

Spring 2000

## Indirect Purchaser Doctrine: Antecedent Transaction, The

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### Recommended Citation

Jill S. Kingsbury, *Indirect Purchaser Doctrine: Antecedent Transaction, The*, 65 Mo. L. REV. (2000)  
Available at: <https://scholarship.law.missouri.edu/mlr/vol65/iss2/3>

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## Notes

# The Indirect Purchaser Doctrine: Antecedent Transaction?

*Campos v. Ticketmaster Corp.*<sup>1</sup>

### I. INTRODUCTION

Section Four of the Clayton Act,<sup>2</sup> the treble-damage action provision of the federal antitrust laws, was intended to foster and encourage competition by allowing private enforcement of the antitrust laws. The ever-present threat of a private action for treble-damages serves as a deterrent to anyone contemplating business activities in violation of the antitrust laws and offers the possibility of compensation to victims injured by anti-competitive activities.<sup>3</sup> The Supreme Court's decision in *Illinois Brick Co. v. Illinois*<sup>4</sup> defined the reach of the treble-damage provision by holding that only direct purchasers of illegally monopolized products or services have standing to sue under Section Four of the Clayton Act.<sup>5</sup>

In *Campos v. Ticketmaster Corp.*,<sup>6</sup> a divided panel of the Eighth Circuit formulated a new rule for determining whether plaintiffs have standing to seek damages for antitrust violations under Section Four of the Clayton Act. This new rule represents a departure from the traditional direct purchaser rule enunciated in *Illinois Brick*.<sup>7</sup> The effect of this decision could significantly limit the ability of plaintiffs injured by antitrust violations to bring suit in the Eighth Circuit.

### II. FACTS AND HOLDING

*Campos* involved allegations of anti-competitive activity in the market for the distribution of tickets to large-scale popular music concerts.<sup>8</sup> Ordinarily concert promoters and venues do not sell and deliver tickets to such events themselves, but rather contract with a distributor to provide that service.<sup>9</sup> The

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1. 140 F.3d 1166 (8th Cir. 1998), *cert. denied*, 119 S. Ct. 865 (1999).

2. 15 U.S.C. § 15 (1994).

3. See *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977).

4. 431 U.S. 720 (1977).

5. See discussion *infra* Part III.

6. 140 F.3d 1166 (8th Cir. 1998), *cert. denied*, 119 S. Ct. 865 (1999).

7. 431 U.S. 720 (1977).

8. *Campos*, 140 F.3d at 1168.

9. *In re Ticketmaster Corp. Antitrust Litig.*, 929 F. Supp. 1272, 1276 (E.D. Mo. 1996), *rev'd*, 140 F.3d 1166 (8th Cir. 1998).

distributor involved in *Campos*, Ticketmaster Corporation (“Ticketmaster”), performed the distribution function by selling tickets over the telephone, at retail outlets, and at the concert venue.<sup>10</sup> Ticketmaster then remitted the collected payment to the venue minus an amount separately designated as a “service” or “handling” fee.<sup>11</sup> In December 1994, sixteen cases against Ticketmaster were consolidated in the Eastern District of Missouri for pretrial proceedings.<sup>12</sup> In each suit, the plaintiff was a ticket purchaser or group of ticket purchasers who had bought tickets through Ticketmaster.<sup>13</sup> The suits involved a variety of defendants.<sup>14</sup> In September 1995, after eleven of the cases had been dismissed, the plaintiffs in the remaining five cases filed a consolidated complaint superseding the individual complaints.<sup>15</sup> The sole defendant remaining in the consolidated complaint was Ticketmaster.<sup>16</sup>

The consolidated complaint consisted of five counts.<sup>17</sup> Two counts alleged that Ticketmaster violated Section One of the Sherman Act<sup>18</sup> by engaging in price fixing with various concert venues and promoters and conspiring with concert venues and promoters to boycott performers who refused to allow the venue to use Ticketmaster’s distribution services.<sup>19</sup> Two counts alleged that Ticketmaster violated Section Two of the Sherman Act<sup>20</sup> by monopolizing, or attempting to monopolize, the market for ticket distribution services.<sup>21</sup> The final count alleged that Ticketmaster violated Section Seven of the Clayton Act<sup>22</sup> by acquiring its competitors.<sup>23</sup>

Plaintiffs sought injunctive relief under Section Sixteen of the Clayton Act,<sup>24</sup> and treble damages under Section Four of the Clayton Act.<sup>25</sup> The claimed

10. *Campos*, 140 F.3d at 1169.

11. *In re Ticketmaster*, 929 F. Supp. at 1276.

12. *Id.* at 1275. Plaintiffs filed suits in Illinois, Georgia, Washington, Michigan, and Massachusetts. *Id.* at 1278.

13. *Id.*

14. *Id.* Defendants in the original suits included Ticketmaster, Ticketmaster President Frederic D. Rosen, various Ticketmaster operating subsidiaries, various Ticketmaster outlets, various promoters who worked with Ticketmaster, a number of concert venues, and major league sports teams in a variety of sports. *Id.* at 1275.

15. *Id.*

16. *Id.*

17. *Id.* at 1276.

18. 15 U.S.C. § 1 (1994).

19. *In re Ticketmaster Corp. Antitrust Litig.*, 929 F. Supp. 1272, 1276 (E.D. Mo. 1996), *rev’d*, 140 F.3d 1166 (8th Cir. 1998).

20. 15 U.S.C. § 2 (1994).

21. *In re Ticketmaster*, 929 F. Supp. at 1276.

22. 15 U.S.C. § 18 (1994).

23. *In re Ticketmaster*, 929 F. Supp. at 1276.

24. 15 U.S.C. § 26 (1994).

25. 15 U.S.C. § 15 (1994).

damages were based on alleged overcharges in ticket distribution service fees that reflected Ticketmaster's exercise of monopoly power in the market for ticket distribution services.<sup>26</sup>

According to the plaintiffs, Ticketmaster was a monopoly supplier of "ticket distribution services" to large-scale popular music shows.<sup>27</sup> Plaintiffs alleged that Ticketmaster attained its controlling position in the market by entering into long-term exclusive contracts with almost every venue and concert promoter in the United States.<sup>28</sup> Under these exclusive contracts, Ticketmaster paid the venues and promoters a fee in exchange for the exclusive right to sell tickets over the telephone, at retail outlets, and at the concert venue.<sup>29</sup> Plaintiffs also alleged that these exclusive dealing arrangements denied actual and potential competitors access to the ticket distribution market and gave Ticketmaster monopoly power over the price in its market.<sup>30</sup>

Ticketmaster's primary defense was that the plaintiffs lacked standing to sue under the federal antitrust laws because they could not show a direct link to the market to give them antitrust standing based on an antitrust damage.<sup>31</sup> On the other hand, plaintiffs contended that they were direct purchasers of "ticket distribution services" from Ticketmaster because they had paid distinct service and convenience fees directly to Ticketmaster.<sup>32</sup> Plaintiffs described these fees as separate from the actual purchase price of tickets as reflected by a separate charge on the plaintiffs' invoices that could be as high as twenty dollars per ticket.<sup>33</sup> By paying these fees, plaintiffs argued that they had suffered injury to their property within the meaning of Section Four of the Clayton Act and thus had standing to seek monetary damages and injunctive relief.<sup>34</sup>

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26. *Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1168 (8th Cir. 1998), *cert. denied*, 119 S. Ct. 865 (1999).

