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ANTITRUST LAW: INDIRECT PURCHASER STANDING TO SUE IN OKLAHOMA — *MAJOR V. MICROSOFT CORP.*

KEITH D. TRACY* & RONALD L. WALKER**

Deciding an issue of first impression in Oklahoma, the Oklahoma Court of Civil Appeals ruled in *Major v. Microsoft Corp.*¹ that an indirect purchaser of a product does not have standing to sue for antitrust damages that might have resulted during the commercial distribution of that product.² The court's ruling is based on federal law precedent and is one of the first appellate opinions interpreting and applying the relatively new Oklahoma Antitrust Reform Act.³

Part I of this Article briefly summarizes the Oklahoma Antitrust Reform Act. Next, Part II explains the historical context of the *Major v. Microsoft Corp.* decision, including a brief history of the antitrust litigation against Microsoft Corporation. Part III addresses the indirect purchaser rule adopted in *Major v. Microsoft Corp.* Part IV then discusses exceptions to the indirect purchaser rule asserted in the case. Finally, Part V evaluates the effect of this decision to prevent “end-runs” around the indirect purchaser rule by asserting claims under the Oklahoma Consumer Protection Act.

I. Oklahoma Antitrust Reform Act

Enacted on July 1, 1998, the Oklahoma Antitrust Reform Act revamped Oklahoma's antitrust statutes, which had remained relatively unchanged since statehood.⁴ Oklahoma antitrust law originated in the Oklahoma Constitution,

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1. 2002 OK CIV APP 120, 60 P.3d 511.

2. *Id.* ¶¶ 9, 11, 60 P.3d at 513.

3. 79 OKLA. STAT. §§ 201-212 (2001).

4. Oklahoma state antitrust law originated in Oklahoma laws 1907-08, pp. 75-57, and were subsequently recodified and amended a number of times. *See, e.g.*, OKLA. COMP. LAWS §§ 8809-8812 (1909); OKLA. REV. LAWS §§ 8220-8244 (1910); OKLA. COMP. STAT. §§ 11,017-

which not only prohibits monopolies,⁵ but also authorizes the state legislature to define each “combination, monopoly, trust, act, or agreement, in restraint of trade” that should be declared unlawful.⁶ Much of American antitrust law is founded on federal antitrust statutes, in particular the Sherman Act,⁷ the Robinson-Patman Act,⁸ and the Clayton Act.⁹ Despite their enactment early in the last century, however, many of these federal antitrust principles were difficult to reconcile with the pre-1998 language of the Oklahoma antitrust statutes. Consequently, the Oklahoma legislature enacted the Oklahoma Antitrust Reform Act, which made significant changes to state antitrust law.

A primary feature of the Antitrust Reform Act is that it seeks to conform Oklahoma’s antitrust law to federal antitrust law by incorporating federal law to the greatest extent possible.¹⁰ In fact, the Oklahoma legislature has affirmatively mandated that “[t]he provisions of this act shall be interpreted in a manner consistent with Federal Antitrust Law . . . and the case law applicable thereto.”¹¹

II. The Context of Major v. Microsoft Corp. and a Brief History of Antitrust Litigation Against Microsoft

A. Government Cases

The Microsoft antitrust litigation beginning in the 1990s is well documented.¹² In 1994, the federal government charged Microsoft with violating § 1 and § 2 the Sherman Antitrust Act for allegedly unlawfully maintaining a monopoly in the market for operating systems designed to run on Intel-compatible personal computers and purportedly using anticompetitive

11,053 (1921); OKLA. STAT. §§ 12,790-12,826 (1931); 79 OKLA. STAT. §§ 1-103 (1991).

5. OKLA. CONST. art. II, § 32.

6. *Id.* art. V, § 44.

7. 15 U.S.C. §§ 1-7 (2000).

8. *Id.* §§ 13-13b, 21a.

9. *Id.* §§ 12, 13, 14-19, 20, 21-27; 29 U.S.C. §§ 52-53 (2000).

10. One notable distinction is that the Oklahoma equivalent of § 1 of the Sherman Act also prohibits “[e]very act . . . in restraint of trade or commerce within this state.” 79 OKLA. STAT. § 203 (2001). By including the word “act,” Oklahoma law is arguably broader than its federal law counterpart. *See Harolds Stores, Inc. v. Dillard Dep’t Stores, Inc.*, 82 F.3d 1533, 1549-51 (10th Cir. 1996).

11. 79 OKLA. STAT. § 212.

12. *See, e.g.*, Microsoft Legal Newsroom, at <http://www.microsoft.com/presspass/legalnews.msp> (last visited Aug. 4, 2005); Dep’t of Justice Antitrust Case Filings, at http://www.usdoj.gov/atr/cases/ms_index.htm (last visited Aug. 4, 2005).

terms in its licensing and software developer agreements.¹³ Microsoft and the federal government resolved their dispute through entry of a consent decree.¹⁴

In 1997, the federal government commenced a civil contempt proceeding contending that Microsoft had violated the consent decree by marketing a single, tied product consisting of an operating system called Windows 95 and the Microsoft web browser, Internet Explorer.¹⁵ Although the trial court denied the government's requested relief, it issued a preliminary injunction against the purportedly illegal "tie-in."¹⁶ On appeal, the U.S. Court of Appeals for the D.C. Circuit reversed and remanded because the trial court had incorrectly interpreted the consent decree and issued the preliminary injunction without adequate notice.¹⁷

In May 1998, one month before the appellate court ruling involving the consent decree, the federal government and a group of approximately twenty states filed separate lawsuits against Microsoft alleging antitrust claims for (1) violating § 1 of the Sherman Act through exclusive dealing and tying Internet Explorer to Windows 95 and Windows 98, and (2) violating § 2 of the Sherman Act by maintaining its monopoly in the personal computer operating systems market and attempting to monopolize the web browser market.¹⁸ The trial court entered findings of fact¹⁹ and conclusions of law²⁰ against Microsoft, both under federal law and the respective state laws raised by the nonfederal, government plaintiffs. In April 2000, as a remedy for the antitrust violations, Judge Jackson ordered Microsoft to modify its conduct and structurally reorganize, including a mandatory divestiture that would split the company into separate operating systems and applications businesses.²¹

13. *United States v. Microsoft Corp.*, 56 F.3d 1448, 1451 (D.C. Cir. 1995) (*Microsoft I*).

14. When the trial court refused to enter the decree, *United States v. Microsoft Corp.*, 159 F.R.D. 318, 338 (D.D.C. 1995), both parties successfully appealed, *Microsoft I*, 56 F.3d at 1455, and the consent decree was ultimately entered, *United States v. Microsoft Corp.*, Civ. A. 94-1564, 1995 WL 505998, at *1 (D.D.C. Aug. 21, 1995).

