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One Short of a Load: Why an Illinois Brick Repealer Will Increase Private Antitrust Enforcement in Montana

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ONE SHORT OF A LOAD: WHY AN *ILLINOIS BRICK* REPEALER WILL INCREASE PRIVATE ANTITRUST ENFORCEMENT IN MONTANA

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I. Introduction

In February 2002, Montana Attorney General Mike McGrath filed suit against 18 prescription drug companies.[1] The complaint, filed in Montana's First Judicial District Court in Helena, alleged the companies had violated state antitrust law by inflating their products' average wholesale price, which was used to calculate Medicare, Medicaid, and other consumer reimbursements.[2] McGrath brought the claim on behalf of "[t]he State of Montana, the federal government, low-income Medicaid recipients and the general public."[3] Five years later, through a settlement with one company alone, the State was able to pass nearly $200,000 to community clinics.[4]

Montana's successful action demonstrates how important state antitrust law and enforcement can be. State antitrust statutes are often broader in scope than federal antitrust law, covering a broader spectrum of anticompetitive conduct.[5] Additionally, many state statutes regulate specific conduct and industries, unlike the relatively general provisions of the Sherman Act.[6] States may be more willing to focus on local restraint of trade cases and can bring expertise in local markets.[7] Further, states bring a unique focus on monetary compensation both in their proprietary capacity as an injured entity and as *parens patriae* for their citizens.[8] Finally, states can

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1. Mont. Dept. of Justice, Press Release, *McGrath Sues Drug Companies Over Prescription Price Fraud*, https://doj.mt.gov/2002/02/mcgrath-sues-drug-companies-over-prescription-price-fraud/ (Feb. 25, 2002).

2. *Id.*

3. *Id.*

4. Mont. Dept. of Justice, Press Release, *Funds from Pharmaceutical Settlement Passed Along to Community Clinics*, https://doj.mt.gov/2007/12/funds-from-pharmaceutical-settlement-passed-along-to-community-clinics/ (Dec. 19, 2007).

5. David W. Lamb, *Avoiding Impotence: Rethinking the Standards for Applying State Antitrust Laws to Interstate Commerce*, 54 Vand. L. Rev. 1705, 1717 (2001).

6. Donald L. Flexner & Mark A. Racanelli, *State and Federal Antitrust Enforcement in the United States: Collision or Harmony?*, 9 Conn. J. Intl. L. 501, 511 (1994).

7. Harry First, *Delivering Remedies: The Role of the States in Antitrust Enforcement*, 69 Geo. Wash. L. Rev. 1004, 1034 (2001).

8. *Id.* at 1039.

make up for a lack of federal enforcement when antitrust is not a priority for the presidential administration.[9] Each of these advantages provides compelling justification for state participation in the antitrust arena through legislation and enforcement.[10]

Yet despite the importance of state antitrust law in our nation's antitrust scheme, startlingly few cases have been decided under Montana's state antitrust laws. This author could only locate six Montana Supreme Court decisions, eleven Montana District Court decisions, and four U.S. District Court for the District of Montana decisions addressing the merits of claims under the Montana Unfair Trade Practices Act ("MUTPA").[11] No antitrust decisions have been filed discussing the merits of claims under the unfair competition provisions of the Montana Unfair Trade Practices and Consumer Protection Act ("MCPA"),[12] Montana's "mini-FTC" Act.

Any number of factors could explain this phenomenon, but a state statute repealing the federal indirect purchaser doctrine could provide one particular avenue for increasing the number of antitrust cases in Montana. Part II of this comment explains the history behind and effects of the United States Supreme Court's adoption of the indirect purchaser doctrine in *Illinois Brick Co. v. Illinois*.[13] Part III examines the U.S. Supreme Court's holding in *California v. ARC America Corporation*[14] that *Illinois Brick* does not preempt state laws and explores the subsequent state law developments regarding indirect purchasers. Part IV analyzes the need for an *Illinois Brick* repealer in Montana based on Montana antitrust statutes and the sole state district court decision discussing the issue. Because Montana's law regarding indirect purchaser suits is ambiguous, enacting an *Illinois Brick* repealer would create clarity in the law that would reduce a plaintiff's risk in bringing such a suit. Additionally, such a provision would act as a policy tool to expand the number of possible claims under the MUTPA, which hopefully would impact the amount of meaningful antitrust enforcement in Montana.

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9. Katherine Mason Jones, *Federalism and Concurrent Jurisdiction in Global Markets: Why a Combination of National and State Antitrust Enforcement Is a Model for Effective Economic Regulation*, 30 Nw. J. Intl. L. & Bus. 285, 336 (2010).

10. This is not to say state involvement in antitrust does not have its critics. *See e.g* Barbara O. Bruckmann, *The Case for a Commerce Clause Challenge to State Antitrust Laws Banning Minimum Resale Price Maintenance*, 39 Hastings Const. L.Q. 391 (2012); Michael S. Greve, *Cartel Federalism? Antitrust Enforcement by State Attorneys General*, 72 U. Chi. L. Rev. 99 (2005); Richard A. Posner, *Antitrust in the New Economy*, 68 Antitrust L.J. 925, 940–943 (2001).

11. Mont. Code Ann. §§ 30–14–201 to 30–14–226 (2011).

12. Mont. Code Ann. §§ 30–14–101 to 30–14–143.

13. *Ill. Brick Co. v. Ill.*, 431 U.S. 720 (1977).

