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# Comments: Davidson v. Microsoft Corporation: Reexamining Maryland's Illinois Brick Bar against Indirect Private Purchasers

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DAVIDSON v. MICROSOFT CORPORATION: REEXAMINING MARYLAND'S ILLINOIS BRICK BAR AGAINST INDIRECT PRIVATE PURCHASERS

I. INTRODUCTION

A three-judge panel of the Court of Special Appeals of Maryland provided the first reported decision on Maryland's *Illinois Brick* repealer statute regarding private party indirect purchasers.<sup>1</sup> It held that private indirect purchasers in antitrust claims, pursuant to the Maryland Antitrust Act ("MATA"), were barred by the Rule of *Illinois Brick*.<sup>2</sup> Indirect purchasers, unlike direct purchasers of products, are purchasers "[i]n the distribution chain[;] they are not the immediate buyers from the alleged antitrust violators."<sup>3</sup> In *Illinois Brick Co. v. Illinois*, the Supreme Court crafted the Rule of *Illinois Brick*, generally prohibiting federal antitrust claims for monetary damages by indirect purchasers.<sup>4</sup> The Court would later explain in *California v. ARC America Corp.* that *Illinois Brick* was limited to an interpretation of federal law and not necessarily binding precedent interpreting state antitrust statutes.<sup>5</sup> Consistent with this holding, the MATA, as amended with its *Illinois Brick* repealer statute in 1982, explicitly allows govern-

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1. *Davidson v. Microsoft Corp.*, 143 Md. App. 43, 792 A.2d 336 (2002), *cert. denied*, 369 Md. 571, 801 A.2d 1032 (2002) [hereinafter *Davidson II*].
  2. *Id.* at 56, 792 A.2d at 344 (holding that licensees were indirect purchasers pursuant to the Rule of *Illinois Brick* and could not sustain an injury to bring suit under the MATA).
  3. *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199, 207 (1990). Another practical definition is: "A direct purchaser is one who purchases directly from a price-fixer. An indirect, downstream, purchaser is one who purchases a price-fixed product from a middleman, who will have in large measure 'passed-on' the anticompetitive overcharge to his customer." Thomas Greene et al., *Practising Law Institute Corporate Law and Practice Course Handbook Series: State Antitrust Law and Enforcement*, 1252 PRAC. L. INST. CORP. L. & PRAC. COURSE HANDBOOK SERIES 1129, 1153 (2001) (citing Robert G. Harris & Lawrence A. Sullivan, *Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis*, 128 U. PA. L. REV. 269 (1979)).
  4. 431 U.S. 720, 747 (1977). *Illinois Brick* did recognize limited exceptions to the prohibition on indirect purchaser antitrust lawsuits. See *California v. ARC Am. Corp.*, 490 U.S. 93, 97 n.2 (1989) (noting that either a cost-plus contract or a controlling relationship between the alleged monopolist and the direct purchaser were explicit exceptions contemplated in *Illinois Brick*); see also *infra* notes 51-53 and accompanying text. The Rule of *Illinois Brick* is limited to damages claims only; *Illinois Brick* would not preclude a private party indirect purchaser suit seeking injunctive relief. See *Ill. Brick Co.*, 431 U.S. at 747 n.31.
  5. 490 U.S. at 105.

ment indirect purchasers to recover from antitrust overcharges, but is silent regarding private party indirect purchasers.<sup>6</sup>

The class action suit brought by computer software licensees against the Microsoft Corporation, pursuant to the MATA, was dismissed by the Circuit Court for Prince George's County in February, 2001.<sup>7</sup> The circuit court's dismissal relied on *Illinois Brick*, as guided by Maryland Commercial Law section 11-209,<sup>8</sup> and Judge Motz's decision in the United States District Court for the District of Maryland, which dismissed a concurrent consolidated private parties' indirect purchaser claim under the Rule of *Illinois Brick*.<sup>9</sup>

The court of special appeals held that private party indirect purchasers were barred from treble-damages claims, pursuant to the MATA, by the Rule of *Illinois Brick*.<sup>10</sup> While the court of special appeals' two-to-one decision marks the end of this litigation, the court acknowledged that an indirect party purchaser, like the state of Maryland, may have a cause of action under state law in pursuing antitrust litigation against the operating system and software manufacturer.<sup>11</sup>

Judge Sonner's dissenting opinion revealed a statutory inconsistency in the majority's application of federal antitrust statutory interpretations as binding guidelines for interpreting the MATA.<sup>12</sup> Judge Sonner also implied that the legal rationales, supporting the majority's application of *Illinois Brick* to software licensors, may be undercut

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6. MD. CODE ANN., COM. LAW II § 11-209(b) (2000). Before *Davidson v. Microsoft Corp.*, the MATA's application to a private party's indirect purchaser antitrust claim had never been tested in a reported opinion. See Jeffrey L. Kessler & Michael K. Lindsay, *State Antitrust Practice and Statutes: State of Maryland*, 2 A.B.A. SEC. ANTITRUST L. ST. ANTITRUST PRAC. & STATUTES 22-24 (2d ed. 1999).
  7. *Davidson v. Microsoft Corp.*, No. CAL00-07040, 2001 WL 514369, at \*1 (Md. Cir. Ct. Feb. 14, 2001), *aff'd*, 143 Md. App. 43, 792 A.2d 336 (2002) [hereinafter *Davidson I*].
  8. See *id.* at \*1-2.
  9. *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 711-13 (D. Md. 2001).
  10. *Davidson II*, 143 Md. App. at 56-57, 792 A.2d at 344-45.
  11. See *id.* at 63, 792 A.2d at 348. Section 11-209 of the Maryland Commercial Law Article states that "the State, or any political subdivision organized under the authority of this State may maintain an action . . . regardless of whether it dealt directly or indirectly with the person who has committed the violation." MD. CODE ANN., COM. LAW II § 11-209(b)(2)(ii). Rather than seeking monetary damages, Maryland joined the proposed consent decree between the federal government and Microsoft in *United States v. Microsoft Corp.* United States Memorandum Regarding Modifications Contained in Second Revised Proposed Final Judgment, *United States v. Microsoft Corp.*, No. 98-1232 (D.D.C. Mar. 6, 2002). The proposed decree was conditionally approved by Judge Kollar-Kotelly on November 1, 2002. *Id.*; see also *New York v. Microsoft Corp.*, 224 F. Supp. 2d 76 (D.D.C. 2002).
  12. *Davidson II*, 143 Md. App. at 60-61, 792 A.2d at 347 (Sonner, J., dissenting) (noting that Maryland's antitrust law "states [that courts] should be guided by federal court interpretations of federal statutes dealing with antitrust violations"). See also MD. CODE ANN., COM. LAW II § 11-202(a)(2).

by modern economic analysis.<sup>13</sup> A specific economic basis for this shift, however, was not explained.<sup>14</sup>

As a result, future private party indirect purchasers may bring anti-trust lawsuits only for injunctive relief without an additional explicit *Illinois Brick* repealer amendment to the MATA.<sup>15</sup> Until the Maryland legislature, the Court of Appeals of Maryland, or the Supreme Court recognizes the economic shift described above, private party indirect purchasers will be unable to receive treble-damage awards for violations of the MATA.

This case comment will review the application of the Rule of *Illinois Brick* to Maryland's holding in *Davidson v. Microsoft Corp.* Part II begins with the conception of the Rule of *Illinois Brick* and the policies supporting it. This comment's legal analysis will describe the subsequent backlash against *Illinois Brick* by the states in the adoption of repealer statutes and the Supreme Court's approval of them in *ARC America*. The analysis will include a brief survey of *Illinois Brick* repealer statutes and will acknowledge the pro-indirect purchaser interpretations of some states with silent or ambiguous statutes. Part III will examine the MATA and Maryland's *Illinois Brick* repealer statute, which amended the MATA in 1982 in this context.

Part IV of this comment will review the holding and dissent in *Davidson* in light of the Maryland General Assembly's guidance in section 11-202 of the Maryland Commercial Code to follow the federal court's interpretation of *Illinois Brick*. The analysis will be complemented by a survey of relevant private party antitrust litigation against Microsoft, pursuant to their respective state statutes, following the settlement of the DOJ's litigation against the software and operating system manufacturer.

Part V will describe the future of antitrust claims by indirect purchasers in Maryland. While this concludes the options for the party litigants in *Davidson*, Part V will embark on a review of economic analyses that have been successful in implementing antitrust law. These intrinsic and applied economic tools may be used by future plaintiffs or legislators in repealing Maryland's adherence to the Rule of *Illinois Brick*. These tools may also allow future private party indirect purchaser plaintiffs to successfully bring treble-damage lawsuits against alleged antitrust violators and defeat summary judgment in Maryland's courts.

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13. *Davidson II*, 143 Md. App. at 59, 792 A.2d at 346 (Sonner, J., dissenting).

14. *Id.* Appellants' brief to the court of special appeals advanced legal theories and factual differences, not economic theories, in their attempt to reverse the trial court's summary dismissal. Brief for Appellant at 6-28, *Davidson II*, 143 Md. App. 43, 792 A.2d 336 (2002) (No. 2001-00060).