15. *United States v. Microsoft Corp.*, 980 F. Supp. 537, 538 (D.D.C. 1997).

16. *Id.* at 543.

17. *United States v. Microsoft Corp.*, 147 F.3d 935, 956 (D.C. Cir. 1998) (*Microsoft II*).

18. *United States v. Microsoft Corp.*, 253 F.3d 34, 45 (D.C. Cir. 2001) (*Microsoft III*). When the case was placed on the court's "fast-track" docket, the parties were limited to fourteen witnesses at trial, direct testimony had to be submitted in writing, and a seventy-six-day bench trial was commenced in October 1998, only five months after the complaints had been filed.

19. *United States v. Microsoft Corp.*, 84 F. Supp. 2d 9, 12 (D.D.C. 1999) (entering findings of fact on November 5, 1999, with subsequent amendments on December 21, 1999).

20. *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30, 35 (D.D.C. 2000).

21. *United States v. Microsoft Corp.*, 97 F. Supp. 2d 59, 64 (D.D.C. 2000).

Microsoft appealed the trial court's decision both on the merits and for judicial bias.²²

On appeal, the en banc D.C. Circuit affirmed in part and reversed in part.²³ On remand, Judge Kollar-Kotelly ordered the parties to enter into intensive settlement negotiations.²⁴ The United States and some of the states were able to reach a compromise with Microsoft,²⁵ which the trial court approved after altering the continuing jurisdiction provision in the consent decree to allow the court to act sua sponte.²⁶ On June 30, 2004, the D.C. Circuit affirmed the approval of the consent decree.²⁷

B. Consumer Class Action Cases

With the appeal pending on Judge Jackson's April 2000 final order, litigants filed an onslaught of consumer class action lawsuits against Microsoft across the country.²⁸ These lawsuits — grounded on the trial court's ruling against Microsoft — quoted many of the findings of fact and conclusions of law in the federal government's case.²⁹ Microsoft settled

22. *Microsoft III*, 253 F.3d at 46. While this appeal was pending, the plaintiff-states petitioned the U.S. Supreme Court for certiorari, but the Court declined to hear the direct appeal, denied the petition for writ of certiorari, and remanded. *United States v. Microsoft Corp.*, 530 U.S. 1301 (2000).

23. *Microsoft III*, 253 F.3d at 118-19. The court agreed that Microsoft had indeed used anticompetitive means to maintain its monopoly in the operating system market, but rejected the contention that Microsoft attempted to monopolize the internet browser market. *Id.* at 84. The court also vacated and remanded the Sherman Act tying violations for failing to conduct a rule of reason analysis, *id.*, and the remedy portion of the final judgment, *id.* at 98. Finally, the court determined that the trial court's integrity was called into question because of Judge Jackson's ex parte contacts with the media, *id.* at 115, and required the case be reassigned to a different trial court judge on remand, *id.* at 117.

24. *United States v. Microsoft Corp.*, 231 F. Supp. 2d 144, 150 (D.D.C. 2002).

25. *Id.* The nonsettling states pursued the remanded action, where Microsoft had been adjudicated as unlawfully maintaining a monopoly in violation of the Sherman Act. *New York v. Microsoft Corp.*, 224 F. Supp. 2d 76 (D.D.C. 2002).

26. *United States v. Microsoft Corp.*, 215 F. Supp. 2d 1, 15 (D.D.C. 2002); *see also Microsoft Corp.*, 231 F. Supp. 2d at 202.

27. *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199 (D.C. Cir. 2004). For some time, the parties will make periodic reports to the trial court regarding compliance with the final judgments in both the settled and nonsettled cases. Antitrust Case (U.S.): Settlement Proceedings, at http://microsoft.com/presspass/legal_newsroomarchive.msp?case=settlement%20proceedings (last visited Aug. 4, 2005).

28. *See Joe Wilcox, Microsoft Whittles Away at Class-Action Suits*, at http://news.com.com/2100-1001_3-243545.html (last visited Aug. 4, 2005).

29. *See, e.g.*, Petition ¶¶ 3, 27, 29, *Major v. Microsoft Corp.*, 2002 OK CIV APP 120, 60 P.3d 511 (No. CJ-2000-1704); Amended Petition ¶¶ 3, 27, 29, *Major* (No. CJ-2000-1704).

consumer class actions in approximately fifteen jurisdictions.³⁰ In total, over 130 putative private consumer class actions were filed against Microsoft under federal and state antitrust laws after Judge Jackson issued his findings of fact.³¹ At least one lawsuit was filed in virtually every state. Two were filed in Oklahoma.

1. Prentice v. Microsoft Corp.

On April 5, 2000, only two days after Judge Jackson announced his conclusions of law, a statewide consumer class action case was filed against Microsoft in the Western District of Oklahoma asserting that Microsoft violated § 1 and § 2 of the Sherman Act and section 203 of the Oklahoma Antitrust Reform Act.³² The putative class was defined as “all Oklahoma owners of Windows 95 and Windows 98 software which contain Internet Explorer.”³³ Because approximately sixty of the antitrust lawsuits filed against Microsoft were in federal courts across the county, the multidistrict litigation procedure was invoked and these cases — including the *Prentice* case — were transferred to the U.S. District Court for the District of Maryland.³⁴ The district court ruled that *Illinois Brick Co. v. Illinois*³⁵ barred the federal law claims asserted in *Prentice*,³⁶ and subsequently granted Microsoft’s motion to dismiss the state law claims in the *Prentice* lawsuit.³⁷

30. Microsoft Consumer Class Action Settlement, at <http://www.microsoft.com/mscorp/legal/class/> (last visited Aug. 4, 2005). For an example of a state consumer class action settlement, see Microsoft-California Class Action Settlement, at <http://www.microsoftcalsettlement.com> (last visited Aug. 4, 2005).

31. See Wilcox, *supra* note 28.

32. See Complaint ¶¶ 14, 18, *Prentice v. Microsoft Corp.*, No. CIV-00-00690 (W.D. Okla. filed Apr. 5, 2000) [hereinafter *Prentice* Complaint].

33. *Id.* at 3; Amended Complaint at 3, *Prentice*, No. CIV-00-00690 (W.D. Okla. filed Apr. 26, 2000).

34. See 28 U.S.C. § 1407 (2000); Initial Transfer Order, *In re Microsoft Antitrust Litig.*, No. MDL 1332 (D. Md. Apr. 25, 2000); Conditional Transfer Order, *In re Microsoft Antitrust Litig.*, No. MDL 1332.