14. *Cal. v. ARC Am. Corp.*, 490 U.S. 93 (1989).

II. The Evolution of the Indirect Purchaser Doctrine

The indirect purchaser rule limits who may bring actions under § 4 of the Clayton Act.[15] Section 4 gives "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" a cause of action, including mandatory treble damages, costs, and attorney's fees.[16] Although Congress's wording in the Clayton Act was relatively broad, granting a cause of action to "*any* person who shall be injured,"[17] the indirect purchaser rule greatly curtails that breadth by preventing a purchaser from suing for compensatory damages any time a third party appears in the supply chain between it and the alleged monopolist.[18] Although the indirect purchaser rule was adopted in *Illinois Brick*, its genesis was in another antitrust case decided nine years earlier: *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*[19] And in the 35 years since *Illinois Brick*, the indirect purchaser doctrine has been a source of heated debate in the legal and academic communities and has been deservedly criticized.

A. Hanover *and the Elimination of the "Passing-On" Defense*

The roots of the indirect purchaser rule can be traced back to the *Hanover* case, in which the U.S. Supreme Court rejected the so-called "passing-on defense."[20] In that case, Hanover Shoe, Inc. brought a complaint under § 2 of the Sherman Act[21] and § 4 of the Clayton Act[22] alleging United had monopolized the shoe machinery industry by only leasing its shoe manufacturing machines and refusing to sell them, which resulted in increased costs for Hanover.[23] United asserted Hanover should not have prevailed on its claims because it had passed on the overcharge to its customers and was therefore not injured as required by the statute.[24]

The Court relied on three policy arguments in rejecting United's argument and effectively eliminating the "passing-on" defense. First, the Court noted that the amount of the overcharge that was passed on to other parties would be inherently difficult to trace among the "wide range of factors" that affect the pricing decisions of a business.[25] Second, the traceability problem would result in incredibly complicated litigation, which would arise

15. 15 U.S.C. § 15 (2012).
16. *Id.*
17. *Id.* (emphasis added).
18. *See Ill. Brick Co.*, 431 U.S. at 745–747.
19. *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968).
20. *Id.* at 494.
21. 15 U.S.C. § 2.
22. 15 U.S.C. § 15.
23. *Hanover Shoe, Inc.*, 392 U.S. at 483–484.
24. *Id.* at 487–488.
25. *Id.* at 492.

frequently because of the number of antitrust defendants who would attempt to assert the defense.[26] Finally, the Court worried that, as a result of the passing-on defense, anticompetitive behavior would go unpunished.[27] If direct purchasers made the sole recovery, they would more likely assert claims than indirect purchasers whose incentive to litigate would be small: "These ultimate consumers, in today's case the buyers of single pairs of shoes, would have only a tiny stake in a lawsuit and little interest in attempting a class action."[28] Yet *Hanover* did not directly bar suits by indirect purchasers; instead it only barred defensive use of the "passing-on" doctrine.[29]

B. Illinois Brick *and the Rejection of Indirect Purchaser Suits*

The U.S. Supreme Court actually adopted the indirect purchaser rule in *Illinois Brick*, nine years after *Hanover*. In that case, the state of Illinois sued concrete block manufacturers on behalf of itself and 700 local governments alleging the manufacturers had fixed prices,[30] which resulted in the governments paying over $3 million more for the blocks than they would have paid in a competitive market.[31] The governments were indirect purchasers because the supply chain included masonry contractors, who purchased the concrete blocks from the manufacturers for use in masonry work, and general contractors, who incorporated the masonry into larger buildings and sold them to the governments.[32] The concrete block manufacturers argued only direct purchasers could bring such a claim, and the federal district court granted summary judgment to them.[33] But the Seventh Circuit reversed, holding indirect purchasers could bring such claims as long as they could show the overcharge was passed on to them by the intervening economic actors.[34]

The U.S. Supreme Court first rejected an asymmetric rule that would treat plaintiff and defendant use of the passing-on doctrine differently, then decided to apply the *Hanover* rule to plaintiffs rather than reject it altogether.[35] In rejecting an asymmetric rule, the majority noted the reasons why it rejected the passing-on defense in *Hanover* applied equally to plaintiffs, especially the traceability problems with analyzing the amount of

26. *Id.* at 493.
27. *Id.* at 494.
28. *Id.*
29. *Hanover Shoe, Inc.*, 392 U.S. at 494.
30. *Ill. Brick Co.*, 431 U.S. at 726–727.
31. *Id.* at 727.
32. *Id.* at 726.
33. *Id.* at 727.
34. *Id.* at 727–728.
35. *Id.* at 728–729.

damages each plaintiff suffered.[36] The majority worried such a rule would result in unwarranted multiple liability for defendants by allowing indirect purchasers to recover passed-on overcharges, while also presuming the direct purchaser should receive a full recovery under *Hanover*.[37] The majority also rejected the argument that the policies of deterrence and punishment behind the enactment of the treble damages provision by Congress justified an unequal application of the rule.[38]

