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## With the Illinois Brick Wall Down, What's Left?: Determining Antitrust Standing Under State Law

Kellen S. Dwyer

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# WITH THE *ILLINOIS BRICK WALL* DOWN, WHAT’S LEFT?: DETERMINING ANTITRUST STANDING UNDER STATE LAW

KELLEN S. DWYER\*

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**Abstract:** This Article deals with a problem which has repeatedly arisen in state and federal courts, resulting in a number of splintered opinions. In 1977, the Supreme Court ruled that only direct purchasers of a price-fixed product may sue under the Sherman Act. Thus, under the “*Illinois Brick* rule,” consumers who buy a price-fixed product from a middle-man may not sue. Many states responded by passing “*Illinois Brick* repealers” which aimed to allow such suits. This Article addresses two questions which have divided the state and federal courts:

Did the *Illinois Brick* repealers grant automatic standing to any indirect purchaser of a price-fixed product, or did they simply repeal the per se rule that

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\* J.D., Yale Law School, 2009; B.A., Gettysburg College, 2006. The author would like to thank George Priest for providing valuable feedback and being an all-around great guy.

indirect purchasers can *never* sue, leaving the question of *which* indirect purchasers may sue to a traditional “antitrust standing” analysis?

If the latter, to what extent must the traditional antitrust standing doctrine be modified to render it consistent with the policies of the *Illinois Brick* repealers?

Although no academic piece has considered these questions, twenty state and federal courts have—all within the last ten years. This Article summarizes the approaches the courts have taken to both of these questions, criticizes those that have gone wrong in its view, and offers a modified test that is both practical and faithful to the policy choices embodied in the repealers.

## I. INTRODUCTION

In 1975, the state of Illinois sued the Illinois Brick Company (“Illinois Brick”), alleging that it fixed the price of concrete blocks, in violation of the Sherman Act. The state claimed that Illinois Brick thereby charged contractors artificially-increased prices for blocks, and that the contractors passed these costs on to the state in the form of higher prices for construction contracts. In *Illinois Brick Co. v. Illinois*,<sup>1</sup> the Supreme Court found that Illinois had not stated a claim under the Sherman Act, holding that so-called “indirect purchasers” of price-fixed products (i.e., those who did not buy directly from the price-fixer) may not sue under the Act.

Several commentators have praised *Illinois Brick* as the most efficient means of combating price-fixing.<sup>2</sup> Allowing indirect purchasers to split the recovery with direct purchasers, they have noted, would dilute the incentive of direct purchasers to act as private attorneys general. And we should not reduce that incentive because direct purchasers are in the best position to detect price-fixing.<sup>3</sup>

But *Illinois Brick* turned out to be politically unpopular because it does not offer any compensation to consumers who were harmed by illegal schemes. Twenty-four states responded to the decision by passing so-called “*Illinois Brick* repealers,” which were designed to allow indirect purchasers to sue under state antitrust laws.<sup>4</sup>

The first question this article considers is as follows: Do the repealers simply remove *Illinois Brick*’s per se bar on indirect purchaser suits, or do they go further and abrogate the requirement of “antitrust standing”? Antitrust standing is a bit of a misnomer, since the doctrine is more like “proximate cause” in torts than it is like Article III standing.<sup>5</sup> The idea is that, since “antitrust violations may be expected

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<sup>1</sup> 431 U.S. 720 (1977) [hereinafter *Illinois Brick*].

<sup>2</sup> See, e.g., 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 (1979).

<sup>3</sup> See *id.*

<sup>4</sup> For a discussion of the history of “*Illinois Brick* repealer” statutes, see Ronald W. Davis, *Indirect Purchaser Litigation: ARC America’s Chickens Come Home to Roost on the Illinois Brick Wall*, 65 ANTITRUST L.J. 375, 382-95 (1997). The Court has ruled that the Sherman Act does not preempt these *Illinois Brick* repealers. See *California v. ARC Am. Corp.*, 490 U.S. 93 (1989).

<sup>5</sup> *Illinois Brick*, 431 U.S. at 760 (Brennan, J., dissenting) (calling antitrust standing “not unlike the concept of proximate cause in tort law”); *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 531-36 (1983) (analogizing antitrust standing to proximate cause)

to cause ripples of harm to flow through the Nation's economy,"<sup>6</sup> courts must devise some limits on who can sue under Sherman.

In *Associated General Contractors of California v. California State Council of Carpenters* ("AGC"),<sup>7</sup> the Supreme Court provided five factors<sup>8</sup> which should guide the antitrust standing analysis: (1) Whether the plaintiff is a participant in the allegedly restrained market;<sup>9</sup> (2) the directness or indirectness of the alleged injury;<sup>10</sup> (3) whether there exists an identifiable class of persons better situated to bring suit;<sup>11</sup> (4) whether the plaintiff's alleged injuries are speculative;<sup>12</sup> and (5) the risk of duplicative liability and the complexity of apportioning damages.<sup>13</sup>

The majority of courts to consider the issue have found that *Illinois Brick* repealers do not count as automatic grants of antitrust standing to anyone who qualifies as an "indirect purchaser."<sup>14</sup> Instead, these courts apply some form of the *AGC* test. Three of the four most recent courts to consider the question, however, have found that the *Illinois Brick* repealers also repealed the requirement of antitrust standing.<sup>15</sup> This article argues that the *AGC* test should apply to states with *Illinois Brick* repealers.

Applying the *AGC* test to *Illinois Brick* repealers raises a second question: how should the test be modified (if at all) to accommodate the policy goals embodied in the repealers? The courts that apply *AGC* have been rather

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[hereinafter *AGC*].

<sup>6</sup> *Blue Shield of Va. v. McCready*, 457 U.S. 465, 476-77 (1982).

<sup>7</sup> 459 U.S. 519 (1983).

<sup>8</sup> Although the factors are stated differently at times, I present the most commonly used version.

<sup>9</sup> See *AGC*, 459 U.S. at 538-39. While it has been argued that *AGC* never intended for this to be a factor, see C. Douglas Floyd, *Antitrust Victims Without Antitrust Remedies: The Narrowing of Standing in Private Antitrust Actions*, 82 MINN. L. REV. 1 (1997), this factor has been included in the tests applied by most circuit courts, see *id.* at 1 (observing that the federal circuit courts have distilled the Supreme Court's holding to the principle that antitrust standing "should be limited, either absolutely or presumptively, to 'consumers or competitors'" in the restrained market).

<sup>10</sup> See *AGC*, 459 U.S. at 540.

<sup>11</sup> *Id.* at 541-42.

<sup>12</sup> *Id.* at 543.

<sup>13</sup> *Id.* at 543-44.

<sup>14</sup> See *Int'l Bhd. of Teamsters, Local 734 Health and Welfare Trust Fund v. Philip Morris Inc.*, 196 F.3d 818, 828 (7th Cir. 1999); *In re Intel Microprocessor Antitrust Litig.*, 496 F. Supp. 2d 404, 408-09 (D. Del. 2007); *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 516 F. Supp. 2d 1072, 1088-89 (N.D. Cal. 2007); *Orr v. Beamon*, 77 F. Supp. 2d 1208, 1211 (D. Kan. 1999); *Southard v. Visa U.S.A. Inc.*, 734 N.W.2d 192, 197 (Iowa 2007); *Knowles v. Visa U.S.A. Inc.*, No. Civ.A. CV-03-707, 2004 WL 2475284, at \*3-5 (Me. Super. Ct. Oct. 20, 2004); *Stark v. Visa U.S.A. Inc.*, No.03-055030-CZ, 2004 WL 1879003, at \*4 (Mich. Cir. Ct. July, 23 2004); *Crouch v. Crompton Corp.*, Nos. 02 CV 4375, 03 CV 2514, 2004 WL 2414027, at \*10 (N.C. Super. Ct. Oct. 28, 2004); *Ho v. Visa U.S.A. Inc.*, No. 112316/00, 2004 WL 1118534 (N.Y. Sup. Ct. Apr. 21, 2004), *aff'd*, 793 N.Y.S.2d 8 (N.Y. App. Div. 2005); *Beckler v. Visa U.S.A. Inc.*, No. 09-04-C-00030, 2004 WL 2115144, at \*2-3 (N.D. Dist. Ct. 2004); *Strang v. Visa U.S.A. Inc.*, No. 03 CV 011323, 2005 WL 1403769 (Wis. Cir. Ct. Feb. 8, 2005); *Kanne v. Visa U.S.A. Inc.*, 723 N.W.2d 293, 298-300 (Neb. 2006); *Peterson v. Visa U.S.A. Inc.*, No. Civ.A. 03-8080, 2005 WL 1403761 (D.C. Super. Ct. Apr. 22, 2005).

<sup>15</sup> See *infra* Section II.C. Although the courts applying *AGC* far out-number those that do not, if you compare only federal courts and state supreme courts the split is just four to three. Moreover, the three represent the more recent trend. It is also worth noting that, within the last three years, four federal courts have sought out a middle ground by refusing to apply *AGC* to state antitrust claims until they receive a clear directive from that state's supreme court. See *infra*, Sub-section II.C.4.

inconsistent on this point, sometimes not even noticing the issue.<sup>16</sup> This article recognizes that if the *AGC* test is applied strictly and without modification, it could effectively reinstate *Illinois Brick*'s per se bar of indirect purchaser suits.<sup>17</sup> Thus, the test must be modified so that it screens remote and speculative claims, without blocking those indirect purchaser suits that state plausible theories of damages. This article offers a modified *AGC* test that is consistent with the *Illinois Brick* repealers and produces results which are predictable, efficient, and fair.