15. MD. CODE ANN., COM. LAW II § 11-209(b).

## II. LEGAL DOCTRINE

A. *The Genesis of the Rule of Illinois Brick*

*[W]e decline to abandon the construction given § 4 [of the Clayton Act]—that the overcharged direct purchaser, and not others in the chain of manufacture or distribution, is the party ‘injured in his business or property’ . . . —in the absence of a convincing demonstration that the Court was wrong . . . .*<sup>16</sup>

Federal antitrust law under § 4 of the Clayton Act creates a cause of action for “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . .”<sup>17</sup> Thus, Congress explicitly created a right for private parties injured under federal antitrust law without specific qualifications.<sup>18</sup> Section 4 of the Clayton Act “does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers . . . (but) is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.”<sup>19</sup>

The Court faced a new challenge in interpreting the Clayton Act regarding indirect purchasers in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*<sup>20</sup> The Court rejected United Shoe’s defense that Hanover, as a direct purchaser, could not have incurred damages from an antitrust claim when the alleged illegal monopoly overcharge was “passed-on” to the plaintiff’s consumers.<sup>21</sup> United Shoe’s failed defense against Hanover alleged that Hanover had been compensated for United’s monopoly price by raising the market price of its shoes to its own consumers and subsequently should not be rewarded with antitrust treble-damages.<sup>22</sup>

16. *Ill. Brick Co.*, 431 U.S. at 729.

17. The Clayton Act, 15 U.S.C. § 15(a) (2000).

18. *Id.*

19. *Ill. Brick Co.*, 431 U.S. at 748 (Brennan, J., dissenting) (quoting *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1948)); see also Cynthia Urda Kassis, *The Indirect Purchaser’s Right to Sue Under Section 4 of the Clayton Act: Another Congressional Response to Illinois Brick*, 32 AM. U. L. REV. 1087, 1098 (1983).

20. 392 U.S. 481, 488 (1968) (holding that a defense against a direct purchaser for violations of the Sherman Antitrust Act pursuant to the Clayton Act of “passing-on” costs was impermissible).

21. *Hanover Shoe, Inc.*, 392 U.S. at 488-89. The term “pass-on” describes “the process by which a middleman in the chain of distribution who has been overcharged by a manufacturer or by a producer adjusts his prices upward so as to pass-on his increased costs to his own customers.” Elaine K. Zipp, Annotation, *Right of Retail Buyer of Price-Fixed Product to Sue Manufacturer on Federal Antitrust Claim*, 55 A.L.R. FED. 919, 922 n.3 (1981). Thus, a direct purchaser “passes-on” the monopoly price to an indirect purchaser.

22. *Ill. Brick Co.*, 431 U.S. at 723-24 (explaining *Hanover Shoe, Inc.*, 392 U.S. 481). There was some scholarly debate regarding the “victory” of *Hanover Shoe* for consumers because indirect purchasers could still conceivably join

Nearly a decade later, the Supreme Court examined the indirect purchaser doctrine as a cause of action in *Illinois Brick Co. v. Illinois*.<sup>23</sup> Illinois, engaged in construction contracts with various masonry contractors, brought suit as an indirect purchaser against various manufacturers of concrete blocks that had engaged in illegal price fixing.<sup>24</sup> The Court held that an indirect purchaser, or a purchaser that has the monopoly price “passed-on” to it, could not recover antitrust claims against an alleged antitrust violator.<sup>25</sup>

*B. The Policy Supporting the Rule of Illinois Brick and Recognized Exceptions*

“[A] little slopover on the shoulders of the wrongdoers . . . . We do not find this risk acceptable.”<sup>26</sup>

The *Illinois Brick* Court looked to several policy reasons in crafting a rule that prevented both an indirect purchaser claim and an indirect purchaser defense.<sup>27</sup> One of the Court’s concerns was an “unwillingness to complicate treble-damages actions” with complex accounting data and calculations in an already complex litigation.<sup>28</sup> Inherent in this concern was the difficulty calculating whether the indirect purchaser had actually received the full monopoly price increase when it purchased the consumer good from the direct purchaser.<sup>29</sup> If the direct purchaser absorbed either partially or completely, any portion of the monopoly overcharge, then damages to the indirect purchaser would be lower or disappear altogether.<sup>30</sup> Thus, a direct purchaser’s

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an antitrust lawsuit with a direct purchaser. See Kassis, *supra* note 19, at 1098-99.

23. 431 U.S. 720.

24. *Id.*

25. *Id.* at 736, 745-47.

26. *Id.* at 731 n.11.

27. *Id.* at 751 (Brennan, J., dissenting). The indirect purchaser defense is equivalent to a “defensive passing-on” of costs; likewise, the indirect purchaser claim is equivalent to an “offensive passing-on” of costs. *Id.* at 750 n.5; see also Jerry L. Beane, *Passing-On Revived: An Antitrust Dilemma*, 32 *BAYLOR L. REV.* 347, 363-64 (1980) (discussing the theory behind “offensive” and “defensive passing-on”).

28. *Ill. Brick Co.*, 431 U.S. at 725.

29. *Id.* at 732-33 n.13. The Court in *Hanover Shoe, Inc.* explained that “[a] wide range of factors influence a company’s pricing policies.” 392 U.S. 481, 492 (1968). Even if the actual cost calculations “in the real economic world” could determine that any pricing change was a result of passing-on the monopoly charge to indirect consumers, it would be nearly impossible to prove that the direct purchaser would not have raised its prices absent the monopoly charge. *Id.* at 493. In fact, the Court in *Hanover Shoe* believed that such a showing was “virtually unascertainable” and “the task would normally prove insurmountable.” *Id.*

30. *Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1170 (8th Cir. 1998).

claim would be less complicated and a more efficient use of judicial and private resources.<sup>31</sup>

In order to place the act of recognizing damages for an indirect purchaser in perspective, it is helpful to recognize the "relative ease" in which a direct purchaser may prove damages. After a judicial determination of an antitrust violation, a direct purchaser must have "proof of some damage."<sup>32</sup> In turn, damages are calculated by the finder of fact to a lesser standard of approximation and subsequently trebled.<sup>33</sup>

Of course, a direct purchaser plaintiff lacking direct evidence of an antitrust violation must rely on expert witnesses. A direct purchaser's evidentiary threshold for using an expert witness is controlled largely by a judicial determination of the expert's scientific foundation based on *Kumho Tire Co. v. Carmichael*.<sup>34</sup>

The Court's second reason for barring an indirect purchaser defense and its concomitant indirect purchaser claim was because excluding a direct purchaser from antitrust litigation would decrease the deterrent effect of antitrust laws.<sup>35</sup> For example, in *Hanover Shoe, United Shoe* was barred from showing that Hanover had passed-on the monopoly overcharge to the ultimate consumer, or indirect purchaser.<sup>36</sup> Assuming that United could prove that Hanover had passed

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31. *Ill. Brick Co.*, 431 U.S. at 732-33 & n.13.

32. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 & n.9 (1969) (holding that "proof of some damage" from illegal conspiracy of overseas patent pools was enough to show a compensable injury under § 4 of the Clayton Act for a damages determination); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946) (holding that a showing of some damage, even when not specific, from an unlawful violation of federal antitrust laws was sufficient to support a treble-damages verdict).

33. *Bigelow*, 327 U.S. at 264. RKO explained several examples where plaintiffs' approximation of damages were inexact, yet sufficient for a reasonable jury to calculate treble damages. *Id.* at 263-64. Part of the Court's holding included recognition that RKO and its co-defendants' "wrongful action had prevented [plaintiffs] from making any more precise proof of the amount of damage." *Id.* at 266.

34. 526 U.S. 137 (1999). The Court in *Kumho Tire* explained that the "standard of evidentiary reliability" of any expert witness is controlled largely by the judicial analysis performed in *Daubert v. Merrill Dow Pharms., Inc.* See *id.* at 149 (citing *Daubert*, 509 U.S. 579, 590 (1993)). The Court in *Daubert* held that the trial judge's determinations may be guided by at least four factors: (1) "[w]hether a theory or technique . . . has been tested"; (2) "[w]hether it 'has been subjected to peer review'"; (3) "[w]hether it has a 'known or potential rate of error'"; and (4) "[w]hether it enjoys 'general acceptance.'" *Id.* at 149-50 (citing *Daubert*, 509 U.S. at 592-94). Maryland courts would probably apply a similar standard for an economic expert in an antitrust claim. See *Buxton v. Buxton*, 363 Md. 634, 650, 770 A.2d 152, 161 (2001).