After deciding an asymmetric application of the rule would be improper, the majority then turned to the question of whether to overrule *Hanover*. As in *Hanover*, the Court worried about how complicated litigation could become.[39] In particular, the *Illinois Brick* majority cited concerns about compulsory joinder of necessary indirect purchasers in antitrust suits and the practical ability to join all necessary parties in the suit when some may not want to participate, others may not be a manageable class, and still others may be beyond the court's personal jurisdiction.[40] The majority further remarked on the difficulty of tracing the damages related to overcharges from one party to another even in an oversimplified economic model, let alone under the complicated facts of an actual case.[41] The opinion also reiterated the Court's beliefs that direct purchasers are best suited to serve as private attorneys general and allowing such purchasers to fully recover the overcharge creates an incentive for them to bring suits.[42] While the majority explicitly recognized that the indirect purchaser rule would mean some injured parties would not be compensated for their damages, it stated arguments in favor of establishing the rule outweighed those concerns.[43]

C. Criticisms of the Indirect Purchaser Rule

Opponents immediately began criticizing the *Illinois Brick* ruling.[44] The first critique came in Justice Brennan's dissent, which accused the majority of thwarting Congress's two primary objectives: compensation and deterrence. Justice Brennan explained, "Injured consumers are precluded from recovering damages from manufacturers, and direct purchasers who act as middlemen have little incentive to sue suppliers so long as they may

36. *Ill. Brick Co.*, 431 U.S. at 731–732.
37. *Id.* at 730.
38. *Id.* at 733–735.
39. *Id.* at 736–737.
40. *Id.* at 737–741.
41. *Id.* at 741–742.
42. *Ill. Brick Co.*, 431 U.S. at 745–746.
43. *Id.* at 746–747.
44. Edward D. Cavanagh, Illinois Brick*: A Look Back and a Look Ahead*, 17 Loy. Consumer L. Rev. 1, 18 (2004).

pass on the bulk of the illegal overcharges to the ultimate consumers."[45] Indeed, the majority recognized that weakness in its opinion,[46] but worried that attempting to trace and allocate damages among all the remote purchasers would merely deplete the recovery rather than make victims whole.[47] Still, the majority opinion represents a conscious decision on the Court's part to prohibit indirect purchasers from recovering damages even though they may have borne the brunt of the passed-on costs. Further, allowing direct purchasers to recover the full overcharge may give them a windfall if they have already passed on the overcharge to their customers,[48] ultimately allowing them to collect their damages twice.[49] However, the Court insisted deterrence would be better effected if direct purchasers could recover the full amount rather than apportioning the recovery among all those who may have been injured.[50]

In recent years, some opponents have criticized the validity of the Court's deterrence justification. Some scholars have noted that direct purchasers may not have much incentive to sue their suppliers, especially if they can pass on the cost to their customers.[51] Further, the indirect purchaser rule could actually encourage anticompetitive behavior:

> Because illegal cartels and monopolists can share rents with direct purchasers without explicitly including them in an illegal conspiracy (and threaten to boycott those who bring suit) antitrust violators can manipulate the incentives of the only parties who have standing. Such arrangements, dubbed "Illinois Walls" because they put illegal conduct effectively beyond the reach of private antitrust enforcement, exploit the weakness in the indirect purchaser rule and facilitate tacit cooperation between antitrust violators and direct purchasers that is virtually impossible to punish.[52]

Direct purchasers may not only have little incentive to bring such claims, but relying on them may ultimately increase the anticompetitive behavior by firms.

Indirect purchasers may also have more incentive to bring such claims than the Supreme Court assumed in *Hanover* and *Illinois Brick*. The modern class action had not developed when *Hanover* was decided; Rule 23 of the Federal Rules of Civil Procedure had not yet been adopted.[53] The mod-

45. *Ill. Brick Co.*, 431 U.S. at 749 (Brennan, Marshall & Blackmun, JJ., dissenting).

46. *Id.* at 746 (majority).

47. *Id.* at 747.

48. Cavanagh, *supra* n. 44, at 23–24.

49. Christopher Paul Dean, Davidson v. Microsoft Corporation*: Reexamining Maryland's* Illinois Brick *Bar against Indirect Private Purchasers*, 33 U. Balt. L. Rev. 69, 77 (2003).

50. *Ill. Brick Co.*, 431 U.S. at 745–746.

51. Cavanagh, *supra* n. 44, at 24.

52. Barak D. Richman & Christopher R. Murray, *Rebuilding* Illinois Brick*: A Functionalist Approach to the Indirect Purchaser Rule*, 81 S. Cal. L. Rev. 69, 94 (2007) (citations omitted).

53. Donald I. Baker, *Federalism and Futility: Hitting the Potholes on the* Illinois Brick *Road*, 17 Antitrust 14, 15 (Fall 2002).

ern system increases the likelihood that indirect purchasers would be willing to participate in a class action suit and so would bring claims against anticompetitive companies.[54]

Finally, application of the indirect purchaser rule in our modern product distribution system may result in significant inequities. With the advent of the internet, many products have become available directly from the manufacturer, while at the same time many of those manufacturers continue to use traditional methods of distribution. Under *Illinois Brick*, final consumers who purchase the product direct from the manufacturer may sue for antitrust violations, but final consumers who purchase the product through an intermediary, like a brick-and-mortar store, may not bring a claim.[55] Under the indirect purchaser rule as applied in federal antitrust law, the consumers' recoveries depend on how they purchased the product. Such inequity, combined with the questionable effect on deterrence and the lack of compensation to the injured parties, raises serious questions about the wisdom of *Illinois Brick* and the indirect purchaser rule.

