Sherman Act." In *Salveson*, however, Judge Schwarzer denied remand because the "gravamen" of plaintiffs' state claims was the same as that of their previously dismissed federal claims, and "[p]laintiffs could have asserted that claim initially under the Cartwright Act. They chose, however, to proceed under the Sherman Act . . . thereby invoking this Court's jurisdiction."

Judge Schwarzer's effort to reconcile the *Moitie* removal holding with the removal statute and prior authority is subject to challenge on the ground that the general removal statute authorizes removal of cases

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138. *Id.* at 575. *See supra* text accompanying notes 100-02.
140. *Id.*
141. *Id.*
142. *Id.* at 575 n.8.
143. *Id.* at 577.
144. *Id.* at 578.
only if they "arise under" federal law. The fact that a plaintiff was unsuccessful in asserting a previous federal claim does not in itself imply that his successive claim based on state law theories "arises under" federal law. To be sure, such an effort to relitigate invokes the policy concerns that underlie the doctrine of res judicata. But the fact that the state court defendants may have a res judicata defense based upon the effect of the prior federal decree under the supremacy clause provides no basis for removal.

Despite Judge Schwarzer's protestations to the contrary, the Salveson decision in effect imposed an "irrevocable election of remedies" in order to promote the goal of efficient judicial administration. This goal in itself provides no basis for removal under existing law. Perhaps the result would be supportable if Judge Schwarzer had been correct in concluding that prosecution of state law claims in state court following the adverse disposition of a prior federal action would "impair the ability of the defendants to assert the federal res judicata defense against those claims." In fact, there is no such impairment. The res judicata defense is fully available in state courts. Existing authority would support a claim of merger or bar in such circumstances with far less strain on established principles of federal jurisdiction than is inherent in the Moitie version of the artful pleading doctrine.

Alternative Procedural Vehicles for the Control of Duplicative State Antitrust Proceedings

Res Judicata

Res judicata is preferable to removal as a method of preventing

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147. The assertion of a federal defense to a state law claim generally provides no basis for removal. See supra note 110 & accompanying text. But see Villarreal v. Brown Express, Inc., 529 F.2d 1219 (5th Cir. 1976) (the "6 million dollar tire" case), a case characterized by the court of appeals as seeking relief from a prior federal judgment awarding recovery on claims of fraud. In affirming removal jurisdiction, the court held that such an action was properly brought in federal court only under rule 60(b)(3) of the Federal Rules of Civil Procedure, and that "[a] party may not fraudulently evade removal by drafting a complaint so that the true purpose of the law suit is artfully disguised." Id. at 1221.

148. Salveson, 525 F. Supp. at 575 ("the court is not free to recharacterize plaintiff's complaint or to implement policies, such as coordination with pending multidistrict litigation, which, though desirable, lie beyond the scope of the removal statute").

149. Id.

150. 1B MOORE'S FEDERAL PRACTICE, supra note 58, ¶ 0.406, at 901-10 (citing Stoll v. Gottlieb, 305 U.S. 165 (1938); Hancock Nat'l Bank v. Farnum, 176 U.S. 640 (1900)).
duplicative state antitrust litigation. The doctrine of res judicata precludes relitigation in state court of state law claims that were or could have been brought in a prior federal action as pendent claims, provided the state law claims arose out of the same transaction or occurrence as the adjudicated federal claim.  

It is difficult to understand Judge Schwarzer's reservations in Salveson concerning the availability of the res judicata defense based on a prior federal judgment. The supremacy clause requires a federal judgment to be accorded the same preclusive effect in state court as it would receive in the courts of the United States. Indeed, in Salveson itself Judge Schwarzer used the doctrine of res judicata in dismissing several of plaintiffs' state law claims on the ground that they arose out of the same transactions as plaintiffs' prior federal antitrust claims, and therefore were barred (even though they had not been raised in the federal action) because they could have been asserted under the doctrine of pendent jurisdiction.

The questions remain whether the doctrine of res judicata may be unavailable in some cases on the ground that the scope of a federal district court's pendent jurisdiction does not include all of the traditional state law claims that might be asserted on the same facts, or because the "cause of action" for res judicata purposes in the federal antitrust action may not comprise all such state claims, or because the parties are different in the federal and state actions. In analyzing these questions, a distinction must be drawn between cases in which the indirect purchasers are named plaintiffs or class members in the initial federal action, and those in which they are not. In the latter context, the doctrine of res judicata does not preclude relitigation by persons not parties to the prior action. When the same parties are involved, however, neither the limited scope of federal pendent jurisdiction nor the res judicata concept of "cause of action" unduly restricts the availability of the res judicata defense as a means to

151. See generally 18 WRIGHT & MILLER, supra note 18, § 4411.
152. 18 WRIGHT & MILLER, supra note 18, § 4468, at 648-49. See also Degnan, Federalized Res Judicata, 85 YALE L.J. 741, 744-50 (1976).
154. Id. at 580, 582.
155. These concerns are heightened in the context of state antitrust or tort actions by the standing given indirect purchasers who have no federal cause of action under Illinois Brick. If such claims are not cognizable in federal court, how can the federal judgment bar a subsequent action in state court by such indirect purchasers? The procedural devices that defendants might use to avert concurrent state litigation by non-parties to the federal action are discussed infra text accompanying notes 263-322.
156. See generally 18 WRIGHT & MILLER, supra note 18, § 4448.
counter break-away state antitrust actions when the state plaintiffs seek to avoid the force of a prior federal decree. The recent decision of the California Court of Appeal in Boccardo v. Safeway Stores, Inc. 157 illustrates this point.

In Boccardo, a number of cattlemen filed class action complaints in federal district courts across the country, alleging that the defendant retail food stores had conspired to depress beef prices paid to meat packers, and that the packers had in turn passed on these “undercharges” in the form of lower prices paid to the plaintiff cattlemen. The Judicial Panel for Multidistrict Litigation transferred all of the actions for consolidated pre-trial proceedings to the United States District Court for the Northern District of Texas. 158 The district court granted defendants’ motions to dismiss Boccardo and the other similar complaints, apparently on the ground that the Illinois Brick preclusion of suits by indirect purchasers applied equally to prevent claims by “indirect sellers”. 159 The plaintiffs in all the actions but Boccardo appealed the judgments of dismissal to the United States Court of Appeals for the Fifth Circuit. 160 The Boccardo plaintiffs, after unsuccessfully moving the Texas district court for post-dismissal leave to amend their complaint to allege state antitrust violations under the California Cartwright Act, 161 proceeded to file a new action based on exactly the same facts in California superior court. 162 They alleged a violation of the Cartwright Act, 163 which had been amended in the wake of Illinois Brick to permit claims by indirect purchasers. 164 Plaintiffs also asserted state law claims for interference with economic relations, “civil conspiracy,” unfair competition, fraudulent business practices, and restitution. 165

The superior court dismissed the action on the ground that the Boccardo plaintiffs had improperly “split” a single cause of action and that their state law claims were barred by the unappealed federal judg-

159. Boccardo, 134 Cal. App. 3d at 1040, 184 Cal. Rptr. at 9. See In re Beef Indus. Antitrust Litig., 600 F.2d 1148, 1153 (5th Cir. 1979), cert. denied, 449 U.S. 905 (1981) (the district court did not file an opinion, but stated from the bench that dismissal was based on Illinois Brick).
161. Boccardo, 134 Cal. App. 3d at 1040, 184 Cal. Rptr. at 906.
162. Id. at 1037, 184 Cal. Rptr. at 903.
163. Id. at 1041, 184 Cal. Rptr. at 906.
164. See supra note 12.
The California Court of Appeal affirmed regarding the res judicata effect of the federal judgment in *Boccardo* was the failure of the *Boccardo* plaintiffs to timely allege their state law claims in the federal action, and the consequent uncertainty about whether the federal district court would have exercised its pendent jurisdiction to hear and determine the state law claims had they been alleged at the outset. This question arose from the generally accepted proposition that a judgment has no preclusive effect on a claim over which the rendering court had no jurisdiction, and the corollary that a federal court’s discretionary refusal to exercise pendent jurisdiction over a state claim does not bar further litigation of the state claim in state court.