This article will focus on four reoccurring fact patterns upon which courts have divided<sup>18</sup>:

1. **The Antibiotic Case (“Antibiotic”)**: Consumers of antibiotics bring suit alleging antitrust violations by antibiotics manufacturers.<sup>19</sup> The manufacturers sold the drugs to wholesalers, who sold to retailers, who sold to the plaintiff-consumers.<sup>20</sup>

2. **The Computer Chip Case (“Computer Chip”)**: Consumers of computers bring suit against manufacturers of the processing chip used in the computers they purchased, alleging antitrust violations.<sup>21</sup> The defendants sold the chips to computer manufacturers, who used the chips to make computers, which they sold to the wholesalers, who sold to the retailers, who sold to the plaintiff-consumers.<sup>22</sup>

3. **The Rubber Tire Case (“Rubber Tire”)**: Consumers of tires bring suit against manufacturers of certain rubber-processing chemicals that are used to make tires (among other uses), alleging antitrust violations.<sup>23</sup> The defendants sold the chemicals to tire manufacturers, who used them to make tires, which they sold to wholesalers, who sold to retailers, who sold to the plaintiff-consumers.<sup>24</sup> Prior to the filing of this suit, the defendants pled guilty to criminal charges in federal court and received fines totaling 116 million dollars.<sup>25</sup> Also prior to this suit, the direct

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<sup>16</sup> See *infra*, Section III.A.

<sup>17</sup> In so recognizing, the article concedes a point to those who argue that the *AGC* test should not be applied at all to *Illinois Brick* repealers. See *Lorix v. Crompton Corp.*, 736 N.W.2d 619, 629 (Minn. 2007) (“We do not believe that the legislature repudiated *Illinois Brick* and invited indirect purchaser suits only for courts to dismiss those suits on the pleadings based on the very concerns that motivated *Illinois Brick*.”).

<sup>18</sup> Compare *DRAM*, 516 F. Supp. 2d 1072 (denying standing in case with a *Computer Chip* fact pattern), with *Intel*, 496 F. Supp. 2d 404 (granting standing in a case with a *Computer Chip* fact pattern); compare *Crouch*, 2004 WL 2414027 (denying standing in a case with a *Rubber Tire* fact pattern), with *Lorix*, 736 N.W.2d 619 (granting standing in a case with a *Rubber Tire* fact pattern). The reason why these fact patterns have been considered by so many courts is that separate indirect purchaser suits arising from the same events were filed throughout the country.

Every court to consider the *Visa* fact pattern has denied standing. See *Crouch*, 2004 WL 2414027, at \*14–15 (discussing such cases). However, not all have agreed that the *AGC* test is the proper basis for denying the claim. See *Lorix*, 736 N.W.2d at 632 (suggesting that the lower court’s dismissal of a *Visa* claim on the grounds that it failed the *AGC* test was the correct result for the wrong reason).

<sup>19</sup> See, e.g., *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970), *aff’d*, 440 F.2d 1079 (1971).

<sup>20</sup> See *id.*

<sup>21</sup> See, e.g., *Intel*, 496 F. Supp. 2d 404; *DRAM*, 516 F. Supp. 2d 1072.

<sup>22</sup> See *id.*

<sup>23</sup> See, e.g., *Crouch*, 2004 WL 2414027.

<sup>24</sup> See *id.*

<sup>25</sup> See *id.*

purchasers of the rubber-processing chemicals filed a nationwide class action, alleging the same facts as the instant case.<sup>26</sup>

4. **The Visa Case (“*Visa*”):** Consumers of a wide variety of products bring suit against Visa and MasterCard, alleging that defendants committed antitrust violations that resulted in merchants being overcharged for credit card services throughout the state.<sup>27</sup> This overcharge allegedly passed from the merchants to the consumers in the form of higher prices on a variety of items. Prior to the filing of this suit, a class consisting of over four million merchants from across the country sued the same defendants in federal court, alleging the same antitrust violations.<sup>28</sup> Visa and MasterCard settled this prior suit for over three billion dollars.<sup>29</sup>

This article will proceed as follows. Part II argues—based on the text of the *Illinois Brick* repealers and on the context in which they were passed—that the repealers should not be read as abrogating *AGC*. Part III begins by examining attempts by courts to modify the *AGC* test so as to render it consistent with the policy judgments embedded in the *Illinois Brick* repealers.<sup>30</sup> Part III continues by constructing a modified test of its own.<sup>31</sup> The article concludes by applying Part III’s modified *AGC* test to the four scenarios presented above.

## II. WHETHER THE *AGC* FACTORS APPLY TO STATE ANTITRUST LAWS

This Part argues that the *Illinois Brick* repealers should be read as permitting a modified application of the *AGC* test. Section A argues from text; Section B from history. Section C criticizes cases that have taken opposing views.

### A. *Argument from Text*

*Illinois Brick* repealers come in two forms. One form notes: “This action may be brought by any person who is injured in his or her business or property by reason of anything forbidden or declared unlawful by this chapter, *regardless of whether such injured person dealt directly or indirectly* with the defendant.”<sup>32</sup>

The other common form is similar: “Any person . . . injured *directly or indirectly* in its business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by [the antitrust laws] may sue for the injury in a civil action.”<sup>33</sup>

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<sup>26</sup> *See id.*

<sup>27</sup> *See id.*

<sup>28</sup> *See id.*

<sup>29</sup> *See Crouch*, 2004 WL 2414027.

<sup>30</sup> *See infra*, Section III.A.

<sup>31</sup> *See infra*, Sections III.B, III.C.

<sup>32</sup> CAL. BUS. & PROF. CODE § 16750(a) (West 2003) (emphasis added).

<sup>33</sup> ME. REV. STAT. ANN. tit. 10, § 1104 (2009) (emphasis added). The District of Columbia statute does not fit either model. *See* D.C. CODE § 28-4509(a) (2010) (“Any indirect purchaser in the chain of manufacture, production, or distribution of goods or services, upon proof of payment of all or any part of any overcharge for such goods or services, shall be deemed to be injured within the meaning of this chapter.”). However, the District of Columbia courts have still found that the statute does not preclude application of the *AGC* test. *See* *Peterson v. Visa U.S.A. Inc.*, No. Civ.A. 03-8080, 2005 WL 1403761 (D.C. Super. Ct. Apr. 22, 2005).

It is clear that the state legislatures which enacted the repealers intended to remove *Illinois Brick*'s per se bar on indirect purchaser suits.<sup>34</sup> While the statutes do not state what type of harm the plaintiff must prove in order to be "injured," we do know that direct purchasers and indirect purchasers must make the same showing. The statutes declare that neither class of purchasers is to be privileged. Instead, antitrust suits shall be evaluated the same "regardless of whether such injured person dealt directly or indirectly with the defendant."<sup>35</sup>

The statutes, therefore, do not evince the intention of granting automatic standing to all indirect purchasers. To the contrary, they aim to subject indirect purchasers to the same procedural hurdles that befall direct purchasers. And—at the time that every single *Illinois Brick* repealer was passed—one of those hurdles was "antitrust standing."<sup>36</sup>

Moreover, the state legislatures that passed *Illinois Brick* repealers must have been aware that "[a]n antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy."<sup>37</sup> Eliminating the requirement of antitrust standing would grant a cause of action to every person who felt such a ripple. If the legislatures intended such a radical shift in antitrust policy, one would expect a clearer statement on the issue.<sup>38</sup>

It is far more likely that the phrase, "regardless of whether such injured person dealt directly or indirectly with the defendant," was meant simply to remove the per se bar on indirect purchaser suits, leaving it to the courts to continue to define reasonable limits on who is "injured" within the meaning of the statutes. Indeed, the legislatures must have been aware of the courts' long tradition of treating the antitrust laws as common law statutes.<sup>39</sup> Moreover, seventeen of the twenty-four *Illinois Brick* repealers were passed after *AGC* laid out its

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<sup>34</sup> The language "or indirectly" was added to the antitrust laws of many states in reaction to the Supreme Court's ruling in *Illinois Brick*, thus earning such amendments the nickname "*Illinois Brick* repealers." See Davis, *supra* note 4, at 391–93. Thus, at a minimum, these amendments aimed to remove the per se bar against indirect purchaser suits. Indeed, the Supreme Court has recognized that *Illinois Brick* repealers "expressly allow indirect purchasers to sue." *California v. ARC Am. Corp.*, 490 U.S. 93, 98 n.3 (1989) (citing the antitrust statutes of thirteen states and noting that they employ such phrases as "regardless of whether such injured person dealt directly or indirectly with the defendant"); see also *id.* at 100 (noting the existence of "express state statutory provisions giving [indirect] purchasers a damages cause of action").

<sup>35</sup> CAL. BUS. & PROF. CODE § 16750(a).

<sup>36</sup> See *supra* notes 5–6 and accompanying text. It is also worth noting that seventeen of the twenty-four states (counting D.C. as a state) enacted their *Illinois Brick* repealers after *AGC*. See Davis, *supra* note 4, at 391–93. Likewise, all six of the high state courts that refused to follow *Illinois Brick* in interpreting their state's antitrust statutes did so after *AGC* was decided. See Ralph Folsom, *Indirect Purchasers: State Antitrust Remedies and Roadblocks*, 50 ANTITRUST BULL. 181, 187–88 (2005).

<sup>37</sup> *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 263 n.14 (1972).

<sup>38</sup> See *Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991) ("Congress' silence in this regard can be likened to the dog that did not bark.") (citing A. DOYLE, *Silver Blaze*, in THE COMPLETE SHERLOCK HOLMES 335 (1927); *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting) ("In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night.").

<sup>39</sup> See *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 687–88 (1978); *SAS of P.R., Inc. v. P.R. Tel. Co.*, 48 F.3d 39, 43 (1st Cir. 1995) ("Despite its statutory framework, antitrust law is largely the handiwork of federal judges and antitrust enforcers . . .").

comprehensive limitations on “antitrust standing,”<sup>40</sup> and yet, nothing in any of those seventeen statutes appears aimed at repealing *AGC*.