27. *Id.* The district court dismissed the case on the pleadings; therefore, the Eighth Circuit treated all factual allegations in the complaint as true. *Id.*

28. *Id.*

29. *Id.* at 1169. *See also In re Ticketmaster Corp. Antitrust Litig.*, 929 F. Supp. 1272, 1276 (E.D. Mo. 1996), *rev'd*, 140 F.3d 1166 (8th Cir. 1998).

30. *In re Ticketmaster*, 929 F. Supp. at 1276.

31. *Id.* at 1276. Ticketmaster also argued that the suits filed in Georgia, Washington, and Michigan should be dismissed because they lacked jurisdiction and proper venue. *Id.* at 1279. Ticketmaster is incorporated in Illinois and headquartered in California. *Id.* at 1278.

32. *Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1171 (8th Cir. 1998), *cert. denied*, 119 S. Ct. 865 (1999).

33. *Id.* at 1169.

34. *Id.* The class of persons who may maintain a private damage action under the antitrust laws is broadly defined in Section 4 of the Clayton Act. That Section provides: [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall

While not questioning the allegation that the plaintiffs had paid an increased price for concert tickets as a result of Ticketmaster's exclusive contracts, the district court, nonetheless, dismissed the plaintiffs' case.<sup>35</sup> Applying the antitrust standing doctrine established in *Associated General Contractors v. California State Council of Carpenters*,<sup>36</sup> the district court held that the plaintiffs had not suffered an injury of the type that Congress sought to redress with the antitrust laws.<sup>37</sup> Additionally, the district court held that even if the plaintiffs had suffered an antitrust injury, they still lacked standing because they failed other elements of the *Contractors* test.<sup>38</sup> Specifically, the district court concluded that the plaintiffs lacked antitrust standing because of problems with calculating damages, duplicative recovery, and identifying proper members of the plaintiffs' proposed class.<sup>39</sup>

In a two to one decision, authored by Chief District Judge Melloy,<sup>40</sup> the Eighth Circuit agreed with the district court's decision with respect to only one of three issues.<sup>41</sup> The divided Eighth Circuit panel affirmed the district court's order dismissing the plaintiffs' claim for monetary damages, holding that the antecedent transaction between Ticketmaster and the venues made the plaintiffs indirect purchasers of Ticketmaster's services under *Illinois Brick*<sup>42</sup> so that the plaintiffs lacked standing to sue for treble damages under Section Four of the

recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15 (1994).

35. *Campos*, 140 F.3d at 1169; see also *In re Ticketmaster Corp. Antitrust Litig.*, 929 F. Supp. 1272, 1277-78 (E.D. Mo. 1996), *rev'd*, 140 F.3d 1166 (8th Cir. 1998). The district court dismissed as moot Ticketmaster's motion to dismiss three of the suits on the grounds that the courts lacked jurisdiction and venue. *Id.* at 1279. However, in the alternative, the district court granted the motion and dismissed the cases filed in Georgia, Washington, and Michigan on the merits by concluding that venue was improper. *Id.*

36. 459 U.S. 519 (1983). The Court in *Contractors* employed a five-part test: (1) the causal connection between the antitrust violation and the harm to the plaintiff (including whether the defendant intended to cause harm); (2) whether the "nature" of the plaintiff's alleged injury is "of the type that the antitrust statute was intended to forestall"; (3) the directness or indirectness of the asserted injury; (4) the existence of more direct victims of the alleged injury (i.e. whether the plaintiff is the party most likely to seek redress of the antitrust violation); and (5) the potential for duplicative recovery or complex apportionment of damages. *Id.* at 537, 540, 541, 545.

37. *Campos*, 140 F.3d at 1168; see also *In re Ticketmaster*, 929 F. Supp. at 1277.

38. *Campos*, 140 F.3d at 1168; see also *In re Ticketmaster*, 929 F. Supp. at 1277.

39. *In re Ticketmaster*, 929 F. Supp. at 1277-78.

40. The Honorable Michael J. Melloy, Chief Judge, United States District Court for the Northern District of Iowa, sat by designation. *Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1168 (8th Cir. 1998), *cert. denied*, 119 S. Ct. 865 (1999).

41. *Id.* at 1174.

42. 431 U.S. 720 (1977).

Clayton Act.<sup>43</sup> The court further held that indirect purchaser status did not bar the plaintiffs' claim for injunctive relief under Section Sixteen of the Clayton Act, and therefore, reversed the district court's ruling that the plaintiffs lacked standing to seek injunctive relief.<sup>44</sup>

### III. LEGAL BACKGROUND

Section Four of the Clayton Act provides a treble-damage remedy to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws."<sup>45</sup> On its face, Section Four contains little in the way of restrictive language, reflecting Congress's intent to design a private enforcement mechanism to meet two broad objectives: (1) to compensate victims of antitrust violations for their injuries, and (2) to deter antitrust violations by imposing substantial costs on violators.<sup>46</sup> The Supreme Court has cautioned the federal courts "not [to] add requirements to burden the private litigant beyond what is set forth by Congress in [the antitrust] laws."<sup>47</sup> However, notwithstanding the Court's warning and the broadly inclusive language of the statute, when faced with the question of which injured party is best able and willing to assert an antitrust claim, the Supreme Court has chosen to craft a restrictive test of antitrust standing.<sup>48</sup> One such test developed by the Supreme Court is the "indirect purchaser" doctrine, the central issue in the instant case.

#### *A. Direct and Indirect Purchasers and the Theory of Passing-On*

Frequently, the direct purchasers of an alleged monopoly product will be distributors or other manufacturers, and the higher-than-competitive price (monopoly overcharge) of the monopoly product causes the direct purchaser to raise the price of its product, a phenomenon commonly referred to as passing-

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43. *Campos*, 140 F.3d at 1171-72.