35. See *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 494 (1968). An indirect purchaser defense would be implicit in allowing a right by indirect purchasers to file antitrust claims for treble damages. *Id.*

36. *Id.* at 493-94. The debate over to what extent a direct purchaser passes-on the monopoly overcharge continues today. See *infra* notes 47-50 and accompanying text. This debate between economic models was exactly the type

the exact amount of the monopoly overcharge to the indirect consumer, an indirect purchaser defense would render Hanover's treble-damage claim useless, as they would have suffered no actual damages.<sup>37</sup>

If Hanover Shoe, the direct purchaser, was barred from a claim by an indirect purchaser passing-on defense (assuming a penny for penny pass-on of the monopoly overcharge), indirect purchasers themselves "would have only a tiny stake in the lawsuit and hence little incentive to sue."<sup>38</sup> Even if some of the smaller indirect purchasers were to succeed in their antitrust claims, in spite of the daunting cost of antitrust litigation, the deterrent effect of treble damages to a small claim would be considerably weaker than the treble-damages award from the direct purchaser that bore the full brunt of the alleged monopoly price increase.<sup>39</sup> Without a significant incentive for an injured party to sue, the Court feared that the alleged antitrust violator would maintain its monopoly profit, legally protected by the indirect purchaser defense against the wholly damaged direct purchaser, and insulated against the significantly smaller claims by the indirect purchaser plaintiffs.<sup>40</sup>

The Court's third concern was to protect antitrust defendants from the risk of multiple awards for one liability.<sup>41</sup> In *Illinois Brick*,

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of accounting complexity that *Hanover Shoe* sought to avoid. *Hanover Shoe, Inc.*, 392 U.S. at 492-93.

37. *See id.* at 493.

38. *Ill. Brick Co.*, 431 U.S. at 725-26 (citing *Hanover Shoe, Inc.*, 392 U.S. at 494). In theory, this "tiny stake" would be the actual damages suffered by the individual consumer, which could be estimated on a per unit basis as the amount of the monopoly overcharge per unit passed-on by the direct purchaser (assuming such a calculation could be performed) and multiplied by the number of units the indirect purchaser actually purchased. While it would be inevitable that private party indirect purchasers, if they were able, would seek class certification, it brings the added difficulty of class certification in indirect purchaser lawsuits. *See generally* Chris S. Coutroulis & D. Matthew Allen, *The Pass-on Problem in Indirect Purchaser Class Litigation*, 44 ANTITRUST BULL. 179, 184-86 (Spring 1999). It is enough to acknowledge that a significant number of lawsuits from indirect purchaser plaintiffs in an *Illinois Brick* repealer state are defeated through a denial of class certification. *See id.* at 187; *see also* William H. Page, *The Limits of State Indirect Purchaser Suits: Class Certification in the Shadow of Illinois Brick*, 67 ANTITRUST L.J. 1, 13 (1999).

39. *Ill. Brick Co.*, 431 U.S. at 734.

40. *See Hanover Shoe, Inc.*, 392 U.S. at 494. The overall deterrent effect of antitrust laws relies on four prongs of enforcement: the DOJ, the FTC, state attorneys general, and private parties, all bringing potential antitrust lawsuits against alleged antitrust violators. *See* E. THOMAS SULLIVAN & HERBERT HOVENKAMP, ANTITRUST LAW, POLICY AND PROCEDURE 69 (4th ed. 1999).

41. *Ill. Brick Co.*, 431 U.S. at 730. Some scholars hypothesize that trial judges are less likely to find liability for any indirect purchaser treble-damage antitrust claim, therefore reducing the liability rather than the amount of the damages awarded. *See, e.g.*, Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 OHIO ST. L.J. 115, 163 (1993).



“[p]rivate treble-damages actions brought by the masonry contractors, general contractors, and private builders were settled, without prejudice to [Illinois’] lawsuit.”<sup>42</sup> If direct purchasers were allowed to recover for the full amount of the overcharge for the monopoly price, then the indirect purchasers might be able to recover the same amount from the defendant absent a legal bar to their claim.<sup>43</sup> Lastly, the Court recognized that procedural devices would be ineffective in preventing this possible multiple liability, especially when potential parties had either received judgment or settlement in advance.<sup>44</sup>

Before *Hanover Shoe* and *Illinois Brick*, the Court had generally interpreted § 4 of the Clayton Act to protect all victims of antitrust violations.<sup>45</sup> In *Hanover Shoe* and *Illinois Brick*, however, the Court determined that neither the defensive use of “passing-on” in *Hanover Shoe*, nor the offensive use of “passing-on” were permitted. These rulings effectively limited an alleged antitrust violator’s litigation liability to its immediate purchasers.<sup>46</sup> The most prevailing reasons for an equal bar to a passing-on defense and a passing-on claim were the uncertainties and complexities the courts would face in accounting for damages to both direct purchasers and the amount of the overcharge passed onto indirect purchasers without overlapping liabilities to the defendant.<sup>47</sup>

This same complexity in litigation was a significant factor preventing *Illinois Brick* from abandoning altogether the rule of *Hanover Shoe*.<sup>48</sup> While the Court deferred somewhat to *stare decisis* in refusing to overturn *Hanover Shoe*,<sup>49</sup> the main reason for expanding *Hanover Shoe* to limit offensive use of passing-on was to prevent “whole new dimensions of complexity” to treble-damage lawsuits and increasing judicial economy.<sup>50</sup>

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42. *Ill. Brick Co.*, 431 U.S. at 727 n.5.

43. *Id.* at 730. The converse of this would also be true. *Id.* If the indirect purchaser was able to recover all, or part, of the monopoly overcharge before the direct purchaser, then the direct purchaser might be able to recover the full amount of the monopoly charge and the defendant would incur the multiple liability. *Id.*

44. *Id.* at 731 n.11. The impact of settled antitrust cases on damages awards cannot be underestimated. One study conducted on over 2,350 antitrust cases filed between 1973 and 1983, in five district courts, found that almost three-fourths of the private party antitrust lawsuits settled. Steven C. Salop & Lawrence J. White, *Economic Analysis of Private Party Antitrust Litigation*, 74 GEO. L.J. 1001, 1010 (1986).

45. *See Ill. Brick Co.*, 431 U.S. at 729, 748; *see also supra* notes 17-19 and accompanying text.

46. *See Beane, supra* note 27, at 363.

47. *Ill. Brick Co.*, 431 U.S. at 731 n.11.

48. *Id.* at 737-38.

49. *Id.* at 736-37.

50. *Id.* at 737. The Court feared both the complexity of the accounting and the complexity of bringing all of the potential plaintiffs through joinder, rendering private antitrust enforcement ineffective. *See id.* at 739-40. For a discussion of the economic complexities supporting *Illinois Brick*, *see Wil-*

The Court also suggested two exceptions to *Illinois Brick* that lower courts have embraced to varying degrees.<sup>51</sup> A cost-plus exception exists for those indirect purchaser plaintiffs that purchase products under a fixed mark-up, fixed quantity contract negotiated prior to the alleged monopoly price increase.<sup>52</sup> The second exception occurs "where the direct purchaser is owned or controlled by its customer."<sup>53</sup>

### C. *The Illinois Brick Repealers*

*But the ruling in Illinois Brick creates a situation equally or even more unfair. It permits the middleman to collect twice—to reap the profits of overcharges from the consumer, and then to charge the manufacturer for the illegality. And it leaves the one party injured in fact—the consumer—wholly uncompensated.*<sup>54</sup>

The congressional backlash to *Illinois Brick*'s interpretation of the Clayton Act was quick, but ineffective. Justice White's request to Congress to amend § 4 of the Clayton Act<sup>55</sup> went effectively unanswered.<sup>56</sup> State legislatures and state appellate courts were more receptive to "repealing"<sup>57</sup> *Illinois Brick* in applications of their respective state anti-

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liam 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); but see Harris & Sullivan, *supra* note 3.

51. *Ill. Brick Co.*, 431 U.S. at 735.

52. *Id.* at 733 n.12, 735-36.

53. *Id.* at 736 n.16. Davidson's claim had hoped to fall under either of these exceptions but failed. See *infra* note 103. For a synopsis of these exceptions, see Herbert Hovenkamp, *The Indirect-Purchaser Rule and Cost-Plus Sales*, 103 HARV. L. REV. 1717, 1718-20 (1990).

54. 125 CONG. REC. 1459 (1979) (statement of Sen. E. Kennedy). Legal and business scholars agree that "it is virtually certain that no part of the [antitrust damages] award will find its way to the indirect purchasers who bore part or all of the offensive price increase." Harris & Sullivan, *supra* note 3, at 298.

55. *Ill. Brick Co.*, 431 U.S. at 733 n.14. Senator Kennedy and Congressman Rodino introduced legislation to repeal the Court's holding in *Illinois Brick* in 1978 and 1979, but failed to have their bills passed by Congress. Harris & Sullivan, *supra* note 3, at 271-72. The *Illinois Brick* ruling may have been a particularly bitter pill for Congressman Rodino, co-sponsor of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 15(c) (1976), when Justice White effectively rendered the Hart-Scott-Rodino Act useless in interpreting a private party's cause of action as an indirect purchaser because of its "unclear intent" concerning the passing-on issues present in *Hanover Shoe*. See *Ill. Brick Co.*, 431 U.S. at 733 n.14; see also 122 CONG. REC. 30883 (1976) (statement of Rep. Flowers).

56. For a list of federal circuit courts and cases that authorized indirect purchasers in an antitrust treble-damage claim and were subsequently overruled, see *Ill. Brick Co.*, 431 U.S. at 754 n.10.

