

ANTITRUST LAW —PRICE FIXING-PROVING INJURY UNDER SECTION 4 OF THE CLAYTON ACT BY INDIRECT PURCHASERS RELAXED BY EXPANSION OF EXCEPTIONS TO *ILLINOIS BRICK*. *In re Mid-Atlantic Toyota Antitrust Litigation*, 516 F. Supp. 1287 (D. Md. 1981). In *In re Mid-Atlantic Toyota Antitrust Litigation*,<sup>1</sup> automobile purchasers, individually and through state *parens patriae* actions,<sup>2</sup> sued Mid-Atlantic Toyota Distributors, Inc., Carecraft Industries, Ltd., and various Toyota dealerships for conspiring to fix an artificially high price for polyglycoat finishes in violation of section 1 of the Sherman Act.<sup>3</sup> Plaintiffs also sought treble damages under section 4 of the Clayton Act.<sup>4</sup> Defendants moved to dismiss, claiming that *Illinois Brick Co. v.*

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1. 516 F. Supp. 1287 (D. Md. 1981).

2. A state attorney general may bring a *parens patriae* action on behalf of any resident who would otherwise have a cause of action under the antitrust laws. 15 U.S.C. § 15c (1976). See generally Note, *Scaling the Illinois Brick Wall: The Future of Indirect Purchasers in Antitrust Litigation*, 63 CORNELL L. REV. 309, 325-27 (1978).

The *parens patriae* plaintiffs were Delaware, Maryland, West Virginia, and the District of Columbia. 516 F. Supp. 1287, 1289 n.1 (D. Md. 1981).

3. *Id.* at 1289. Section 1 of the Sherman Act provides:

Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1 (1976).

4. Section 4 of the Clayton Act provides:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15 (1976).

The underlying purpose of the antitrust laws is the promotion of competition in an open market. *E.g.*, *Reiter v. Sonotone Corp.*, 442 U.S. 330, 342 (1979). The antitrust laws provide public and private mechanisms for enforcing sanctions against antitrust violators. The award of treble damages under § 4 is a potent private antitrust enforcement weapon. Section 4 has two primary objectives: to deter antitrust violators by depriving them of the "fruits of their illegality," and to compensate antitrust victims for their injuries. *E.g.*, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485-86 (1977); Beane, *Passing-On Revived: An Antitrust Dilemma*, 32 BAYLOR L. REV. 347, 348 (1980).

*Illinois*<sup>5</sup> barred plaintiffs, as indirect purchasers,<sup>6</sup> from proving injury under section 4.<sup>7</sup> Plaintiffs responded that the facts fell within the vertical conspiracy exception to *Illinois Brick*.<sup>8</sup> The district court denied defendants' motion and *held*: Indirect purchasers may recover treble damages for price-fixing antitrust violations under section 4 of the Clayton Act when difficulties in tracing damages and the risk of duplicative liability are not present.<sup>9</sup>

In *Illinois Brick* the United States Supreme Court restricted the ability of indirect purchasers to recover treble damages from antitrust violators under section 4 of the Clayton Act.<sup>10</sup> Indirect purchasers of concrete block sued eleven concrete block manufacturers for conspiring

5. 431 U.S. 720 (1977). See notes 10-25 *infra* and accompanying text.

6. An indirect purchaser is a purchaser who is more than one step removed in a chain of distribution from a seller. For example, a consumer who buys from a retailer who, in turn, bought from a manufacturer is an indirect purchaser of the manufacturer.

7. 516 F. Supp. at 1289. See note 18 *infra* and accompanying text.

8. 516 F. Supp. at 1294-95. See notes 26-36 *infra* and accompanying text.

The plaintiffs and the court referred to the vertical conspiracy exception as the co-conspirator exception. 516 F. Supp. at 1295 n.18.

9. 516 F. Supp. at 1294. See notes 19-21 *infra* and accompanying text. The court held also that the vertical conspiracy exception was consistent with the policy considerations underlying *Illinois Brick*. 516 F. Supp. at 1295. See notes 45-50 *infra* and accompanying text.

10. 431 U.S. 720 (1977).