35. 431 U.S. 720 (1977).

36. *Prentice* Complaint, *supra* note 32.

37. Memorandum Order at 3-4, *In re Microsoft Antitrust Litig.*, No. MDL 1332 (D. Md. Jan. 23, 2003) (applying *Major v. Microsoft Corp.*, 2002 OK CIV APP 120, ¶ 9, 60 P.3d 511, 513, in which the Oklahoma Court of Civil Appeals held that the holdings of *Illinois Brick* apply to claims brought under the Oklahoma Antitrust Reform Act, and recognizing *Major* as controlling law in Oklahoma on the matter).

2. *Major v. Microsoft Corp.*

On the same day *Prentice* was filed in federal court in Oklahoma, *Major v. Microsoft Corp.* was filed in the state district court for Tulsa County. In *Major*, the plaintiff alleged, on behalf of a statewide class of Microsoft consumers, that Microsoft had violated the Oklahoma Antitrust Reform Act and had imposed an unconscionable contract price in violation of title 12A, section 2-302 of the Oklahoma Uniform Commercial Code regarding contracts for the sale of goods.³⁸

Arguing that the *Illinois Brick* indirect purchaser rule applied, Microsoft moved to dismiss the antitrust claims.³⁹ Judge Gregory K. Frizzell agreed and granted Microsoft's motion to dismiss.⁴⁰ The plaintiff filed an amended petition, which contained new allegations of purported exceptions to the indirect purchaser rule as well as a claim under the Oklahoma Consumer Protection Act.⁴¹ Judge Frizzell again dismissed the action,⁴² and on appeal, the Oklahoma Court of Civil Appeals affirmed, adopting the district court's order of dismissal.⁴³ The antitrust rulings contained in the appellate court ruling are analyzed below.

III. *The Indirect Purchaser Rule*

A. *Federal Law*

Under *Illinois Brick*, indirect purchasers do not have standing to assert a private cause of action for damages under federal antitrust law.⁴⁴ Only those who purchase *directly* from an alleged antitrust violator can recover damages under federal law.⁴⁵ In *Illinois Brick*, the State of Illinois and 700 local governmental entities in the Chicago area sued several concrete block manufacturers for price fixing in violation of the Sherman Act.⁴⁶ The

38. *Major v. Microsoft Corp.*, 2002 OK CIV APP 120, ¶ 2, 60 P.3d 511, 512. The UCC claim was ultimately dismissed because UCC section 2-302 does not provide a basis for affirmative relief, but only serves as a defense to a claim for relief. *Id.* ¶ 11, 60 P.3d at 517.

39. *Id.* ¶ 3, 60 P.3d at 512; see *Ill. Brick*, 431 U.S. at 729.

40. *Major* ¶ 11, 60 P.3d at 513.

41. *Id.* ¶ 2, 60 P.3d at 512.

42. *Id.* ¶ 3, 60 P.3d at 512.

43. *Id.* ¶ 11, 60 P.3d at 513 (concluding that Judge Frizzell's opinion had so adequately explained the rationale for dismissing the amended petition that the appellate court should adopt Judge Frizzell's order as its own) (citing OKLA. SUP. CT. R. 1.202).

44. *Ill. Brick*, 431 U.S. at 729.

45. *Id.*

46. *Id.* at 726.

manufacturers had sold concrete blocks to certain masonry contractors, who in turn used those blocks to construct buildings later sold to the plaintiffs.⁴⁷ The plaintiffs alleged that the manufacturers conspired to fix the prices of their concrete blocks and at least part of those overcharges had been “passed on” by the middlemen to the plaintiffs.⁴⁸

The trial court granted summary judgment to the concrete block manufacturers because the plaintiffs had not purchased anything directly from the manufacturers but were merely indirect purchasers.⁴⁹ While the plaintiffs successfully appealed the case to the Seventh Circuit,⁵⁰ the U.S. Supreme Court reversed.⁵¹ The Court held that “the overcharged direct purchaser, and not others in the chain of manufacture or distribution, is the party ‘injured in his business or property’ within the meaning of [§ 4 of the Clayton Act].”⁵² The Court rested its conclusion on two principal rationales: (1) attempting to determine the amount of overcharge passed on to the consumers would make antitrust litigation even more complex, protracted, and expensive; and (2) concentrating the potential recovery in the direct purchasers, rather than dissipating it among indirect purchasers with small claims, would increase the effectiveness of the use of private actions to enforce the antitrust laws.⁵³

Regarding the first rationale, the Court explained that holding otherwise would allow “potential plaintiffs at each level in the distribution chain . . . to assert conflicting claims to a common fund — the amount of the alleged overcharge — by contending that the entire overcharge was absorbed at that particular level in the chain.”⁵⁴ Such a holding would also compel defendants to take discovery on and possibly defend conflicting claims for damages asserted by participants at every level in the distribution chain, which “would greatly complicate and reduce the effectiveness of the already protracted treble-damages proceedings.”⁵⁵ The Court stated:

Permitting the use of pass-on theories under § 4 essentially would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge — from direct purchasers to middlemen to

47. *Id.*

48. *Id.* at 726-27.

49. *Illinois v. Ampress Brick Co.*, 67 F.R.D. 461, 468 (N.D. Ill. 1975).

50. *Illinois v. Ampress Brick Co.*, 536 F.2d 1163, 1166-67 (7th Cir. 1976).

51. *Ill. Brick*, 431 U.S. at 729.

52. *Id.*

53. *Id.* at 745.

54. *Id.* at 737.

55. *Id.* at 732.

ultimate consumers. However appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness.⁵⁶

Under the second rationale, the *Illinois Brick* Court noted that allowing indirect purchasers to have standing, *especially in consumer actions*, would mean that “[i]n treble-damages actions by ultimate consumers, the overcharge would have to be apportioned among the relevant wholesalers, retailers, and other middlemen”⁵⁷ The Court concluded that “[t]he legislative purpose in creating a group of ‘private attorneys general’ to enforce the antitrust laws under § 4” — a purpose shared by the Oklahoma Antitrust Reform Act — was “better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them than by attempting to apportion the overcharge among all that may have absorbed a part of it.”⁵⁸

The U.S. Supreme Court has reaffirmed *Illinois Brick* on multiple occasions.⁵⁹ In *Kansas v. UtiliCorp United, Inc.*,⁶⁰ the Court emphasized the simplicity and force of the indirect purchaser bar imposed by *Illinois Brick*.⁶¹ *UtiliCorp* concerned an alleged conspiracy among natural gas producers to inflate prices for natural gas sold to utilities.⁶² Among the plaintiffs were the States of Kansas and Missouri, which asserted antitrust claims on behalf of consumers in their states who purchased gas from those utilities.⁶³ Kansas and Missouri argued that even though the consumers were indirect purchasers of the gas from the defendant-producers, the indirect purchaser rule should not apply because state regulations required the utilities to pass on the entire amount of the overcharge to the consumers.⁶⁴ The Court nevertheless refused

56. *Id.* at 737.