57. Federal antitrust laws, based on the Commerce Clause, Article I, Section 8 of the Constitution, are not repealed by an act of state sovereignty. Rather, the "*Illinois Brick* repealer" is a subtle misnomer; the *Illinois Brick* repealers simply allow a cause of action to indirect purchasers pursuant to state anti-

trust statutes. Since *Illinois Brick*, several states have generally allowed some type of indirect purchaser claims for damages pursuant to state antitrust or consumer protection laws.<sup>58</sup>

For purposes of this discussion, states allowing indirect purchasers an antitrust cause of action for damages generally fall into one of two categories.<sup>59</sup> The first category of states are those with explicit repealer statutes. An explicit *Illinois Brick* repealer statute will generally allow indirect purchasers to bring claims for plaintiffs in one, or any combination of the following: (1) state and political subdivisions as indirect purchasers; (2) state attorney generals as *parens patriae* on behalf of citizens that are indirect purchasers; and (3) private party indirect purchasers.<sup>60</sup>

These explicit repealer statutes survived judicial scrutiny in *ARC America* when the Supreme Court held that *Illinois Brick* did not preempt state antitrust laws allowing claims from indirect purchasers.<sup>61</sup>

trust law where a similar claim under federal law would be barred and where federal statutes do not preempt state law. See *infra* notes 61-68 and accompanying text.

58. See Kevin J. O'Connor, *Is the Illinois Brick Wall Crumbling?*, 15 ANTITRUST 34, 34-35 (2001); see also Greene et al., *supra* note 3, at 1153-55.
59. Professor O'Connor actually describes three categories of indirect purchaser actions for damages: (1) by, or on behalf of, indirect purchasers; (2) on behalf of state indirect purchasers; and (3) on behalf of consumers, under either consumer protection or unfair trade practices laws. O'Connor, *supra* note 58, at 34-35. In comparison, Professor Page preferred categorizing indirect purchaser suits into two broad categories: (1) states that allow indirect purchaser suits with explicit *Illinois Brick* repealers; and (2) states that allow indirect purchaser claims based on antitrust or consumer protection statutes predating the *Illinois Brick* decision. Page, *supra* note 38, at 2.
60. See *Ill. Brick Co.*, 431 U.S. at 733 n.12, 735-36. For an example of a statute with *Illinois Brick* repealers through consumer protection laws, see CONN. GEN. STAT. §§ 35-32, 35-35 (1997) (allowing the Attorney General to "bring an action . . . as . . . *parens patriae* for persons residing in the state" and "[t]he state . . . shall recover treble damages"). For examples of states with complete explicit *Illinois Brick* repealers, see ALA. CODE § 6-5-60(a) (1993) (allowing recovery by "[a]ny person . . . injured or damaged . . . direct or indirect"); CAL. BUS. & PROF. CODE § 16750(a) (West 1997) (allowing recovery "regardless of whether such injured person dealt directly or indirectly with the defendant"); MINN. STAT. § 325D.57 (1995) (allowing recovery by any person "injured directly or indirectly"); and MISS. CODE ANN. § 75-21-9 (1999) ("any person . . . injured or damaged . . . direct or indirect").
61. 490 U.S. 93, 103 (1989) (holding that state indirect purchaser statutes were not preempted because *Illinois Brick* was an interpretation of § 4 of the Clayton Act and as such has no bearing on the availability of recovery to indirect private purchasers under state antitrust laws). It is an item of antitrust trivia that Justice White authored *Hanover Shoe, Illinois Brick*, and *ARC America*, explicitly barring a federal indirect passing-on defense and offense, and permitting states the opportunity to create such indirect defensive and offensive passing-on rights. *Id.* at 103; see also *Ill. Brick Co.*, 431 U.S. at 735-36; *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 488 (1968).

In *ARC America*, appellant California sought treble damages as an indirect purchaser pursuant to the establishment of a settlement fund in a cement antitrust class action.<sup>62</sup> The trial court and the Ninth Circuit held that the direct purchasers, including ARC America, should receive the distribution of the \$32 million settlement fund because indirect purchasers were barred from recovery under *Illinois Brick*.<sup>63</sup> The Ninth Circuit further reiterated the three purposes behind *Illinois Brick* as follows: "avoiding unnecessarily complicated litigation; providing direct purchasers with incentives to bring private antitrust actions; and avoiding multiple liability of defendants."<sup>64</sup>

In overturning the Ninth Circuit, the Court explained that *Illinois Brick* was merely a judicial interpretation of the Clayton Act, not a "decision defining the interrelationship between the federal and state antitrust laws."<sup>65</sup> Because federal antitrust laws like the Sherman and Clayton Acts were created to allow federal antitrust law to *supplement* existing state antitrust statutes and common law,<sup>66</sup> there was neither express preemption by Congress nor an "obstacle to the accomplishment" of Congress' objectives by enforcing a seemingly contrary state antitrust statutory scheme.<sup>67</sup> Lastly, the Court explained that indirect purchaser claims pursuant to state antitrust laws would have no effect on lessening the incentive of direct purchasers in pursuing their federal claims in federal courts.<sup>68</sup>

The second category of states repealing *Illinois Brick* are those states that recognize indirect purchasers having an antitrust cause of action in their existing antitrust statutes.<sup>69</sup> These state appellate courts sim-

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62. *ARC Am. Corp.*, 490 U.S. at 97-99.

63. *Id.* at 99.

64. *Id.* (citing *In re Cement & Concrete Antitrust Litig.*, 817 F.2d 1435, 1445 (9th Cir. 1987)).

65. *Id.* at 105.

66. *See id.* at 102 (interpreting 21 CONG. REC. 2457 (1890) (remarks of Sen. Sherman)); *see also* MORRIS D. FORKOSCH, ANTITRUST AND THE CONSUMER, 32-170 (1956) (analyzing the legislative history of the Sherman Act).

67. *ARC Am. Corp.*, 490 U.S. at 102. The Court further explained that state antitrust laws achieved the same purpose as federal antitrust laws; "detering anticompetitive conduct and ensuring compensation of victims of that conduct." *Id.*

68. *Id.* at 104. Some scholars attribute the decision in *ARC America* as a victory for Reagan Federalism. For a recent article addressing this topic, see Donald I. Baker, *Federalism & Futility: Hitting the Potholes on the Illinois Brick Road*, 17 ANTITRUST 14 (2002).

69. *See generally* *Bunker's Glass Co. v. Pilkington PLC*, 47 P.3d 1119 (Ariz. Ct. App. 2002) (interpreting section 44-1408 of the 1994 Arizona Revised Statutes to include a cause of action for indirect purchasers without explicit statutory language repealing *Illinois Brick*); *Comes v. Microsoft Corp.*, 646 N.W.2d 440 (Iowa 2002) (interpreting section 553.12 of the 1997 Iowa Code to include a cause of action for all purchasers, including indirect purchasers, without explicit statutory language repealing *Illinois Brick* and despite legislative directive to be guided by federal antitrust interpretations); *Hyde v. Abbot Labs.*, 473 S.E.2d 680 (N.C. Ct. App. 1996) (interpreting

ply interpret seemingly ambiguous state antitrust statutes as including all purchasers, including indirect purchasers.

D. *The Maryland Antitrust Act*<sup>70</sup>

*"It is the intent of the General Assembly that, in construing this subtitle, the courts be guided by the interpretation given by the federal courts to the various federal statutes dealing with the same or similar matters . . . ."*<sup>71</sup>

In 1972, the Maryland General Assembly enacted House Bill No. 1, the MATA, which is codified at sections 11-201 to 11-213 of the Commercial Law Article of the Maryland Code.<sup>72</sup> The MATA was the first explicit statutory regulation of antitrust activity under Article 41 of the Maryland Declaration of Rights.<sup>73</sup>

Section 11-202 of the Maryland Commercial Code states the general purpose and construction of the MATA.<sup>74</sup> Three provisions of this section are relevant to the discussion of *Davidson*.

First, the General Assembly "declares that the purpose of this subtitle is to complement the body of federal law governing restraints of trade . . . ."<sup>75</sup> When this guidance is coupled with the Supreme Court's view of federal antitrust law in *ARC America*, namely that fed-

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section 75-16 of the 1990 North Carolina General Statutes to include indirect purchasers without an explicit directive because the Rule of *Illinois Brick* did not exist when the statute was drafted in 1969). *But see* Major v. Microsoft Corp., 60 P.3d 511, 513 (Okla. Civ. App. 2002) (interpreting section 205 of the 2002 Oklahoma Antitrust Reform Act, allowing "any person who is injured," as consistent with federal antitrust laws and thus precluding an indirect purchaser claim).

70. The MATA refers to both the original legislation and the current antitrust statute. MD. CODE ANN., COM. LAW II § 11-213 (2000). This comment will refer to both the original 1972 act, as codified in 1975, and the current statute as the MATA; however, references to the 1975 statute that have been amended or changed will be cited accordingly. Likewise, the MATA provisions that have remained unchanged since 1972 will be cited to the 2000 code.

71. *Id.* § 11-202 (emphasis added).

72. William L. Reynolds, II & James B. Wright, *A Practitioner's Guide to the Maryland Antitrust Act*, 36 MD. L. REV. 323, 323 & n.2 (1976).