Courts use three approaches to limit the scope of § 4. In *Illinois Brick* the Supreme Court barred a method of proving damages under § 4 by prohibiting indirect purchasers from using the pass-on theory. See note 18 *infra* and accompanying text. The Supreme Court in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) limited the type of injury that falls within § 4 to "antitrust injuries." The court held:

[F]or plaintiffs to recover treble damages on account of § 7 violations, they must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.

429 U.S. at 489. See generally Note, *The Third Circuit's "Functional Analysis": Patrolling the Portals to Treble Damages Actions Brought Under Section 4 of the Clayton Act*, 21 B.C.L. REV. 659, 666-67 (1980). The courts of appeals have limited those who can sue by construing the language, "by reason of," in § 4 to require plaintiffs to prove legal causation or "antitrust standing." See, e.g., *Conference of Studio Unions v. Loew's, Inc.*, 193 F.2d 51, 54 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952). The circuits, however, have split on the test used to determine antitrust standing. The direct injury test focuses on the relationship between the plaintiff and the defendant, denying standing if the plaintiff is not the person to whom the defendant directed the violation. The target area test focuses on the region of the economy affected by the antitrust violation. Plaintiffs have standing if they are within the target area of the violation—"that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry." *Id.* at 54-55. For a discussion of the "direct injury" and "target area" tests for antitrust standing, see Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L.J. 809 (1977); Note, *supra*.

to fix prices in violation of section 1 of the Sherman Act.<sup>11</sup> Plaintiffs alleged that intermediate purchasers in the chain of distribution increased their prices to compensate for the defendants' overcharges. Thus, plaintiffs claimed that the pass-on<sup>12</sup> of defendants' overcharges resulted in their injuries. The defendants contended that the Court's holding in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*,<sup>13</sup> compelled the Court to permit only direct purchasers in a chain of distribution to sue under section 4. In *Hanover Shoe*, the Court barred defendants from asserting as an affirmative defense that overcharges to direct purchaser plaintiffs were passed on by the plaintiffs to their customers.<sup>14</sup>

The *Illinois Brick* Court, stressing the need for symmetry<sup>15</sup> with *Hanover Shoe*'s ban on defensive pass-on,<sup>16</sup> precluded indirect purchasers from using the offensive pass-on theory<sup>17</sup> to prove section 4 injuries.<sup>18</sup>

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11. The defendants sold concrete blocks to masonry contractors who, in turn, sold them to general contractors. The general contractors incorporated the concrete blocks in masonry structures and sold the structures to the plaintiffs. 431 U.S. at 726-27.

12. "Pass-on" refers "to the process whereby a businessman who has been overcharged adjusts his own price upward to reflect the overcharge." McGuire, *The Passing-On Defense and the Right of Remote Purchasers to Recover Treble Damages Under Hanover Shoe*, 33 U. PITT. L. REV. 177, 181 (1977). Pass-on also refers to the passing on of undercharges up a chain of distribution. See *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979), cert. denied, 449 U.S. 905 (1980). See also note 33 *infra*.

13. 392 U.S. 481 (1968).

14. A shoe manufacturer challenged the validity of a shoe machinery manufacturer's "lease-only" policy. Plaintiff claimed injury from the increased costs incurred by defendant's refusal to sell its machinery. As an affirmative defense, the machinery manufacturer argued that plaintiff did not sustain a § 4 injury because any illegal overcharge to plaintiff was passed on by plaintiff to its shoe customers. The Supreme Court, in rejecting the defendant's argument, held that antitrust defendants are barred from using pass-on defenses to escape § 4 liability. The Court offered two reasons for its decision. First, the inherent difficulties in proving pass-on are normally insurmountable. Second, successful use of defensive pass-on would allow antitrust violators to escape liability, because indirect purchasers, such as the shoe customers in *Hanover Shoe*, would lack a sufficient stake in any recovery to bring suit independently. *Id.* at 481.

15. *But see* 431 U.S. 720, 748 (1977) (Brennan, J., dissenting). Justice Brennan argued that the deterrence policy underlying the defensive pass-on prohibition did not mandate a bar on offensive pass-on. A strict bar on offensive pass-on would allow some antitrust violators to escape punishment. *Id.*

16. In defensive pass-on the defendant alleges, as an affirmative defense, that the direct purchaser plaintiff passed on the overcharge to its customers and, therefore, did not suffer a § 4 injury. *E.g.*, 392 U.S. 481 (1968).