44. *Id.* at 1172. Concluding that the district court applied the wrong legal standard for venue under the Clayton Act, the court vacated and remanded for further proceedings on the issue of venue. *Id.* at 1173-74.

45. 15 U.S.C. § 15 (1994).

46. *See, e.g., Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977); William M. Landes & Richard A. Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick*, 46 U. CHI. L. REV. 602, 605 (1979).

47. *Illinois Brick*, 431 U.S. at 755-56 (quoting *Radovich v. National Football League*, 352 U.S. 445, 454 (1957)).

48. *See, e.g., Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199 (1990); *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968); *Southern Pac. Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (1918).

on.<sup>49</sup> In most cases, the direct purchaser will absorb part of the overcharge and pass-on part of the overcharge to the next link in the vertical supply chain, the indirect purchaser. This process is repeated again and again as indirect purchasers sell their product to the next link. Ultimately, much of the effect of the overcharge is borne by the consumers of the final product in the form of higher prices.

Because the monopoly overcharge is divided among the various direct and indirect purchasers throughout the vertical supply chain, the question of which of these many affected parties should have the right to recover treble damages under Section Four of the Clayton Act arises. It is not surprising that both defendants and plaintiffs have attempted to answer this question by invoking the pass-on theory. Defendants have argued that because direct purchaser plaintiffs passed on any overcharge to the next link in the supply chain, direct purchaser plaintiffs suffered no injury and therefore lacked antitrust standing.<sup>50</sup> Conversely, in suits against remote sellers, indirect purchaser plaintiffs have argued that because middlemen passed on overcharges to them, they were injured by the antitrust violation and therefore have standing to seek antitrust damages.<sup>51</sup>

Recognizing the inherent difficulty in apportioning damages among various direct and indirect purchasers in a vertical supply chain, the Supreme Court has chosen to avoid this morass by enunciating a bright-line rule that only the purchaser immediately downstream from the alleged monopolist may bring an antitrust action.<sup>52</sup> On its face, this rule appears inconsistent with Section Four of the Clayton Act because it potentially awards the direct purchaser damages three times the amount of the overcharge, while indirect purchasers receive nothing, even when the direct purchaser passes on the overcharge to its own customers.<sup>53</sup> The key to understanding how the Supreme Court arrived at this rule is quite simply a matter of timing. The Supreme Court was presented with the defensive use of pass-on theory before it was presented with the offensive use of pass-on theory. Therefore, the appropriate starting point for an analysis of the indirect purchaser doctrine is the Supreme Court's decision in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*,<sup>54</sup> where the Court first laid the foundation for the direct purchaser standing requirement.

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49. Gregory J. Werden & Marius Schwartz, *Illinois Brick and the Deterrence of Antitrust Violations—An Economic Analysis*, 35 HASTINGS L.J. 629, 629 (1984).

50. See, e.g., *Hanover Shoe v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968).

51. See, e.g., *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

52. *Illinois Brick*, 431 U.S. at 744.

53. Herbert Hovenkamp, *The Indirect-Purchaser Rule and Cost-Plus Sales*, 103 HARV. L. REV. 1717, 1718 (1990).

54. 392 U.S. 481 (1968).

### *B. The Hanover Shoe Decision—Defensive Passing-On*

In *Hanover Shoe v. United Shoe Machinery Corp.*,<sup>55</sup> Hanover, a shoe manufacturer, alleged that United Shoe had monopolized the shoe manufacturing machinery industry by refusing to sell its equipment and requiring users to lease the equipment instead.<sup>56</sup> Hanover filed suit under Section Four of the Clayton Act, seeking damages for overcharges that it had paid for leasing machinery from United Shoe.<sup>57</sup> United Shoe defended on the ground that Hanover had passed on any monopoly overcharge to its own customers, the wholesale purchasers of its shoes, and therefore had suffered no injury.<sup>58</sup>

The Supreme Court rejected United Shoe's pass-on defense, holding that the injury occurs and is complete when the defendant sells its product at the illegally high price.<sup>59</sup> To allow the defensive use of pass-on would complicate antitrust enforcement by requiring an apportionment of damages between different tiers of purchasers of the defendant's product.<sup>60</sup> Furthermore, the Court reasoned that a pass-on defense would raise difficult proof issues as to the amount of the overcharge passed on and whether, absent the overcharge, Hanover Shoe could have raised its prices.<sup>61</sup>

The Court also expressed concern that unless direct purchasers were allowed to sue for the portion of the overcharge arguably passed on to indirect purchasers, private antitrust enforcement would be substantially impaired because downstream buyers would have only "a tiny stake in a lawsuit" and thus little incentive to sue.<sup>62</sup> In consequence, violators of antitrust laws would escape liability and the effectiveness of treble damage actions would be substantially reduced.<sup>63</sup>

While *Hanover Shoe* resolved the debate over the use of the pass-on defense, it left unanswered the question of whether ultimate consumers could use

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55. *Id.*

56. *Id.* at 483.

57. *Id.* at 483-84.

58. *Id.* at 487-88.

59. *Id.* at 489.

60. *Id.* at 492-93. The economic theory of "incidence analysis" developed to determine whether a tax at one level in the production chain could be passed-on to other levels and ultimately to consumers. Using incidence analysis, it is theoretically possible to calculate the percentage of any overcharge that a firm at one level can pass-on to the next level. See John Cirace, *Apportioning Damages Between Direct and Indirect Purchasers in Consolidated Antitrust Suits: ARC America Unravels the Illinois Brick Rule*, 35 VILL. L. REV. 283, 311 (1990).

61. *Hanover Shoe v. United Shoe Mach. Corp.*, 392 U.S. 481, 492-93 (1968).

62. *Id.* at 494.