III. State Law and the Indirect Purchaser Rule

The indirect purchaser rule was adopted by the U.S. Supreme Court in the context of a federal antitrust action. However, antitrust enforcement in the United States occurs under both state and federal law. Indeed, 21 states had enacted antitrust statutes before the Sherman Act was passed in 1890.[56] The Supreme Court has repeatedly stated federal antitrust law is designed to supplement state antitrust law and does not necessarily preempt it.[57] Yet the indirect purchaser rule would seem to be ineffective if plaintiffs could simply make an end-run around the rule by filing in state court,[58] raising the question of whether *Illinois Brick* preempts state indirect purchaser suits.

A. California v. ARC America Corp.

The U.S. Supreme Court addressed the question of federal preemption of state indirect purchaser rules in *ARC America.* Alabama, Arizona, California, and Minnesota filed antitrust suits, including federal and state claims, alleging a nationwide conspiracy to fix cement prices by ARC

54. Ronald W. Davis, *Indirect Purchaser Litigation:* ARC America*'s Chickens Come Home to Roost on the* Illinois Brick *Wall*, 65 Antitrust L.J. 375, 384–385 (1997).

55. *See Ill. Brick Co.*, 431 U.S. at 735, 741.

56. *ARC Am. Corp.*, 490 U.S. at 101 n. 4.

57. *See e.g. Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982); *Exxon Corp. v. Gov. of Md.*, 437 U.S. 117, 132 (1978); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 595 (1976).

58. Louise Weinberg, *The Federal-State Conflict of Laws: "Actual" Conflicts*, 70 Tex. L. Rev. 1743, 1764 (1992).

America and the other defendants.[59] The actions were consolidated into one federal proceeding along with similar actions from other federal courts around the nation.[60] Several of the defendants settled, creating a $32 million settlement fund for the federal district court to distribute.[61] The district court refused to allow the four states to include their state indirect purchaser claims against the fund, ruling that state indirect purchaser claims were preempted by the federal indirect purchaser rule, and the Ninth Circuit affirmed.[62]

The Supreme Court overturned the ruling, holding *Illinois Brick* did not preempt state indirect purchaser suits.[63] For a federal law to preempt a state law: (1) Congress must have expressly preempted the state law; (2) Congress must have intended to completely occupy the field with federal law; or (3) the state law must conflict with the federal law.[64] In arguing for preemption, ARC America not only needed to establish that the indirect purchaser rule fell into one of the three categories for preemption but also was required to overcome the presumption against preemption in areas "traditionally regulated by the States."[65]

ARC America argued state indirect purchaser suits conflicted with federal law because they "pose[d] an obstacle to the accomplishment of the purposes and objectives of Congress."[66] But the Court noted *state* indirect purchaser suits would not interfere with Congress's goal of avoiding complexity in *federal* antitrust actions.[67] Further, federal policy does not prevent states from imposing liability in addition to federal liability,[68] and allowing state claims would not reduce the incentive for direct purchasers to bring suits under federal law.[69] Under *ARC America*, application of the indirect purchaser rule in state antitrust suits depends on the law of that state.[70]

B. State Approaches

Generally, states take one of three approaches to the indirect purchaser rule. Some states have adopted legislation, commonly known as an *Illinois*

59. *ARC Am. Corp.*, 490 U.S. at 97–98.
60. *Id.* at 98.
61. *Id.* at 98–99.
62. *Id.* at 99.
63. *Id.* at 101.
64. *Id.* at 100.
65. *ARC Am. Corp.*, 490 U.S. at 101.
66. *Id.* at 102.
67. *Id.* at 103.
68. *Id.* at 105.
69. *Id.* at 104.
70. *Id.* at 101–102.

Brick repealer, expressly creating indirect purchaser standing under their state antitrust laws. Other states have left the indirect purchaser question to be decided by their courts. Among those states, some have interpreted their antitrust statutes consistently with *Illinois Brick*, while others have not.

Those states that interpret their antitrust statutes consistently with *Illinois Brick* tend to rely on harmonization statutes. For example, in a Maryland case, *Davidson v. Microsoft Corporation*,[71] the Maryland Court of Special Appeals focused on the provision of the Maryland Antitrust Act that said courts should be "guided by the interpretation given by federal courts to the various federal statutes dealing with the same or similar matters."[72] Because the court had no express statement from the legislature establishing that it should not follow *Illinois Brick*, it interpreted the Maryland statutes consistently with the federal case law.[73] The court also noted the Maryland legislature had rejected a general *Illinois Brick* repealer statute but had passed one regarding government plaintiffs, further establishing the Maryland legislature did not intend to give non-governmental indirect purchasers the ability to bring a suit.[74]

Even when state courts interpret their antitrust statutes consistently with *Illinois Brick*, they might allow other claims involving the same acts by the defendant. For instance, a Florida appellate court found that indirect purchasers have standing to bring claims under the State's consumer protection statutes even though the State's antitrust statutes barred the claims.[75] In particular, the court recognized the consumer protection statutes allowed consumers to bring actions for violations of the consumer protection rules promulgated by the Federal Trade Commission, including price fixing.[76] The court noted that prohibiting indirect purchaser suits under the consumer protection statutes would be contrary to the legislative policy behind those statutes.[77] At least one article viewed the decision as an adoption of "a means of avoiding the sometimes harsh effect of *Illinois Brick*."[78]

Other states have used a more direct approach to avoid the harshness of the indirect purchaser rule and simply found *Illinois Brick* inapplicable under state law. The Iowa Supreme Court took such an approach in *Comes v. Microsoft Corporation*.[79] In that case, the Court held the harmonization

71. *Davidson v. Microsoft Corp.*, 792 A.2d 336 (Md. Spec. App. 2002).