17. In offensive pass-on the plaintiff indirect purchaser alleges injury from overcharges passed on by intermediate purchasers in the chain of distribution. Schaefer, *Passing-On Theory in Antitrust Treble Damages Actions: An Economic and Legal Analysis*, 16 WM. & MARY L. REV. 883, 884 (1975).

18. 431 U.S. 720 (1977). Although the Court did not bar indirect purchasers from seeking

The court offered two policy justifications for its decision. First, and foremost, tracing an overcharge through a chain of distribution usually presents an insurmountable problem of proof.<sup>19</sup> A variety of factors, both rational and irrational, affect product price determinations. Economic pricing theories thus are incapable of reconstructing complex pricing decisions accurately enough to apportion responsibility for the effects of an overcharge in different levels of modern distribution chains.<sup>20</sup> Second, permitting offensive, but not defensive, pass-on subjects defendants to the risk of duplicative liability.<sup>21</sup> A direct purchaser could recover the full amount of an overcharge under *Hanover Shoe*, even though an indirect purchaser had already recovered for all or part of the overcharge passed on to it.

The *Illinois Brick* Court expressly recognized two limited exceptions to its holding: the preexisting cost-plus contract exception,<sup>22</sup> and the

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relief under § 4, *id.* at 728 n.7, the practical effect was the same. The indirect purchasers were unable to prove their injuries without the aid of the pass-on theory and, as a result, were unable to proceed to trial. *Id.*

The decision creates a paradox, in light of the Supreme Court's recent holding that ultimate consumers have standing to sue under § 4. *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979). Because ultimate consumers usually are indirect purchasers, the Supreme Court granted a § 4 remedy with one hand, and took it away with the other.

19. 431 U.S. at 731-32, 741-43. One commentator has observed that:

The practical difficulties of employing pass-on theory begin with the realization that few, if any situations arise where an overcharge is completely passed on to indirect purchasers. That portion of the overcharge passed on is determinable, in theory, through the use of economic analysis . . . . Unhappily, it is difficult, if not impossible, to determine with reasonable certainty the facts needed to apply this analysis. Even if concepts like price-elasticity of demand were ascertainable, the element of irrationality in pricing and purchasing would render the analysis suspect.

Note, *supra* note 2, at 312. For an in-depth discussion of the economics of pass-on, see Schaefer, *supra* note 17, at 887-97. Compare Landes & 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) (pro-*Illinois Brick*) and Landes & Posner, *The Economics of Passing-on: A Reply to Harris & Sullivan*, 128 U. PA. L. REV. 1274 (1980) (same) with Harris & Sullivan, *Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis*, 128 U. PA. L. REV. 269 (1979) (anti-*Illinois Brick*) and Harris & Sullivan, *Passing On the Monopoly Overcharge: A Response to Landes & Posner*, 128 U. PA. L. REV. 1280 (1980) (same).

20. 431 U.S. at 731-32, 741-43. The Court stated: "[I]t is unrealistic to think that elasticity studies introduced by expert witnesses will resolve the pass-on issue. . . . 'Sound laws of economics' can only heighten the awareness of the difficulties and uncertainties involved in determining how the relevant variables would have behaved had there been no overcharge." *Id.* at 742-43.

21. *Id.* at 730-31. Although procedural devices such as compulsory joinder would eliminate most if not all potential for duplicative liability, the Court found that such devices would further complicate already complex proceedings. *Id.* at 740.