73. *Id.* at 323. "[M]onopolies are odious, contrary to the spirit of free government and the principles of commerce, and ought not to be suffered." MD. CONST. art. 41. Despite this historic first codification of Maryland's constitutional antitrust powers, there were no reported private actions under the MATA during its first four years of existence. Reynolds & Wright, *supra* note 72, at 349. In comparison, three cases touching the MATA, including *Davidson v. Microsoft*, have been reported between 1999 and 2002. *See* Martello v. Blue Cross & Blue Shield of Md., Inc., 143 Md. App. 462, 795 A.2d 185 (2002); *Davidson II*, 143 Md. App. 43, 792 A.2d 336 (2002); *Electronics Store, Inc. v. Cellco P'ship*, 127 Md. App. 385, 732 A.2d 980 (1999).

74. MD. CODE ANN., COM. LAW II § 11-202.

75. *Id.* § 11-202(a)(1).

eral antitrust laws were designed to complement existing state and common law antitrust laws, it creates a curious statutory interpretation scheme similar to the “chicken-egg” truism.<sup>76</sup> If a deciding court were to interpret an ambiguous Maryland antitrust law, it would be guided by section 11-202(a)(1) to interpret the law as complementing existing federal law.<sup>77</sup> Under *ARC America*, those same federal statutory interpretations would be guided by legislative history from 1890, which indicates that federal antitrust laws merely “supplement, not displace, state antitrust remedies.”<sup>78</sup> In turn, if the antitrust issue was sufficiently ambiguous within the statute, this federal interpretation could lead the court back to 1867 and the Maryland Declaration of Rights for a common law solution, if one existed.

Second, section 11-202(a)(2) states that courts should be “guided by the interpretations given by the federal courts to the various federal statutes dealing with the same or similar matters . . . .”<sup>79</sup> This same section also explicitly lists the Clayton Act as one of the federal statutes to “guide” the Maryland courts.<sup>80</sup> Within six years of the passage of the MATA, this guidance was held to be only persuasive, not binding, for interpreting Maryland antitrust statutes.<sup>81</sup>

Lastly, section 11-201 lists an additional consideration for a court in interpreting its statutory language. Section 11-201(b) provides “this subtitle shall be liberally construed to serve its beneficial purposes.”<sup>82</sup>

In civil antitrust lawsuits, section 11-209 of the 1975 Maryland Commercial Code created causes of actions for both the state and for “a person.”<sup>83</sup> Subsection (b)(1) pertained explicitly to the United States, the state, and political subdivisions of the state, while subsection (b)(2) controlled lawsuits by private parties.<sup>84</sup> In the original MATA,

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76. “Which came first, the chicken or the egg?” See *supra* notes 65-68 and accompanying text.

77. See MD. CODE ANN., COM. LAW II § 11-202(a)(1).

78. *California v. ARC Am. Corp.*, 490 U.S. 93, 102 (1989). See *supra* notes 61-68 and accompanying text.

79. MD. CODE ANN., COM. LAW II § 11-202(a)(2).

80. *Id.*

81. *Quality Disc. Tires v. Firestone Tire & Rubber Co.*, 282 Md. 7, 12, 382 A.2d 867, 870 (1978) (holding that section 11-202(a)(2) of the Commercial Law Article of the Maryland Code advises a court “[to] be guided (but not bound) by the opinions of the federal courts under the federal antitrust laws” in determining the legal standard for a resale price maintenance claim under Maryland law). *But see* *State v. Jonathan Logan, Inc.*, 301 Md. 63, 66-67, 482 A.2d 1, 2 (1984) (explaining that § 4 of the Sherman Act is “analogous” to section 11-209(a) of the Commercial Law Article of the Maryland Code).

82. MD. CODE ANN., COM. LAW II § 11-202(b)(1).

83. MD. CODE ANN., COM. LAW § 11-209(b) (1975) (amended 1982).

84. *Id. Compare* “[t]he United States, the State, and any political subdivision organized under the authority of the State is a person having standing to bring an action under this subsection” with “[a] person whose business or property has been injured or threatened with injury by a violation of [section] 11-204 may maintain an action for damages or for an injunction or

there is no explicit mention of either a direct purchaser or indirect purchaser cause of action.<sup>85</sup>

After *Illinois Brick*, the Maryland General Assembly amended the MATA in 1982, explicitly allowing the state and its agencies to bring claims as indirect purchasers pursuant to Maryland law.<sup>86</sup> This partial *Illinois Brick* repealer made no mention of either allowing or preventing private individual indirect claims for treble damages. While Maryland remained guided by federal antitrust jurisprudence in accordance with section 11-202 (a) (2) of the MATA,<sup>87</sup> this "guidance" left the Maryland antitrust law ambiguous and open to interpretation for indirect purchaser antitrust claims made by private parties.<sup>88</sup>

#### IV. THE INSTANT CASE: *DAVIDSON V. MICROSOFT CORPORATION*

*"[A]ppellee had engaged in business practices in violation of federal antitrust laws."<sup>89</sup>*

##### A. *Factual and Procedural Analysis of Davidson*

In March 2000, Bobby Davidson and Tri-County Industries, two unrelated plaintiffs, brought suit against the Microsoft Corporation in the Circuit Court for Prince George's County on behalf of a class of Maryland consumers pursuant to the MATA.<sup>90</sup> Both Mr. Davidson and Tri-County had purchased computers in 1999 containing Microsoft Windows 98 software.<sup>91</sup> Both had also registered the owner-

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both against any person who has committed the violation." *Id.* Title 11 defines a person as "an individual, corporation, business trust, estate, trust, partnership, association, two or more persons having a joint or common interest, or any other legal or commercial entity." MD. CODE ANN., COM. LAW II § 11-201(f) (2000).

85. MD. CODE ANN., COM. LAW § 11-209(b) (1975) (amended 1982).

86. MD. CODE ANN., COM. LAW II § 11-209(b)(2)(ii) (2000). *See supra* note 6 and accompanying text.

87. *See supra* notes 75-81 and accompanying text.

88. *See* MD. CODE ANN., COM. LAW II § 11-202(a)(2). *See generally* 6 JULIAN O. VON KALINOWSKI, ANTITRUST LAWS & TRADE REGULATION § 120.08[1][e] (2d ed. 2003) (noting that, before *Davidson*, private party indirect purchaser claims for damages were probably barred in Maryland).

89. *Davidson II*, 143 Md. App. at 46, 792 A.2d at 338.

90. *Id.* at 45, 792 A.2d at 338; *Davidson I*, 2001 WL 514369, at \*1.

91. *Davidson I*, 2001 WL 514369, at \*1. The plaintiffs subsequently amended their complaint on January 26, 2001 to include a claim under the Maryland Consumer Protection Act alleging that Microsoft "failed to inform the plaintiffs that it was a monopoly and that it had illegally set the price of Windows 98." *Id.* at \*2. The trial court later held that there was no such violation and dismissed this claim. *Id.* The court of special appeals later unanimously affirmed this dismissal in *Davidson II*. 143 Md. App. at 57, 792 A.2d at 345.

ship of that software with Microsoft in accordance with the corporation's End-User License Agreement ("EULA").<sup>92</sup>

Concurrent with the Maryland antitrust claim was a similar action in the United States District Court for the District of Maryland. Pursuant to federal antitrust laws regarding the Microsoft operating system software and its interference with Java technology, Internet Web browsers, and office software applications, Judge Frederick Motz consolidated sixty-one claims against Microsoft.<sup>93</sup>

The plaintiffs' memorandum opposing both Microsoft's Motion to Dismiss and Motion for Summary Judgment specified the importance of the EULA between Microsoft and the end-user.<sup>94</sup> These EULAs were described as "take it or leave it" propositions that must be entered when the end-user first "chooses" to use the software.<sup>95</sup> The court stated that these contracts transfer a user license to the end-user; neither the end-user nor the original equipment manufacturer ("OEM") ever purchase or receive title to the software during the transaction.<sup>96</sup>

Judge Motz's decision dismissed all of the claims brought by indirect purchasers pursuant to *Illinois Brick*.<sup>97</sup> Although the plaintiffs did not directly purchase the software from Microsoft, they alleged that the actual product purchased was the EULA, which "ran directly between Microsoft and themselves."<sup>98</sup> The court acknowledged that, while the EULA was a licensing agreement directly between Microsoft and the consumer, the actual purchase of this perpetual license of the operating system software occurred between Microsoft and the OEM, and then between the OEM and the consumer.<sup>99</sup>

On February 14, 2001, the trial court in *Davidson I* dismissed the MATA claim.<sup>100</sup> The trial court explained that Maryland had "cho-

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92. *Davidson I*, 2001 WL 514369, at \*1.

93. *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 704-08 (D. Md. 2001). As a result of the federal criminal antitrust lawsuit showing that Microsoft had exercised illegal monopoly power in violation of § 2 of the Sherman Act, seventy-three antitrust cases against Microsoft were not consolidated in Judge Motz's court because they provided no basis for federal jurisdiction. *Id.* at 705 n.1. Fifty-eight of those cases were pending at the time of Judge Motz's decision. *Id.*

94. *Id.* at 705-06.

95. *Id.* at 706.