For the eight *Illinois Brick* repealers that contain clauses regarding duplicative liability, it is even clearer that they did not intend to grant automatic standing to indirect purchasers. Such clauses empower courts to “take any steps necessary to avoid duplicative recovery.”<sup>41</sup> Two states, Rhode Island and Oregon, go even further, directing that “[t]he court shall exclude from the amount of monetary relief awarded . . . any monetary relief which duplicates amounts which have been awarded for the same injury.”<sup>42</sup> It is not hard to imagine an indirect purchaser suit where dismissal is “necessary” to avoid duplicative liability. Indeed, in cases like *Visa*, in which the defendants have already entered into large settlements with direct purchasers, any damages plaintiffs might receive would necessarily be duplicative.

Finally, a number of state antitrust laws explicitly request that they be read consistently with federal interpretations.<sup>43</sup> Other states have case law establishing the same principle.<sup>44</sup> Accordingly, the state legislatures which enacted the repealers had every reason to believe that although *Illinois Brick*’s per se bar would be repealed, their courts would continue to apply *AGC*’s prudential limits on standing.

### *B. Argument from History*

Even putting the text aside, a state legislature still would not have expected the repeal of *Illinois Brick* to result in the annihilation of antitrust standing barriers because (1) *Illinois Brick*’s most well-known critics insisted that their position would not relieve plaintiffs from the requirements of antitrust standing; and (2) *Illinois Brick* itself explicitly states that it dealt with an issue that was separate and distinct from “antitrust standing.”

Justice Brennan authored a forceful dissent from the Court’s decision in *Illinois Brick*, yet even he did not advocate granting automatic standing to all indirect purchasers. To the contrary, Brennan admitted that “there is a point beyond which the wrongdoer should not be held liable.”<sup>45</sup> Brennan noted that

<sup>40</sup> See *supra* note 36.

<sup>41</sup> S.D. CODIFIED LAWS § 37-1-33 (2009); see also 740 ILL. COMP. STAT. ANN. 10/7(2) (West 2010); MINN STAT. ANN. § 325D.57 (West 2010); N.Y. GEN. BUS. LAW § 340(6) (McKinney 2009); N.M. STAT. ANN. § 57-1-3(C) (West 2009); VT. STAT. ANN. tit. 9, § 2465(b) (2009).

<sup>42</sup> R.I. GEN. LAWS § 6-36-12(a)(1) (2009); see also OR. REV. STAT. ANN. § 646.775(1)(b)(A) (2009).

<sup>43</sup> By my count, twelve of the states which have passed *Illinois Brick* repealers also have provisions that direct courts to follow federal interpretations of the antitrust laws. Six do so in mandatory terms. See HAW. REV. STAT. ANN. § 480-3 (LexisNexis 2009); 740 ILL. COMP. STAT. ANN. § 10/11 (West 2010); MD. CODE ANN., COM. LAW § 11-202(a)(2) (West 2009); NEV. REV. STAT. ANN. § 598A.050 (West 2007); N.M. STAT. ANN. § 57-1-15 (West 2009); R.I. GEN. LAWS § 6-36-2 (2009). Five phrase their harmonization clause in permissive terms. See ARIZ. REV. STAT. ANN. § 44-44-1412 (2010); D.C. CODE § 28-4515 (2010); MICH. COMP. LAWS ANN. § 445.784(2) (West 2010); OR. REV. STAT. ANN. § 646.715(2) (2009); S.D. CODIFIED LAWS § 37-1-22 (2009). Vermont’s harmonization provision is unclear on this point. See VT. STAT. ANN. tit. 9, § 2453(b) (2009).

<sup>44</sup> E.g., *Minn. Twins P’ship v. State ex rel. Hatch*, 592 N.W.2d 847, 851 (Minn. 1999).

<sup>45</sup> *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 760 (1977) (Brennan, J., dissenting) (citing *Brunswick*



courts have “developed various tests of antitrust ‘standing,’” to limit the reach of the antitrust laws, and appeared to advocate such a case-by-case approach.<sup>46</sup> While Brennan did not endorse any particular standing test,<sup>47</sup> he would join the majority opinion in *AGC* just six years later.<sup>48</sup>

Brennan’s acceptance of a case-by-case standing analysis is also revealed in his discussion of the risk of duplicative liability. Brennan acknowledged the “abstract merit” of the majority’s concern about duplicative liability, but felt that it did not “justify erecting a bar against *all* recoveries by indirect purchasers without regard to whether the *particular case* presents a significant danger of double recovery.”<sup>49</sup> Justice Brennan also mentioned a proposal by Professor Areeda that claimed that indirect purchaser cases should be decided based on “the number of intervening hands the product has passed through and the extent of its change.”<sup>50</sup> Professor Areeda’s approach was apparently an example of the type of case-by-case approach that Brennan had in mind.

The *Illinois Brick* plaintiffs adopted a similarly moderate position. They did not advocate automatic standing for all indirect purchasers, but instead adopted the view that standing should be upheld only in instances where middlemen resell unaltered products, or where contractors add a fixed percentage markup to the costs of their raw materials.<sup>51</sup> It would have been inadvisable to take a more extreme position (e.g., that all indirect purchasers of a price-fixed products should have standing), because the lower federal courts had been “virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation.”<sup>52</sup>

It is also critical to remember that *Illinois Brick* was not a standing case. Rather, the court dealt only with whether *Hanover Shoe, Inc. v. United Shoe Machinery Corp.* implied a per se bar on suits by indirect purchasers.<sup>53</sup> The district court had rejected the suit under a standing theory, but the Supreme Court explicitly stated that it did not address the standing issue except to note that it is

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Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977)); *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251 (1972)).

<sup>46</sup> *Id.*

<sup>47</sup> Some courts have claimed that Brennan endorsed the “target area” test for determining antitrust standing. E.g., *Knowles v. Visa U.S.A. Inc.*, No. Civ.A. CV-03-707, 2004 WL 2475284, at \*5 (Me. Super. Ct. Oct. 20, 2004). This is incorrect. Brennan’s dissent merely mentioned that the “target area” test is “more liberal, and more widely accepted.” *Illinois Brick*, 431 U.S. at 760 (Brennan, J., dissenting). Yet, Justice Brennan joined the majority in *AGC*, which declined to adopt the target area test. See *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 536 n.33 (1983).

<sup>48</sup> *AGC*, 459 U.S. 519.

<sup>49</sup> *Illinois Brick*, 431 U.S. at 761 (Brennan, J., dissenting) (emphasis added).

<sup>50</sup> *Id.* at 760 n.15 (citing PHILLIP E. AREEDA, ANTITRUST ANALYSIS: PROBLEMS, TEXT, CASES 75 (2d ed. 1974)). Note the similarity between Professor Areeda’s approach and the modified *AGC* test articulated in Section II.C.

<sup>51</sup> *Illinois Brick*, 431 U.S. at 743 (citing Brief for Respondents at 9–30, *Illinois Brick*, 431 U.S. 720 (No. 76-404); Transcript of Oral Argument at 36–48, *Illinois Brick*, 431 U.S. 720 (No. 76-404)).

<sup>52</sup> *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 263 n.14 (1972).

<sup>53</sup> 392 U.S. 481 (1968).

“analytically distinct” from the question at hand.<sup>54</sup> Similarly, Justice Brennan’s dissent treated the case as only dealing with whether there should be a categorical bar against indirect purchaser suits. Brennan merely argued that the majority’s concerns did not justify “an *absolute* bar to recovery.”<sup>55</sup>

This point has not been lost on several of the courts to consider the issue. Most notably, Judge Easterbrook, writing for a Seventh Circuit panel which applied the *AGC* test to an *Illinois Brick* repealer, explained that, while the state “does not follow the *Illinois Brick* doctrine,” that doctrine is “only one of several obstacles to . . . recovery on an antitrust claim.”<sup>56</sup> Because *Illinois Brick* did not alter the Court’s antitrust standing jurisprudence, *Illinois Brick*’s repeal should imply nothing about standing.

### C. Opposing Cases

Three of the four most recent courts to consider the issue have held that the *Illinois Brick* repealers abrogated antitrust standing. This section will discuss each case in turn, and argue that their reasoning is flawed and should not be followed in future cases. This section will also criticize a recent trend of federal courts refusing to apply *AGC* to state antitrust claims unless that state’s highest court has specifically ruled that *AGC* applies.

#### 1. *Lorix v. Crompton Corp.* (Minn. 2007)

*Lorix v. Crompton Corp.* involved a suit that followed the *Rubber Tire* fact pattern.<sup>57</sup> The Supreme Court of Minnesota refused to apply *AGC* on the grounds that (1) *AGC* and *Illinois Brick* are derived from the same concerns that the state legislature rejected in passing its repealer;<sup>58</sup> (2) the state legislature authorized duplicative liability in passing its repealer;<sup>59</sup> (3) the repealer’s legislative history shows the legislature’s intent to grant automatic standing to indirect purchasers;<sup>60</sup> and (4) any concerns about complex and speculative damages theories can be worked out in discovery.<sup>61</sup> None of these form a defensible basis for the court’s decision.

First, *AGC* and *Illinois Brick* do not stem from the same rationale. The *Lorix* court made no effort to square its remarkable claim that “*AGC* was informed by *Illinois Brick* and repeated . . . *Illinois Brick*’s reservations about indirect purchaser suits,”<sup>62</sup> with the fact that Justice Brennan—who authored a forceful dissent in

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<sup>54</sup> *Illinois Brick*, 431 U.S. at 728 n.7.

<sup>55</sup> *Id.* at 759 (Brennan J., dissenting) (emphasis added).

<sup>56</sup> *Int’l Bhd. of Teamsters, Local 734 Health & Welfare Trust Fund v. Philip Morris Inc.*, 196 F.3d 818, 828 (1999) (citing *Illinois Brick*, 431 U.S. at 728 n.7).

<sup>57</sup> 736 N.W.2d 619 (Minn. 2007).

<sup>58</sup> *Id.* at 627.

<sup>59</sup> *Id.* at 628.

<sup>60</sup> *Id.* at 632.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 629.