22. *Id.* at 735-36. In a fixed quantity, cost-plus contract the buyer agrees to bear the risk of

ownership or control exception.<sup>23</sup> In both of these situations market forces do not control the effect of the defendant-seller's overcharge on the indirect purchaser;<sup>24</sup> rather, the effect is determined in advance.<sup>25</sup>

Federal courts, subsequent to *Illinois Brick*, have recognized a third exception. Indirect purchasers can circumvent *Illinois Brick* by proving a vertical conspiracy involving remote sellers and intermediate purchasers in a chain of distribution.<sup>26</sup> Proof of the conspiracy reclassifies the indirect purchaser as a direct purchaser of the conspiracy, thereby obviating plaintiffs' need for the pass-on theory to establish a section 4 injury.<sup>27</sup>

*Gas-a-tron of Arizona v. American Oil Co.*<sup>28</sup> was the first case to recognize the vertical conspiracy exception.<sup>29</sup> The Arizona District Court conditioned denial of the defendants' motion for summary judgment<sup>30</sup>

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future increases in the seller's cost of production. An overcharge to the seller from an antitrust violator is automatically passed on to the buyer, insulating the seller from injury. The ease with which the overcharge is traced removes the cost-plus contract from the concerns of *Illinois Brick*. For a comprehensive discussion of the cost-plus contract exception, see Note, *A Door in the Illinois Brick Wall—A Functional Equivalent to the Cost-Plus Contract Exception*, 33 VAND. L. REV. 481 (1980).

23. 431 U.S. at 736 n.16. The ownership or control exception exempts indirect purchasers who purchase from direct purchasers that are owned or controlled by antitrust violators. The Court suggested the scope of the exception by citing two cases in which the direct purchaser was either owned or financially controlled by the antitrust violator. *Id.* See also *Royal Printing Co. v. Kimberly-Clark Corp.*, 621 F.2d 323 (9th Cir. 1980) (financial control requires control over pricing decisions); *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979) (control through "acquisition of stock, or indirectly through various financial arrangements, including credit"), *cert. denied*, 449 U.S. 905 (1980).

24. See notes 22-23 *supra* and accompanying text.

25. 431 U.S. at 736.

26. See e.g., *Fontana Aviation, Inc. v. Cessna Aircraft Co.*, 617 F.2d 478 (7th Cir. 1980); *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980); *Reiter v. Sonotone Corp.*, 486 F. Supp. 115 (D. Minn. 1980); *Dart Drug Corp. v. Corning Glass Works*, 480 F. Supp. 1091 (D. Md. 1979); *Gas-a-tron of Arizona v. American Oil Co.*, 1977-2 Trade Cas. (CCH) ¶ 61,789 (D. Ariz. 1977). *But see* *Technical Learning Collective, Inc. v. Daimler-Benz Aktiengesellschaft*, 1980-81 Trade Cas. (CCH) ¶ 63,612 (D. Md. 1980).

27. See, e.g., *Reiter v. Sonotone Corp.*, 486 F. Supp. 115 (D. Minn. 1980); *Gas-a-tron of Arizona v. American Oil Co.*, 1977-2 Trade Cas. (CCH) ¶ 61,789 (D. Ariz. 1977). See generally Note, *supra* note 2, at 331-32.

28. 1977-2 Trade Cas. (CCH) ¶ 61,789 (D. Ariz. 1977).

29. *Id.* In *Gas-a-tron* retail sellers of gasoline alleged that two oil refiners had conspired to fix the wholesale price of gasoline in Tucson. The retail sellers purchased their gasoline from independent distributors who, in turn, purchased from the oil refiners. The middlemen distributors were neither named as co-conspirators nor joined as defendants in the complaint. *Id.*

30. Most of the cases involving the vertical conspiracy exception are resolved at the pre-trial summary judgment stage of litigation.

on an amendment to plaintiffs' complaint that would name the middlemen-distributors as co-conspirators.<sup>31</sup> The court reasoned that proof of the conspiracy would enable the plaintiffs to establish section 4 injury without resorting to the pass-on theory.<sup>32</sup> No pass-on theory would be necessary if the plaintiffs could prove a direct purchase from a member of the price-fixing conspiracy.