96. *Id.* In fact, the OEM's sole function in the EULA is merely to deliver the EULA to the end-user; the OEMs have a separate license with Microsoft allowing them to pre-install Microsoft software on their computers. *Id.* at 705-06.

97. *Id.* at 709-13.

98. *Id.* at 709.

99. *Id.* Judge Motz's opinion also discussed claims of foreign parties, plaintiffs' motion for remand, dismissal of some antitrust claims under their respective state laws, and an order certifying his decision for an interlocutory appeal under 28 U.S.C. § 1292. *Id.* at 705.

100. *Davidson I*, 2001 WL 514369, at \*2.



sen” to “conform” the MATA to federal law in accordance with section 11-202 of the Maryland Commercial Code.<sup>101</sup> In turn, the court held that end-users, like Mr. Davidson and Tri-County, were indirect purchasers, in spite of the “direct” EULA between Microsoft and the plaintiffs.<sup>102</sup> Because there was no explicit mention of an *Illinois Brick* repealer for private indirect purchasers, and section 11-209(b)(1) did provide a state indirect purchaser claim, the trial court held that the Rule of *Illinois Brick* barred the plaintiffs’ claim.<sup>103</sup>

### B. Legal Analysis of Davidson

The issue before the court in *Davidson II* was limited to the statutory construction of sections 11-202 and 11-209 of the MATA.<sup>104</sup> Judge James Eyler’s majority opinion interpreted the guidance of section 11-202(a)(2) as a directive: “courts are to be guided by the interpretation given by federal courts to the various federal statutes dealing with the same or similar matters.”<sup>105</sup> While the majority buttressed its interpretation of section 11-209 with other arguments, its main argument rested in its view of federal precedent as binding through section 11-202.<sup>106</sup>

In interpreting section 11-202, the majority relied on *State v. Jonathan Logan, Inc.*, a state antitrust lawsuit regarding a resale price maintenance conspiracy in raincoats.<sup>107</sup> The court in *Jonathan Logan, Inc.* interpreted section 11-209(a)(2) of the Commercial Code and held that an equity court could not award disgorgement where the statute was silent to that specific remedy.<sup>108</sup> Where the statute is silent, *Jonathan Logan, Inc.* further explained, it should be guided by federal interpretations of the federal statutory analog in accordance with the policy of section 11-202.<sup>109</sup> Because analogous federal anti-trust laws did not permit an equity judgment under an analogous statute, neither did the MATA.<sup>110</sup>

Judge Sonner’s dissent in *Davidson II* discounted the majority’s interpretation of section 11-202 and reliance on *Jonathan Logan, Inc.*<sup>111</sup> Judge Sonner explained that the majority erroneously interpreted the

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101. *Id.* at \*1. See *supra* notes 79-81 and accompanying text.

102. *Davidson I*, 2001 WL 514369, at \*2.

103. *Id.* at \*1. Judge Lamasney also held that neither of the two *Illinois Brick* exceptions—a cost plus contract or ownership of the direct purchaser—applied. *Id.* at \*2. See *supra* notes 51-53 and accompanying text for more analysis of these exceptions.

104. See *Davidson II*, 143 Md. App. at 49-51, 792 A.2d at 340-41.

105. *Id.* at 50, 792 A.2d at 340-41 (citing MD. CODE ANN., COM. LAW II § 11-202(a)(2) (2000)). See *supra* notes 79-81 and accompanying text.

106. See *Davidson II*, 143 Md. App. at 50-51, 792 A.2d at 340-41.

107. 301 Md. 63, 64, 482 A.2d 1, 1 (1984).

108. See *id.* at 70-76, 482 A.2d at 4-8.

109. *Id.* at 75, 482 A.2d at 7.

110. See *id.*

111. *Davidson II*, 143 Md. App. at 63-64, 792 A.2d at 348-49.

guidance in section 11-202 as binding, rather than as a permissive inference as described in *Quality Discount Tires v. Firestone Tire*.<sup>112</sup> He further explained that where the MATA may be ambiguous, Maryland courts are free to interpret the statute contrary to federal law.<sup>113</sup>

The majority continued its analysis of section 11-209(b).<sup>114</sup> While it stated that “[a] person . . . may maintain an action for damages,” the statute made no explicit mention of private parties as indirect purchasers.<sup>115</sup> Next, the court defined a person as “an individual, corporation, business trust, estate, trust, partnership, association, two or more persons . . . .”<sup>116</sup> The court held that this definition did “not purport to address the *Illinois Brick* issue.”<sup>117</sup> Thus, the majority held that the MATA was sufficiently ambiguous to require guidance from federal interpretations of *Illinois Brick*.<sup>118</sup>

The majority further buttressed its argument with evidence of indirect legislative history.<sup>119</sup> In 1981, the Maryland General Assembly failed to pass an explicit *Illinois Brick* repealer statute for all plaintiffs.<sup>120</sup> In 1982, section 11-209(b)(2) was amended, allowing the state and its agencies to bring indirect purchaser lawsuits, but was silent as to private parties.<sup>121</sup>

The court also mentioned Senate Bill 484, which was drafted in 2001 to explicitly allow a cause of action for indirect purchasers.<sup>122</sup> The court explained in dicta that the bill’s introduction and subsequent defeat in the Senate Judicial Committee by a six-to-five vote indicated that there was no recognition of a private party indirect purchaser claim in the MATA.<sup>123</sup>

While the majority recognized that its reliance on Senate Bill 484’s defeat was dicta, its reliance on Senate Bill 484 is further weakened in that it failed to explain that Senate Bill 484 also proposed more than a mere *Illinois Brick* repealer.<sup>124</sup> Senate Bill 484 actually proposed two changes to the MATA.<sup>125</sup> First, it specifically proposed the repeal of the Rule of *Illinois Brick* for private party indirect purchasers.<sup>126</sup> Sec-

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112. *Id.* See *supra* note 81 and accompanying text.

113. *Davidson II*, 143 Md. App. at 61, 792 A.2d at 347 (citing *Greenbelt Homes, Inc. v. Nyman Realty, Inc.*, 48 Md. App. 42, 48, 426 A.2d 394, 398 (1981)).

114. *Id.* at 49, 792 A.2d at 340.

115. *Id.*

116. *Id.* at 50, 792 A.2d at 340 (explaining MD. CODE ANN., COM. LAW II § 11-201(f) (2000)). See *supra* note 84.

117. *Davidson II*, 143 Md. App. at 50, 792 A.2d at 340.

118. See *id.* at 50-51, 56, 792 A.2d at 340-41, 344.

119. *Id.* at 51, 792 A.2d at 341.

120. *Id.*

121. *Id.* See *supra* notes 86-88 and accompanying text.

122. *Davidson II*, 143 Md. App. at 51 & n.4, 792 A.2d at 341 & n.4; S. 484, 2001 Leg., 415th Sess. (Md. 2001).

123. *Davidson II*, 143 Md. App. at 51 & n.4, 792 A.2d at 341 & n.4.

124. *Id.*

125. S. 484, 2001 Leg., 415th Sess. (Md. 2001).

126. *Id.*

ond, it proposed to overturn *Jonathan Logan, Inc.* and explicitly allow the Attorney General to bring a *parens patriae* action for damages on behalf of Maryland consumers.<sup>127</sup>

The court concluded its opinion with a brief explanation of the guiding policies of the Rule of *Illinois Brick*.<sup>128</sup> Judge James Eyler's majority opinion specifically cited the concern addressed in *Hanover Shoe* regarding the "massive evidence and complicated theories" involved in calculating the actual overcharge passed-on to the consumer/indirect purchaser.<sup>129</sup> Satisfied that the circuit court's holding met both the legal doctrine and the relevant public policy of *Illinois Brick*, the court of special appeals affirmed the lower court's dismissal of the indirect purchaser's antitrust claim.<sup>130</sup>

In contrast, Judge Sonner countered the majority's policy argument behind *Illinois Brick* concerning the effectiveness of antitrust enforcement through private party lawsuits.<sup>131</sup> Normally, direct purchasers, by virtue that they faced both the entire monopoly price and suffered the largest monopoly damages, have the greatest incentive to bring a complex, expensive antitrust lawsuit.<sup>132</sup> With the advent of internet browsers and modern personal computers, Judge Sonner recognized that there had been a fundamental change of circumstances since *Illinois Brick* in 1977.<sup>133</sup> When software direct purchasers have a greater incentive to sell the monopoly product at the monopoly price, and the indirect purchasers are estopped by a judicial bar, there is no private party entering antitrust litigation and thus, no deterrent effect.<sup>134</sup>

After countering the majority's interpretation of both section 11-202 and the policy behind *Illinois Brick*, the dissent argued that claims by indirect purchasers were permitted within section 11-209.<sup>135</sup> Recognizing that the MATA section 11-209 serves the "same purpose" as the Clayton Act,<sup>136</sup> Judge Sonner explained that section 11-209 purports no explicit distinction between a "person" as a direct or indirect purchaser in an antitrust claim.<sup>137</sup>

Judge Sonner turned to statutory construction to determine the legislature's intent, stating that "there is no ambiguity, and we may not

127. *Id.*

128. *Davidson II*, 143 Md. App. at 47-50, 792 A.2d at 339-40. See *supra* Part II.A-B.