In the *Boccardo* case there was no question but that the plaintiffs’ federal claims and their subsequent Cartwright Act and state tort theories arose from a “common nucleus of operative fact” within the meaning of *United Mine Workers of America v. Gibbs.* The state claims therefore would have fallen within the pendent jurisdiction of the federal district court had they been alleged at the outset of the federal action. Moreover, *Boccardo* is a clear example of a case in which a plaintiff’s claims, “considered without regard to their federal or state character, . . . are such that he would ordinarily be expected to try them all in one judicial proceeding.” Thus, had the federal action proceeded to judgment on the merits after full trial, that judgment would have precluded subsequent federal and state actions based on the same “cause of action,” as to every matter that was raised and every matter that might have been raised.

167. *Id.* at 1053-54, 184 Cal. Rptr. at 914.
168. The court easily resolved in the affirmative the question of whether a rule 12(b)(6) dismissal for failure to state a claim upon which relief could be granted constituted a judgment “on the merits” for res judicata purposes. *Id.* at 1041-42, 184 Cal. Rptr. at 906 (quoting 1B Moore’s Federal Practice, supra note 58, ¶ 0.409[2], at 1003).
169. *Id.* at 1044-54, 184 Cal. Rptr. at 909-14.
170. See 1B Moore’s Federal Practice, supra note 58, ¶ 0.405, at 634-35; see also Calderone Enter. Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971), cert. denied, 406 U.S. 930 (1972).
174. *Id.* at 725.
175. *Id.* at 724 (citing Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 320, 321 (1927)).

The extent of the preclusive effect of a judgment depends in part upon the definition of "cause of action" or "claim." Application of the broad "transactional" definition of a
The fundamental question in *Boccardo*, and in break-away state antitrust actions generally, is whether a federal district court's pre-trial disposition of jurisdiction-conferring federal antitrust claims deprives the federal court of jurisdictional power to hear and resolve pendent state antitrust and tort claims arising from the same facts. If the district court retains such power, the question remains whether and to what extent the court's discretion under *Gibbs* to decline to exercise pendent jurisdiction should preclude a res judicata bar to a state law claim that the plaintiff could have but did not raise in the federal action.

In *Gibbs*, the Supreme Court upheld the trial court's discretionary decision to retain jurisdiction over the pendent state law claims, despite the trial court's post verdict dismissal of the jurisdictional federal claim. The Supreme Court observed in dictum: "Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." This categorical pronouncement has been widely followed in the lower

"claim" adopted by the Restatement (Second) of Judgments, which would bar "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose," RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (1980), is appropriate in the context of break-away state antitrust actions. As the Restatement implicitly recognizes, id. § 24(2), the definition of "cause of action" for the purpose of determining the scope of claim preclusion should not be based on the traditional but intellectually arid process of defining "primary rights" or duties, id. § 24 comment a. Instead, the determination should reflect a court's normative judgment about what claims should be resolved in a single action, "giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations." Id. § 24(2). In this regard the law of res judicata mirrors the theory of pendent jurisdiction articulated in *Gibbs*, under which pendent jurisdiction depends on the court's assessment of whether "a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding." United Mine Workers v. Gibbs, 383 U.S. at 725.

176. When this question was addressed on remand in the *Moitie* case, the Ninth Circuit applied the Restatement's transactional approach to hold that, even had plaintiffs alleged state tort theories in *Brown II*, they would be barred by the dismissal of the federal antitrust claims in *Brown I*. Brown v. Federated Dep't Stores, 653 F.2d 1266 (9th Cir. 1981). In the *Salveson* case, Judge Schwarzer similarly concluded that "[a] subsequent action advancing a different legal theory based on the same events and injuries is barred by a final decision in the first action where that theory could have been argued as an alternative or additional ground for recovery." 525 F. Supp. 566, 582 (N.D. Cal. 1981). And in Harper Plastics, Inc. v. Amoco Chem. Corp., 657 F.2d 939 (7th Cir. 1981), a Seventh Circuit panel, while recognizing that exclusive reliance on whether claims "arise out of the same basic factual situation" might prove "too much" in other settings, had no difficulty in concluding that a break-away state contract claim was barred by the previous dismissal of a federal antitrust claim based on precisely the same facts. Id. at 944-45.


178. Id. at 726 (emphasis added).
The language suggests that it would constitute an abuse of discretion, if not an act in excess of jurisdiction, for a federal court to adjudicate pendent state claims following pre-trial dismissal of the federal claims. If this were true, pre-trial dismissal of federal antitrust claims would preclude litigation in federal court of pendent state law claims, and would thus pose no bar to subsequent litigation of those state law claims in state court.

That the Supreme Court's dictum in Gibbs cannot be taken at face value is evident from its subsequent decision in Rosado v. Wyman. The Rosado Court sustained the discretion of the district court to hear and resolve a challenge to state welfare regulations that were allegedly inconsistent with federal statutory provisions, notwithstanding the pre-trial dismissal, on the ground of mootness, of the jurisdiction-conferring constitutional claim. The Court noted that in the district court's determination of the mootness issue, "substantial time and energy have been expended looking toward the resolution of a dispute that plaintiffs were entitled to bring in federal court." The Court concluded: "We are not willing to defeat the common sense policy of pendent jurisdiction—the conservation of judicial energy and the avoidance of multiplicity of litigation—by a conceptual approach that would require jurisdiction over the primary claim at all stages as a prerequisite to resolution of the pendent claim."

Rosado involved a pendent federal claim, and the Court acknowledged that "the statutory question is so essentially one of federal policy that the argument for exercise of pendent jurisdiction is particularly strong." Yet the practical considerations of judicial administration at the core of Rosado are not confined to pendent federal claims. Encouraged by Rosado, a substantial number of decisions in the courts of appeals have affirmed the discretion of federal district courts to hear and resolve pendent state law claims following pre-trial disposition of jurisdiction-conferring federal claims when the trial court has expended substantial time and effort prior to its decision on the federal

181. Id. at 404.
182. Id. at 405 (footnote omitted).
183. Id. at 404 (citing United Mine Workers v. Gibbs, 383 U.S. 715, 727 (1966)).
claim.184

The California Court of Appeal in Boccardo185 adopted the principles of the Rosado case and its progeny, and the position of the Restatement (Second) of Judgments. The Restatement takes the position that subsequent state actions based on the same cause of action should be precluded unless the state court in the second proceeding concludes that the court in the prior federal action "would clearly not have had jurisdiction to entertain the omitted theory or ground (or, having jurisdiction, would clearly have declined to exercise it as a matter of discretion)."186

The Boccardo court held that the subsequent state antitrust and tort claims were barred because the jurisdiction-conferring federal claim was substantial and because it was not apparent that the federal court would have declined to assume and retain jurisdiction over the state claims had they been properly alleged in the federal action.187 The California court distinguished the federal cases that apparently required dismissal of pendent claims on the basis that the jurisdiction-conferring federal claims in those cases had been dismissed before there had been "substantial expenditure of the court's time and energy on the case."188 By contrast, in the Boccardo action in federal court "a substantial amount of time and energy had been expended prior to the dismissal of the federal complaint."189 "Thus, although it is possible that the federal court would have dismissed a Cartwright Act claim without prejudice to a later state action, we cannot say that it was clear

See, e.g., Financial Gen. Bankshares v. Metzger, 680 F.2d 768, 773 n.8 (D.C. Cir. 1982) (state claim tried after federal claims settled or dismissed); North Dakota v. Merchants Nat'l Bank & Trust Co., 634 F.2d 368, 371 (8th Cir. 1980) (state claim decided on remand after dismissal of federal claims affirmed); Lentino v. Fringe Employee Plans, Inc., 611 F.2d 474, 479-80 (3d Cir. 1979) (state claim tried after federal claim dropped on morning of trial); Transok Pipeline Co. v. Darks, 565 F.2d 1150, 1155 (10th Cir. 1977), cert. denied, 435 U.S. 1006 (1978) (state claims decided in jury trial after federal claims settled before trial; court of appeals asserted that "[i]t would be a shocking waste of time and money now to require this cause to be relitigated in the state court"); Brunswick v. Regent, 463 F.2d 1205, 1206-07 (5th Cir. 1972), cert. denied, 410 U.S. 942 (1973) (state claims tried after federal claims dropped at pretrial conference); Gray v. International Ass'n of Heat & Frost Insulators Local 51, 447 F.2d 1118, 1120 (6th Cir. 1971) (state claim decided at jury trial on remand after dismissal of federal claims affirmed); Gem Corrugated Box Corp. v. National Kraft Container Corp., 427 F.2d 499, 501 n.1 (2d Cir. 1970) (state claim decided at jury trial after federal claims dismissed by stipulation of the parties).