The Fifth Circuit Court of Appeals in *In re Beef Antitrust Litigation*<sup>33</sup> concluded that a plaintiff claiming the vertical conspiracy exception must, in addition to naming the co-conspirators in the complaint, join the middlemen as defendants.<sup>34</sup> Otherwise, proof of a vertical conspiracy would subject remote seller defendants to the risk of duplicative liability that the *Illinois Brick* Court found unacceptable.<sup>35</sup> The defendants would be unable, in a separate lawsuit brought by the middlemen, to use the first suit's vertical conspiracy holding to estop the middlemen from successfully asserting in their own lawsuit that there was no conspiracy.<sup>36</sup> The Fifth Circuit observed that inconsistent adjudications on the existence of a vertical conspiracy would enable both indirect purchasers and middlemen to recover for a single overcharge.<sup>37</sup>

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31. *Gas-a-tron of Arizona v. American Oil Co.*, 1977-2 Trade Cas. (CCH) ¶ 61,789 (D. Ariz. 1977). *Accord*, *Fontana Aviation, Inc. v. Cessna Aircraft Co.*, 617 F.2d 478, 481 (7th Cir. 1980); *Reiter v. Sonotone Corp.*, 486 F. Supp. 115, 118-19 (D. Minn. 1980); *Abrams v. Interco Inc.*, 1980-2 Trade Cas. (CCH) ¶ 63,292, at 75, 552 (S.D.N.Y. 1980).

32. 1977-2 Trade Cas. (CCH) ¶ 61,789. The court neither considered nor argued that its decision overcame *Illinois Brick's* concern for the risk of duplicative liability. *Id.* See also *Reiter v. Sonotone Corp.*, 486 F. Supp. 115 (D. Minn. 1980); Note, *supra* note 2, at 331-32.

33. 600 F.2d 1148 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980). In *In re Beef* the fact pattern was the reverse of that in *Illinois Brick*. Plaintiffs, cattle ranchers and feeders, alleged that retail food chains conspired to fix the wholesale price of beef at artificially low levels. The plaintiffs claimed injury from the pass-on of the defendants' undercharges by middlemen slaughterhouses and meat packers. *Id.* at 1153.

34. *Id.* at 1163. *Accord*, *Dart Drug Corp. v. Corning Glass Works*, 480 F. Supp. 1091, 1103 (D. Md. 1979); *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 497 F. Supp. 218, 228 (C.D. Cal. 1980).

35. 600 F.2d at 1163.

36. *Id.* But see *Technical Learning Collective, Inc. v. Daimler-Benz Aktiengesellschaft*, 1980-81 Trade Cas. (CCH) ¶ 63,612 (D. Md. 1980). In *Technical Learning Collective*, Judge Northrop argued that joinder of the middlemen co-conspirators would not eliminate all risk of duplicative liability. He interpreted *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968), to hold that the doctrine of *in pari delicto* was not a defense to an antitrust action. Judge Northrop cited *Columbia Nitrogen Corp. v. Royster Corp.*, 451 F.2d 3, 15-16 (4th Cir. 1971), for the general proposition that antitrust co-conspirators are barred from seeking treble damages from each other only when their economic strength is substantially equal. *Technical Learning Collective, Inc.*, 1980-81 Trade Cas. (CCH) ¶ 63,612 at 77,252-53.

37. 600 F.2d at 1163.

In *In re Mid-Atlantic Toyota Antitrust Litigation*,<sup>38</sup> Judge Young, before considering the vertical conspiracy exception, addressed the broader issue of whether the two exceptions expressly mentioned in *Illinois Brick* were exclusive.<sup>39</sup> The judge reasoned that the Supreme Court premised recognition of the cost-plus contract and control exceptions on the supposition that tracing complexities are avoided when market forces are obviated.<sup>40</sup> He then argued that application of the *Illinois Brick* rule would be inappropriate if the reasons for the rule, including the risk of duplicative liability, did not exist.<sup>41</sup> Concluding that the Supreme Court only intended the exceptions to serve as guides for determining other exceptions to the rule,<sup>42</sup> Judge Young proposed a standard for recognizing exceptions to *Illinois Brick*. The *Mid-Atlantic Toyota* standard permits indirect purchaser lawsuits whenever there are no tracing problems and “only a ‘mere possibility’<sup>43</sup> of duplicative liability” exists.<sup>44</sup>

Judge Young next addressed the issue of whether an exception of vertical conspiracies satisfies the requirements of the proposed standard.<sup>45</sup> He concluded that tracing complexities are avoided when the plaintiff purchases directly from a member of the conspiracy.<sup>46</sup> He also concluded that joinder of the co-conspirators as defendants would eliminate all but a “mere possibility” of duplicative liability.<sup>47</sup>

The *In re Mid-Atlantic Toyota Antitrust Litigation* decision is consis-

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38. 516 F. Supp. 1287 (D. Md. 1981).