63. *Id.*



pass-on theory offensively against remote monopoly sellers.<sup>64</sup> The Supreme Court addressed this question in *Illinois Brick Co. v. Illinois*.<sup>65</sup>

### C. *The Illinois Brick* Decision—Offensive Passing-On

Nine years after the Supreme Court decided *Hanover Shoe, Illinois Brick Co. v. Illinois*<sup>66</sup> presented the Court with what has been called the “mirror image of *Hanover Shoe*.”<sup>67</sup> *Illinois Brick* involved a suit brought by the State of Illinois, on behalf of itself and seven hundred local governmental agencies, seeking damages for injuries caused by an alleged conspiracy to fix the price of concrete block.<sup>68</sup> The state and local governments did not purchase the block directly from the alleged price fixers, but rather had hired general contractors, who in turn had hired subcontractors, who had purchased the allegedly overpriced block from the alleged conspirators.<sup>69</sup> Thus, the state and local governmental entities were indirect purchasers of the monopoly product, two levels down the distribution chain from the alleged monopolist.<sup>70</sup> Nevertheless, the state and local governmental entities argued that because part or all of the overcharge had been passed on to them by the subcontractors and general contractors, they suffered an antitrust injury, which gave them standing to seek antitrust damages.<sup>71</sup> The defendants, on the other hand, contended that *Hanover Shoe* barred the recovery of damages by indirect purchasers.<sup>72</sup>

The majority<sup>73</sup> concluded that any rule regarding pass-on in antitrust damage actions must apply equally to plaintiffs and defendants.<sup>74</sup> Hence, the court was faced with two choices.<sup>75</sup> The Court could allow offensive pass-on in the instant case and restore the pass-on defense, thereby overruling *Hanover*

64. Barbara H. Bares et al., *Scaling the Illinois Brick Wall: The Future of Indirect Purchasers in Antitrust Litigation*, 63 CORNELL L. REV. 309, 315 (1978).

65. 431 U.S. 720 (1977).

66. *Id.*

67. Landes & Posner, *supra* note 46, at 603.

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

69. *Id.* at 726.

70. *Id.*

71. *Id.* at 727.

72. *Id.*

73. Justice White wrote for the majority of six. Justices Marshall and Blackmun joined Justice Brennan in dissent. See generally *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

74. *Id.* at 728. Justice Brennan described the Court’s consistent application of the *Hanover Shoe* rule as having only “superficial appeal” because the interests at stake in offensive and defensive pass-on are quite different. For example, allowing offensive pass-on would promote compensation, while allowing defensive pass-on would facilitate a defendant’s escaping liability. *Id.* at 753 (Brennan, J., dissenting).

75. *Id.* at 736.

*Shoe*.<sup>76</sup> Alternatively, the Court could apply *Hanover Shoe* directly and bar the plaintiffs' claim.<sup>77</sup> The Court chose to uphold *Hanover Shoe*'s construction of Section Four of the Clayton Act that the overcharged direct purchaser, and not others in the chain of manufacture or distribution, was the party "injured in his business or property."<sup>78</sup>

The majority gave two reasons to support this notion of symmetry.<sup>79</sup> First, the Court concluded that a rule that prohibits defensive passing-on, but allows offensive passing-on by indirect purchasers, would "create a serious risk of multiple liability for defendants."<sup>80</sup> Assuming that the direct purchaser would "automatically" recover the full amount of the overcharge, the Court reasoned that to allow the indirect purchaser to also sue for recovery would substantially increase the possibility of inconsistent adjudications and overlapping recoveries.<sup>81</sup> The majority, however, failed to set forth clearly why the risk of multiple liability is either socially undesirable or legally impermissible.<sup>82</sup>

The second reason the majority provided to support the notion of symmetry in the use of passing-on was the principal basis underlying the decision in *Hanover Shoe*.<sup>83</sup> Specifically, the court reasoned that the evidentiary complexities and uncertainties involved in apportioning damages in cases involving defensive passing-on would be multiplied in cases where offensive passing-on was used by a plaintiff several steps removed from the defendant in the vertical distribution chain.<sup>84</sup> Furthermore, the Court understood *Hanover Shoe* to rest on the judgment that the antitrust laws would be more effectively enforced by direct purchasers rather than those who may have only a tiny stake in the outcome.<sup>85</sup>

Hence, the Court concluded that the *Hanover Shoe* rule, by providing a strong incentive for full overcharge recoveries, renders direct purchasers

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76. *Id.*

77. *Id.*

78. *Id.* at 728-29.

79. *Id.* at 730-47.

80. *Id.* at 730-31.

81. *Id.*

82. It is quite possible that the threat of multiple liability would serve the deterrence purpose of the antitrust laws quite well. Commentators have noted that the validity of this argument turns on whether courts can fashion relief and employ procedural devices to avoid multiple liability. For example, in instances where the direct purchaser recovers first, courts could require the direct purchaser (1) to post bond in the amount of his recovery; (2) to deposit the recovery in an escrow account; or (3) to hold the fund, at least in part, in constructive trust for the indirect purchaser. Thereafter, if the court permits an indirect purchaser to assert a pass-on claim, part or all of his recovery would come from the direct purchaser. Bares et al., *supra* note 64, at 317 n.34.

83. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 731-48 (1977).

84. *Id.* at 732-33.

85. *Id.* at 734-35.

superior Section Four plaintiffs in terms of deterring illegal conduct and depriving violators of the “fruits of their illegality.”<sup>86</sup> Although the majority recognized the compensatory aim of Section Four, it refused to take that concept to its logical extreme by attempting to allocate damages among all those injured within the defendant’s distribution chain.<sup>87</sup> The Court reasoned that given the difficulty of ascertaining the amount absorbed by any particular indirect purchaser, permitting all indirect purchasers to sue would merely reduce overall recoveries rather than make individual victims whole.<sup>88</sup> In light of these considerations, the Court concluded that as a general rule only direct purchasers could be “injured in [their] business or property within the meaning of § 4.”<sup>89</sup>

#### D. Assessing the Impact of the Illinois Brick Rule

*Illinois Brick* established a general rule barring suits by indirect purchasers injured by antitrust violations. Debate exists regarding how well the rule furthers the established goals of compensation and deterrence,<sup>90</sup> but perhaps even

86. *Id.* Justice Brennan observed that to deny injured consumers an opportunity for recovery is indefensible, particularly when many direct purchasers who wish to maintain a business relationship with their overcharging supplier will simply pass on price increases and not sue. *Id.* at 764 (Brennan, J., dissenting). *But see* Bares et al., *supra* note 64, at 320-21 n.51 (1978) (stating that this criticism assumes that the restraint’s impact on direct purchasers never reaches the point where a direct purchaser finds it more lucrative to sue his suppliers than to maintain business relationships with them, and that the market affected by the restraint is not dominated by a single purchaser who can blunt the impact of any restraint to the extent he exercises market power over his suppliers).

87. *Illinois Brick*, 431 U.S. at 734-35. The dissenters argued that the uncertainties and complexities of estimating damages were unconvincing reasons to deny indirect purchasers an opportunity to prove their injuries and damages. *Id.* at 759-60 (Brennan, J., dissenting). Furthermore, from a deterrence standpoint, Justice Brennan observed that it is irrelevant to whom damages are paid. *Id.* at 760.

88. *Id.* at 746-47.