72. *Id.* at 340 (quoting Md. Com. Law Code Ann. § 11–202(a)(2) (2000, 2001 Supp.)).

73. *ARC Am. Corp.*, 490 U.S. at 342.

74. *Id.* at 341.

75. *Mack v. Bristol-Myers Squibb Co.*, 673 So.2d 100, 103, 110 (Fla. 1st Dist. App. 1996).

76. *Id.* at 103–104.

77. *Id.* at 110.

78. William J. Blechman & Scott E. Perwin, *Formula for Success: Standing of Indirect Purchasers under the Florida Deceptive & Unfair Trade Practices Act*, 71 Fla. B.J. 81, 81 (Mar. 1997).

79. *Comes v. Microsoft Corp.*, 646 N.W.2d 440 (Iowa 2002).

provision in the State's antitrust statutes required consistent application of state and federal antitrust law to create a uniform standard of conduct for businesses, not to create uniformity in who could sue.[80] Further, despite the harmonization provision, the Iowa legislature adopted its antitrust statutes under the interpretation of federal antitrust statutes before *Illinois Brick*, so the indirect purchaser rule was not in effect when the legislature adopted federal law and was not part of the legislative intent behind the law.[81] Finally, the Court said the policies behind *Illinois Brick* did not apply to Iowa antitrust actions: the possibility of multiple recoveries was overstated;[82] direct purchasers seem unlikely to sue their suppliers;[83] and, while litigation by indirect purchasers may be complicated, such complication should not "defeat the ends of justice."[84]

Other states have more explicitly countered the effect of *Illinois Brick* by enacting "repealer" legislation. Two states, Alabama and Mississippi, had legislation allowing indirect purchaser suits on the books before *Illinois Brick* was decided,[85] but several other states enacted such legislation after the decision.[86] *Illinois Brick* repealers vary greatly from state to state,[87] perhaps because they can be easily tailored to meet the needs of each state.[88] Although *Illinois Brick* is usually discussed in terms of indirect purchasers suing monopolists, some states have worded their repealer statutes to cover monopsony[89] as well—an important consideration in agricultural states where a single buyer of an agricultural commodity could largely control the prices farmers and ranchers receive.[90] Similarly, some states limit their repealers by limiting indirect purchaser status to certain classes, such as purchasers in certain industries.[91] As discussed above, the Maryland legislature rejected a general indirect purchaser statute but enacted one granting the government such standing when the government purchased indirectly.[92] Similarly, in 2005, Maryland passed another limited *Illinois Brick* repealer applying only in suits against sellers of food, drugs, cosmet-

80. *Id.* at 446.

81. *Id.* at 447.

82. *Id.* at 449.

83. *Id.* at 450.

84. *Id.* at 450–451.

85. S. Scott Parel, *Removing the* Illiniois Brick *Standing Barrier from the Texas Free Enterprise & Antitrust Act—A Matter of Choice*, 50 SMU L. Rev. 409, 419 n. 59 (1996).

86. Robert H. Lande, *New Options for State Indirect Purchaser Legislation: Protecting the Real Victims of Antitrust Violations*, 61 Ala. L. Rev. 447, 448 (2010).

87. *Id.* at 449.

88. *Id.* at 450.

89. A monopsony is a "market situation in which one buyer controls the market." *Black's Law Dictionary* 1098 (Bryan A. Garner ed., 9th ed., West 2009).

90. Lande, *supra* n. 86, at 456.

91. *Id.* at 459.

92. *Davidson*, 792 A.2d at 341 (citing Md. Com. Law Code Ann. § 11–209(b)(2)(ii) (1982)).

ics, or commercial feeds.[93] Additionally, repealers vary in whether they allow the alleged monopolist to assert the passing-on defense and what level of damages they allow.[94] Such provisions may represent genuine policy goals but also might represent a political compromise necessary to get such legislation passed.[95]

IV. An *Illinois Brick* Repealer Could Increase the Number of Antitrust Cases Brought in Montana

Adopting an *Illinois Brick* repealer would create an additional class of citizens with standing to bring claims under the MUTPA, which could feasibly increase the number of claims brought. Although Montana law has been construed by at least one commentator to allow indirect purchaser claims,[96] the MUTPA does not clearly provide standing for indirect purchasers. The lack of a clear indicator of whether the MUTPA allows indirect purchaser standing may chill practitioners from bringing such claims, especially in light of the prevailing party being entitled to attorney's fees.[97]

A. Validity of Indirect Purchaser Suits Is Unclear under Montana Statutes

Montana's code includes two primary ways of asserting antitrust claims: the MCPA and the MUTPA. The MCPA's prohibition on "unfair methods of competition"[98] helps fulfill the overall purpose of that Act: "to protect the public from unfair or deceptive practices engaged in by trade or commerce."[99] The MUTPA prohibits restrictions on trade to protect the public from monopolies and to encourage competition.[100] Each Act has its relative advantages and disadvantages, but neither provides a clear statement indicating whether or not Montana accepts the U.S. Supreme Court's adoption of the indirect purchaser rule in *Illinois Brick*.