39. *Id.* at 1293. See notes 22-23 *supra* and accompanying text.

40. 516 F. Supp. at 1293.

41. *Id.* at 1297 n.14. *But see* Technical Learning Collective, Inc. v. Daimler-Benz Aktiengesellschaft, 1980-81 Trade Cas. (CCH) ¶ 63,612, at 77,254 (D. Md. 1980) (*Illinois Brick* unequivocally barred the offensive use of the pass-on theory with two narrow exceptions).

42. 516 F. Supp. at 1293.

43. The standard for avoiding duplicative liability is not absolute because under the control exception found in *Illinois Brick* there always “exists at least the ‘mere possibility’ that the ‘controlled’ direct purchaser will eventually bring a price-fixing suit against the supplier.” *Id.* at 1294. See also *id.* at 1293 (discussing footnote 11 to *Illinois Brick*).

44. *Id.* at 1294.

45. *Id.* at 1294-95.

46. *Id.* at 1295.

47. *Id.* at 1295-96. Judge Young disagreed with Judge Northrop’s conclusion in Technical Learning Collective, Inc. v. Daimler-Benz Aktiengesellschaft, 1980-81 Trade Cas. (CCH) ¶ 63,612 (D. Md. 1980), that joinder of the middlemen co-conspirators would not eliminate the risk of duplicative liability. Judge Young understood *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968), to hold that some aspects of the *in pari delicto* doctrine should be retained under the antitrust laws. He also interpreted *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3 (4th Cir. 1971), to hold that any party who voluntarily and equally participates in a

tent with the policy considerations underlying *Illinois Brick*.<sup>48</sup> The standard proposed by Judge Young prevents some of the harsh results of a narrow construction of *Illinois Brick*'s exceptions. Direct purchasers often lack the incentive to sue when they are dependent on the seller for supplies or are able to pass on the overcharge without injury to themselves.<sup>49</sup> In these situations, indirect purchasers are often the only parties interested in challenging an antitrust violation. Prohibiting indirect purchaser lawsuits when tracing complexities are non-existent and the risk of duplicative liability is negligible simply permits antitrust violators to escape liability. Such a result directly contravenes the deterrence and compensation goals underlying section 4 of the Clayton Act.<sup>50</sup>

The *In re Mid-Atlantic Toyota Antitrust Litigation* decision promotes enforcement of the antitrust laws by increasing the potential number and variety of indirect purchaser suits<sup>51</sup> without undermining the policies of *Illinois Brick*.<sup>52</sup>

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price-fixing conspiracy cannot sue a co-conspirator under § 4 of the Clayton Act. 516 F. Supp. at 1295-96.

48. See notes 40-42 *supra* and accompanying text.

49. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745 (1977) (Brennan, J., dissenting).

50. See note 4 *supra*.

51. A likely first step is the recognition of exceptions for situations that are the functional equivalents of the cost-plus contract, control, and vertical conspiracy exceptions. See generally Note, *supra* note 22 (arguing for a functional equivalent to the cost-plus contract exception).

52. Lower federal courts never accepted *Illinois Brick* enthusiastically. The creation of such exceptions as vertical conspiracy reflects this sentiment. Courts have also limited *Illinois Brick* to overcharge cases. It does not apply generally to other forms of antitrust monetary injury. See, e.g., *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573 (3d Cir. 1979) (only applicable to overcharges induced by horizontal price-fixing conspiracy); *Dart Drug Corp. v. Corning Glass Works*, 480 F. Supp. 1091 (D. Md. 1979) (inapplicable to suit based on an alleged agreement not to deal); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1246 (E.D. Pa. 1980) (inapplicable to suit against competing manufacturer for lost sales).

Congressional attempts to overturn *Illinois Brick* have been ineffective. See Beane, *supra* note 4, at 362-64; Wallace, *Another Year of Significant Congressional Objectives*, 48 ANTITRUST L.J. 1519, 1527-29 (1979).