185. 134 Cal. App. 3d at 1045, 184 Cal. Rptr. at 909.
186. RESTATEMENT (SECOND) OF JUDGMENTS § 25 comment e (1980).
188. Id. at 1055, 184 Cal. Rptr. at 914.
that the court would have done so.\textsuperscript{190}

A substantial argument can be made that even broader preclusive effect should be accorded the federal judgment by \textit{requiring} that the federal litigant join all his state law claims over which the federal court would have had power to exercise pendent jurisdiction. As the Reporter for the Restatement observed: "In cases of doubt, it is appropriate for the rules of res judicata to compel the plaintiff to bring forward his state theories in the federal action, in order to make it possible to resolve the entire controversy in a single lawsuit."\textsuperscript{191} The \textit{Boccardo} court recognized that such a rule would "eliminate the guesswork necessarily involved in determining how the federal court would have exercised its discretion because the federal court in each case would have had the opportunity to determine whether pendent jurisdiction should be imposed."\textsuperscript{192} There seems little reason to allow state antitrust plaintiffs to gamble on favorable post-trial analysis of preclusion when the federal court was available at the outset to resolve all of their claims in a single proceeding.\textsuperscript{193}

At least one federal court has adopted the less exacting standard of the Restatement. In its 1981 decision in \textit{Harper Plastics, Inc. v. Amoco Chemicals Corp.},\textsuperscript{194} the Seventh Circuit held that a break-away state contract action was barred by a prior federal dismissal of a Robinson-Patman\textsuperscript{195} claim based on the same facts. The court reached its conclusion without any elaborate inquiry into whether the federal court would have assumed or retained pendent jurisdiction over the state contract claim had it been included in the federal complaint. The court stated:

\begin{quote}
We fail to discern the unfairness in requiring a plaintiff to join all relevant theories of relief in a single proceeding. The uncertainty over whether a trial judge would exercise pendent jurisdiction does not justify permitting the institution of a multiplicity of proceedings which may have the effect of harassing defendants and wasting judicial resources. If appellant entertained any doubts at the pleading stage, they should have been resolved in favor of joinder.\textsuperscript{196}
\end{quote}

Against this backdrop, there is no basis in the cases, the scholarly

\textsuperscript{190.} \textit{Id.}
\textsuperscript{191.} \textit{RESTATEMENT (SECOND) OF JUDGMENTS} § 25 reporter's note (1980).
\textsuperscript{192.} \textit{Boccardo}, 134 Cal. App. 3d at 1051, 184 Cal. Rptr. at 912.
\textsuperscript{193.} \textit{See id.} at 1051-52, 184 Cal. Rptr. at 912-13 (citing Harper Plastics, Inc. v. Amoco Chem. Corp., 657 F.2d 939 (7th Cir. 1981)).
\textsuperscript{194.} 657 F.2d 939 (7th Cir. 1981).
\textsuperscript{196.} Harper Plastics, Inc. v. Amoco Chem. Corp., 657 F.2d at 946.
authority, or the precepts of federalism for declining to accord full res judicata effect to a federal court’s pre-trial dismissal of federal antitrust claims. Such use of res judicata will preclude subsequent state antitrust and tort litigation that is instituted by the unsuccessful federal plaintiffs and is based on the same wrongful conduct and injury, even if new theories not asserted in the federal action are raised.

Injunctions or Stays of Concurrent State Litigation Involving the Same Parties

Despite the broad preclusive effect of a prior federal judgment on state law tort claims as illustrated by Boccardo, there is still potential for duplicative federal and state litigation. First, before entry of the federal judgment there can be no res judicata barrier to the break-away state proceedings.197 Second, when the state plaintiffs are indirect purchasers who were “not members of any federal class,” the federal judgment could have no preclusive effect even when entered.198 The latter problem is addressed separately in the following section. When the break-away state plaintiffs are named plaintiffs or class members in the federal action, however, injunctions or stays of the state proceedings may be available prior to judgment.

Injunctions

Any effort to enjoin federal plaintiffs or class members from pursuing concurrent state proceedings must comply with the Anti-Injunction Act.199 Under the Supreme Court’s restrictive—and much criticized200—construction of that Act in Atlantic Coast Line Railroad v. Brotherhood of Locomotive Engineers,201 “any injunction against state court proceedings otherwise proper under general equitable principles must be based on one of the specific statutory exceptions to § 2283 [the Act] if it is to be upheld.”202 Furthermore, because the statute “in part

197. 1B Moore’s Federal Practice, supra note 58, ¶ 0.409[1], at 1001-02. See also United States v. Wallace & Tiernan Co., 336 U.S. 193 (1946); G. & C. Merriam Co. v. Saalfielo, 241 U.S. 22 (1916); Kapiolani Estate v. Atcherly, 238 U.S. 119 (1915).
198. 1B Moore’s Federal Practice, supra note 58, ¶ 0.409[2], at 1001-02.
199. 28 U.S.C. § 2283 (1976) (“A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.”).
202. Id. at 287.
rests on the fundamental constitutional independence of the States and their courts, the exceptions should not be enlarged by loose statutory construction." 203

Of the three exceptions enumerated in the Act, the one for injunctions "expressly authorized by Act of Congress" 204 is plainly inapplicable to break-away state actions. As discussed by the Supreme Court in Vendo Co. v. Lekstro-Vend Corp., 205 there would be no basis in the ordinary break-away state tort action commenced by federal antitrust plaintiffs for contending that the mere maintenance of the state action violates the federal antitrust laws or any other federal statute. Moreover, such state proceedings, even under the broadest construction of the multiple opinions in Vendo, could not ordinarily be shown to be part of a "pattern of baseless repetitive claims" that could constitute the factual basis for a finding of implied congressional authorization for an injunction. 206

The third exception, allowing federal injunctions necessary to "protect or effectuate" the federal district court's judgment, 207 is equally unavailing. This "relitigation" exception has been employed by the federal courts to enjoin break-away state litigation when a federal judgment provides a basis for a res judicata defense in the state proceedings. 208 While, under this third exception, federal district courts have full authority to ensure that prior federal decrees are accorded claim preclusive effect, this power provides no basis for enjoining concurrent, duplicative state litigation when no federal judgment has been entered. 209

203. Id.
204. See supra note 199.
206. Id. at 636 n.6 (quoting California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972), and noting that injunctions may issue for future proceedings).
207. See supra note 199.

The availability of such injunctive federal relief undermines Judge Schwarzer's assumption in Salveson that availability of a res judicata defense to the break-away state action may be inadequate because the assertion of such a defense in state court is costly and time consuming, because state courts may adopt a narrow view of the scope of the federal cause of action, or because state courts may be unwilling to displace state tort remedies by according broad preclusive effect to a prior federal decree.