89. *Id.* at 728-48. The Court noted two possible exceptions to the direct purchaser rule. *Id.* at 735-36. The first exception is where there is a pre-existing, fixed-quantity, cost-plus contract between the direct purchaser and its customer, as well as between all other parties in the distribution chain from the direct purchaser to the plaintiff. *Id.* at 736. Under such a contract, in setting the price at which to sell to indirect purchasers, the direct purchaser automatically adds a contractually predetermined sum to the price he paid the seller. *Id.* Therefore, the normally complicated task of demonstrating that the overcharge has not been absorbed by the direct purchaser is made easy. *Id.*; *see* Phillips v. Crown Central Petroleum Corp., 602 F.2d 616, 633 n.4 (4th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980); *see also* Mid-West Paper Prods. Co. v. Continental Group, Inc., 596 F.2d 573, 577 n.9 (3d Cir. 1979); Fisher v. Wattles, 639 F. Supp. 7, 8-9 (M.D. Pa. 1985). The second exception arises where the direct purchaser is owned or controlled by its customer. *See* *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 n.16 (1977); *In re Sugar Indus. Antitrust Litig.*, 579 F.2d 13, 16 (3d Cir. 1978).

90. Compare Harris & Sullivan, *Passing on the Monopoly Overcharge: A*

more fundamentally, the rule raises general policy questions associated with private enforcement of the antitrust laws. In enunciating an inflexible rule, the Court has foreclosed suits brought by indirect purchasers, frequently in situations where the policy bases underlying the rule are absent.<sup>91</sup>

In *Kansas v. UtiliCorp United, Inc.*,<sup>92</sup> the Supreme Court refused to carve out an exception to the direct purchaser rule for situations where the full cost of the product (and hence one hundred percent of any overcharge) had been passed on to the indirect purchaser.<sup>93</sup> In *UtiliCorp*, the States of Missouri and Kansas, acting as *parens patriae*,<sup>94</sup> brought an antitrust suit on behalf of their residents,

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*Comprehensive Policy Analysis*, 128 U. PA. L. REV. 269 (1979) (arguing the *Illinois Brick* rule sacrifices goal of compensatory justice and undermines deterrence), with Landes & Posner, *supra* note 46 (arguing the *Illinois Brick* rule promotes compensatory justice and deterrent objectives). See also Werden & Schwartz, *supra* note 49, at 635-39 (discussing the debate between Harris & Sullivan and Landes & Posner).

91. See, e.g., *Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958, 966 (3d Cir. 1983) (holding that an indirect purchaser, even if a "direct target" of an antitrust conspiracy, lacked standing under *Illinois Brick*), *cert. denied*, 465 U.S. 1024 (1984); *Link v. Mercedes-Benz of N. Am., Inc.*, 788 F.2d 918, 929 (3d Cir. 1986) (holding that retail customers of car dealers who were required to purchase parts exclusively from Mercedes at inflated prices were indirect purchasers and therefore lacked standing).

92. 497 U.S. 199 (1990).

93. *Id.* at 204-19.

94. State attorney generals have *parens patriae* (literally, "parent of the country") authority to bring actions on behalf of state residents for antitrust violations and to recover on their behalf. 15 U.S.C. § 15c (1994). "Private attorneys general" were envisioned because of the great potential for antitrust violations in the American economy in comparison to the limited resources of the Department of Justice Antitrust Department. See *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977); cf. *Illinois Brick*, 431 U.S. at 764 n.23 (Brennan, J., dissenting). Section 4c of the Clayton Act provides in pertinent part:

(a)(1) Any attorney general of a State may bring a civil action in the name of such State, as *parens patriae* on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of [the Sherman Act]. The court shall exclude from the amount of monetary relief awarded in such action any amount of monetary relief (A) which duplicates amounts which have been awarded for the same injury, or (B) which is properly allocable to (i) natural persons who have excluded their claims pursuant to subsection (b)(2) of this section, and (ii) any business entity.

(2) The court shall award the State as monetary relief threefold the total damage sustained as described in paragraph (1) of this subsection, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15c (1994).

claiming that a pipeline company and several gas producers had conspired to inflate the price of the natural gas they supplied to public utilities.<sup>95</sup>

The States argued that since the utilities had passed on the full amount of the overcharge to their customers, the consumers were the only ones actually injured, and the underlying concerns of *Illinois Brick* were lacking.<sup>96</sup> The Court rejected the States' argument and held that "[a]lthough the rationales of *Hanover Shoe* and *Illinois Brick* may not apply with equal force in all instances, we find it inconsistent with precedent and imprudent in any event to create an exception for regulated public utilities."<sup>97</sup> Hence, *UtiliCorp* strongly reaffirmed *Illinois Brick*'s strict standing requirement.

While *Illinois Brick* continues to create barriers for indirect purchasers seeking recovery for federal antitrust violations, a number of state antitrust statutes allow indirect purchasers to bring a suit for recovery.<sup>98</sup> In *California v. ARC America Corp.*,<sup>99</sup> the Supreme Court held that notwithstanding *Illinois Brick*, state antitrust statutes allowing recovery by indirect purchasers are not preempted by federal law.<sup>100</sup>

#### IV. INSTANT DECISION

A divided court, following the general rule established in *Illinois Brick* that only direct purchasers from a monopoly supplier can sue for treble damages under Section Four of the Clayton Act, looked to the antecedent transaction between Ticketmaster and the venues to arrive at its holding that the plaintiffs were indirect purchasers and thus were barred under the federal antitrust laws from bringing a suit for damages.<sup>101</sup>

##### A. The Majority Opinion

In reaching the conclusion that the plaintiffs were indirect purchasers, the majority first examined the definition of an indirect purchaser handed down by the Supreme Court in *Illinois Brick* and its progeny, and examples offered by

95. *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 204 (1990).

96. *Id.* at 208.

97. *Id.*

98. *See, e.g.*, ALA. CODE § 6-5-60(a) (1993); COLO. REV. STAT. ANN. § 6-4-114 (West 1999); D.C. CODE ANN. § 28-4509 (1981); KAN. STAT. ANN. § 50-801(b) (1994); MD. CODE ANN., COM. LAW II § 11-209 (2000); MICH. COMP. LAWS ANN. § 445.778 (West 1989); MINN. STAT. ANN. § 325D.57 (1995); MISS. CODE ANN. § 75-21-9 (1991); N.M. STAT. ANN. § 57-1-3(A) (Michie 1995); R.I. GEN. LAWS § 6-36-12(g) (1992); S.D. CODIFIED LAWS § 37-1-33 (Michie 1994); WIS. STAT. ANN. § 133.18(1)(a) (West 1989).

99. 490 U.S. 93 (1989).

100. *Id.* at 101-06.