129. *Davidson II*, 143 Md. App. at 48-49, 792 A.2d at 340 (citing *Ill. Brick Co.*, 431 U.S. 720, 741 (1977) (explaining *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968))). See *supra* notes 27-53 and accompanying text.

130. *Davidson II*, 143 Md. App. at 56-57, 792 A.2d at 344-45.

131. *Id.* at 57-64, 792 A.2d at 345-48 (Sonner, J., dissenting).

132. See *id.* at 61 n.2, 792 A.2d at 347 n.2 (citing *Hanover Shoe, Inc.*, 392 U.S. at 494).

133. *Id.* at 59, 792 A.2d at 346.

134. See *id.*; *supra* note 40 and accompanying text (describing the four prongs of antitrust deterrence).

135. *Davidson II*, 143 Md. App. at 59-63, 792 A.2d at 346-48.

136. *Id.* at 60, 792 A.2d at 346.

137. *Id.* at 62, 792 A.2d at 348.

find one where none exists."<sup>138</sup> The statutory purpose of the MATA, pursuant to section 11-202, is "to protect the public and foster fair and honest intrastate competition."<sup>139</sup> The Maryland General Assembly recommended a liberal construction<sup>140</sup> "that harmonizes the general scheme of the statute."<sup>141</sup> Lastly, Judge Sonner warned the majority that statutory construction should rely on the General Assembly's actions, not the General Assembly's failure to act in not explicitly providing for an indirect purchaser remedy.<sup>142</sup>

Judge Sonner concluded his argument with the holding in *ARC America* that federal antitrust law had not preempted the field of state antitrust law.<sup>143</sup> Recognizing that state antitrust law was not preempted by federal law, Judge Sonner cited several jurisdictions that, pursuant to state antitrust law, allowed claims by an indirect purchaser in cases where the indirect purchaser provisions were ambiguous.<sup>144</sup>

#### V. ECONOMIC ANALYSIS REVEALS THE THEORETICAL UNDERPINNINGS OF *ILLINOIS BRICK*

*"[T]his Court has reconsidered its decisions construing the Sherman Act when the theoretical underpinnings of those decisions are called into serious question."*<sup>145</sup>

The court of special appeals failed to reach the economic underpinnings of the Rule of *Illinois Brick* in *Davidson*. Relying on a quarter-century old legal principle in an area of law significantly influenced by economic theory, Maryland's first reported decision embraces the Rule of *Illinois Brick* where it is not explicitly repealed.<sup>146</sup> As such, private persons, as indirect purchasers, are legally barred from damage claims pursuant to the MATA.<sup>147</sup> While indirect purchasers can

138. *Id.* "We must apply principles of construction that render a common sense reading of statutory terms in light of the overriding purpose and goal of the statute." *Id.* (citing *Haigley v. Dept. of Health & Mental Hygiene*, 128 Md. App. 194, 222, 736 A.2d 1185, 1200 (1999) (quoting *Martin v. Beverage Capital Corp.*, 353 Md. 388, 399, 726 A.2d 728, 734 (1999))).

139. *Id.* (quoting MD. CODE ANN., COM. LAW II § 11-202(a)(1) (2000)).

140. *Id.* (quoting MD. CODE ANN., COM. LAW II § 11-202(b)(1)).

141. *Id.* (citing *Smith v. Higinbothom*, 187 Md. 115, 125, 48 A.2d 754, 759 (1946)).

142. *Id.* at 62-63, 792 A.2d at 348 (citing *Police Comm'r of Baltimore City v. Dowling*, 281 Md. 412, 420-21, 379 A.2d 1007, 1012 (1977)).

143. *Id.* at 63, 792 A.2d at 348 (citing *California v. ARC Am. Corp.*, 490 U.S. 93, 105-06 (1989)).

144. *See id.* at 64, 792 A.2d at 349 (citing *Hyde v. Abbott Labs., Inc.*, 473 S.E.2d 680, 683 (N.C. Ct. App. 1996); *Blake v. Abbott Labs., Inc.*, 1996 WL 134947, at \*3 (Tenn. Ct. App. Mar. 27, 1996)); *see also supra* note 69 and accompanying text.

145. *State Oil Co. v. Khan*, 522 U.S. 3, 21 (1997) (Stevens, J., dissenting).

146. *See supra* note 6 and accompanying text.

147. *Davidson II*, 143 Md. App. at 52, 792 A.2d at 342. The Rule of *Illinois Brick* may be re-examined by the Supreme Court in *Verizon Communications, Inc.*

seek injunctive relief, they are forced to rely on direct purchasers to deter exercises of monopoly power on the price of consumer goods.<sup>148</sup>

Barring these potential remedies, private party indirect purchasers seeking monetary damages pursuant to the MATA will need to either support legislation explicitly repealing the Rule of *Illinois Brick*, or provide a sufficient argument to overcome the underlying principles behind *Illinois Brick* as outlined in Part II. In either case, the discussion that follows is designed to facilitate that process by outlining both an applied and intrinsic economic course of action.

A. *Applied Analysis Demonstrates that Direct Purchasers May Have Neither the Most Effective Deterrent Effect on Antitrust Violators nor the Most Efficient Means to Uncover and Police Antitrust Violators*

An applied approach attacks the first two policy reasons behind the Rule of *Illinois Brick*: (1) that direct purchaser claims provide the most effective deterrence to antitrust violators; and (2) that direct purchasers will provide the most efficient means of both policing antitrust violators and litigating those violations in court.

First, the theory that direct purchasers provide “maximum deterrence” to bring private actions because they will bring the largest suits for treble damages is inherently flawed without sufficient empirical

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*v. Law Offices of Curtis Trinko, L.L.P.* Law Offices of Curtis Trinko, L.L.P. v. Bell Atlantic Corp., 305 F.3d 89 (2d Cir. 2002), cert. granted sub nom. Verizon Communications, Inc. v. Law Offices of Curtis Trinko, L.L.P., 123 S. Ct. 1480 (2003) (reviewing the Second Circuit’s reversal of the district court’s dismissal of Trinko’s antitrust claim). In *Law Offices of Curtis Trinko v. Bell Atlantic Corp.*, the Second Circuit allowed an indirect private party purchaser to bring suit pursuant to the Sherman Antitrust Act because the indirect purchaser was directly harmed when “it received poor phone service[, from then Bell Atlantic,] because it chose to do business with [the direct purchaser].” 294 F.3d 307, 324-25 (2d Cir. 2002). If Maryland courts continue to rely on federal guidance in interpreting Maryland’s antitrust law, pursuant to section 11-202 of the Commercial Law Code, then the Supreme Court’s ultimate resolution of *Verizon* might impact Maryland’s adherence to *Illinois Brick*.

148. See *Davidson II*, 143 Md. App. at 51, 792 A.2d at 341 (citing *State v. Jonathan Logan, Inc.*, 301 Md. 63, 64-65, 482 A.2d 1, 1-2 (1984)). The Rule of *Illinois Brick* prevents indirect purchaser claims for treble-monetary damages, not injunctive relief. See *supra* note 4. As such, a private party indirect purchaser could bring an action for injunctive relief in Maryland. MD. CODE ANN., COM. LAW II § 11-209(b) (2000). As a lesser alternative to injunctive relief, the court may order restitution to Maryland consumers of an alleged antitrust violator in equity proceedings brought by the Maryland Attorney General to prevent or restrain violations of MATA section 11-204. *Id.* § 11-209(a). While the statute explicitly permits restitution to “any person,” it also explicitly recognizes that the court “may” use “all equitable powers” to fashion an appropriate remedy. *Id.* § 11-209. This provision regarding restitution damages and all equitable remedies has not been exercised by the court in a reported opinion.

studies supporting this proposition.<sup>149</sup> Over the long term, direct purchasers will successfully pass-on 100% or more of the monopoly or cartel overcharge in a competitive market subject to constant returns to scale.<sup>150</sup> Some markets, based on maintaining a resale profit margin for the direct consumer, will pass-on more than 100% of the price increase in the long run.<sup>151</sup> Thus, many, if not most, direct purchasers would have no actual damages to claim against an alleged antitrust violator and, in turn, have no actual deterrent effect on antitrust conduct.

From an efficiency perspective, the issue is which party would be the most efficient litigator against the alleged antitrust violator. *Illinois Brick* supporters believe that direct purchasers have the lowest litigation cost and the greatest economic benefit.<sup>152</sup> This model has two weaknesses; the first is that over time, the economic incentive or benefit to a direct purchaser to pursue a private party antitrust claim is zero

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149. See Hovenkamp, *supra* note 53, at 1727.

150. *Id.* at 1726-27. Professor Hovenkamp describes the overall market effect as follows:

[I]f zero profits are earned by the marginal direct purchaser before the cartel or monopoly comes into existence, any absorption of overcharge will force at least some direct purchasers to earn negative returns. In the long run these dealers must exit from the market. Equilibrium will be restored when the marginal firm is once again earning zero returns . . . [when] the industry supply curve is perfectly elastic; thus the consumer price will go up by exactly as much as the overcharge. If the direct purchaser's resale market is competitive and subject to economies of scale, the final price to the consumers will actually increase by more than the cartel [or monopoly] overcharge . . . from the fact that costs go up as volume decreases in markets subject to scale economies.