209. See supra note 197 & accompanying text.
The second exception is for injunctions “necessary in aid of [the federal district court’s] jurisdiction.”\textsuperscript{210} In \textit{Atlantic Coast Line}, the Supreme Court endorsed the traditional doctrine that normally when there is concurrent federal and state jurisdiction in actions in personam, “neither court [is] free to prevent either party from simultaneously pursuing claims in both courts.”\textsuperscript{211} Only when the state court action “seriously [impairs] the federal court’s flexibility and authority to decide [its] case”\textsuperscript{212} does the statutory exception come into play. The Court cited its earlier holding in \textit{Kline v. Burke Construction Co.}\textsuperscript{213} that, although an injunction could issue to bar subsequent state suits involving the same “res” in actions in personam, “each court is free to proceed in its own time, without reference to the proceedings in the other court.”\textsuperscript{214}

An instructive illustration of the difficulties posed by this narrow construction of the second exception to the anti-injunction statute is the Eight Circuit’s controversial decision vacating the certification of a “mandatory” federal class\textsuperscript{215} in \textit{In re Federal Skywalk Cases}.\textsuperscript{216} In the wake of the collapse of an elevated walkway in a crowded Hyatt Regency Hotel lobby, numerous individual lawsuits were commenced in federal and Missouri state courts seeking both compensatory and punitive damages. The federal district court certified a “mandatory” rule 23(b)(1) class action, apparently because of concern that uncertain Missouri state law might preclude multiple punitive damages recoveries for the same wrong, that due process would preclude such recovery at a certain point, or that the defendants’ finite assets might limit their ability to satisfy damage awards in multiple actions.\textsuperscript{217} In the district court’s view, these circumstances rendered certification appropriate under both rule 23(b)(1)(A)\textsuperscript{218} and rule 23(b)(1)(B).\textsuperscript{219} On interlocu-

\begin{itemize}
\item \textsuperscript{210} See supra note 199.
\item \textsuperscript{211} \textit{Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng’r}, 398 U.S. at 295.
\item \textsuperscript{212} \textit{Id}.
\item \textsuperscript{213} 260 U.S. 226 (1922).
\item \textsuperscript{214} \textit{Id} at 229-30.
\item \textsuperscript{215} \textit{Fed. R. Civ. P. 23(b)(1)} (no provision for class members to opt out).
\item \textsuperscript{216} \textit{In re Federal Skywalk Cases}, 680 F.2d 1175 (8th Cir. 1982), \textit{cert. denied}, 103 S. Ct. 342 (1982).
\item \textsuperscript{217} \textit{In re Federal Skywalk Cases}, 93 F.R.D. 415, 424-25 (W.D. Mo. 1982).
\item \textsuperscript{218} Rule 23(b)(1)(A) permits certification of a class if there is a risk that “inconsistent or varying adjudications . . . would establish inconsistent standards of conduct for the party opposing the class.” \textit{Fed. R. Civ. P. 23(b)(1)(A)}.
\item \textsuperscript{219} Rule 23(b)(1)(B) permits certification of a class if there is a risk that individual adjudications “would as a practical matter be dispositive of the interests of other members . . . or substantially impair or impede their ability to protect their interests.” \textit{Fed. R. Civ. P. 23(b)(1)(B)}. \textit{See In re Federal Skywalk Cases}, 93 F.R.D. 415, 423-24 (W.D. Mo. 1982).
\end{itemize}
tory appeal, the Eight Circuit vacated the class certification order on the ground that it explicitly precluded class members from settling their state punitive damages claims, and by necessary implication precluded them from litigating their state court actions on the issues of liability and punitive damages. In effect the majority viewed the class certification order as a violation of the anti-injunction statute as construed in *Atlantic Coast Line* and *Vendo*.

Judge Heaney's strong dissent in *Skywalk* agreed that the necessary effect of the class certification order was to preclude concurrent state court litigation to determine liability or entitlement to punitive damages—although he emphasized that "no plaintiff has, as yet, been enjoined from pursuing any state court action." In his view, however, the same risks that rendered rule 23(b)(1) certification appropriate in the first place also required preclusion of concurrent state court litigation under the "necessary in aid of jurisdiction" exception to the anti-injunction statute.

Assuming that a rule 23(b)(1) class action would otherwise have been appropriate in the *Skywalk* cases and that the Eight Circuit was

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220. *In re* Federal Skywalk Cases, 680 F.2d at 1180-83.
221. *Id.* at 1181-83.
222. *Id.* at 1192 (Heaney, J., dissenting) (footnote omitted).
223. *Id.* As to the preclusion of independent state actions for punitive damages, Judge Heaney would have held:

"Such a restriction is absolutely necessary to the district court's jurisdiction over this class issue due to the applicable state law on punitive damages. Although the parties do not agree on the certainty of the state law rule, they do agree that there is a legitimate and reasonable claim that under Missouri law, only the first plaintiff to achieve a judgment would obtain a punitive award—all other plaintiffs would be frozen out. . . . When a mandatory class is necessary to protect all plaintiffs on this claim, it seems obvious that an injunction against independent litigation of the issue is 'necessary in aid of' the jurisdiction of the class."

224. That the certification would otherwise have been appropriate is at best debatable. Once the court determines that there is a risk of separate individual actions, it must consider whether allowing the members to proceed on their own will expose the party to a serious risk of being put into a "conflicted position." Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure* (1), 81 HARV. L. REV. 356, 388 (1967). It has been suggested that this requires more than a risk that separate judgments would oblige the opposing party to pay damages to some class members but not to others or
correct that the certification of a rule 23(b)(1) class action mandates preclusion of duplicative state litigation by class members, the reversal of the class certification in the face of potentially wasteful concurrent state litigation and inconsistent judgments attests to the continuing vitality of Atlantic Coast Line's narrow construction of the "in aid of jurisdiction" exception to the Anti-Injunction statute. However, the arguments for broadening the narrow view of Atlantic Coast Line exemplified by the majority opinion in Skywalk, are particularly compelling in cases involving break-away state antitrust actions maintained by parties to concurrent federal proceedings.

One argument is that overcharges claimed by direct and indirect purchasers in concurrent state and federal actions could be considered a "res" that, under the Kline case, provides a basis for a federal injunction. This view posits that such simultaneous overcharge claims are claims against a single overcharge "fund." In its recent decision in Union Carbide Corp. v. Superior Court, for example, the California Court of Appeal concluded that direct purchasers were necessary parties to be joined if feasible in a state indirect-purchaser action under the Cartwright Act. The court viewed the alleged overcharges caused by price fixing in this case as a 'common fund.' Petitioners sold each container of gas only once and allegedly overcharged only once for each sale. The issue to be decided is who is entitled to recover damages for the alleged overcharge.

It is true that here the 'common fund' is not a specifically identified trust fund or collection of royalties. But the alleged overcharge is something that must be proven and identified at trial in order for damages to be recovered. It is also a fund to which there may be conflicting claims. The difficulty with this approach is that it would bring almost any

See Comment, Rule 23: Categories of Subsection (b) in the Class Action—A Symposium, 10 B.C. INDUS. & COM. L. REV. 539 (1969). See also In re Northern Dist. of Cal. Dalkon Shield IUD Prods. Liability Litig., 693 F.2d 847 (9th Cir. 1982), cert. denied, 103 S. Ct. 817 (1983) (decertifying a nationwide class of punitive damage claimants).

225. In re Federal Skywalk Cases, 680 F.2d at 1180. The Skywalk court cited Reynolds v. National Football League, 584 F.2d 280, 283 (8th Cir. 1978), for the proposition that parties to a mandatory class are not free to initiate actions in other courts to litigate certified issues. That result is not clearly required by the case cited or rule 23.


227. See supra text accompanying notes 213-14.

228. See Alton Box Board Co. v. Esprit De Corp., 682 F.2d 1267, 1270-73 (9th Cir. 1982) (argument of appellant-manufacturer).


230. Id. at 451, 183 Cal. Rptr. at 322.
duplicative in personam action within the *Kline* res exception. Apart from a settlement fund that may have been created for administration by the court, there is no preexisting res that constitutes the object of such actions within the contemplation of *Kline*.231 The supposed res is only the sum of all damages that might be recovered in related in personam actions. As Judge Wallace of the Ninth Circuit concluded in *Alton Box Board Co. v. Esprit De Corp.*,232 "the analogy to the in rem cases is strained."233

The *Alton Box Board* court nevertheless was sensitive to the equities favoring a federal defendant's application for injunctive relief when the same overcharges are alleged in multiple suits:

The manufacturers argue creatively that an injunction is necessary to aid the district court's jurisdiction because Esprit's state Cartwright Act class action involves a claim to the same "common fund—the amount of the alleged overcharge,"... over which the multidistrict litigation court is charged with determining the rights and liabilities of the parties thereto. This argument is persuasive. It highlights the risk that Esprit's state suit may result in the 'duplicative recoveries' condemned by the Supreme Court.... Its defect is that it runs to the merits. With respect to the issue of whether the district court had jurisdiction under the Anti-Injunction Act, it is not on point.234