The MCPA does not definitively indicate whether indirect purchasers could bring an action under the Act. The MCPA creates a private cause of action for "consumers" injured by violations of the Act,[101] including those

93. Lande, *supra* n. 86, at 459–460 (citing Md. Code Ann., Health-Gen. § 21–1114 (Lexis Supp. 2008)).

94. *Id.* at 456–459, 476–477.

95. *Id.* at 460.

96. Daniel R. Karon, *"Your Honor, Tear Down That* Illinois Brick *Wall!"—The National Movement toward Indirect Purchaser Antitrust Standing & Consumer Justice*, 30 Wm. Mitchell L. Rev. 1351, 1384–1386 (2004).

97. Mont. Code Ann. § 30–14–222(4).

98. Mont. Code Ann. § 30–14–103.

99. *Plath v. Schonrock*, 64 P.3d 984, 990 (Mont. 2003).

100. Mont. Code Ann. §§ 30–14–201, 205.

101. Mont. Code Ann. § 30–14–133(1).

harmed by unfair methods of competition.[102] To qualify as a consumer a person must purchase or lease goods or services for personal, family, or household purposes,[103] but no language addresses whether consumers may bring suits as indirect purchasers. The MCPA also includes a harmonization provision that requires courts to give "due consideration and weight" to the corresponding statute in the Federal Trade Commission Act but does not make the consideration of that Act binding.[104] Because federal law does not bind Montana courts in this area, the indirect purchaser rule does not necessarily apply. Because the definition of consumer does not speak to whether the purchase or lease could be indirect, that uncertainty could create a chilling effect on the antitrust cases that might be brought under the MCPA.

The structure of the MCPA may further chill the number of antitrust cases brought under it. The Act creates a general prohibition on unfair methods of competition but does not include any more specific language indicating per se violations.[105] The lack of more clearly defined statutory violations could create uncertainty for potential plaintiffs. While the MCPA includes a harmonization provision,[106] federal case law is not binding to create such clearly-defined *per se* violations. Additionally, a consumer who successfully litigates a case under the MCPA may only receive the greater of actual damages or $500 and could receive treble damages in the court's discretion.[107] As the U.S. Supreme Court acknowledged in *Hanover*, indirect purchaser plaintiffs may each have a relatively small recovery,[108] which means their incentive to bring claims would likely be low. Further, the MCPA does not allow private class actions,[109] which would allow consumers to aggregate low value claims into a single suit. Even though the Montana Supreme Court has adopted a standard allowing attorney's fees against an MCPA plaintiff only if the action was found frivolous, unreasonable, or without foundation,[110] the language of the MCPA allows attorney's fees at judicial discretion,[111] and some practitioners may be unaware of that plaintiff-friendly rule. Each of these factors might contribute to why this author could locate no antitrust decisions filed under the MCPA.

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102. *Id.*

103. Mont. Code Ann. § 30–14–102(1).

104. Mont. Code Ann. § 30–14–104(1).

105. Mont. Code Ann. § 30–14–103.

106. Mont. Code Ann. § 30–14–104.

107. Mont. Code Ann. § 30–14–133(1).

108. *Hanover Shoe, Inc.*, 392 U.S. at 494.

109. Mont. Code Ann. § 30–14–133(1).

110. *Tripp v. Jeld-Wen, Inc.*, 112 P.3d 1018, 1026 (Mont. 2005).

111. Mont. Code Ann. § 30–14–133(3).

The MUTPA also fails to address whether the indirect purchaser rule applies. Under the MUTPA, "[a] person who is or will be injured" may sue those illegally restraining trade,[112] but the MUTPA does not explicitly state whether the injured person can be an indirect purchaser. The MUTPA does not have a harmonization provision, but the Montana Supreme Court has construed MUTPA provisions that are similar to the Sherman Act consistently with federal interpretations of the Sherman Act.[113] Yet nothing in the Act definitively establishes whether the indirect purchaser rule applies under the MUTPA.

Despite the ambiguity regarding whether the indirect purchaser rule applies under the Act, the MUTPA includes other advantages that increase the likelihood of antitrust suits being brought under the Act. The MUTPA prohibits several *per se* restraints of trade like price-fixing, bid-rigging, and selling at less than cost,[114] which decrease a potential plaintiff's uncertainty about what conduct is prohibited by the Act. It also allows plaintiffs to recover the greater of mandatory treble damages or $1000 plus another $500 for each day the defendant violated the Act[115]—penalties which are significantly higher than under the MCPA and might create an incentive for potential plaintiffs to bring suits. Additionally, eligible plaintiffs can bring class action claims under the MUTPA because, unlike the MCPA, the MUTPA does not include a provision prohibiting such actions. And while the MUTPA allows the prevailing party to recover attorney's fees,[116] the greater certainty associated with *per se* rules and the greater possible recovery would likely outweigh the risks of that provision for potential plaintiffs.