*Illinois Brick*—joined the majority opinion in *AGC* without reservation. Moreover, *AGC* only cited *Illinois Brick* for two points. The first cited *Brennan's dissent* for the proposition that “there is a point beyond which the wrongdoer should not be held liable.”<sup>63</sup> The second simply noted that both cases share the “same concerns” regarding duplicative liability. But these concerns were also shared by the *Illinois Brick* dissenters.<sup>64</sup>

This leads us to *Lorix's* second claim that duplicative liability is a risk “inherent” in indirect purchaser suits, which the legislature necessarily embraced by repealing *Illinois Brick*.<sup>65</sup> But again, the issue between the majority and dissent in *Illinois Brick* was not *whether* duplicative liability should be avoided, but *how*. The majority believed that the concerns warranted a per se exclusion of indirect purchasers; the dissent supported a case-by-case approach.<sup>66</sup> Quite to the contrary of accepting duplicative liability as “inherent” in indirect purchaser suits, Justice Brennan thought that duplicative recovery in indirect purchaser suits would be rare because “direct purchasers who act as middlemen have little incentive to sue [their] suppliers.”<sup>67</sup> Where such a risk did present itself, Brennan relied on “existing procedural mechanisms” to “eliminate this danger.”<sup>68</sup>

Following Brennan's lead, the legislative overrides proposed in the wake of *Illinois Brick* sought to avoid multiple liability,<sup>69</sup> and the *Illinois Brick* repealers of several states—including Minnesota—contain clauses explicitly authorizing courts to do what is necessary to avoid such liability.<sup>70</sup> Indeed, even the *Lorix* court itself took the position that duplicative recovery in indirect purchaser suits is “the exception, not the rule.”<sup>71</sup> It is hard to credit the argument that lifting the bar on indirect purchaser suits necessarily implies accepting duplicative liability when the proponents of indirect purchaser suits vehemently denied the same.

Third, the *Lorix* court cites two statements from a Minnesota Senate Judiciary Committee hearing in order to show that Minnesota's *Illinois Brick* repealer was intended to grant automatic standing to indirect purchasers. But the statements support the opposite claim. The state's Assistant Attorney General testified that, “[a]ll we're saying is that under Minnesota law we recognize that indirect purchasers should have his or her [sic] rights to determine damages as well as the direct purchaser.”<sup>72</sup> But direct purchasers have never enjoyed automatic standing to sue. Rather, at the time the statement was made, direct purchasers were subject to the *AGC* test.

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<sup>63</sup> *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 534 (1983) (citing *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 760 (1977) (Brennan, J., dissenting)).

<sup>64</sup> *See supra*, Section II.B.

<sup>65</sup> *Lorix v. Crompton Corp.*, 736 N.W.2d 619, 628 (Minn. 2007).

<sup>66</sup> *See supra* Section I.B.

<sup>67</sup> *Illinois Brick*, 431 U.S. at 749 (Brennan, J., dissenting).

<sup>68</sup> *Id.* at 761.

<sup>69</sup> *See Landes & Posner, supra* note 2, at 603 (“All legislative attempts to overrule the rule of *Illinois Brick* recognize that some mechanism must be included to prevent multiple liability.”).

<sup>70</sup> *See supra* notes 43–44.

<sup>71</sup> *Lorix*, 736 N.W.2d at 631 (citing similar statements by a number of *Illinois Brick* critics).

<sup>72</sup> *Id.* at 627 (citing *Hearing on Sen. F. 1807 Before the Sen. Judiciary Comm.*, 73rd Leg., (Minn. 1984) (statement of Stephen Kilgriff, Assistant Att'y Gen.)).

The *Lorix* court also noted that a proponent of the bill told the committee “[w]e don’t want to [create] causes of action where they wouldn’t have existed prior to the *Illinois Brick* case.”<sup>73</sup> If this indicates anything, it is that the legislature did not intend to create standing for remote injuries which would not otherwise clear the Supreme Court’s then-existing standing hurdles. But *Lorix* apparently understood this statement as freezing antitrust standing jurisprudence where it was in 1977, so as to bar the application of the *AGC* test.<sup>74</sup>

The suggestion that the Minnesota legislature secretly instructed its courts to ignore all post-1977 case law regarding antitrust standing is particularly odd given that that case law was in great flux in 1977. As Justice Brennan observed, “[C]ourts have . . . developed various tests of antitrust ‘standing.’”<sup>75</sup> Brennan then mentioned several tests that courts have used.<sup>76</sup> Six years later—and one year before Minnesota’s *Illinois Brick* repealer was passed—*AGC* synthesized the various standing cases into one multifactor test.<sup>77</sup> So even if Minnesota did intend to return antitrust standing to its 1977 state, a court would still be justified in applying the *AGC* test because it best reflects the “various tests” of antitrust standing that courts employed at the time of *Illinois Brick*.

Fourth, although *Lorix* conceded that the question of “whether the damages claims are speculative is relevant to standing under Minnesota antitrust law,”<sup>78</sup> it refused to consider this question at the motion to dismiss stage.<sup>79</sup> The court found such an argument premature:

[I]t is possible that the discovery process will reveal the amount of overcharge from Crompton, the chain of distribution through which the overcharge [may have flowed] to Lorix, the degree to which the overcharge may have been absorbed by more direct purchasers, and the impact of other market factors on the price of tires manufactured with price-fixed chemicals.<sup>80</sup>

This position is inconsistent with the teachings of *Bell Atlantic Corp. v. Twombly*,<sup>81</sup> which was decided less than three months before *Lorix*. In *Twombly*, the Court recognized the unusually high cost of discovery in antitrust cases,<sup>82</sup> and

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<sup>73</sup> *Id.* at 634 (citing *Hearing on Sen. F. 1807 Before the Sen. Judiciary Comm.*, 73rd Leg., (Minn. 1984) (minutes)).

<sup>74</sup> *Id.* (noting that “[c]laims of overcharge due to price fixing of components several steps removed from the ultimate consumer proceeded past motions to dismiss and for summary judgment in federal courts prior to *Illinois Brick*.”) (citations omitted).

<sup>75</sup> *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 760 (1977) (Brennan, J., dissenting) (emphasis added).

<sup>76</sup> *Id.* at 760 & n.18.

<sup>77</sup> See *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519 (1983).

<sup>78</sup> *Lorix*, 736 N.W.2d at 628.

<sup>79</sup> *Id.* at 633.

<sup>80</sup> *Id.*

<sup>81</sup> 550 U.S. 544 (2007).

<sup>82</sup> *Id.* at 558 (citing *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984) (“[T]he costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint.”); William H. Wagener, Note, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78

found that these costs justified a higher standard of pleading. “[I]t is one thing to be cautious before dismissing an antitrust complaint in advance of discovery,” the Court explained, “but quite another to forget that . . . antitrust discovery can be expensive.”<sup>83</sup> The Court worried that—unless there is stronger screening at the motion to dismiss stage—the threat of discovery expense will push cost-conscious defendants to settle even anemic cases.”<sup>84</sup>

*Lorix* dismissed *Twombly* in a footnote, finding that its “plausibility” standard established the requisite showing for pleading a price-fixing conspiracy but had no application to pleading damages.<sup>85</sup> Yet *Lorix* provided no specific citation for this claimed limitation, and nothing in *Twombly* supports it. To the contrary, *Twombly*’s concerns of litigation costs and settlement blackmail apply equally to damages theories.<sup>86</sup> On litigation costs, William Landes and Richard Posner have noted that proving injury to indirect purchasers “requires knowledge of the elasticities of supply and demand” and “it is exceedingly difficult to estimate both.”<sup>87</sup> These estimations may create “many practical difficulties” that “increase . . . the costs, time, and uncertainty involved in antitrust enforcement.”<sup>88</sup> Likewise, since indirect purchaser suits will ordinarily be filed as class actions,<sup>89</sup> they implicate the concerns of settlement blackmail associated therewith.<sup>90</sup> If courts follow *Lorix* and refuse to consider whether a plaintiffs’ damages theory is overly speculative until after discovery, many cases will settle before such a determination is ever made.

*Long v. Abbott Laboratories* illustrates this point.<sup>91</sup> *Long* involved eleven separate indirect purchaser class actions filed in eleven states after a federal suit alleging the same acts was filed by direct purchasers. Although the defendants tried and won the federal case, the state class actions were too large and costly to litigate, and class counsel was able to extract a \$9 million settlement. Because the

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N.Y.U. L. REV. 1887, 1898–99 (2003) (discussing the unusually high cost of discovery in antitrust cases); MANUAL FOR COMPLEX LITIGATION (FOURTH) § 30, at 519 (2004) (describing extensive scope of discovery in antitrust cases); Memorandum from Paul V. Niemeyer, Chair, Advisory Comm. on Civil Rules, to Hon. Anthony J. Scirica, Chair, Comm. on Rules of Practice & Procedure (May 11, 1999), 192 F.R.D. 354, 357 (2000) (reporting that discovery accounts for as much as ninety percent of litigation costs when discovery is actively employed)).

<sup>83</sup> *Twombly*, 550 U.S. at 558.

<sup>84</sup> *Id.* at 559.

<sup>85</sup> *Lorix v. Crompton Corp.*, 736 N.W.2d 619, 631 n.3 (Minn. 2007).

<sup>86</sup> *Twombly*, 550 U.S. at 558–59. Moreover, much to the chagrin of the Plaintiff’s bar, the Court has shown no desire to limit *Twombly* to its facts. See *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009) (applying *Twombly*’s heightened pleading standard to *Bivens* claims).

<sup>87</sup> Landes & Posner, *supra* note 2, at 619.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 612.

<sup>90</sup> See *Castano v. American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (“[C]lass certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low. These settlements have been referred to as judicial blackmail.”); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995) (refusing to certify a class action where plaintiffs had lost thirteen of fourteen trials on similar claims, explaining that the likelihood of a forced settlement is unacceptable given that the claim was probably not meritorious).

<sup>91</sup> No. 97-CV-8289, 1999 WL 33545517 (N.C. Super. Ct. July 30, 1999).

damages theory was too remote and complicated to divide the settlement among the class, a cy pres fund was created.<sup>92</sup> This settlement of an apparently non-meritorious claim (with the proceeds not even going to the allegedly aggrieved class members) might have been avoided had the court taken a thorough look at the damages theory before moving the case into discovery.