This analysis is overly constricted. As the court itself acknowledged,235 there are a number of contexts in which federal courts have invoked the "in aid of jurisdiction" exception notwithstanding the absence of a res in the *Kline* sense.236 The threat of duplicative recovery that Judge Wallace found "persuasive" in *Alton Box Board*,237 and that prompted the *Union Carbide* court to conclude that direct purchasers were necessary parties to the indirect-purchaser action before it,238 should be viewed as a highly relevant factor in the determination of the proper scope of the Anti-Injunction Act. Giving weight to the threat of duplicative recovery would not be plainly contrary to the language of the Act. The Supreme Court itself has suggested that an injunction might be proper when a concurrent in personam proceeding in state

231. See supra notes 213-14 & accompanying text.
232. 682 F.2d 1267 (9th Cir. 1982).
233. Id. at 1272 (affirming denial of federal injunction against state indirect purchaser action on other grounds).
234. Id. (citations omitted).
235. Id. at 1272 n.8.
236. See supra notes 213-14 & accompanying text.
237. See supra text accompanying note 234.
238. See supra text accompanying note 230.
court interferes with the disposition of a pending federal case. In *Atlantic Coast Line* the Court stated:

While this language ["necessary in aid of its jurisdiction"] is admittedly broad, we conclude that it implies something similar to the concept of injunctions to 'protect or effectuate' judgments. Both exceptions to the general prohibition of § 2283 imply that some federal injunctive relief may be necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case.\(^{239}\)

There are strong arguments that break-away state antitrust actions, particularly those maintained by members of a federal class action, pose precisely such a serious impairment of the federal court's ability to decide the multidistrict litigation before it. Of course, so long as *Kline* retains any vitality, the mere burden of duplicative litigation or the prospect that an in personam state judgment may have some claim- or issue-preclusive effect in the pending federal litigation does not by itself constitute such an impairment.\(^{240}\) But the problems of judicial administration posed by break-away state litigation go well beyond the burden to the parties or the res judicata effect of any ultimate judgment that is entered. Conflicting pre-trial orders are a distinct possibility, perhaps permitting litigants in one forum to circumvent restrictions on privilege and discovery in the other. In addition, the very pendency of the state proceedings may significantly complicate and perhaps entirely frustrate efforts to streamline the federal case through simplification of the issues or through comprehensive settlement. In an era when pre-trial procedures have come to dominate the progress of complex federal litigation and active judicial management of the crowded federal docket is widely viewed as essential,\(^{241}\) such difficulties cannot be dismissed as concerning only the parties; they can also "impair the federal court's flexibility and authority to decide"\(^{242}\) a case.

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\(^{239}\) *Atlantic Coast Line* R.R. v. Brotherhood of Locomotive Eng'r, 398 U.S. at 295. To confine *Atlantic Coast Line*'s "in aid of jurisdiction" exception to true in rem actions would be to ignore the policies underlying the statute and its exceptions in favor of a mechanical categorization. For just that reason, *Shaffer v. Heitner*, 433 U.S. 186 (1977), rejected the ancient doctrine sharply differentiating in rem from in personam actions in resolving questions of territorial jurisdiction. The same analysis commands abandonment of such an artificial distinction under the Anti-Injunction Act.

\(^{240}\) See Redish, *supra* note 200, at 745.


\(^{242}\) See *supra* text accompanying note 239.
Moreover, when there is potential for duplicative recovery of an overcharge in state indirect-purchaser proceedings, the authority of the federal district court to decide its case on the merits may be frustrated by the effect of any state judgment. In *Illinois Brick*, the Supreme Court stated explicitly that it would not permit recovery of the same overcharges by both direct and indirect purchasers: it was "unwilling to 'open the door to duplicative recoveries' under section 4."243 Assuming that the *Illinois Brick* rule, although not preempting state indirect-purchaser claims, expresses a federal policy of preventing duplicative recovery of damages under section 4 of the Clayton Act for the same overcharge by both direct and indirect purchasers, a prior state judgment permitting recovery by indirect purchasers would preclude the federal court from awarding damages to the direct purchasers before it, despite proven liability and harm.244

Even if the foregoing analysis of the Anti-Injunction Act is rejected, federal antitrust defendants are not helpless. The primary area of abuse indicated by the cases has been the subsequent initiation of state proceedings by disgruntled federal plaintiffs. The anti-injunction statute merely prohibits federal injunctions of pending state proceedings.245 It would not prevent a federal court from enjoining the parties to a federal action from subsequently initiating state court actions based on the same cause of action, when such claims could be asserted under the pendent jurisdiction of the federal court. The maintenance of such subsequent actions would not necessarily infringe any right of the federal defendants. Nonetheless, the federal court's interests in sound judicial administration and in avoiding harassing or burdensome duplicative state court litigation provide ample bases for en-


244. In this respect the situation is closely akin to that involved in decisions permitting federal courts, in insurers' actions for declaratory judgment of noncoverage, to enjoin state actions seeking recovery under the policy being contested. Redish, *supra* note 200, at 748-50. In both settings the practical effect of the state judgment could be to make the federal proceeding meaningless. *Id.* at 743-53. In addition, if direct-purchaser recovery were precluded by a prior state judgment, the primary goal of promoting the deterrent function of the private treble damage remedy would be frustrated. The very possibility that the direct purchaser would be forced to accept a reduced damage award in a particular case, or, at a minimum, to relitigate the correctness of the state court's pass-on determinations, would affect the incentives of direct purchasers to file federal actions. This prospect of undermining control of federal treble damage recovery by direct purchasers would impair the federal court's ability to decide the case before it by undercutting the preferential position to which direct purchasers were elevated by *Illinois Brick*.

joining such litigation when the proscriptions of the Anti-Injunction Act do not apply. In the Skywalk cases, for example, all the judges suggested that, absent the *pendency* of state proceedings, a broad injunction prohibiting members of the federal class from *initiating* concurrent state court actions based on the same accident and injuries would have been appropriate.  

Finally, entirely apart from the express prohibitions of the Anti-Injunction Act, it might be argued that the *Younger v. Harris* doctrine of equitable restraint precludes a federal injunction of pending or threatened state proceedings in the interest of “Our Federalism.”  

In light of the Supreme Court’s interpretation of *Younger*, this argument is unconvincing. In an effort to maintain the delicate balance of competing federal and state concerns, the Supreme Court has limited the scope of the *Younger* doctrine to criminal or “quasi-criminal” cases, and to civil proceedings (such as state bar disciplinary proceedings) involving “important state interests.” There is little reason to conclude that private damage actions under state antitrust laws would or should be held to fall within that category. A federal court’s power to enjoin such actions in state court is, therefore, not diminished by *Younger*.

In sum, when the same parties are involved in duplicative state and federal actions, a federal court’s power to enjoin state break-away antitrust litigation may provide an effective alternative to removal. Because it applies only to pending state proceedings, the Anti-Injunction Act poses no obstacle to federal injunctions against the *initiation* of subsequent state proceedings. And, when a federal court judgment has been entered in a prior proceeding, the exception to the Anti-Injunction Act for injunctions “necessary to effectuate” that judgment comes into play. Finally, despite the narrow interpretation generally given the “necessary in aid of jurisdiction” exception to the Anti-Injunction Act with respect to pending state proceedings, the Supreme Court should recognize that the strong policies favoring judicial economy and protection of parties from harassing, duplicative litigation necessitate a

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246. *In re* Federal Skywalk Cases, 680 F.2d at 1180, 1184.
248. Under the judicially created doctrine of “equitable restraint,” a federal court may refuse to enjoin concurrent state proceedings even when the Anti-Injunction Act does not compel such restraint.
251. *Id.* at 434-35.
broader interpretation of that exception in the context of break-away state antitrust litigation.

**Stays**

As an alternative to a federal injunction, federal defendants may seek a stay of break-away state actions initiated by past or present federal plaintiffs pending the entry of a federal judgment. Some state courts have been reluctant to grant stays in favor of concurrent federal proceedings, particularly when there is not a close identity of issues. These courts presumably believe they have an obligation to exercise their jurisdiction to provide justice to litigators who have stated a claim for relief under state law. This position is true to the *Kline* Court’s admonition that “[e]ach court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court.” However, in light of the increasing overlap between federal and state regulatory and penal laws in such areas as antitrust, securities, and civil rights, and the resulting complex problems of federalism and judicial administration, this approach disregards modern realities. State courts would abdicate none of their authority or responsibility by staying the exercise of their jurisdiction in favor of the federal forum in circumstances similar to those presented in *Moitie*, *Boccardo*, or *Salveson*. Such stays would be particularly appropriate because only the federal court can provide a comprehensive resolution of all disputes between the parties, given the exclusive jurisdiction of federal courts over federal antitrust claims. Moreover, if the state plaintiffs are already parties to the federal action they will not be additionally inconvenienced by being forced to litigate all of their related claims in the federal forum, or by suffering the res judicata effect of any ultimate federal judgment if they do not.