Yet even under the MUTPA, few antitrust decisions have been issued. Although the MUTPA has higher mandatory penalties and the potential for class actions, only six Montana Supreme Court cases and eleven Montana District Court cases have discussed the merits of cases under the Act. The uncertainty associated with the ambiguity of indirect purchaser standing under the Act, combined with the mandatory attorney's fees statute, likely has a chilling effect on the number of suits brought under the MUTPA. Ultimately, the lack of a definite statutory provision allowing indirect purchaser suits in both the MCPA and the MUTPA may increase the risk for antitrust plaintiffs, thereby reducing the number of suits they will bring.

112. Mont. Code Ann. § 30–14–222.

113. *Smith v. Video Lottery Consultants, Inc.*, 858 P.2d 11, 13 (Mont. 1993).

114. Mont. Code Ann. §§ 30–14–205, 209.

115. Mont. Code Ann. § 30–14–222(2).

116. Mont. Code Ann. § 30–14–222(4).

B. Case Law Does Not Clarify Indirect Purchaser Status in Montana

The Montana Supreme Court has never issued an opinion on whether the indirect purchaser doctrine applies in Montana, and only one state district court case has ever decided the issue. In *Olson v. Microsoft Corporation*,[117] the Montana First Judicial District Court held a class action antitrust suit under the MUTPA could move forward because the indirect purchaser rule does not apply under Montana law.[118] Although the court recognized that Montana case law generally supports interpreting the MUTPA with deference to the jurisprudence under the Sherman Act,[119] it also noted that the Montana constitution has a strong policy regarding open courts.[120] In particular, Article II, section 16 of the Montana Constitution states: "Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character." The *Olson* court held that constitutional provision, as well as the lack of language limiting the injured persons who can sue under the MUTPA to direct purchasers, established the indirect purchaser rule did not apply under Montana law.[121]

However, the *Olson* decision does not provide a definitive answer on the question. *Olson*, as a trial court decision, does not bind other trial courts in Montana or the Montana Supreme Court. Also, the decision does not accord much weight to prior Montana Supreme Court cases holding the MUTPA should be interpreted with deference to Sherman Act jurisprudence.

Finally, the reliance on Montana's constitutional provision providing for open courts neglects to consider the effect of *Meech v. Hillhaven West, Inc.*[122] on that constitutional right. In *Meech*, the plaintiff challenged the constitutionality of the Montana Wrongful Discharge from Employment Act ("WDEA") when the defendant moved to dismiss his common law claims as preempted under the WDEA.[123] The plaintiff argued that by preempting his common law claims, the WDEA violated "his fundamental right to full legal redress."[124] The *Meech* Court made clear that the open courts clause was aimed at "equal administration of justice" by the courts[125] and not at creating a fundamental right to a particular cause of action.[126] Although in dicta, the Court was particularly clear that the judiciary could

117. *Olson v. Microsoft Corp.*, 2001 Mont. Dist. LEXIS 2710 (Mont. 1st. Dist. Feb. 15, 2001).
118. *Id.* at **10–11.
119. *Id.* at **9–10 (citing *Smith*, 858 P.2d at 13).
120. *Id.* at *11 (citing Mont. Const. art. II, § 16).
121. *Id.*
122. *Meech v. Hillhaven W., Inc.*, 776 P.2d 488 (Mont. 1989).
123. *Id.* at 490.
124. *Id.* at 491.
125. *Id.* at 493.
126. *Id.* at 497–498.

also limit common law causes of action through its decisions, like when it abolished the inter-spousal tort immunity defense.[127] An extension of that reasoning would allow Montana courts to similarly limit statutory causes of action when the statute was particularly unclear or was silent and needed interpretation. For these reasons, the *Olson* case does not make the applicability of the indirect purchaser rule in Montana particularly clear.

C. Appropriate Legislation Would Reduce Uncertainty about the Applicability of the Indirect Purchaser Rule in Montana

An *Illinois Brick* repealer would clarify the status of the indirect purchaser rule in the State. By legislatively rejecting the indirect purchaser rule in Montana, such a repealer would reduce the uncertainty currently inherent in bringing an indirect purchaser antitrust action, thus reducing the risk those plaintiffs face in bringing such an action. A repealer would also further the MUTPA's statutory purpose of preventing monopolies and safeguarding competition[128] by broadening the class of plaintiffs allowed to bring claims under the MUTPA.

An *Illinois Brick* repealer would be most effective when applied to the MUTPA. The MUTPA already provides greater statutory penalties than the MCPA, including mandatory, rather than discretionary, treble damages.[129] The MUTPA does not prohibit class action suits; class action suits amplify the incentive for indirect purchasers to bring a claim. The MUTPA, through more definite rules, provides a clearer picture of what conduct qualifies as anticompetitive conduct than the MCPA does, further reducing the plaintiff's risk in bringing a suit. Finally, the MCPA cause of action allows consumers to bring suits; some states have interpreted the definition of consumer to include indirect purchasers.[130] Ultimately, a repealer explicitly allowing indirect purchaser suits may be less necessary and effective under the MCPA than the MUTPA.