101. *Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1171 (8th Cir. 1998), *cert. denied*, 119 S. Ct. 865 (1999).

commentators.<sup>102</sup> The court then formulated its own definition of an indirect purchaser as someone “who bears some portion of a monopoly overcharge only by virtue of an antecedent transaction between the monopolist and another, independent purchaser.”<sup>103</sup> The court further stated that “[s]uch indirect purchasers may not sue to recover damages for the portion of the overcharge they bear.”<sup>104</sup> The right to sue for damages, the court concluded, rests with the direct purchasers, “who participate in the antecedent transaction with the monopolist.”<sup>105</sup>

The majority then reviewed the economic assumptions underlying the direct purchaser rule, discussing the indirect purchaser as someone who pays some portion of a monopoly overcharge only because the previous purchaser was unable to avoid the overcharge.<sup>106</sup> While recognizing that a monopoly overcharge generally injures both direct and indirect purchasers, the court pointed to “incidence analysis,” the task of apportioning the payment of overcharges between direct and indirect purchasers, as a justification for denying indirect purchasers standing to sue for injuries suffered because of an antitrust violation.<sup>107</sup> Finally, the court noted that none of the limited circumstances that might warrant avoidance of the direct purchaser rule existed in this case.<sup>108</sup> Specifically, there was no “cost-plus” contract, no allegation that the indirect purchasers owned or controlled the direct purchasers, and no proper allegation that the direct purchasers had conspired with Ticketmaster.<sup>109</sup> Concluding that the direct purchaser rule applied in this case, the court turned to the question of whether the plaintiffs were direct or indirect purchasers of Ticketmaster’s services.<sup>110</sup>

In response to the plaintiffs’ argument that they were direct purchasers of “ticket distribution services” from Ticketmaster, the majority made three important conclusions. First, the court likened Ticketmaster’s service to a “billing practice,” and agreed with the Third Circuit that “billing practices” are not determinative of indirect purchaser status.<sup>111</sup> Second, the majority concluded that Ticketmaster’s exclusive contracts with almost every concert promoter in the United States had forced concert venues to use Ticketmaster for distribution of its tickets to those concerts.<sup>112</sup> Hence, the court held that “the plaintiffs’

102. *Id.* at 1169-72.

103. *Id.* at 1169.

104. *Id.* at 1170.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 1171.

109. *Id.*

110. *Id.*

111. *Id.* (citing *McCarthy v. Recordex Serv., Inc.*, 80 F.3d 842, 853 n.18 (3d Cir. 1996)). *But see infra* note 137.

112. *Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1171 (8th Cir. 1998), *cert.*

inability to obtain ticket delivery services in a competitive market was simply the consequence of the antecedent inability of venues to do so."<sup>113</sup> The majority concluded that this type of derivative dealing is the essence of indirect purchaser status, and therefore constituted a bar to the plaintiffs' suit for damages.<sup>114</sup>

Finally, the majority considered the plaintiffs' assertion that Ticketmaster's service fees were collected directly from ticket buyers and were separate from the actual purchase price of concert tickets.<sup>115</sup> The court concluded that regardless of how the cost is divided between the actual purchase price and the service fees, the two components together amount to a single price of attending a concert.<sup>116</sup> The court noted that since the total purchase price of the ticket, the actual ticket price plus the service charge, was a price that the market would bear, a venue free from Ticketmaster's domination would have been able to charge that price itself and keep the extra surcharge.<sup>117</sup> Therefore, the majority concluded that the plaintiffs were indirect purchasers of Ticketmaster's services and thus did not have standing to seek monetary damages under Section Four of the Clayton Act.<sup>118</sup>

However, the court held that *Illinois Brick* did not preclude indirect purchasers from seeking injunctive relief under Section Sixteen of the Clayton Act.<sup>119</sup> The court reasoned that the complexities of incidence analysis do not arise when courts consider the propriety of injunctive relief.<sup>120</sup> Therefore, because all of the plaintiffs claimed to have purchased tickets from Ticketmaster and paid the alleged monopolistic service fees, the court held that plaintiffs did have standing to pursue a claim for injunctive relief.<sup>121</sup>

### B. The Dissent

Judge Morris Sheppard Arnold disagreed with the majority's definition of an indirect purchaser.<sup>122</sup> First, in noting that the phrase "antecedent transaction" appears nowhere in the authorities relied on by the majority, Judge Arnold stated that "a mere 'antecedent transaction' will not turn all purchasers of a

*denied*, 119 S. Ct. 865 (1999).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 1171-72 (citing *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 495 (1992) (Scalia, J., dissenting)).

117. *Id.* at 1172 (citing *Kansas v. UtiliCorp United Inc.*, 497 U.S. 199, 209 (1990); *U.S. Football League v. National Football League*, 842 F.2d 1335, 1357-58 n.19 (2d Cir. 1988); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 492 (1968)).

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 1171 (Arnold, J. dissenting).

monopolized product into indirect purchasers for the purposes of *Illinois Brick*.<sup>123</sup> According to Judge Arnold, two conditions must be satisfied before a purchaser will be deemed an indirect purchaser under Section Four of the Clayton Act.<sup>124</sup>

First, the antecedent transaction must have been one in a direct vertical chain of transactions.<sup>125</sup> Judge Arnold concluded that no such chain existed in this case because the monopoly product at issue was ticket distribution services, not tickets.<sup>126</sup> The antecedent agreement between Ticketmaster and the venues was not one in which the venues bought some product from Ticketmaster in order to resell it to the plaintiffs.<sup>127</sup> Rather, Ticketmaster sold its product directly to the plaintiffs, and it was immaterial that Ticketmaster would not have supplied the service but for its antecedent agreement with the venues.<sup>128</sup>

Second, the antecedent transaction must have resulted in the passing-on of monopoly costs from the direct purchaser to the indirect purchaser.<sup>129</sup> In the instant case, Judge Arnold stated that the venues did not pass-on any portion of the alleged monopoly overcharge to concert-goers, but actually received a portion of that overcharge from Ticketmaster.<sup>130</sup> The entirety of the alleged monopoly overcharge was borne by the plaintiffs so that, in Judge Arnold's opinion, the plaintiffs were the only parties injured by Ticketmaster's alleged illegal price-fixing.<sup>131</sup> Therefore, Judge Arnold concluded that the majority's decision effectively foreclosed the possibility of anyone bringing suit against Ticketmaster in the Eighth Circuit.<sup>132</sup>

## V. COMMENT

In finding that the plaintiffs were indirect purchasers, the majority in *Campos* formulated a new test for direct purchaser status under the antitrust laws. The paradoxical aspect of the decision is that the intent of the majority was to simply apply the *Illinois Brick* direct purchaser rule.<sup>133</sup> The consequences of this decision are significant for a number of reasons. First, the new test is likely to result in fewer plaintiffs having standing to recover for antitrust injuries

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123. *Id.* at 1174.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 1174-75.