The decision of the Supreme Court in *Colorado River Water Con-*

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254. See supra text accompanying notes 31-88.

255. See supra text accompanying notes 157-77.

256. See supra text accompanying notes 124-50.

section District v. United States provides a proper model of judicial effort to avoid piecemeal litigation of state and federal claims. Notwithstanding the apparent limitation of its holding to water rights issues, the Colorado River Court evidenced a willingness to engage in a sensitive, multifaceted inquiry to accommodate the competing concerns of federal supremacy, the state's interest in the subject matter, and sound judicial administration. In addition to its particular concern with the "clear federal policy opposed to piecemeal adjudication of water rights in a river system," the Court noted:

In assessing the appropriateness of dismissal in the event of an exercise of concurrent jurisdiction, a federal court may . . . consider such factors as the inconvenience of the federal forum . . . ; the desirability of avoiding piecemeal litigation . . . ; and the order in which jurisdiction was obtained by the concurrent forums. . . . No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise jurisdiction and the combination of factors counselling against that exercise is required.

Colorado River is only the most recent illustration of the historic willingness of federal courts to dismiss or stay actions otherwise within their jurisdiction if state proceedings appear, on balance, to present a better forum for the comprehensive disposition of all related litigation arising out of a single transaction. Hopefully, state courts will reciprocate in the context of break-away state antitrust litigation by plaintiffs who can only obtain a comprehensive disposition of all of their claims in previously filed federal litigation to which they are parties.

258. 424 U.S. 800 (1976). The case involved conflicting state and federal water rights proceedings. Despite the Court's conclusion that the case did not fall within any of the traditional abstention doctrines, id. at 813-17, and its recognition of the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them," id. at 817, the majority upheld the discretion of the federal district court to dismiss proceedings involving Indian and United States water rights in favor of concurrent state proceedings for reasons of "wise judicial administration," id. at 819.

259. Id. at 819.

260. Id. at 820.

261. Id. at 818-19 (citations omitted).

262. See Brillhart v. Excess Ins. Co. of Am., 316 U.S. 491 (1942); Langnes v. Green, 282 U.S. 531 (1931); P. Beiersdorf & Co. v. McGohey, 187 F.2d 14 (2d Cir. 1951); Mottolese v. Kaufman, 176 F.2d 301 (2d Cir. 1949). Cf. The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972) (upholding enforcement of contractual forum selection clause against contention that it improperly ousted the trial court's jurisdiction). But cf. Moses S. Cone Memorial Hosp. v. Mercury Const. Corp., 103 S. Ct. 927 (1983) (holding that a federal district court had abused its discretion in staying an action seeking to compel arbitration under the United States Arbitration Act when no substantial proceedings had occurred in a previously filed state action involving the same issue, that a stay would not avoid piecemeal litigation, that federal law applied to the dispute, and that state remedies were probably inadequate).
Procedural Devices to Avert Concurrent State Litigation by Non-Parties to the Federal Action

The preceding discussion suggests that a broad reading of the removal statute is unnecessary to prevent the burden, harassment, and potential for duplicative liability that may ensue when a named federal plaintiff or member of a federal class attempts to obtain a "second bite at the apple" by instituting parallel state proceedings based on the same wrongful conduct and injury. The issues become more complex when state plaintiffs are not parties to the federal case and particularly when they are indirect purchasers asserting claims that are not cognizable in federal court under Illinois Brick.263

It is important to emphasize that the force of the argument for federal hegemony seems considerably reduced in this context. The plaintiff is not seeking to evade the federal forum that alone can resolve all of the plaintiff's federal and state claims. The state plaintiff has no federal law claims to resolve.264 There are, nonetheless, substantial practical reasons that would justify defense efforts to block state proceedings. If simultaneous indirect-purchaser actions are permitted to proceed without regard for federal actions by the direct purchasers, efforts to achieve a comprehensive settlement in the federal actions may be frustrated by the possibility of duplicative recoveries. The risk of overlapping liability is substantial since the state plaintiffs could not be bound by the judgment in a federal action to which they were not parties, and the federal court would not be barred from awarding recovery to direct purchasers because of the res judicata effect of a previous state judgment involving other parties.265 To avoid such results, defendants might make use of the procedural devices considered below: statutory interpleader, conventional party joinder, and class action.

Statutory Interpleader

Statutory interpleader, with its provisions for nationwide service of process266 and requirement of only minimal diversity and reduced jurisdictional amount,267 immediately comes to mind as a potential solu-
tion to the non-party problem. However, the traditional role of interpleader is “to protect against double vexation in respect to a single liability.” Thus interpleader may be inappropriate when, as here, federal and state laws vest the cause of action in different classes of purchasers for the impact of a single price-fixing conspiracy, so that double liability derives from two independent systems of substantive law. Even if this difficulty could be overcome, antitrust defendants seeking to interplead all claimants would be required to pay treble the aggregate amount of the claimed overcharges into the registry of the court, or provide a bond payable in that amount. In view of the sums involved in typical nationwide antitrust class action proceedings, it is doubtful that many defendants would be willing or able to pursue this approach.

**Party Joinder**

Apart from statutory interpleader, the federal courts may be able to compel party joinder to achieve a comprehensive disposition of all direct- and indirect-purchaser claims arising from an antitrust conspiracy. In *Union Carbide Corp. v. Superior Court*, the California Court of Appeal reasoned that, under the California counterpart of federal rule 19, direct purchasers were necessary parties to a state court action instituted by indirect purchasers because both direct and indirect purchasers were claiming a right to recover from a common overcharge fund and the defendants could not be required to pay twice for the same overcharges.

As previously discussed, this reasoning is not entirely persuasive. There is no existing “fund” to which there are conflicting and necessarily mutually exclusive claims. Instead, state and federal laws have independently vested causes of action for the same wrongful con-

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268. C. Wright, *Federal Courts* 494 (4th ed. 1983) (emphasis added) (citing State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 534 (1967)). *Cf.* *supra* note 217. On the other hand, if defendants could establish that federal and state liability are indeed mutually exclusive, either on statutory or constitutional grounds, interpleader should be available to prevent double vexation with respect to that single liability.


274. *See supra* text accompanying notes 229-33.
duct in different parties. It is unclear whether California would permit recovery by indirect purchasers if the full amount of the overcharge had already been recovered in a federal court by direct purchasers. Conversely, as previously suggested, the language of *Illinois Brick* strongly implies that a federal court should be reluctant to award duplicative recovery to direct purchasers when indirect purchasers have already recovered damages on a pass-on theory in state proceedings. Moreover, due process considerations might preclude such duplicative liability even if it were otherwise statutorily permitted.

While these questions have not been resolved, the 1966 amendments to Federal Rule of Civil Procedure 19 were intended to emphasize that pragmatic considerations should govern compulsory party joinder. The advisory committee specifically noted that "[t]he interests that are being furthered here are not only those of the parties, but also that of the public in avoiding repeated law suits on the same essential subject matter." Rule 19(a)(2) does not require an absolute certainty of duplicative liability, but provides that absent persons should be joined, if possible, when a disposition in their absence may leave existing parties subject to "a substantial risk . . . of double, multiple, or otherwise inconsistent obligations." Moreover, if state courts construe local antitrust statutes as precluding recovery by indirect purchasers when direct purchasers have already recovered for the same overcharge in a prior federal action, joinder of the indirect purchasers in the federal action should be required under the first clause of rule 19(a)(2). In such a case, disposition of the federal action may "as a practical matter impair or impede [the indirect purchasers'] ability to protect" their interests in state courts.