57. *Id.* at 740.

58. *Id.* at 746 (internal citation omitted) (quoting *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972)). The *Illinois Brick* indirect purchaser rule is based upon, and is a corollary to, the rule articulated in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968) (rejecting the “pass on” defense as a matter of law and holding that a direct-purchaser defendant cannot introduce evidence that indirect purchasers actually absorbed a portion of the overcharge).

59. *See, e.g.*, *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 207 (1990) (stating that the antitrust plaintiff must be the “immediate buyer[] from the alleged antitrust violator[]”).

60. 497 U.S. 199 (1990).

61. *Id.*

62. *Id.* at 204.

63. *Id.*

64. *Id.* at 208.

to create an exception to the indirect purchaser rule.⁶⁵ After describing the policies behind *Illinois Brick*, the Court stated that “even assuming that any economic assumptions underlying the *Illinois Brick* rule might be disproved in a specific case, we think it an unwarranted and counterproductive exercise to litigate a series of exceptions.”⁶⁶

Illinois Brick has been applied in federal courts in the Tenth Circuit, including those in Oklahoma. For example, the Tenth Circuit has affirmed a district court’s application of the indirect purchaser rule to prohibit a consumer class action antitrust claim from being pursued by indirect purchasers. In *Hise v. Philip Morris Inc.*,⁶⁷ a putative class of tobacco consumers sued the major tobacco manufacturers claiming that the manufacturers had conspired to cover the costs of the settlement of state medicaid reimbursement litigation by raising the price of their tobacco products.⁶⁸ Because the tobacco products in question were sold only to distributors and not directly to consumers, thereby making the consumers indirect purchasers, the federal district judge rejected the antitrust claim, a ruling the Tenth Circuit ultimately affirmed.⁶⁹

B. Oklahoma Law

Major v. Microsoft Corp. held for the first time in Oklahoma that the indirect purchaser rule applies to bar antitrust claims for damages by a plaintiff who did not purchase the product in question directly from the defendant.⁷⁰ This ruling follows the Oklahoma legislative mandate that state courts interpret the Oklahoma Antitrust Reform Act consistently with federal law.⁷¹

65. *Id.* at 208-18.

66. *Id.* at 217.

67. 46 F. Supp. 2d 1201 (N.D. Okla. 1999), *aff’d*, 208 F.3d 226 (10th Cir. 2000).

68. *Id.* at 1208.

69. *Id.* at 1207. The court noted:

Illinois Brick and its progeny make clear that only direct purchasers, and no others in the chain of manufacture and distribution, have standing to bring an action for damages under the federal antitrust laws. Plaintiffs’ attempts to distinguish this case lack merit, and the Court concludes that, as indirect purchasers of tobacco products, *Illinois Brick* bars their claim for damages here.

Id. (internal citations omitted).

70. 2002 OK CIV APP 120, ¶¶ 9, 11, 60 P.3d 511, 513.

71. See 79 OKLA. STAT. § 212 (2001) (noting that “[t]he provisions of this act shall be interpreted in a manner consistent with Federal Antitrust Law . . . and the case law applicable thereto”) (emphasis added) (internal citation omitted). “When intent of legislature is plainly expressed in a statute, it must be followed without further inquiry.” *Estate of Kasishke v. Okla. Tax Comm’n*, 1975 OK 133, ¶ 18, 541 P.2d 848, 851. Courts in other states with similar

Even before the legislature enacted title 79, section 212, however, Oklahoma courts interpreted the state antitrust statutes in light of federal statutes and case law because of the similarity of the state and federal antitrust statutes.⁷² Since its adoption, a federal court in another jurisdiction has interpreted the Oklahoma Antitrust Reform Act to bar indirect purchasers from having standing.⁷³

Moreover, when Oklahoma passed its Antitrust Reform Act in 1998, it automatically incorporated and codified the *Illinois Brick* indirect purchaser rule because federal antitrust statutes were adopted almost verbatim in the Oklahoma Antitrust Reform Act.⁷⁴ Thus, unlike some other states, Oklahoma has chosen not to legislatively overturn the indirect purchaser rule.⁷⁵

In *Major*, the plaintiff had purchased his copies of Windows 98 from a computer manufacturer and a national retailer, *not* from Microsoft.⁷⁶ The vast majority of Microsoft sales of Windows 98 are to computer manufacturers who incorporate the product into computers.⁷⁷ The computers and stand-alone operating systems are sold in many different venues, such as mail-order catalogs, large department stores, and computer specialty stores.⁷⁸ They are sold in a wide variety of packages with other hardware and often with maintenance or consulting services.⁷⁹

statutes have also relied on *Illinois Brick* and barred indirect purchaser actions. *See, e.g.,* Stifflear v. Bristol-Myers Squibb Co., 931 P.2d 471, 475-76 (Colo. Ct. App. 1996); Abbott Labs., Inc. v. Segura, 907 S.W.2d 503, 505-07 (Tex. 1995); Blewett v. Abbott Labs., 938 P.2d 842, 845-46 (Wash. Ct. App. 1997).

72. *See* Teleco, Inc. v. Ford Indus., Inc., 1978 OK 159, ¶ 3, 587 P.2d 1360, 1362 (“[T]he provisions of this State’s antitrust statutes are similar to Federal legislation, and that interpretation of Federal antitrust legislation provides valuable assistance in interpreting the provisions of the Oklahoma statutes.”).

73. *FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25, 50 (D.D.C. 1999), *modified on other grounds*, 99 F. Supp. 2d 1 (D.D.C. 1999) (holding that the State of Oklahoma may not sue to recover damages on behalf of indirect purchasers).

74. “Judicial interpretation by a court of last resort impressed on adopted legislation before its reception cannot be changed by jurisprudence of the receiving state. Legislative process affords the only effective means for departure from the binding force of the [adopted statute].” *In re Estate of Speake*, 1987 OK 61, ¶ 7, 743 P.2d 648, 650.

75. Attempts to modify the rule have failed. *See* S. 48-450, 1st Sess. (Okla. 2001) (vetoed by Governor Frank Keating on April 11, 2001); S. 49-232, 1st Sess. (Okla. 2003) (not reported out of the House Judiciary Committee).