132. *Id.* at 1175.

133. After a detailed analysis of *Illinois Brick*, the majority stated, "[s]ince the direct purchaser rule applies in this case, the question becomes whether the plaintiffs are direct or indirect purchasers of Ticketmaster's services." *Id.* at 1171.



than under the general rule enunciated in *Illinois Brick*. Hence, the new test frustrates both the compensation and deterrence objectives of the treble-damage action. More fundamentally, however, the majority's decision has important consequences regarding the private enforcement of antitrust laws. Given the state of competition within the computerized ticketing service industry, the plaintiffs' private action offered one avenue for close judicial scrutiny of exclusive dealing arrangements. Such scrutiny is required to eliminate the concentration of market power and ultimately to protect consumers.<sup>134</sup>

### A. Application of the Indirect Purchaser Doctrine

The key to applying the indirect purchaser doctrine hinges on correctly identifying the alleged monopoly product. For example, if a homeowner desires a blue house, she has two options: she can employ the services of a housepainter, or she can purchase blue paint and paint the house herself. If the homeowner chooses to employ a housepainter, the homeowner would be a direct purchaser of housepainting services and an indirect purchaser of blue paint. However, if the homeowner chooses to paint the house herself, she would be a direct purchaser of blue paint and would never enter the market for housepainting services. Thus, whether the indirect purchaser doctrine is implicated depends on whether blue paint or housepainting services is the monopoly product.

If the paint manufacturer is the monopolist, and blue paint is the monopoly product, and the homeowner chooses to acquire a blue house by employing the services of a housepainter, then the homeowner will be an indirect purchaser of the monopoly product and will bear that portion of the monopoly overcharge passed on by the housepainter. Thus, to avoid multiple liability and apportioning problems, the painter, who purchases directly from the monopolist, not the homeowner, is the party entitled to bring suit against the paint manufacturer under *Illinois Brick*. However, if the homeowner chooses to acquire a blue house by purchasing the paint herself and painting the house on her own, she would clearly be a direct purchaser of the monopoly product and have standing to sue under Section Four of the Clayton Act.

However, the situation is much different if the monopolist is the housepainter and the monopoly product is housepainting services. Under this scenario, the homeowner would never be an indirect purchaser of the monopoly product. If the homeowner chooses to acquire a blue house by employing the services of a housepainter, she would clearly be a direct purchaser of the monopoly product under *Illinois Brick*. Alternatively, if the homeowner chooses not to purchase the services of the housepainter, but rather to purchase her own

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134. Wanda Jane Rogers, *Beyond Economic Theory: A Model for Analyzing the Antitrust Implications of Exclusive Dealing Arrangements*, 45 DUKE L.J. 1009, 1013 (1996).

paint and paint the house herself, she avoids paying a monopoly overcharge by never entering the market for the monopoly product. In this context, any agreement that may exist between the paint manufacturer and the housepainter is irrelevant.

Like the homeowner who desires a blue house, the plaintiffs in *Campos* desire a seat at a concert. Ticketmaster's service, namely convenience, is analogous to the service provided by the housepainter. Moreover, the concert venue's product, a ticket to the concert, is equivalent to the blue paint supplied by the paint manufacturer. Therefore, as the above example illustrates, the application of the indirect purchaser doctrine hinges on the correct identification of the monopoly product.

If the monopolist is the concert venue, making concert tickets the monopoly product, and if concert goers choose to acquire a seat at a concert by employing the services of Ticketmaster, then concert goers would be indirect purchasers of the monopoly product, tickets, and direct purchasers of ticket distribution services. Consequently, as indirect purchasers of the monopoly product, concert goers would not have standing to sue under *Illinois Brick*.

However, if the monopolist is Ticketmaster, making ticket distribution services the monopoly product, and if concert goers choose to acquire seats at a concert by employing the services of Ticketmaster, then the concert goers would clearly be direct purchasers of the monopoly product. Any arrangement between the concert venues and Ticketmaster is irrelevant. Hence, if the *Campos* majority would have appropriately identified the monopoly product as ticket distribution services, the question of whether the plaintiff's were indirect purchasers would not have even been at issue.

Furthermore, it is important to note that the majority in *Campos* failed to take into consideration an important distinction between a "good" and a "service." Referring once again to the paint/housepainting services example, paint is a good, capable of being purchased and re-sold. For instance, paint can be purchased by a painter, re-sold to a homeowner, and further re-sold as incorporated into the sale of the painted house. Therefore, in the context of a "good" the indirect purchaser doctrine is implicated because the possibility of subsequent purchasers clearly arises.

However, when the product at issue is a "service," the concept of an indirect purchaser is meaningless. Unlike a "good" that can be re-sold, a "service" provides value only to the direct purchaser, and once provided, the "service" is in a real sense "used" up. For example, the services provided by a housepainter offer value only to the purchaser, namely convenience in obtaining a freshly painted house without the required effort. This service has value only to the purchaser, is "used" up once the service is provided, and therefore is incapable of being re-sold. Consequently, it is difficult to envision a scenario where an indirect purchaser of a "service" is even possible. A haircut provides an even more concrete example. The service provided by a haircut provides value only to the purchaser and is unable to be re-sold to another purchaser. It

is completely irrelevant to the analysis whether the service provider requires inputs of other goods, such as paint, scissors, or as in *Campos*, tickets.

It is also important to draw the distinction between “goods” and “services” in *Campos* for another reason. Because concert goers purchase a service directly from Ticketmaster, the difficult problem of apportionment of damages clearly does not exist. Furthermore, because the venues suffer no injury and pay no monopoly overcharge to Ticketmaster, the potential for multiple liability is also absent.

Rather than appropriately classifying the monopoly product as ticket distribution services, the majority formulated a new test of purchaser status under the indirect purchaser doctrine of *Illinois Brick*. Under this new test, to determine if a plaintiff is a direct purchaser depends upon whether the plaintiff bears a portion of the monopoly overcharge by virtue of an antecedent transaction between the alleged monopolist and an independent purchaser separate from the party from whom the plaintiff purchased the monopoly product. Under the majority’s antecedent transaction test, concert goers can never be direct purchasers from Ticketmaster so long as Ticketmaster has an antecedent transaction with another independent purchaser.