In short, indirect purchasers maintaining state proceedings should be viewed as "necessary" parties to federal direct-purchaser actions under rule 19. Yet it is doubtful that, weighing the pragmatic factors of rule 19(b), they should be viewed as "indispensable" parties such that, absent their joinder, "in equity and good conscience the [federal] action . . . should be dismissed." As discussed below, it may be difficult to

275. *See supra* text accompanying notes 243-44.
280. *Id.* 19(a)(2)(i).
281. *Id.* 19(b). Under rule 19(b), "necessary" parties are those falling within rule 19(a) who must be joined "if possible." Rule 19(a) parties are regarded as "indispensable" only if,
obtain personal jurisdiction over all such parties. Nevertheless, complete relief can be granted the parties only in a federal forum, and it may be possible to defer execution on any federal judgment to permit resolution of indirect purchaser claims or to include protective provisions in the judgment that would obviate or minimize the risk of duplicative recovery. Thus, state indirect-purchaser plaintiffs should be considered necessary but not indispensable parties to the federal action.

The claims of break-away state plaintiffs, whether under state tort or antitrust laws, are typically based on the same facts and alleged wrongful conduct by the defendants as the federal claims. There is authority for the view that such claims fall within the ancillary or "pendent party" subject-matter jurisdiction of the federal court because of their close relationship to the claims already joined.285

The Supreme Court's decisions in Aldinger v. Howard286 and Owen Equipment & Erection Co. v. Kroeger287 should not be read as contrary to this conclusion. In those cases, the Court refused to extend the United Mine Workers v. Gibbs288 concept of pendent jurisdiction to permit the maintenance of state-law claims against either a new party (Aldinger) or an existing non-diverse third-party defendant (Owen). In both cases, the Court's conclusion was ultimately founded on its construction of the particular jurisdictional statutes as evidencing a congressional intent to foreclose subject matter jurisdiction over the type of claims asserted. The Aldinger Court emphasized that the determinative question was "whether by virtue of the statutory grant of subject-matter jurisdiction, upon which petitioner's principal claim against the treasurer rests, Congress has addressed itself to the party as to whom juris-

weighing the pragmatic factors of rule 19(b) the court concludes that the action should be dismissed if their joinder is not possible.

284. See FED. R. CIV. P. 19(b). See also Advisory Committee Notes, 39 F.R.D. 69, 92-93 (1966).
diction pendent to the principal claim is sought.” In the Court’s view, Congress had intended to exclude counties and municipalities from the scope of the Civil Rights Act jurisdictional statute, and the exercise of pendent party jurisdiction over the county defendant was therefore improper. The Court in Owen sustained the long-standing Strawbridge v. Curtis construction of the diversity statute as requiring complete diversity of citizenship, thereby precluding the assertion of jurisdiction over plaintiff’s affirmative claim for relief against a non-diverse third-party defendant.

The situation of the break-away state antitrust action maintained by indirect purchasers is different. Section 4 of the Clayton Act both confers jurisdiction on federal district courts without regard to amount in controversy and creates a private right of action for damages. Illinois Brick did not rest on the Supreme Court’s conclusion that Congress intended to exclude the claims of indirect purchasers from the subject-matter jurisdiction of the federal courts. Rather, the holding represented the Court’s construction of the cause of action created by that statute in light of the necessity to enhance the deterrent function of the private damage remedy and considerations of practical judicial administration.

Judge Friendly’s recent opinion in Weinberger v. Kendrick demonstrates a properly restrictive construction of the Aldinger limitation on pendent party jurisdiction. This case involved a federal class action that initially sought recovery on the behalf of purchasers of securities during a specified recovery period. Plaintiffs alleged misrepresentations and non-disclosures in violation of section 10(b) of the Securities Exchange Act of 1934. Subsequently, the complaint was amended to include a proposed rule 23(b)(3) “opt-out” settlement class of holders of securities during the same period. These holders, as non-purchasers or sellers, had no federal claim but asserted state law theories of common law fraud and breach of fiduciary duty as a basis for recovery.

290. Id. at 17.
291. 7 U.S. (3 Cranch) 267 (1806).
295. 648 F.2d 61 (2d Cir. 1982).
296. Id. at 64.
297. Rule 23(c)(2) permits members of a class certified under rule 23(b)(3) to choose to “opt out” and thereby to be neither bound nor benefitted by the class action judgment. FED. R. CIV. P. 23(c)(2).
298. Weinberger, 698 F.2d at 68.
The proposed settlement would have compromised the state law claims as well as the federal claims of the purchaser class, unless the state law claimants elected to opt out of the class. A number of members of the "holder" class, who were also named plaintiffs in a pending state class action asserting the same state law claims, objected to the settlement on several grounds, including the federal court's alleged lack of subject matter jurisdiction over their state law claims. Judge Friendly rejected this argument on the ground that the state claims had a "common nucleus of operative fact" with the federal claims and fell within the pendent party jurisdiction of the federal court. He distinguished *Aldinger* on the ground that the Supreme Court had recognized that other statutes and other alignments of parties and claims might call for a different result:

The circumstances here are about as powerful for the exercise of pendent party jurisdiction as can be imagined. The exclusivity of federal jurisdiction over claims for violation of the Securities Exchange Act makes a federal court the only one where a complete disposition of federal and related state claims can be rendered. . . . The concern most frequently voiced with regard to the pendent party doctrine is that it requires a party not otherwise subject to suit in federal court to defend himself in that forum . . . In this case pendent party jurisdiction serves . . . to extend federal jurisdiction to a new group of plaintiffs. Pursuant to the opt-out procedures established by the district court, plaintiffs who did not wish to have their claims settled in a federal forum and in fact received notice of the settlement needed only to request exclusion.

These remarks are directly applicable in the context of the break-away state antitrust action, as federal jurisdiction over the federal antitrust claims is also exclusive.

Judge Friendly qualified his conclusion in *Weinberger* by observing that any inference of congressional intent to exclude holders of securities from federal litigation in order to avoid vexatious litigation was "inapplicable when, as here, extension of pendent party jurisdiction permits the comprehensive settlement of plaintiffs' claims." This suggests that the result might be different in litigation than in settlement. A similar argument could be based on *Illinois Brick*’s broad condemnation of the complexities engendered by indirect-purchaser litigation as undermining the deterrent effect of the federal treble dam-

299. *Id.* at 76-79.
300. *Id.* at 76-77.
301. *Id.*
302. *See supra* note 78.
303. *Weinberger*, 698 F.2d at 77 n.15.
But the question in *Illinois Brick* was much different than that presented by the joinder of state law indirect-purchaser claimants to a federal direct-purchaser action. In *Illinois Brick*, the Court recognized that permitting defendants to defeat the recovery of direct purchasers by showing a pass-on could unduly complicate the private treble damage remedy under section 4 of the Clayton Act and thus destroy its deterrent effect. The joinder of state law indirect purchaser claims in a federal direct purchaser action, however, need not undermine the *Illinois Brick* result. Federal direct purchasers should remain free to recover the entire overcharge. The issue of any pass-on to indirect purchasers under state law, and the effect—under state law, the supremacy clause, or the due process clause—on their claims of any prior award of damages to the direct purchasers, could be severed for separate trial. In this way, defendants would only be exposed to a single determination of liability binding on all possible claimants, and all parties would have ample opportunity to contest in a single proceeding the fundamental issue of whether state indirect-purchaser liability can co-exist with full recovery by direct purchasers under the federal *Illinois Brick* rule.

**Class Action**

The question of personal jurisdiction over all persons who might possess claims as indirect purchasers under state law is a separate issue. Again, however, the problems of joinder of all or substantially all claims in the federal direct purchaser action may not be insuperable. Although it might be impracticable individually to join all of the indirect purchasers to the federal action, it is possible that they could be joined as a class if the requirements of rule 23 of the Federal Rules of Civil Procedure were satisfied and if the class representatives were subject to the in personam jurisdiction of the federal court. Such a procedure would obviate the need to effectuate service of process on each class member. In the typical multidistrict proceeding, adequate rep-

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305. *Id.* at 725.
306. *FED. R. CIV. P.* 42(b).
308. It could be argued, based on dictum in *Miner v. Gillette Co.*, 87 Ill. 2d at 478 (1981), *cert. granted*, 456 U.S. 914, *cert. dismissed*, 103 S. Ct. 484 (1982), that all class members, and not just the named class representatives, must have "minimum contacts" with the state in which the district court sits if they are an "involuntary" class. *See infra* note 314 & accompanying text. In *Miner*, the Illinois Supreme Court held that all members of a state plaintiffs' class action need not have minimum contacts with the forum. However, the court
representatives of the class of indirect purchasers should be amenable to service of process under the long-arm statutes of the various states in which the transferor courts sit.\textsuperscript{309}

To be sure, this procedure would not be without difficulty. The requirements of rules 23(a) and 23(b) must be satisfied.\textsuperscript{310} As indicated below, while these problems of class action maintenance are far from trivial, they are probably not insurmountable.