76. *Major v. Microsoft Corp.*, 2002 OK CIV APP 120, ¶ 1, 60 P.3d 511, 512.

77. Defendant’s Reply to Plaintiff’s Response to Defendant’s Motion to Dismiss Brief at 9, *Major* (No. CJ-2000-1704) [hereinafter Defendant’s Reply Brief in *Major*].

78. *Id.*

79. *Id.*

Some putative class members in *Major* bought their copies from local stores, thus interposing not just one, but two or three layers in the chain of purchases.⁸⁰ In addition, one of Major's copies of Windows 98 was sold as a component of a computer — which was by far the most common method of purchasing Windows 98 — further exacerbating the difficulty of determining the incidence and amount of any alleged overcharge.⁸¹

The *Major* court considered whether two words in the Oklahoma Act — “any person” — meant that antitrust standing is available to everyone, including indirect purchasers.⁸² The plaintiff in *Major* argued that the word “any” disclosed a legislative intent to allow “every” person, including indirect purchasers, to recover for state antitrust violations.⁸³ These same two words, however, appear in the federal antitrust statute,⁸⁴ and it was these very words that the U.S. Supreme Court interpreted and applied in *Illinois Brick* to preclude suits by indirect purchasers.⁸⁵

The plaintiff in *Major* sought to avoid the *Illinois Brick* rule by asserting that “[a]s a precondition to their first use of Windows 98,” the putative class members were required “to accept and agree to an end user license . . . directly from Microsoft.”⁸⁶ Even if true, this allegation had no bearing on Major's standing. The end user license agreement protects Microsoft's rights under federal copyright laws and ensures that its software is not pirated or used improperly.⁸⁷ The plaintiff did not *pay* anything to Microsoft for the license and, as a result, the license was irrelevant to the “passing on” issues of *Illinois*

80. Defendant's Motion to Dismiss Brief at 9, *Major* (No. CJ-2000-1704).

81. *Id.*

82. *Major v. Microsoft Corp.*, 2002 OK CIV APP 120, ¶ 7, 60 P.3d 511, 513 (looking to 79 OKLA. STAT. § 205(A)(1) (2001)).

83. Plaintiff's Response to Defendant's Motion to Dismiss Brief at 8, *Major* (No. CJ-2000-1704) [hereinafter Plaintiff's Response Brief in *Major*].

84. Compare 15 U.S.C. § 15(a) (2000) (“any person who shall be injured in his business or property”), with 79 OKLA. STAT. § 205(A)(1) (“[a]ny person who is injured in his or her business or property”).

85. *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 729 (1977). Moreover, the Supreme Court had already rejected the interpretation advocated by the plaintiff, ruling that “[i]t is reasonable to assume that Congress did *not* intend to allow *every* person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property.” *Blue Shield v. McCready*, 457 U.S. 465, 477 (1982) (emphasis added).

86. First Amended Class Action Petition for Damages ¶ 7, *Major* (No. CJ-2000-1704) [hereinafter Amended Petition]. The plaintiff appeared to be unusual in this respect because the vast majority of licenses for Windows 98 were entered into between end users and computer manufacturers, not with Microsoft directly.

87. See Defendant's Reply Brief in *Major*, *supra* note 77, at 8 n.12.

Brick.⁸⁸ The plaintiff in *Major* was an indirect purchaser because he paid nothing to Microsoft for Windows 98.

The *Major* plaintiff also argued that the indirect purchaser rule should not apply to a “unique injury.” This “injury” was actually an alleged injury to the market as a whole, specifically denial of “technical innovation, market choice, product variety and substitutable supply.”⁸⁹ Such allegations were repeatedly rejected in the Microsoft antitrust litigation because a consumer lacks standing to claim injury to the market as a whole.⁹⁰ The other purported “unique injury” was that Microsoft’s integration of a browser into Windows 98 allegedly resulted in performance degradation as compared to a hypothetical operating system without the browser.⁹¹ The court in *Major* determined this was simply a claim that the plaintiff should have obtained a better product than he did,⁹² which circled back to the problems identified in *Illinois Brick*.

The trial court in *Major* also considered and rejected *Major*’s argument that he was a direct purchaser.⁹³ Although the plaintiff had not paid anything directly to Microsoft, he argued that he was a direct purchaser because some or all of the money paid to third parties for software was ultimately paid to Microsoft.⁹⁴ If a direct purchase is one where the price is not directly paid but rather is ultimately paid to the manufacturer, then no purchase could ever be considered an indirect purchase. Direct purchasers are only those who are “the immediate buyers from the alleged antitrust violators.”⁹⁵ The fact that the plaintiff had a *direct* contractual relationship with Microsoft through the end user license agreement was also of no consequence because there was no direct payment to the defendant for that license.⁹⁶

88. *Id.*

89. Amended Petition, *supra* note 86, ¶ 80.

90. *E.g., In re Microsoft Antitrust Litig.*, 127 F. Supp. 2d 702, 710-14 (D. Md. 2001).

91. Plaintiff’s Response Brief in *Major*, *supra* note 83, at 8.

92. *Major* at Exhibit A, Pt. 4, 60 P.3d at 517.

93. *Id.* ¶¶ 10-11, 60 P.3d at 513.

94. Plaintiff’s Response Brief in *Major*, *supra* note 83, at 12.

95. *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 207 (1990).

96. End user license agreements do not make the plaintiffs “direct buyers” and do not change the operative fact that “[n]o money passed directly from Plaintiffs to Defendant.” *Arnold v. Microsoft Corp.*, No. 00-CI-00123, 2001 WL 193767, at **1, 6 (Ky. Cir. Ct. July 21, 2000). “Plaintiffs are indirect purchasers under *Illinois Brick*. That Plaintiffs have entered into end-user license agreements with Defendants does not change this status” *Daraee v. Microsoft Corp.*, No. 004-3311, 2000 WL 33187306, at *1 (Or. Cir. Ct. June 27, 2000).

IV. Alleged Exceptions to the Indirect Purchaser Rule

The U.S. Supreme Court in *Kansas v. UtiliCorp United, Inc.* admonished that it would be “an unwarranted and counterproductive exercise to litigate a series of exceptions” to *Illinois Brick*.⁹⁷ Despite the Court’s clear guidance, litigants have argued for exceptions to the *Illinois Brick* doctrine, but none have ever been accepted by the Supreme Court. The overwhelming majority of federal courts that have considered possible exceptions since *UtiliCorp* have declined to apply them.⁹⁸ *Major v. Microsoft Corp.* and the antitrust litigation nationwide against Microsoft, including the multidistrict litigation court,⁹⁹ was no different in terms of litigating and rejecting the so-called “exceptions.”