A repealer in Montana should not only explicitly allow indirect purchaser suits but also explain both that the passing-on defense is allowed and how damages will be apportioned between direct and indirect purchasers. These provisions should be tailored to best achieve the dual goals of deterrence and compensation without increasing unnecessary litigation costs.[131] Because of its relatively small economy, Montana must also consider whether overly severe rules might drive business out of the State. Allowing the passing-on defense would prevent multiple recoveries, which might

127. *Id.* at 495.
128. Mont. Code Ann. § 30–14–201.
129. *Compare* Mont. Code Ann. § 30–14–133(1) *with* § 30–14–222(2).
130. *See e.g. Mack*, 673 So.2d at 108.
131. Lande, *supra* n. 86, at 495.

have the unwanted result of decreasing the deterrence effect of allowing indirect purchaser suits, but would also seem more fair to antitrust defendants.

Although Montana could enact statutory rules conclusively determining the apportionment of recoveries between direct and indirect purchasers and thus reduce the complexity and expense of such litigation, creating a rebuttable apportionment presumption would better serve the goal of compensating antitrust plaintiffs for their injuries.[132] Further, adopting a rebuttable presumption that antitrust damages accrue to the final consumer unless proven otherwise would generally grant the damages to the parties most likely to be injured: the consumers.[133] Although such a provision may create a disincentive for direct purchasers to bring claims,[134] direct purchasers already have a disincentive to sue their suppliers. And in cases where the injury to direct purchasers is egregious enough to overcome those disincentives, a direct purchaser could still rebut the presumption. An *Illinois Brick* repealer in Montana should allow indirect purchaser suits and the passing-on defense and should create a rebuttable presumption that damages will accrue to the final consumer.

Additionally, while amending the MUTPA to include an *Illinois Brick* repealer, the Montana Legislature should also consider amending the Act's attorney's fees provisions. Currently, the plain language of the statute requires attorney's fees be awarded to the prevailing party,[135] which increases the risk inherent in private enforcement actions. In contrast, the Clayton Act authorizes an injured antitrust plaintiff to recover "the cost of suit, including a reasonable attorney's fee."[136] Federal courts have held the attorney's fee award is to protect a successful plaintiff's treble damages from being unduly diminished by attorney's fees.[137] And under the Clayton Act, attorney's fees are not allowed for a successful defense of such an action.[138] Ultimately, the Clayton Act attorney's fees provision furthers the punitive nature of the treble damages policy against antitrust violators and provides an incentive for private enforcement of the law.[139] Montana could reduce

132. *Id.* at 478–483.

133. *Id.* at 478.

134. *Id.*

135. Mont. Code Ann. § 30–14–222(4).

136. 15 U.S.C. § 15(a).

137. *Perkins v. Stand. Oil Co. of Cal.*, 474 F.2d 549, 553 (9th Cir. 1973) (citing *Farmington Dowel Prods. Co. v. Forster Mfg. Co.*, 421 F.2d 61, 88 (1st Cir. 1969)), *supplemented*, 487 F.2d 672 (9th Cir. 1973).

138. *Gillam v. A. Shyman, Inc.*, 205 F. Supp. 534, 535 (D. Alaska 1962); *Byram Concretanks, Inc. v. Warren Concrete Prods. Co. of N.J.*, 374 F.2d 649, 651 (3d Cir. 1967).

139. *Redefining the "Cost of Suit" under Section Four of the Clayton Act*, 82 Mich. L. Rev. 1905, 1920, 1922 (1984).

the risk to antitrust plaintiffs under the MUTPA by amending the Act to only allow attorney's fees to prevailing plaintiffs.

Each of these revisions to the MUTPA would be relatively easy to effect in amending the statute. First, to allow indirect purchaser suits, Montana Code Annotated § 30–14–222(a) should be amended to read "a person *who dealt directly or indirectly with the defendant* and who is or will be injured or the department may bring an action," instead of "a person who is or will be injured or the department may bring an action" as it currently reads. Using the "dealt with" language would allow indirect claims to be brought against both monopolists and monopsonists. Another subsection should be added to § 30–14–222 to address the passing-on defense and to create a rebuttable presumption regarding damages apportionment. For example:

> A defendant may prove as a partial or complete defense to damages that those damages were accrued by other parties in the supply chain, as long as those other parties have been joined in the suit. All damages incurred from a violation of this part will be presumed to have been passed on to the ultimate purchaser or seller, but any party, plaintiff or defendant, may rebut that presumption with a preponderance of the evidence.

Finally, the repealer should include an amendment to the attorney's fees provision in § 30–14–222(4), replacing the words "the prevailing party" with "a prevailing plaintiff," so the subsection reads: "In an action brought by a party other than the department, a prevailing plaintiff is entitled to attorney's fees and costs." These amendments would address the primary concerns regarding indirect purchaser suits in Montana.

V. Conclusion

One approach Montana could take to increase private antitrust enforcement would be to enact an *Illinois Brick* repealer rejecting the indirect purchaser rule. Under *ARC America*, such a rule is not preempted by federal law. A repealer would allow Montana to counteract some of the negative effects of *Illinois Brick*, including the denial of compensation to injured indirect purchasers and the deferral of private enforcement to direct purchasers who may have less incentive to sue their suppliers. The MUTPA is well suited for such a repealer because it allows class actions and has clearly defined many anticompetitive behaviors as unlawful. Finally, by reducing the uncertainty about whether indirect purchasers can sue under the MUTPA, an *Illinois Brick* repealer would decrease the plaintiff's risk in bringing an antitrust action and increase private antitrust enforcement in Montana.