Under rule 23(a), not only must common questions be presented, but the claims of the class representative must be "typical" of those of the class, and the court must determine that "the representative parties will fairly and adequately protect the interests of the class."\textsuperscript{311} The Supreme Court has held that these requirements together imply that the claims of each class member must be "fairly encompassed" in the claims of the class representatives.\textsuperscript{312} When the pass-on theories of various indirect purchasers involve significant factual differences, this requirement would no doubt require limiting the scope of the federal class proceeding to the common issue of the legal viability of such pass-on theories in the face of direct-purchaser recovery under \textit{Illinois Brick}.\textsuperscript{313}

implied that the result in a \textit{defense} class action might be different. \textit{Id.} at 12-13, 428 N.E.2d at 481. The Supreme Court granted certiorari, but after full briefing and argument, dismissed the writ of certiorari for want of jurisdiction, "there being no final judgment." \textit{Gillette Co. v. Miner}, 103 U.S. 484 (1982).

Assuming that a state court were required to possess "minimum contacts" with respect to all members of an "involuntary" class under its own class action rule, one might argue that the same requirement would apply in a federal class action brought in a district court in that state. This argument, based on rule 4(e)-(f) that generally limits the reach of a federal district court's \textit{process} to that permitted under state law, is erroneous. Class actions proceed on the assumption that only the named representatives need be formally before the court. Service of process on named representatives subject to the court's jurisdiction fulfills this requirement. Thus, the question in a federal class action context is not whether service of process is authorized as to all class members under rule 4, but whether due process of law precludes a determination of the rights of absent class members who would be otherwise outside the reach of the court's jurisdiction. With respect to this issue, it is generally accepted that due process limits which arise from the need to respect territorial limits on the sovereign authority of individual state courts, \textit{see, e.g.}, \textit{World-Wide Volkswagen Corp. v. Woodson}, 444 U.S. 286, 291-94 (1980), do not apply to federal question litigation in federal court and thus may not apply in federal antitrust class actions. \textit{See generally} Berger, \textit{Acquiring in Personam Jurisdiction in Federal Question Cases: Procedural Frustration under Federal Rule of Civil Procedure 4}, 1982 \textit{Utah L. Rev.} 285. The petitioners in \textit{Gillette} disclaimed any application of their arguments to federal class actions. Brief for Petitioner at 15, \textit{Gillette Co. v. Miner}, 103 U.S. 484 (1982).

\textsuperscript{309} 15 \textit{WRIGHT \& MILLER}, supra note 18, §§ 3866-3867, at 382.

\textsuperscript{310} \textit{FED. R. CIV. P.} 23(a)-(b).

\textsuperscript{311} \textit{Id.} 23(a)(2)-(4).

\textsuperscript{312} General Tel. Co. of Southwest \textit{v. Falcon}, 457 U.S. 147, 155-57 (1982).

\textsuperscript{313} Rule 23(c)(4) authorizes class actions "with respect to particular issues." \textit{See gener-
The fact that the class representatives in such a case would be "involuntary" representatives should not be fatal, for defense classes are allowed under rule 23.\textsuperscript{314} Of course, the court must give careful consideration to the adequacy of representation, focusing primarily on competence of counsel for the class and the close correspondence of the claims of the absentees with those of the named representatives.\textsuperscript{315}

As to subdivision (b) of rule 23, a "common question" class action under rule 23(b)(3) is one possibility.\textsuperscript{316} However, meeting the requirement of rule 23(b)(3) that common questions "predominate" over individual questions might be difficult because of the possible necessity of individual proof on the pass-on issues and damages. Again, however, maintenance of an issue-limited class action would be appropriate.\textsuperscript{317} This is particularly true in light of the superiority of the class action device to resolve the fundamental issue of the effect of federal direct-purchaser recovery on the indirect-purchaser class.\textsuperscript{318}

One might contend, however, that a significant number of members of the class might "opt out" of any rule 23(b)(3) class action,\textsuperscript{319} frustrating any attempt to obtain comprehensive disposition of the litigation. This fear is overdrawn. Particularly in the context of a comprehensive settlement providing for recovery for both direct and indirect purchasers, there would be substantial incentive to remain in the class and receive any benefits being offered.

Moreover, it is far from clear that rule 23(b)(3) offers the only possible vehicle for class certification of indirect purchasers. A "no opt-out" class action is available under rule 23(b)(1) when the rule 23(a)
requirements are met and individual adjudications among class members "would as a practical matter be dispositive of the interests of the other members not parties to the adjudication or substantially impair or impede their ability to protect their interests." Although this language is not evidently directed to the situation of two groups whose interests are united on the underlying question of antitrust liability but antagonistic on the issues of impact and damages, there is no a priori obstacle to viewing direct and indirect purchasers as subclasses of a larger class that is united on the basic question of liability. The advisory committee's note states that the rule is directed toward precisely the kind of practical prejudice that could result if recovery by one subclass of a larger class, antagonistic in interest to another subclass, were permitted. In its discussion of the example of multiple claims to a limited fund, for example, the advisory committee observes that "[a] class action by or against representative members to settle the validity of the claims as a whole, or in groups . . . meets the problem."

In sum, even when actual or potential state plaintiffs are not initially members of a federal class, they frequently will be necessary parties who should be joined if feasible, whose claims fall within the subject matter jurisdiction of the federal court under the doctrine of pendent party jurisdiction, and who may be brought within the territorial jurisdiction of the federal district court through the class action mechanism. Once joined, such parties are subject to the preclusive res judicata effect of any federal judgment on their claims. Moreover, their efforts to undercut a comprehensive federal disposition by concurrent state proceedings should be subject to injunction or stay.

Conclusion

Congested dockets of both federal and state courts have inevitably led the courts to accord increasing weight to the interests of judicial

320. FED. R. CIV. P. 23(b)(1)(B).
321. Courts have held that neither the stare decisis effect of individual actions nor the mere possibility that defendant's assets may be insufficient to satisfy all individual judgments justifies rule 23(b)(1) treatment. See, e.g., La Mar v. H & B Novelty & Loan Co., 489 F.2d 461, 467 (9th Cir. 1973); In re Northern Dist. of Cal. Dalkon Shield IUD Prod. Liab. Litig., 693 F.2d 847, 851 (9th Cir. 1982), cert. denied, 103 S. Ct. 817 (1983). However, in the context of break-away state antitrust litigation by indirect purchasers, recovery in federal court by direct purchasers may legally preclude additional recovery under state law. See infra text accompanying note 322. Such a risk of legal preclusion seems fully analogous to the "limited fund" situation that rule 23(b)(1) was designed to deal with. See 7A WRIGHT & MILLER, supra note 18, §§ 1773-1774.
administration in their procedural decisions, as illustrated by the res judicata and removal decisions in *Moitie*. Nonetheless, the temptation to cut the untidy "Gordian Knot" of break-away state litigation with one thrust of the removal blade should be resisted by the federal courts. That resolution of a very real problem is both legally questionable and practically unnecessary. While not offering the painless simplicity of removal, the doctrine of res judicata and the use of injunctions, stays, and party joinder provide adequate protection for the legitimate interests of antitrust defendants subjected to such duplicative proceedings. More importantly, by focusing explicitly on such factors as respect for federal judgments, judicial economy, prevention of inconsistent adjudications, avoidance of prejudice to absent parties, and protection of the federal courts' ability fully to dispose of cases, these procedural alternatives enable courts to balance the conflicting interests of federalism and sound judicial administration in antitrust and other areas of concurrent federal-state litigation, without impairing settled principles of federal jurisdiction.