The plaintiff in *Major* unsuccessfully argued for three purported exceptions to *Illinois Brick*, including: (1) purchases from a member of a vertical price fixing conspiracy; (2) purchases from an entity “owned or controlled” by the antitrust violator; and (3) instances in which the retailer that sells to the plaintiff is required to pass all costs on to the end user pursuant to a preexisting, cost-plus, fixed-quantity contract.¹⁰⁰

A. Vertical Price Fixing Conspiracy

The court in *Major* analyzed whether the plaintiff had alleged a vertical conspiracy of price fixing between Microsoft and Windows 98 retailers from whom indirect purchasers bought their products, such as Office Depot and Gateway.¹⁰¹ However, the plaintiff failed to meet the requirement of alleging the existence of a vertical conspiracy or “facts sufficient to sustain such an allegation.”¹⁰² As such, the *Major* court decided the argument to be nothing more than “a transparent attempt to evade the rule of *Illinois Brick*.”¹⁰³

The plaintiff in *Major* also alleged a separate vertical conspiracy, one where Microsoft allegedly conspired to fix prices with three computer

97. *UtiliCorp*, 497 U.S. at 217.

98. See, e.g., *Lucas Auto. Eng'g v. Bridgestone/Firestone*, 140 F.3d 1228, 1234 (9th Cir. 1998); *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 605-06 (7th Cir. 1997); *McCarthy v. Recordex Servs., Inc.*, 80 F.3d 842, 852-55 (3d Cir. 1996).

99. The multidistrict litigation court hearing all of the cases pending in federal court rejected the exact language regarding the *Illinois Brick* exceptions that the plaintiff offered here. *In re Microsoft Antitrust Litig.*, 127 F. Supp. 2d 702, 710-14 (D. Md. 2001).

100. *Major v. Microsoft Corp.*, 2002 OK CIV APP 120, ¶¶ 10-11, 60 P.3d 511, 513.

101. *Id.* at Exhibit A, Pt. 1, 60 P.3d at 515.

102. *Jewish Hosp. Ass'n v. Stewart Mech. Enters.*, 628 F.2d 971, 977 (6th Cir. 1980).

103. *Id.*; *Major* at Exhibit A, Pt. 1, 60 P.3d at 515.

manufacturers: Compaq, Dell, and NEC.¹⁰⁴ The court also rejected these allegations because: (1) Major did not purchase directly from any of the alleged coconspirators, but instead purchased from Office Depot and Gateway;¹⁰⁵ (2) none of the alleged coconspirators were joined as defendants in the *Major* case, failing to satisfy a requirement of every federal appellate court that has considered the proposed vertical conspiracy exception;¹⁰⁶ (3) the conclusory allegations lacked supporting facts;¹⁰⁷ and (4) the antitrust claims asserted were economically implausible and were equally consistent with competitive conduct.¹⁰⁸

The validity of any vertical conspiracy exception is particularly doubtful because it is not even mentioned as a possibility in the *Illinois Brick* opinion.¹⁰⁹ Moreover, those courts that have considered the exception have made clear that the rationale for it would be that an individual who purchases an overpriced good from a member of a price fixing conspiracy bears that overcharge directly and, therefore, pass on would not be at issue.¹¹⁰

B. Ownership or Control

The ownership or control exception, suggested as a possible exception in a footnote in *Illinois Brick*,¹¹¹ has never been definitively accepted.¹¹² Even

104. Amended Petition, *supra* note 86, ¶¶ 10-11.

105. *Major* at Exhibit A, Pt. 1, 60 P.3d at 515.

106. *See, e.g.,* McCarthy v. Recordex Servs., Inc., 80 F.3d 842, 854-55 (3d Cir. 1996); *In re* Midwest Milk Monopolization Litig., 730 F.2d 528, 529-30 (8th Cir. 1984); *In re* Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 691 F.2d 1335, 1342 (9th Cir. 1982); *In re* Beef Indus. Antitrust Litig., 600 F.2d 1148, 1163 (5th Cir. 1979).

107. The “vertical conspiracy” exception has only been applied to cases in which the manufacturer and middlemen jointly conspired to *fix the price* charged by the middlemen to their customers. *See* Gas-A-Tron v. Am. Oil Co., No. 73-191, 1977 WL 1519, at *2 (D. Ariz. Dec. 7, 1977) (holding that only claims that coconspirators “fixed the prices at which plaintiffs purchased” — not the price at which suppliers purchased — are sufficient to survive *Illinois Brick*).

108. *In re* Microsoft Antitrust Litig., 127 F. Supp. 2d 702, 705-08 (D. Md. 2001). Economically implausible antitrust claims supported only by conclusory allegations are regularly dismissed for failure to state a claim. *See, e.g.,* DM Research Inc. v. Coll. of Am. Pathologists, 170 F.3d 53, 56 (1st Cir. 1999); TV Communications Network, Inc. v. Turner Network Television, Inc., 964 F.2d 1022, 1026 (10th Cir. 1992).

109. *See In re* Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 605 (7th Cir. 1997) (“*UtiliCorp* implies that the only exceptions to the *Illinois Brick* doctrine are those stated in *Illinois Brick* itself.”).

110. *See, e.g., In re* Mid-Atl. Toyota Antitrust Litig., 516 F. Supp. 1287, 1295 (D. Md. 1981); *Reiter v. Sonotone Corp.*, 486 F. Supp. 115, 119 (D. Minn. 1980).

111. *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 736 n.16 (1977).

112. *See Comes v. Microsoft Corp.*, No. CL 82311, 2000 WL 33176061, at *6 (Iowa D. Ct.

if courts recognized such an exception, it would only apply when the antitrust defendant exercises pervasive control over intermediaries, including the prices charged to end users.¹¹³

In *Major*, neither the plaintiff nor the putative class could establish that Microsoft owned or controlled Office Depot or Gateway, the two companies from whom Major purchased Windows 98.¹¹⁴ The plaintiff did allege, however, that an end user license agreement with Microsoft was “substantially similar, if not identical” to those between Microsoft and middlemen suppliers.¹¹⁵ Yet, the court found this allegation had nothing to do with ownership or control.¹¹⁶ Control over the terms of the license agreement did not imply any control over the price charged to end users.¹¹⁷ Other jurisdictions hearing Microsoft antitrust cases similarly rejected this contention.¹¹⁸

C. Preexisting Cost-Plus Contract

In *Illinois Brick*, the Supreme Court appeared to create a preexisting cost-plus contract exception to the indirect purchaser rule.¹¹⁹ Relying on the Court’s language in *Illinois Brick*, the plaintiff in *Major* argued that the transaction between Microsoft and its original equipment manufacturers was the “functional equivalent” of a preexisting cost-plus contract.¹²⁰ Even if such

July 11, 2000). Courts that have considered it have held that it is to be narrowly construed and have rarely found it applicable. *See, e.g., Jewish Hosp. Ass’n v. Stewart Mech. Enters.*, 628 F.2d 971, 975 (6th Cir. 1980) (noting that *Illinois Brick* emphasized the “narrow scope of exemptions to the indirect-purchaser rule”).