Finally, more troubling than what the *Lorix* court said is what the court did not say. The court made little effort to define when, if ever, a claimed antitrust injury would be too remote to achieve standing under Minnesota law. The court relied heavily on its prior decision in *State ex rel. Humphrey v. Philip Morris Inc.*,<sup>93</sup> in which it held that Blue Cross, a health services organization, had standing under Minnesota's *Illinois Brick* repealer to sue a group of tobacco companies.<sup>94</sup> Blue Cross alleged that the tobacco companies conspired to suppress research on the deleterious effects of smoking and to manipulate nicotine levels in cigarettes, which caused smoking addiction throughout Minnesota.<sup>95</sup> This, in turn, allegedly led to increased health care costs for Blue Cross.<sup>96</sup>

*Phillip Morris* illustrates the extreme results that could follow from the rejection of the *AGC* test. The damage to the HMOs—if there was damage at all—is indistinguishable from the many “ripples of harm to flow through the Nation's economy” as a result of the use of tobacco.<sup>97</sup> While numerous courts rejected similar claims out of hand,<sup>98</sup> the Minnesota Supreme Court found it “clear” that the “expansive grant of standing” contained in Minnesota's *Illinois Brick* repealer “reaches the injuries suffered by Blue Cross.”<sup>99</sup>

*Lorix* did concede that *Visa* provided a fact pattern that was “most likely too remote and speculative to afford standing” because its theory of damages essentially allowed “every person in the state to sue for an antitrust violation simply by virtue of his or her status as a consumer.”<sup>100</sup> Yet the court did not provide the principle by which it would reject standing in *Visa*,<sup>101</sup> distinguishing it only on the grounds that it involved a tying arrangement whereas *Lorix* alleged price-fixing “which, at least in theory, provides a sounder basis for calculation of damages . . . .”<sup>102</sup> Without any meaningful concept of antitrust standing, even a

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<sup>92</sup> *Id.* The details of *Long* are also recounted in *Crouch v. Crompton Corp.*, No. 02 CVS 4375, 2004 WL 2414027, at \*16 (N.C. Super. Ct. Oct. 28, 2004).

<sup>93</sup> 551 N.W.2d 490 (Minn. 1996).

<sup>94</sup> See *Lorix v. Crompton Corp.*, 736 N.W.2d 619, 630 (Minn. 2007).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 263 n. 14 (1972).

<sup>98</sup> See *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912 (3d Cir. 1999); *Int'l Bhd. of Teamsters, Local 734 Health & Welfare Trust Fund v. Philip Morris*, 196 F.3d 818 (7th Cir. 1999); *Or. Laborers-Employers Health & Welfare Fund v. Philip Morris Inc.*, 185 F.3d 957 (9th Cir. 1999).

<sup>99</sup> *State ex rel. Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490, 496 (Minn. 1996).

<sup>100</sup> *Lorix v. Crompton Corp.*, 736 N.W.2d 619, 632 (Minn. 2007).

<sup>101</sup> *Id.* at 631 (“We find it unnecessary today to define the outer limits of antitrust standing in Minnesota, because whatever those limits may be, *Lorix* falls well within them.”).

<sup>102</sup> *Id.* at 632. The court also noted that *Lorix* indicated at oral argument that her proposed class did not include purchasers of tires attached to used cars, and that any suggestion to the contrary in her complaint was a “drafting error.” *Id.* at 633 n.4. The court further mentioned that *Lorix* abandoned her

simply case like *Visa* left the *Lorix* court grasping at straws.

2. *D.R. Ward Construction v. Rohm and Hass Co. (E.D. Pa. 2006)*

A second court to rule that the *AGC* test does not apply to claims under state antitrust laws is the United States District Court for the Eastern District of Pennsylvania in *D.R. Ward Construction Co. v. Rohm and Haas Co.*<sup>103</sup> There, a class of consumers of products containing plastic additives sued the manufacturers and distributors of those additives, alleging price-fixing.<sup>104</sup> The district court refused to apply the *AGC* test to claims under the antitrust laws of Arizona, Tennessee, and Vermont, predicting that those state's supreme courts would do the same if the question was squarely presented.<sup>105</sup>

The *D.R. Ward* court offered mostly the same flawed arguments that have already been discussed in the context of the *Lorix* case. The court exhibited a casual, pre-*Twombly* attitude,<sup>106</sup> finding that, “although facts external to the complaint, such as the percentage of plastic additives in the products plaintiffs purchased, carry the potential to impact the causation analysis, these facts are irrelevant to the resolution of defendant’s motion to dismiss.”<sup>107</sup> The court then insisted that “the discovery process is necessary to develop an array of factual issues that bear upon the directness of the plaintiff’s injury.”<sup>108</sup>

Likewise, the court ignored concerns of duplicative recovery raised by ongoing direct purchaser suits in federal court, finding such worries “inapposite when used to determine standing under state antitrust statutes that permit indirect purchaser claims.”<sup>109</sup> The court went on to conclude that “many of the considerations which motivated the Supreme Court to adopt the *AGC* analysis,” such as “the prevention of duplicative recoveries,” were “rejected” by the Arizona Supreme Court.<sup>110</sup> However, the Arizona decision in question supports the proposition that duplicative recovery was a legitimate concern, to be dealt with on a case-by-case basis. That court explained:

The risk of multiple liability for defendants—that is, being subject to a direct purchaser action and also an indirect purchaser state case—is a legitimate and important concern. It is not, however, a problem that our trial courts are incompetent to handle. Indeed, most of the *Illinois Brick* repealer statutes leave the

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earlier position, espoused at the court of appeals, that any Minnesota citizen could sue Crompton because the price-fixing raised the price of tires, which raised the price of transportation, which raised the price of all goods transported by truck within the state. *Id.* The Court found these limitations “sensible” and was “confident the district court can craft other sensible limits on the proposed class.” *Id.*

<sup>103</sup> 470 F. Supp. 2d 485 (2006).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> In the court’s defense, *D.R. Ward* was decided before *Twombly*.

<sup>107</sup> *D.R. Ward*, 470 F. Supp. 2d at 502.

<sup>108</sup> *Id.* at 503.

<sup>109</sup> *Id.* at 504.

<sup>110</sup> *Id.* at 498.

solution to the double-recovery problem to the courts.<sup>111</sup>

Like *Lorix*, *D.R. Ward* erected an extremely low bar for bringing an antitrust claim. It found that a party has antitrust standing in Arizona, Tennessee, and Vermont when it “meets the minimum constitutional requirements.”<sup>112</sup> Applying this standard, the plaintiffs had standing because they alleged “the amount of the overcharge that was passed-on” to them and therefore had “an interest in the outcome of the litigation.”<sup>113</sup>

The court’s analysis stems from confusion in terminology. The term “antitrust standing” is largely a misnomer. The Court has often explained that the concept is more analogous to proximate cause than to traditional Article III standing.<sup>114</sup> Thus, assuming *arguendo* that Arizona, Tennessee, and Vermont would not apply the *AGC* test, one would expect each state to apply some other proximate cause test, rather than simply applying constitutional standing.

Without any proximate cause test whatsoever, the breadth of the antitrust claims that could be brought is stunning. Indeed, even *Visa* would go forward under *D.R. Ward* because the plaintiffs there also had “an interest in the outcome of the litigation.”<sup>115</sup>

### 3. *Moniz v. Bayer Corp.* (D. Mass. 2007)

A third court to refuse to apply the *AGC* test to a state antitrust claim is the United States District Court for the District of Massachusetts in *Moniz v. Bayer Corp.*<sup>116</sup> Like *Lorix*, *Moniz* was a *Rubber Tire* case. In just one paragraph the court rejected the *AGC* test simply by noting that the case interpreted federal law and that Massachusetts has recognized that indirect purchasers have standing.<sup>117</sup>

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<sup>111</sup> *Bunker’s Glass Co. v. Pilkington, PLC*, 75 P.3d 99, 108 (Ariz. 2003) (citing state statutes). The Tennessee Supreme Court took a similar position:

The risk that an antitrust violator may be subject to both a direct purchaser suit and an indirect purchaser suit under the TTPA does exist. Our trial courts, however, are competent to handle such a problem. In fact, many *Illinois Brick Co.* repealer statutes leave the solution of the risk of multiple liability to the trial courts.

*Freeman Indus., LLC v. Eastman Chem. Co.*, 172 S.W.3d 512, 520 (Tenn. 2005) (citations omitted).

<sup>112</sup> *Id.* at 498-99, 501.

<sup>113</sup> *Id.* at 498. Although this statement was made in the context of applying Arizona law, the court made similar statements when referring also to the law of Tennessee and Vermont. *See, e.g., id.* at 503 (finding that claims under the law of each state may go forward so long as “plaintiffs can show that the unlawful increase in the price of plastics additives *affected* the cost of the products they purchased”) (emphasis added).

<sup>114</sup> *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 760 (1977) (Brennan, J., dissenting) (“Courts have therefore developed various tests of antitrust ‘standing,’ not unlike the concept of proximate cause in tort law, to define that point.”); *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 531-36 (1983) (analogizing the notion of “antitrust standing” to that of proximate cause).

<sup>115</sup> *D.R. Ward*, 490 F. Supp. 2d at 498.

<sup>116</sup> 484 F. Supp. 2d 228 (D. Mass. 2007).

<sup>117</sup> *Id.* at 231. The court also implied that there were only “three unpublished opinions” that applied *AGC* to state law claims. *Id.* This is, of course, incorrect. *See supra* note 14.