The majority’s decision to classify plaintiffs as indirect purchasers provides Ticketmaster with the incentive to pay additional consideration to the venues in exchange for the venues refraining from selling tickets at their box offices. Consequently, concert goers will be unable to avoid the overcharge or seek antitrust damages. More importantly, however, Ticketmaster will not only retain the fruits of its illegality but will be in a position to increase its bounty. While the majority did hold that the plaintiffs had standing to seek injunctive relief, given collective action problems involved in suits of this type, it is unlikely that the plaintiffs will have an incentive to proceed.

### B. Exclusive Dealing Arrangements

The majority’s decision is clearly out of step with the underlying purposes of the *Illinois Brick* decision and with the mainstream judicial response to the issue of the indirect purchaser doctrine. Perhaps anticipating the difficult task of determining the legality of exclusive dealing arrangements, the court chose to simply mesh this issue with the relatively easy question of purchaser status and deny standing to all plaintiffs when such a contract exists. The difficulty created by meshing the determination of purchaser status with the analysis of vertical relationships under exclusive dealing arrangements is that the terms “buyer” and “seller” are imprecise in this context and exhibit a dual feature.<sup>135</sup> This duality is apparent in the disagreement between the majority and dissent.

Clearly, under the vertical relationship envisioned by the majority,

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135. Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals’ Costs to Achieve Power Over Price*, 96 YALE L.J. 209, 226 (1986).  
<https://scholarship.law.missouri.edu/mlr/vol65/iss2/3>

Ticketmaster is portrayed as “upstream,” at the top of the vertical relationship, with the concert venues “downstream.” In this context, Ticketmaster supplies ticket distribution services as an input to “downstream” concert venues, which employ this input in their business of selling tickets to consumers. Hence, Ticketmaster appears to be the “seller” and the concert venues the “buyers.” Thus, under this interpretation, it seems logical to view the venues as direct purchasers, thereby relegating concert goers to indirect purchaser status.

However, the vertical relationship envisioned by the dissent just as plausibly portrays the concert venues as the “upstream” firms supplying “distribution rights” as an input to “downstream” distributors like Ticketmaster. Ticketmaster employs this input in its business of distributing tickets to consumers. Hence, the concert venues appear to be the “sellers” and Ticketmaster the “buyer.” Under this interpretation, it seems logical to view the plaintiffs as direct purchasers of Ticketmaster’s service.

Nevertheless, from the perspective of the consumer, it is irrelevant which firm in the exclusive arrangement is a buyer and which is a seller. What is important is whether one (or both) of the parties to the arrangement is the purchaser of an exclusionary right that raises competitors’ costs and gives the purchaser power over the price in its market.<sup>136</sup> This is the difficult question raised by exclusive dealing arrangements, and the analysis of this question should not be meshed with the question of purchaser status. Clearly, in *Campos*, it was Ticketmaster’s purchase of an exclusionary right that led to the injury suffered by the plaintiff. Unfortunately, the majority’s decision failed to recognize this important distinction and instead chose to make the issue of an “antecedent agreement” the determinative factor of purchaser status.<sup>137</sup>

136. *Id.* at 226.

137. Furthermore, the majority’s decision is problematic because it attempted to liken Ticketmaster’s services to “billing practices,” as discussed by the Third Circuit in *McCarthy v. Recordex Service, Inc.*, 80 F.3d 842 (3d Cir. 1996). In *McCarthy*, plaintiff-clients, whose attorneys purchased photocopies of the clients’ hospital records from copy service defendants, brought an antitrust claim alleging that various hospitals and copy service companies conspired to charge excessive prices for photocopies of the plaintiffs’ medical records. *Id.* at 845. The hospitals had entered into a contract with copy service companies whereby the copy service was granted the exclusive right to photocopy hospital records. *Id.* at 846. The sole source of revenue received by the copy service was derived from the copying charges paid by the requestors. *Id.* In each case, the plaintiffs’ attorney requested photocopies of the plaintiff-client’s hospital records. *Id.* at 845. Additionally, in each case, the copy service company billed the plaintiff’s attorney directly. *Id.* The attorneys in turn passed on the overcharge to their clients. *Id.* at 853.

The Third Circuit upheld the district court’s dismissal of the suit and held that the plaintiffs lacked standing because they were not direct purchasers of the hospital records within the meaning of *Illinois Brick*. *Id.* at 852. However, in reaching this decision, the Third Circuit undertook no analysis of the antecedent transactions between the hospitals and the copy service companies. Rather, the decision was grounded upon the policy concerns expressed in *Illinois Brick*, specifically multiple liability and apportionment

Although the plaintiffs in *Campos* actually purchased an alleged monopoly product, ticket distribution services, directly from an alleged monopolist, Ticketmaster, under the new rule enunciated by the majority, they were indirect purchasers and hence lacked standing to seek antitrust damages. The majority's decision could impose substantial limitations on the private enforcement of the antitrust laws in the Eighth Circuit.

## VI. CONCLUSION

In attempting to apply the *Illinois Brick* decision, the court actually formulated a new rule for determining purchaser status under the antitrust laws. Under this rule, a purchaser who bears a portion of a monopoly overcharge by virtue of an antecedent transaction between an alleged monopolist and another independent purchaser is classified as an indirect purchaser. Not only does this rule work to contravene the underlying purposes of the federal antitrust laws, but it provides an incentive to industries to enter into exclusive dealing arrangements as a means of shielding themselves from the reach of the treble-damage threat of Section Four of the Clayton Act.

Because contractual agreements frequently serve as the foundation for all business distribution systems, the ramifications of this decision are significant and could extend far beyond the ticketing distribution industry. The existence of an agreement between an alleged monopolist and someone other than the plaintiff should not be the determinative factor in indirect purchaser analysis. Courts should take care to properly distinguish indirect purchasers from direct purchasers, and an allegation of vertical restraint should catalyze a more searching inquiry.

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problems. *Id.* at 851. The "billing practice" at issue in *McCarthy* concerned the billing practices of the attorneys, not the alleged monopolist.

The similarity of the facts of *McCarthy* to the instant case is obvious. Ticketmaster entered into contracts with the concert venues for the exclusive right to distribute concert tickets. Ticketmaster derived its revenue from the service fees paid by the plaintiffs. Because the ticket purchasers bought tickets directly from Ticketmaster, they are analogous to the attorneys in *McCarthy*, which the Third Circuit concluded, "were undeniably the direct purchasers of the photocopies." *Id.* at 852. For the plaintiffs to be indirect purchasers, as were the plaintiffs in *McCarthy*, another level of distribution is necessary. For instance, if "ticket scalpers" purchased tickets directly from Ticketmaster and resold them to the plaintiffs, then the instant plaintiffs would have been analogous to the plaintiffs in *McCarthy*. However, that is clearly not what the plaintiffs alleged in