113. *In re Microsoft Antitrust Litig.*, 127 F. Supp. 2d at 713 (holding that the absence of allegation of control over price is “fatal”). Unless the control extends to the price charged for operating systems or computers, the “[p]roblems of proving the amount of the pass-on remain undiminished.” *Jewish Hosp. Ass’n*, 628 F.2d at 975. Indeed, the control exception is limited to cases where one party “owns or exerts such significant control over [another] as to be *virtually the same entity*.” *Fisher v. Wattles*, 639 F. Supp. 7, 9 (M.D. Pa. 1985) (emphasis added); *see also In re Brand Name Prescription Drugs*, 123 F.3d at 605-06.

114. *See In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148, 1162 (5th Cir. 1979) (rejecting the plaintiffs’ assertion of the “control” exception because the “plaintiffs in these suits have never suggested that the grocery chains ‘controlled’ the packers or slaughterhouses”).

115. Amended Petition, *supra* note 86, ¶ 60.

116. *Major v. Microsoft Corp.*, 2002 OK CIV APP 120, Exhibit A, Pt. 2, 60 P.3d 511, 516.

117. Differential pricing does “nothing to convert the two-step transaction into the equivalent of a single sale.” *Jewish Hosp. Ass’n*, 628 F.2d at 975. “Charging different prices to different direct purchasers stands in contradiction to the concept of there being effectively only one transaction between Microsoft and Plaintiffs.” *Comes*, 2000 WL 33176061, at *7.

118. *See, e.g., Comes*, 2000 WL 33176061, at **12-13.

119. *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977).

120. *Major* at Exhibit A, Pt. 3, 60 P.3d at 516.

an exception exists, it arises only when a customer is committed to buying a fixed quantity of goods regardless of price, and the supplier is insulated from any decrease in sales volume when it attempts to pass on a manufacturer's overcharge.¹²¹

The *Major* court rejected this argument for two primary reasons. First, the plaintiff in *Major* failed to allege the requisite preexisting cost-plus contract.¹²² If a seller's desire to recover its costs and a "competitive rate of return" on its investment resulted in a "cost-plus contract," the exception to *Illinois Brick* would swallow the rule.

Second, *UtiliCorp* rang the death knell of the cost-plus exception, and no federal appellate court has since embraced it.¹²³ In *UtiliCorp*, the Supreme Court rejected application of such an exception even where the law required the direct purchaser utilities to pass on 100% of any alleged overcharge.¹²⁴ If the legally required 100% pass on in *UtiliCorp* did not qualify as a cost-plus contract, then certainly the Microsoft situation would not qualify.¹²⁵

V. No "End-Runs" Around the Indirect Purchaser Rule in Oklahoma

The amended petition in *Major* asserted a new legal theory — a cause of action under the Oklahoma Consumer Protection Act.¹²⁶ The alleged unfair and deceptive trade practices supporting the consumer protection claim consisted of exactly the same conduct underlying the plaintiff's antitrust claim.¹²⁷ Nevertheless, the *Major* court dismissed the consumer protection law claim for failure to state a claim.¹²⁸

The court in *Major* held that the Oklahoma Consumer Protection Act does not extend to unfair methods of competition.¹²⁹ Statutory interpretation supports the court's ruling. Section 753 of the Oklahoma Act contains a list

121. *Ill. Brick*, 431 U.S. at 736.

122. *Major* at Exhibit A, Pt. 3, 60 P.3d at 517.

123. *See, e.g.,* *McCarthy v. Recordex Servs., Inc.*, 80 F.3d 842, 855 (3d Cir. 1996) ("[T]he vitality of the 'pre-existing cost-plus contract' exception is doubtful . . . in light of *UtiliCorp*."); *Illinois ex rel. Burris v. Panhandle E. Pipeline Co.*, 935 F.2d 1469, 1478 (7th Cir. 1991) ("The [Supreme] Court's interpretation of the cost-plus exception appears so narrow . . . as to preclude its application in any case.")

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

125. *See Comes v. Microsoft Corp.*, No. CL 82311, 2000 WL 33176061, at *7 (D. Ct. Iowa, July 11, 2000) ("This allegation by its terms does not contain the certainty required by *UtiliCorp*.")

126. *Major* ¶ 2, 60 P.3d at 512.

127. Amended Petition, *supra* note 86, ¶ 92.

128. *Major* at Exhibit A, Pt. 6, 60 P.3d at 517-18.

129. *Id.*

of specific prohibited practices and a catch-all bar against “unfair or deceptive trade practice[s].”¹³⁰ The specifically enumerated activities are violations of other named statutes or involve deception or misleading conduct, neither of which has anything to do with anticompetitive behavior. Under ordinary principles of statutory construction, courts should interpret the catch-all phrase at the end of the list of specifically enumerated conduct to be limited to conduct of the same type as the list.¹³¹

In addition, the Oklahoma legislature seemingly intended to exclude unfair methods of competition from the scope of the statute. When the legislature adopted the consumer protection statute in 1972, it had available to it various model consumer protection statutes.¹³² In particular, the Federal Trade Commission had promulgated three forms of a model consumer protection or unfair trade practice statute: (1) “Alternative Form No. 1” prohibiting “unfair methods of competition and unfair or deceptive acts or practices”; (2) “Alternative Form No. 2” that referred only to “false, misleading, or deceptive acts or practices” without a reference to unfair methods of competition; and (3) “Alternative Form No. 3” that referred only to “unfair or deceptive” acts or practices without a reference to unfair methods of competition.¹³³ The commentary accompanying these model forms explained that Alternative Form No. 1 was intended to reach “not only deceptive practices which prey upon consumers, but also unfair methods which injure competition,” giving as examples price fixing arrangements, boycotts by suppliers, and “other trade restraints which tend to create monopoly and enhance prices.”¹³⁴ Alternative Form No. 3, which included a list of twelve particular deceptive practices along with a catch-all provision, was described as “somewhat narrower in scope than the language of either Alternative No. 1 or Alternative No. 2.”¹³⁵

The Oklahoma legislature modeled its statute on Alternative Form No. 3. The Oklahoma Consumer Protection Act as enacted includes ten of the twelve specific deceptive practices, as well as several others, and the catch-all bar on “unfair and deceptive trade practices,” with no reference to “unfair methods of competition.”¹³⁶ The legislature also refused to adopt a provision contained

130. 15 OKLA. STAT. § 753 (2001).