#### 4. “Clear Statement” Rule in Recent Federal Cases

Recently, several federal courts have refused to apply *AGC* to state antitrust claims in the absence of a clear directive from that state’s supreme court.<sup>118</sup> This ostensibly modest approach suffers from three faults. First, these federal courts assume they avoid making state policy by declining to apply *AGC* until a state court does. Yet, these courts do not abstain from hearing state antitrust cases until state courts decide the issue.<sup>119</sup> Instead, the courts hear such cases and thus have to decide whether or not to let the indirect purchasers’ claims go forward. That is to say that the courts must decide unsettled state law questions. Normally, a federal court’s duty in such circumstances is to “carefully predict how the state’s highest court would resolve” the issue,<sup>120</sup> without a thumb on the scale one way or the other. By adopting an anti-*AGC* default, these courts do not “carefully predict,” rather they make an uninformed decision in the guise of abstention.

Second, these federal cases create considerable incentives to forum shop. Any plaintiff’s attorney bringing an indirect purchaser suit is going to jump through hoops to get into federal court given the choice between a federal court that says it will not apply *AGC* until the state court decides the issue, and a state court that has not yet decided the issue. Third, these federal courts have not explained how they would deal with a *Visa* fact pattern. Presumably, these courts would have to either let such absurd cases go forward, or develop some sort of antitrust standing jurisprudence of their own to screen them.

#### D. Summary

This Part has argued that both the text and history of the *Illinois Brick* repealers suggests that those statutes were not intended to eliminate the *AGC* test of antitrust standing. Rather, the *AGC* test should be applied to *Illinois Brick* repealers to the extent that it is consistent with those statutes’ policy goals and background assumptions. The development of such a modified *AGC* test is the subject of the next Part.

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<sup>118</sup> See *In re Potash Antitrust Litig.*, No. 08 CV 6910, 2009 WL 3583107, at \*28 (N.D. Ill. Nov. 3, 2009) (“Absent any ruling or indication by the state supreme court or state appellate courts, this Court is reluctant to apply the federal *AGC* test to Indirect Purchaser Plaintiffs’ Michigan antitrust claim.”); *In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d 1133, 1153 (N.D. Cal. 2009) (“This Court . . . is reticent to adopt an across-the-board rule that a state’s harmonization provision . . . is an appropriate means of predicting how a state’s highest court would rule regarding the applicability of *AGC* to state law antitrust claims.”); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d 1109, 1123 (N.D. Cal. 2008) (“[I]t is inappropriate to broadly apply the *AGC* test to plaintiffs’ claims under the repealer states’ laws in the absence of a clear directive from those states’ legislatures or highest courts.”); *In re Graphics Processing Units Antitrust Litig.*, 540 F. Supp. 2d 1085, 1097 (N.D. Cal. 2007) (“Absent clearer directive from the courts and legislatures of those states, this order declines to hold that *AGC* is the laws of those states at this time.”).

<sup>119</sup> Compare *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) (abstaining from hearing a case because it involves complex questions of state law, policy, and administration).

<sup>120</sup> *Runner v. N.Y. Stock Exch., Inc.*, 568 F.3d 383, 386 (2d Cir. 2009).

### III. A MODIFIED *AGC* TEST

This Part presents a version of the *AGC* test that is modified so as to accommodate the policy choices embodied in the *Illinois Brick* repealers. Section A canvases the approaches that courts have taken on this issue. Section B lays out the principles that should guide the construction of a modified *AGC* test, and Section C develops such a test.

#### A. Existing Approaches

Some courts have applied the *AGC* factors to claims under *Illinois Brick* repealers without modification, apparently not recognizing that doing so may create a de facto ban on all indirect purchaser suits.<sup>121</sup> For instance, a Wisconsin court found that the “directness” factor counseled dismissal since “there is no question that the plaintiff alleges injuries that are indirect.”<sup>122</sup>

But if the mere fact that a plaintiff is not a direct purchaser counsels dismissal, then it is hard to see how the *AGC* test can be rectified with *Illinois Brick* repealers which demand that a plaintiff’s ability to bring suit should be determined “regardless of whether [the plaintiff] dealt directly or indirectly with the defendant.”<sup>123</sup> The “better plaintiff” prong would also seem to count against every indirect purchaser since the direct purchaser is presumably a better private attorney general.<sup>124</sup> The unmodified approach, then, risks dismissing each of the four fact patterns, even the *Antibiotic* case.

Other courts have simply been unclear on how the *AGC* test is to be reconciled with the policy objectives of the *Illinois Brick* repealers. In *Kanne v. Visa U.S.A. Inc.*,<sup>125</sup> for instance, the Nebraska Supreme court dismissed plaintiffs’ claim in a *Visa* case by applying an unmodified *AGC* test. The court then rejected the argument that “the wholesale adoption of the *AGC* five-factor test” would render the court’s previous recognition of indirect purchaser suits “meaningless,”<sup>126</sup> asserting, without explanation, that the *AGC* test “can accommodate the approval of ‘indirect purchaser’ actions.”<sup>127</sup>

Similarly unsatisfying is the analysis of the United States District Court for

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<sup>121</sup> See, *Southard v. Visa U.S.A. Inc.*, 734 N.W.2d 192 (Iowa 2007); *Strang v. Visa U.S.A. Inc.*, No. 03 CV 011323, 2005 WL 1403769 (Wis. Cir. Ct. Feb. 8, 2005); *Stark v. Visa U.S.A. Inc.*, No. 03-055030-CZ, 2004 WL 1879003 (Mich. Cir. Ct. July 23, 2004); *Peterson v. Visa U.S.A. Inc.*, No. Civ.A. 03-8080, 2005 WL 1403761 (D.C. Super. Ct. Apr. 22, 2005); *Ho v. Visa U.S.A. Inc.*, No. 112316/00, 2004 WL 1118534 (N.Y. Sup. Ct. Apr. 21, 2004), *aff’d*, 793 N.Y.S.2d 8 (N.Y. App. Div. 2005), *motion for leave to appeal denied*, 833 N.E.2d 708 (N.Y. 2005).

<sup>122</sup> *Strang*, 2005 WL 1403769, at \*4. By contrast, the Iowa Supreme Court may have left room for a future softening of the *AGC* test. Applying the “directness” factor to a *Visa* claim, the court found that “[c]learly, the injuries alleged by the plaintiffs are *not even indirect*, as the plaintiffs are not in the chain of distribution. Their injuries are better described as derivative.” *Southard*, 734 N.W.2d at 199 (emphasis added). Unlike the Wisconsin court, Iowa stopped short of implying that the mere fact that a plaintiff is not a direct purchaser will count against finding antitrust standing.

<sup>123</sup> See, e.g., CAL. BUS. & PROF. CODE § 16750(a) (West 2010).

<sup>124</sup> See *infra* Subsection II.C.3; Landes & Posner, *supra* note 2.

<sup>125</sup> 723 N.W.2d 293 (Neb. 2006).

<sup>126</sup> *Id.* at 300.

<sup>127</sup> *Id.*

the District of Delaware. The court simply pronounced that “the remaining three factors,” referring to (1) whether the injury is direct or speculative; (2) whether there are more direct victims; and (3) the potential for duplicative recovery or complex apportionment of damages, “carry less weight in the standing analysis in jurisdictions rejecting *Illinois Brick*.”<sup>128</sup> The court gave no indication as to *how much* weight these factors should carry.

By contrast, at least three courts have set out to craft a version of the *AGC* test that takes “into account the broader principles relating to indirect purchasers provided by state law.”<sup>129</sup> These courts divided, however, on whether and how each prong should be modified.

First, *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*<sup>130</sup> dealt with the *Computer Chip* fact pattern. The court found that the following factors applied in their unmodified form, and weighed against standing: (1) whether the plaintiff is a participant in the allegedly restrained market; (2) whether the alleged harm is “speculative”; and (3) the complexity involved in apportioning damages.<sup>131</sup>

The court then modified the “directness” prong, so as not to prejudice plaintiffs simply because they are indirect purchasers.<sup>132</sup> Instead, it asked “whether, *as indirect purchasers*, there is a direct link in the causation chain between defendants’ alleged conspiracy to restrain prices, and the artificially high prices paid by plaintiffs who purchased products in which DRAM is a component.”<sup>133</sup> The court found this factor weighed against standing because DRAM is merely a component in an end-product “contain[ing] numerous other components, all of which *collectively* determine the final price actually paid by plaintiffs for the final product,” and because plaintiffs made no allegations that “demonstrate that . . . the ultimate cost of the DRAM component is somehow directly traceable” to the price plaintiffs paid.<sup>134</sup> Finally, the court found that the duplicative recovery factor did not apply at all because states that passed *Illinois Brick* repealers “have necessarily made the policy decision that duplicative recovery may permissibly occur.”<sup>135</sup> The court denied standing.

Second, *Crouch v. Crompton Corp.*<sup>136</sup> considered two cases, a *Rubber Tire* and a *Visa* case. The court found that the following factors applied in their unmodified form, and weighed against standing in both cases: (1) whether the plaintiffs are participants in the allegedly restrained markets; and (2) whether the alleged harm is “speculative.”<sup>137</sup> Notably, the court applied the “speculative harm”

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<sup>128</sup> *In re Intel Corp. Microprocessor Antitrust Litig.*, 496 F. Supp. 2d 404, 410 (D. Del. 2007).

<sup>129</sup> *In re. Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 516 F. Supp. 2d 1072, 1088 (N.D. Cal. 2007) (citing *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 987 (9th Cir. 2000)).

<sup>130</sup> 516 F. Supp. 2d 1072 (N.D. Cal 2007).

<sup>131</sup> *Id.* at 1089-93.

<sup>132</sup> *Id.* at 1091.

<sup>133</sup> *Id.* (emphasis added).

<sup>134</sup> *Id.* at 1092.

<sup>135</sup> *Id.*

<sup>136</sup> Nos. 02 CV 4375, 03 CV 2514, 2004 WL 2414027 (N.C. Super. Ct. Oct 28, 2004).

<sup>137</sup> *Id.* at \*18-27.

prong somewhat aggressively, apparently wanting plaintiffs to provide, at the complaint stage, regression analysis and estimations of supply and demand elasticities.<sup>138</sup> The court found such analysis necessary to show that it is plausible that the plaintiffs suffered actual harm.