131. *See* Nucholls v. Bd. of Adjustment of the City of Tulsa, 1977 OK 3, ¶ 6, 560 P.2d 556, 558-59.

132. *See* Patterson v. Beall, 2000 OK 92, ¶ 27, 19 P.3d 839, 846.

133. COUNCIL OF STATE GOV'TS, SUGGESTED STATE LEGISLATION 142 (1970) [hereinafter SUGGESTED STATE LEGISLATION].

134. *Id.*

135. *Id.*

136. 15 OKLA. STAT. §§ 752(11), 752(12), 753(20) (2001).

in all three model forms, calling for the statute to be interpreted together with the Federal Trade Commission Act,¹³⁷ which had long banned unfair methods of competition and had been construed to reach conduct that violated the Sherman Antitrust Act.¹³⁸ Instead, the legislature chose to leave the regulation of anticompetitive conduct to the then-existing antitrust laws.¹³⁹ This interpretation is consistent with decisions in states with similar statutes.¹⁴⁰

Another reason supporting the court's rejection of the consumer protection law claim is that the statutory policy of harmonizing state and federal antitrust law would be nullified if indirect purchasers whose claims were barred under the antitrust laws were permitted to assert a claim under consumer protection laws.¹⁴¹ It would eviscerate the legislative mandate of harmonizing Oklahoma antitrust law with federal law if the *Illinois Brick* rule could be avoided by pleading a violation of the Oklahoma Consumer Protection Act. Statutory provisions must be reconciled, as far as practicable, to make them consistent and harmonious.¹⁴² Other rules of statutory interpretation compel the same result.¹⁴³ A different result would mean that virtually every antitrust claim

137. 15 U.S.C. §§ 41-58 (2000).

138. See *Boos v. Abbott Labs., Inc.*, 925 F. Supp. 49, 54 (D. Mass. 1996); SUGGESTED STATE LEGISLATION, *supra* note 133; see also Marshall A. Leaffer & Michael H. Lipson, *Consumer Actions Against Unfair or Deceptive Acts or Practices: The Private Uses of Federal Trade Commission Jurisprudence*, 48 GEO. WASH. L. REV. 521, 560-64 (1980) (surveying consumer protection laws in all states and showing Oklahoma's as one of the narrowest).

139. 79 OKLA. STAT. §§ 1-7, 21-36, 81-87 (repealed July 1, 1998).

140. Courts in other jurisdictions with consumer protection or unfair trade practice statutes that do not include prohibitions of "unfair methods of competition" have construed this legislative omission as evincing an intent to exclude antitrust violations from the statute's reach. See, e.g., *Abbott Labs., Inc. v. Segura*, 907 S.W.2d 503, 513 (Tex. 1995) (Gonzales, J., concurring) ("[N]o amendment to the [Texas Deceptive Trade Practices-Consumer Protection Act] . . . indicates any subsequent legislative intent to expand the [Act] to encompass price-fixing and monopoly claims. (Of course, there would be no need to do so, since the [Texas] Antitrust Act serves this purpose.)").

141. *Major v. Microsoft Corp.*, 2002 OK CIV APP 120, Exhibit A, Pt. 6, 60 P.3d 511, 517.

142. *Sharp v. Tulsa County Election Bd.*, 1994 OK 104, ¶ 11, 890 P.2d 836, 840; see also *Riley v. Cordell*, 1948 OK 125, ¶ 18, 194 P.2d 857, 860 (interpretations of state statutes must be "reasonable . . . and in keeping with the public policy of this state"). The policies underlying *Illinois Brick* — such as avoiding multiple liability for the same conduct and the excessive expense, delay, and complexity necessarily involved in apportioning damages among multiple levels of the distribution chain — are fully applicable whether the plaintiff labels his claims as antitrust violations, UCC unconscionability claims, or unfair and deceptive trade practices.

143. A general statute is controlled by a specific statute that clearly includes the matter in controversy. *Carter v. City of Okla. City*, 1993 OK 134, ¶ 11, 862 P.2d 77, 80. The Oklahoma Consumer Protection Act is a statute of general application covering a wide range of commercial conduct, but the Oklahoma Antitrust Reform Act is aimed at a narrower class of anticompetitive conduct and the matter in controversy is clearly covered by the substantive scope of that law.

could be labeled as a consumer protection claim, and *Illinois Brick* could be skirted.

Courts in other states with federal law harmonization provisions have also refused to permit an “end-run” around *Illinois Brick* through consumer protection or similar statutes. For example, in *Vacco v. Microsoft Corp.*,¹⁴⁴ the Connecticut state court held that permitting claims barred by *Illinois Brick* to be asserted under the Connecticut Unfair Trade Practices Act “would be contrary to United States Supreme Court authority . . . and would undermine the Supreme Court’s policy choices in its interpretation of federal antitrust law, which this court is directed to follow.”¹⁴⁵

This new rule of law in Oklahoma has potential for greater application. Only future judicial decisions will reveal just how far this “no end-run” principle extends. Three possible extensions of this holding are that (1) any antitrust allegations that are not legally cognizable under antitrust principles cannot be the basis for a valid consumer protection claim, regardless of whether the antitrust claim is barred under *Illinois Brick* or some similar rule of law; (2) any antitrust allegations that are not recognized under antitrust law cannot form the basis for any other cause of action; and (3) nonantitrust claims, such as claims for deceptive trade practices, that are legally deficient may not be recognized under the consumer protection laws either.

VI. Conclusion

Major v. Microsoft Corp. incorporates and applies the *Illinois Brick* indirect purchaser rule in Oklahoma, soundly rejects purported exceptions to the indirect purchaser rule, and discards any effort to recast legally deficient antitrust claims as a valid consumer protection act cause of action. This watershed case will likely be cited for decades to come as the rule of law in Oklahoma on indirect purchaser standing.

Likewise, where two statutes conflict, the later-enacted statute controls over the earlier. *Duncan v. City of Nichols Hills*, 1996 OK 16, ¶¶ 26-29, 913 P.2d 1303, 1310. Because the Oklahoma Consumer Protection Act was enacted in 1972, and amended in 1988 to create a private right of action, the interpretation of that provision is controlled by the Oklahoma Antitrust Reform Act, which was not enacted until 1998.

144. No. X06CV000160064S, 2000 WL 1683386 (Conn. Super. Ct. Oct. 10, 2000).

145. *Id.* at *6.