As for “directness,” the court explained that, although being an indirect purchaser does not itself preclude standing, “the causal connection between the act and the claimed injury cannot be too remote.”<sup>139</sup> The court further noted that “[p]urchasers who buy the product which is the subject of the restraint are more likely to be able to show sufficiently direct injury than those who purchase a product with a component which is the subject of the restraint.”<sup>140</sup> The fewer and simpler the links of the distribution chain are, the more “direct” the injury claim is. Similarly, in considering whether there are better parties to bring the claim, the court omits direct purchasers from its calculations, looking only at whether there are better *indirect* purchasers that could sue.<sup>141</sup>

The court also softened its consideration of the risk of duplicative recovery and danger of complex apportionment of damages, finding that these factors should be “limited by the General Assembly’s creation of indirect purchaser standing,” but not “totally eliminated.”<sup>142</sup> The court denied standing to both the *Rubber Tire* and *Visa* plaintiffs.

Third, in *Knowles v. Visa U.S.A. Inc.*,<sup>143</sup> a *Visa* case, the court found that the following factors applied in their unmodified form, whether: (1) there are persons better situated to bring suit; (2) plaintiff’s damages are speculative; (3) there is a danger of duplicative recoveries; and (4) there is a need for complex apportionment.<sup>144</sup> The court refused to penalize plaintiffs for not participating in the allegedly restrained market, finding that Maine’s *Illinois Brick* repealer suggests this factor should be irrelevant.<sup>145</sup> The court also refused to apply the “directness” prong.<sup>146</sup> Still, the court denied standing.

### *B. Principles to Guide the Inquiry*

The courts which have sought to reconcile *AGC* with the *Illinois Brick* repealers have offered little guidance. They are unhelpful, not simply because they disagreed amongst themselves, but also because they did not offer a clear picture of what they were looking for. This article has examined the text of the repealers, informed by the public discourse regarding *Illinois Brick*, in order to ascertain the intent of the legislatures that sought to repeal that case. This analysis yields four principles to guide the construction of a modified *AGC* test.

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<sup>138</sup> *See id.* at \*19.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 27.

<sup>142</sup> *Crouch*, 2004 WL 2414027, at \*19.

<sup>143</sup> No. Civ.A. CV-03-707, 2004 WL 2475284 (Me. Super. Ct. Oct. 20, 2004).

<sup>144</sup> *Id.* at \*6.

<sup>145</sup> *Id.* at \*5.

<sup>146</sup> *Id.*

First, the text of the repealers suggests that they sought to remove the categorical bar on indirect purchaser suits and establish a regime where a plaintiff's status as a direct or indirect purchaser alone did not affect his or her ability to sue.<sup>147</sup> Accordingly, we must modify or eliminate any *AGC* factor that counts against standing based on a characteristic that is inherent in indirect purchaser suits.

Second, *Illinois Brick's* most prominent critics dealt with some of the *specific issues* that arise in applying *AGC* to the repealers. With some issues, like duplicative recovery,<sup>148</sup> *Illinois Brick's* critics denied that their position would lead to such problems, and supported a case-by-case inquiry to deal with them if they arose. With other issues, like the complexity of damage apportionment,<sup>149</sup> the critics admitted that their position would result in such ills but deemed them necessary evils. The positions of *Illinois Brick's* critics on the precise issues in question are highly probative of the intent of *Illinois Brick's* repealers.

Third, the facts of *Illinois Brick* are instructive because the legislatures that sought to repeal that case likely expected that a case with identical facts could be brought under the new law. In order to be faithful to the repealers, the modified *AGC* test must allow suits on facts similar to *Illinois Brick*. It is therefore necessary to review those facts.

The plaintiffs in *Illinois Brick* consisted of the state of Illinois and over 700 Illinois cities and towns. They alleged that the defendants, manufacturers of concrete block, fixed the price of the blocks which were eventually sold to the plaintiffs by general building contractors in the form of concrete buildings.<sup>150</sup> The general contractors followed a standard procedure to calculate bids made to public agencies. As the plaintiffs' brief explained:

Prior to competitive bidding, the contractor ascertains the cost of concrete block required, as well as all other necessary materials, and gets quotations on jobs to be subcontracted, which may include masonry work. Based on the lowest quotation he receives, the contractor includes the full cost of the concrete block, or masonry subcontract, in his bid as a known cost. The contractor totals his material, labor, and subcontract costs, then adds a variable percentage for overhead and profit.<sup>151</sup>

The modification of the *AGC* test will be a failure if it results in the dismissal of cases with facts indistinguishable from *Illinois Brick*.

Fourth, the general line which the *Illinois Brick* plaintiffs drew between antitrust suits that should and should not be allowed is highly relevant. As the Court summarized it, "[r]espondents here argue, not without support from some lower courts, that pass-on theories should be permitted for middlemen that resell goods without altering them and for contractors that add a fixed percentage markup to the cost of their materials in submitting bids."<sup>152</sup> The *Illinois Brick* plaintiffs

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<sup>147</sup> See *supra* text accompanying notes 36-38.

<sup>148</sup> See *supra* text accompanying notes 48-50.

<sup>149</sup> See *infra* text accompanying notes 173-75.

<sup>150</sup> *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 726 (1977).

<sup>151</sup> Brief of Respondents at 20, *Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977) (No. 76-404).

<sup>152</sup> *Illinois Brick*, 431 U.S. at 726 (citing Brief for Respondents, *supra* note 53, at 9-30; Transcript of Oral Argument at 36-48, *Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977) (No. 76-404)).

conceded that “the Supreme Court properly refused to let United Shoe muddy the record with esoteric inquiry into Hanover’s profit margins and hypothetical pricing changes.”<sup>153</sup> But they distinguished *Hanover Shoe*, pointing out that the cost of concrete block is known in advance of bidding and included in the bid, and arguing that because the contractors do not purchase block until the bid is awarded, “any increase in this cost has a direct impact” on the plaintiffs.<sup>154</sup>

Plaintiffs’ position was not an arbitrary line in the sand. Rather, it was based on the then-current state of the case law.<sup>155</sup> Indeed, plaintiffs cited several federal circuit cases drawing similar distinctions.<sup>156</sup> The general line drawn by plaintiffs thus provides insight into the legal regime that existed pre-*Illinois Brick* and which may have been expected to return when that decision was repealed at the state level.

### C. The Modified AGC Test

This section develops a modified *AGC* test with the above principles in mind.

#### 1. Participants in the Allegedly Restrained Market

This factor should apply without modification. *DRAM*, *Crouch*, and *Knowles* split on this question two-to-one. Yet the cases do not offer any argument to support their conclusions. This factor would support standing in fact patterns like the *Antibiotic* case where a retailer buys a product from a price-fixing manufacturer and sells it unchanged to the consumer. In that situation, the retailer and the consumer are participants in the “same market” since they both purchase the same product, albeit the consumer is one step down the distribution chain.

By contrast, this factor would not support standing in cases like the *Computer Chip* case and the *Rubber Tire* case, where the price-fixing manufacturer sells a product to another manufacturer who uses that product to create a new product, and ultimately sells that new product to a consumer. There, the price-fixing manufacturer and the plaintiff are not in the “same market.” The former is in the market for the component product, the latter in the market for the end product. As the *DRAM* court put it, “the market that plaintiffs allege as the source for the purportedly illegal price-fixing conspiracy was the general market for DRAM, a market that is distinct from the market for electronic products that include DRAM.”<sup>157</sup>

The distinction between indirect purchasers of price-fixed products and indirect purchasers of products that *contain* or were *made with* price-fixed products

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<sup>153</sup> Brief for Respondents, *supra* note 53, at 22 (citing *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968)).

<sup>154</sup> Brief for Respondents, *supra* note 53, at 21-23.

<sup>155</sup> Note the Court’s concession that plaintiffs’ position was “not without support from some lower courts.” See *supra* text accompanying note 152.

<sup>156</sup> Brief for Respondents, *supra* note 53, at 10-19 (citing cases).

<sup>157</sup> *In re. Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 516 F. Supp. 2d, 1072, 1091 (N.D. Cal. 2007).

is not a mere formality. Rather, it reflects a difference in the likelihood that the consumer suffered injury. In the former case, the middleman's costs consist largely of one thing: the price-fixed product. By contrast, in the latter case, the manufacturer's costs include all the component materials (of which the price-fixed product is but one), as well as labor, machinery, and everything else that goes into manufacturing. The *Illinois Brick* plaintiffs made this same point in their brief, summarizing a then-current Second Circuit case.<sup>158</sup>

Moreover, where the plaintiff buys the same product that was price-fixed, that product will likely have an inelastic demand curve, increasing the chances that the cost was passed on to the consumer. This is so because it makes little sense to fix prices in an elastic market as consumers would simply refuse to pay the inflated rates. However, when plaintiffs buy something that *contains* a price-fixed product, it may well be that the elasticities of demand for the two products differ substantially. For example, the market for plastic may be rather inelastic, while the market for plastic *toys* may be rather elastic.

This is not to say that a purchaser of products containing price-fixed materials can never recover. The facts of *Illinois Brick* itself present an example where the value of a price-fixed component can be isolated and its pass-on proved. As just one of five considerations, this factor should operate more as a rebuttable presumption.

### 2. *The Directness of Plaintiff's Alleged Harm*

This factor should apply in an appropriately modified form. The mere fact that plaintiffs are not direct purchasers should not count against standing. But the causal connection between the act and the claimed injury should not be too remote. Unlike the first prong, the inquiry here is not binary, but instead, presents a sliding scale. The "more direct" theories of harm will involve a single product in a single chain of distribution, with few links in between plaintiff and defendant. The "less direct" theories will concern products with tangential relationships to the price-fixed product or involve many links and many chains of distribution, with multiple potentially intervening causes. Of course, many cases will fall in between.

### 3. *Whether There is a Better Potential Plaintiff*

This factor should not apply at all. *Crouch* tried to fit this factor with the repealers by asking only whether there is a better "indirect" plaintiff to bring the suit.<sup>159</sup> But this misses the point made by the critics of *Illinois Brick*. They were concerned with compensating victims—at least to the extent possible without incurring duplicative recovery—not simply with finding an efficient enforcer.<sup>160</sup> Moreover, they were skeptical of courts that would deny standing to a plaintiff that has brought suit by pointing to other parties that are in theory "better" but have not

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<sup>158</sup> Brief for Respondents, *supra* note 53, at 15 (citing *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079 (2d Cir. 1971)).

<sup>159</sup> *Crouch v. Crompton Corp.*, Nos. 02 CV 4375, 03 CV 2514, 2004 WL 2414027, at \*27 (N.C. Super. Ct. Oct 28, 2004) (emphasis added).

<sup>160</sup> *Ill. Brick v. Illinois*, 431 U.S. 720, 749, 764 (1977) (Brennan, J., dissenting).

in fact sued.<sup>161</sup> Accordingly, if a party meets the other *AGC* factors, standing should be upheld regardless of whether there exists a hypothetically better plaintiff.

#### 4. Whether Plaintiff's Damages Theory is "Speculative"

There is little dispute that this factor applies.<sup>162</sup> In the context of indirect purchaser claims, this means that the onus is on the plaintiff, at the complaint stage, to show the plausibility of his or her damages theory.<sup>163</sup> As *Crouch* pointed out, this will often require plaintiffs to show how they are going to estimate the elasticity of supply and demand, and how they will eliminate intervening causes.<sup>164</sup> Requiring the plaintiff to provide the details of his damages theory at the motion to dismiss stage not only screens out frivolous claims, it also protects valid ones. This factor allows a plaintiff who fails the first two prongs a chance to show that, although he or she is not a participant in the restrained market and his damages theory is remote, he or she actually has a reliable means of proving the harm he suffered.

#### 5. Complexity of Damages Apportionment and Risk of Duplicative Liability

For whatever reason, these two distinct considerations get lumped into one factor. Perhaps as a consequence, courts have either held that both apply in an unmodified form, or neither do.<sup>165</sup> But a more nuanced view is required. The complexity prong needs to be significantly softened while the risk of duplicative liability should apply with nearly full force.

Justice Brennan rejected the argument that *Illinois Brick* plaintiffs' claim should be dismissed because it would require "long and complicated proceedings involving massive evidence and complicated theories."<sup>166</sup> Noting that "this may be said of almost all antitrust cases,"<sup>167</sup> Brennan appeared willing to bear this complexity. State courts refusing to follow *Illinois Brick* have expressed similar sentiments.<sup>168</sup> The *Illinois Brick* repealers may therefore be read as reflecting the policy decision that complex damage apportionment, and the accompanying

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<sup>161</sup> *Id.* at 749 ("Injured consumers are precluded from recovering damages from manufacturers, and direct purchasers who act as middlemen have little incentive to sue suppliers so long as they may pass on the bulk of the illegal overcharges to the ultimate consumers.").

<sup>162</sup> Even *Lorix* conceded this point. See *Lorix v. Crompton Corp.*, 736 N.W.2d 619, 628 (Minn. 2007) ("*AGC* factor (4), whether the damages claims are speculative, is relevant to standing under the Minnesota antitrust law.").

<sup>163</sup> See *supra* text accompanying notes 84-95.

<sup>164</sup> *Crouch*, 2004 WL 2414027 at \*19.

<sup>165</sup> Compare *In re. Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 516 F. Supp. 2d 1072 (N.D. Cal. 2007), and *Crouch*, 2004 WL 2414027, with *Knowles v. Visa U.S.A. Inc.*, Civ.A.CV-03-707, 2004 WL 2475284 (Me. Super. Ct. Oct. 20, 2004).

<sup>166</sup> *Ill. Brick v. Illinois*, 431 U.S. 720, 758 (1977) (Brennan, J., dissenting).

<sup>167</sup> *Id.*

<sup>168</sup> E.g., *Bunker's Glass Co. v. Pilkington, PLC*, 75 P.3d 99, 108 (Ariz. 2003) ("The complexity of proving damages through multiple levels of sales is a daunting task, but one to which our courts are equal.").



administrative costs, are prices worth paying in order to compensate actual victims. Therefore, a plaintiff with a reliable damages theory should not be turned away merely because of the administrative costs of dividing those damages among the victims. Still, the repealer's endurance of complexity must be limited by the rationale for doing so: compensation.<sup>169</sup> Where a damages theory is so complex that the compensation to the real victims is de minimis or wholly absent,<sup>170</sup> the policy behind the repealer no longer counsels in favor of standing.

In contrast with complex damage apportionment, there has never been an indication that *Illinois Brick* repealer embraced duplicative liability. Instead, those provisions—some explicitly, others implicitly—allow courts to take “necessary” steps to avoid double recovery.<sup>171</sup> Where other suits arising from the same illegal acts have already provided full recovery, it is “necessary” for a court to dismiss the claim in order to avoid duplicative liability. If another suit has already been filed, and plaintiffs cannot join that suit, the court should stay the action. The only exception to this rule may be where a state indirect purchaser suit is *followed* by a federal direct purchaser suit. Here, the state court would have no power to stop the federal claim from going forward and dismissing the state indirect claim would fly in the face of the chief goal of the *Illinois Brick* repealer: providing indirect purchasers a chance to recover which is equal to that of direct purchasers.<sup>172</sup>

#### IV. CONCLUSION

This article has sought to clean up a legal issue that has been clouded with confusion. It has argued that the *Illinois Brick* repealer should not be read as granting automatic standing to indirect purchasers. Instead, the repealer are largely consistent with the federal test of “antitrust standing” which the Supreme Court articulated in *AGC*. Still, that test must be slightly modified so that it does not operate as a de facto reinstatement of *Illinois Brick*.

Before concluding, it may be helpful to apply Part III's modified *AGC* test to the four scenarios presented at the beginning of this article:

**The Antibiotic Case:** The modified test would find standing in this case. The plaintiff-consumers and the manufacturer-defendants are both participants in the market for antibiotics. It is therefore likely that the demand for the products that plaintiffs purchased is rather inelastic (otherwise why would defendants fix the prices of that product?).<sup>173</sup> Further, the causal link between plaintiff and defendants is relatively simple, with a single product changing hands only two or three times.<sup>174</sup> Plaintiffs will likely be able to offer a relatively reliable method of

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<sup>169</sup> See *supra* notes 160-61 and accompanying text.

<sup>170</sup> See *supra* note 93 and accompanying text.

<sup>171</sup> See *supra* notes 42-43 and text accompanying notes 49-50.

<sup>172</sup> See *supra* text accompanying notes 36-37.

<sup>173</sup> This important fact—that plaintiffs and defendants are participants in the same market—would not be credited by the *Knowles* court. See *supra* note 149 and accompanying text. By ignoring this factor, the *Knowles* approach risks dismissing suits in which it is probable that defendant's mark-ups were actually passed on to plaintiffs.

<sup>174</sup> But whether it changed hands two or three times is inconsequential under this article's test. By

proving damages, and there has not yet been a suit filed by direct purchasers.

**The Computer Chip Case:** The modified test *might* support standing in this case. Prong one counts against standing because plaintiffs are in the computer market, not the computer chip market. The “directness” prong is unclear. It will depend on the cost of the computer chip in relation to the total cost of manufacturing a computer. It will make a big difference in terms of “directness,” whether the chip represents seventy percent of the cost of building the computer, or seven percent of that cost. In an unclear case like this, a lot will depend on whether the plaintiffs demonstrate a reliable means of proving damages. How are they going to show the inelasticity of the computer market? How are they going to eliminate potential intervening causes?<sup>175</sup> Of course, the fact that there has not been a direct purchaser suit counts in favor of standing.

**The Rubber Tire Case:** The modified test would not support standing here. As a threshold matter, defendants have already been fined over 116 million dollars. Even if this criminal sanction does not count as “recovery,” there has also been a prior direct purchaser suit filed. This at least counsels a stay of the suit pending resolution of the prior claim. In any event, plaintiffs and defendants are in different markets (i.e., the tire market versus the rubber-processing chemical market). The causal connection is far from “direct” since rubber-processing chemicals make up only a small portion of the cost of manufacturing tires. It is also doubtful that plaintiffs will be able to present a reliable means of tracing the effect of this small increase in manufacturing costs.

**The Visa Case:** This is the type of suit that the notion of “antitrust standing” was designed to bar. The defendants have already paid over three billion dollars to direct purchasers, which alone warrants dismissal. Plaintiffs are not even purchasers of components in a related market. Instead, they are purchasers of the entire range of consumer products sold by nearly every merchant in the state (at least those who accept Visa or MasterCard). Showing the pass-on would require an estimation of the elasticity of demand for almost every product sold in the state. Even if that feat were possible, it is hard to imagine how the funds could be apportioned.

The modified *AGC* test thus helps shape the antitrust standing analysis in a way that does not prejudice indirect purchasers as such. Indeed, the test would grant standing to indirect purchasers like those in the *Antibiotic* case who offer a plausible theory of damages and do not pose a risk of duplicative recovery. The remote and speculative claims of the *Rubber Tire* and *Visa* cases are rightly rejected. Borderline cases like the *Computer Chip* case will turn on the facts.

As the *AGC* court noted, the “infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in

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contrast, the *Crouch* test would apparently hold that a plaintiff that is three levels down the distribution chain is a “worse plaintiff” than one that is two levels down and count that factor against finding the former plaintiff has standing. See Subsection II.C.3.

<sup>175</sup> Because it rejects the complexity prong, this article’s test would uphold standing where damages can be reliably proven, even if doing so would be complex and costly. The *DRAM* court, by contrast, dismissed a *Computer Chip* case, in part because of the complexity of proving damages. See *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 516 F. Supp. 2d 1072, 1088-89 (N.D. Cal. 2008)

every case.”<sup>176</sup> This article, however, has aimed to at least “identify factors” that “guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances.”<sup>177</sup>

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<sup>176</sup> *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 536 (1983).

<sup>177</sup> *Id.* at 537.