*Id.* at 1726 n.45 (emphasis added) (citations omitted). Hovenkamp's fear was that in a competitive market, over time, where the majority of direct purchasers are dealers and retailers (like most American distribution markets), the bulk, if not all of the overcharge would be passed-on to the consumer. *Id.* at 1727.

151. See generally Robert L. Steiner, *The Third Relevant Market*, 45 ANTITRUST BULL. 719, 745-58 (Spring 2000). Steiner explained that the direct purchasers of tobacco from the tobacco cartel in the retail tobacco market would pass-on price increases to maintain gross retail margins and thus, exploit the monopoly overcharge. *Id.* For example, assume that cigarettes can be manufactured at the marginal price of \$0.90 and sold by a monopolist at a profitable market price of \$1.00. The retailers of cigarettes resell their cigarettes to consumers at an established gross margin of 20%, or \$1.20. If the cigarette monopolist raises the price of cigarettes to a monopoly price of \$2.00, the retailers will raise their prices to maintain their gross margin at 20%, or \$2.40. Thus, the indirect purchaser will see a \$1.40 price increase for the \$1.00 monopoly price increase. See *id.* Mr. Steiner also acknowledged in his study that economic models based on perfectly competitive markets often predict pass-through costs of less or more than 100%, depending on supply and demand calculation assumptions. *Id.* at 746-47.

152. See Landes & Posner, *supra* note 50, at 608-09.

or even negative.<sup>153</sup> The second weakness lies in the basis “that [direct] purchasers suspect and actively investigate possible antitrust violations,” and, by default, that direct purchasers are situated with the best information to pursue antitrust litigation.<sup>154</sup> The best source of information about an alleged antitrust violation is likely the violator’s employees themselves.<sup>155</sup>

Since the economic incentive for a direct purchaser in the long run and an employee with no actual injury is zero, neither has a particularly significant *economic incentive* to bring an antitrust lawsuit, which would provide a deterrent effect against an alleged antitrust violator. The employee of the alleged antitrust violator, however, by virtue of his or her *actual information*, would be the most efficient party to police antitrust violators. In contrast, the direct purchaser, for fear of retaliation by the monopoly manufacturer, may make a business decision not to pursue antitrust litigation.

*B. Incidence Analysis Can Effectively Demonstrate Pass-Through Costs to Consumers in Modern Markets*<sup>156</sup>

The policy underpinning *Illinois Brick* susceptible to intrinsic economic analysis is that of the allegedly complex calculations required to show pass-through of the monopoly overcharge by the intermediary and direct purchasers to the ultimate indirect purchaser—the consumer.<sup>157</sup> When calculating indirect purchaser damages, in contrast to direct purchaser damages, the burden on showing indirect purchaser damages in *Illinois Brick* in 1977 seems daunting.<sup>158</sup> Modern economists have produced reasonable calculations for estimating pass-through costs to indirect purchasers and, in turn, should be able to avoid the threat of multiple liabilities to alleged antitrust violators.<sup>159</sup>

153. See Hovenkamp, *supra* note 53, at 1727-28; see also *supra* notes 150-51 and accompanying text.

154. Hovenkamp, *supra* note 53, at 1728. Professor Hovenkamp was skeptical that direct purchasers are more likely to detect antitrust violations. See *id.* at 1729. In contrast, he offers a more practical test—the likelihood of detection of an antitrust violation is probably proportional to the number of “detectives.” *Id.* He recognized that federal government litigation, state attorneys general litigation, and federal antitrust investigations, settled without prosecution, consist of the bulk of the “detectors” of antitrust violators, not the direct purchasers themselves. See *id.*

155. *Id.* As one analyst stated, “[w]hen actual participants and close students of an industry testify that something is so, it probably is so.” Steiner, *supra* note 151, at 751.

156. Incidence theory is an economic theory related to the passing-on of costs that utilizes standard economic analysis tools and assumptions of neoclassical micro-economics. Harris & Sullivan, *supra* note 3, at 275-76.

157. See *id.* at 269-71.

158. See *supra* notes 32-34 and accompanying text.

159. See Ronald Cotterill et al., *Beyond Illinois Brick: The Law and Economics of Cost Pass-Through in the ADM Price Fixing Case*, 18 REV. INDUS. ORG. 45, 51 (2001) (explaining the calculation of pass-through prices with a non-linear de-

A modern trend at the FTC, in determining whether a potential merger is substantially likely to lessen competition, is to conduct intrinsic economic analysis and calculate the post-merger price to the consumer.<sup>160</sup> Some antitrust commentators and analysts have seized on a common hypothesis in merger law—if the actual change in price from the pending merger can be calculated and the pass-on of this price change on the consumer can be determined, then there is no need to calculate market definitions or surrogates to approve a horizontal merger.<sup>161</sup> Instead, the FTC can determine if a horizontal merger will “tend to create a monopoly” or “substantially . . . lessen competition”<sup>162</sup> by measuring the anticompetitive harm directly to the consumer.

To frame the same hypothesis in the language of § 4 of the Clayton Act and the Rule of *Illinois Brick*, if the actual change in price directed by the alleged monopolist and suffered by the direct purchaser can be traced through the pass-on to the ultimate consumer, there would be no need for an absolute bar to their indirect purchaser claims.<sup>163</sup>

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mand curve); C. Robert Taylor, *Indirect Damages from Price Fixing: The Alabama Lysine Case*, 18 REV. INDUS. ORG. 33, 34-35 (2001) (explaining pass-through of lysine prices in both a vertically integrated market and on a cost-plus basis); *but see* Coutroulis & Allen, *supra* note 38, at 196, 198, 200, 204 (explaining that the calculation of pass-through prices by incidence analysis of demand curves and market factors to be an ineffective tool in litigating antitrust claims).

160. See DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (1997). The Horizontal Merger Guidelines serve as an analytical tool describing the enforcement policies of the DOJ and the FTC in reviewing horizontal mergers. *Id.* A significant portion of the Guidelines stress that the evaluation of surrogate market indicators, such as market definitions, market power, and market concentration using the Herfindahl-Hirschman Index, because the DOJ and the FTC assume that actually calculating the ability of the post-merger firm to charge and sustain a monopoly price is too difficult. See *id.* While the legal analysis of pass-through costs from efficiencies from a pending horizontal merger through these guidelines differs from the legal analysis in a § 4 Clayton Act violation, the economic analysis is identical because it analyzes a company's ability in the relevant market to pass-through changes in costs to ultimate consumers. See Harris & Sullivan, *supra* note 3, at 275-76.
161. See generally Robert H. Lande & James Langenfield, *From the Surrogates to Stories: The Evolution of Federal Merger Policy*, 11 ANTITRUST 5 (1997). See also *supra* note 151 and accompanying text.
162. 15 U.S.C. § 18 (2000).
163. See *Ill. Brick Co.*, 431 U.S. at 751 (Brennan, J., dissenting). Supporters of the Rule of *Illinois Brick* would quickly argue that the “apparent ease” of such calculations is no more than a myth and the basis for the legal bar. They argue, for example, that Microsoft distributed software to consumers through: (1) original equipment manufacturers; (2) direct purchasers; (3) mass market wholesalers; and (4) retailers. See Kenneth G. Elzinga and David E. Mills, *PC Software*, 44 ANTITRUST BULL. 739, 777 (Spring 1999). Thus, Microsoft implies that determining the actual consumer cost is too difficult an exercise when one has to consider the impact of quantity discounts and inconsistent pricing patterns throughout the multitude of distribution chains. *Id.* at 778. In stark contrast, the dissent in *Illinois Brick*



A celebrated example of calculating pass-on charges in a horizontal merger occurred when the FTC reviewed the proposed Staples–Office Depot merger.<sup>164</sup> The FTC recognized at least three specific factors in calculating the pass-through of certain cost savings to consumers post-merger.<sup>165</sup> These factors were: (1) the shape of the consumer demand curve; (2) the shape of the marginal cost line; and (3) the extent of competition in the market.<sup>166</sup> An identical showing of pass-on pricing, based on the Staples model, could be utilized in an indirect purchaser setting.

Another example of such an analysis of pass-through costs in price-fixing litigation focused on market demand elasticities in the manufacture of carbonated soft drinks (“CSD”) from high fructose corn syrup (“HFCS”).<sup>167</sup> This framework assumes basic assumptions that consumers have imperfect information about retail prices of the ultimate product, CSD, and that the HFCS is used in fixed proportions to the final product, and is of very small relative value to the final price of the CSD.<sup>168</sup> This framework produced an observed pass-through

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twenty-five years earlier explained that a jury could reasonably trace costs and damages along a complex distribution chain in *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969), where the plaintiff alleged a violation of the Robinson-Pattman Act. *Ill. Brick Co.*, 420 U.S. at 751 (Brennan, J., dissenting). The *Perkins* Court traced the passing-on of discriminatory low prices through four vertical steps and three horizontal levels in resolving whether Standard Oil would be liable for damages. *Perkins*, 395 U.S. at 645. By removing an absolute bar on all indirect claims, Justice Brennan’s dissent admitted that there would be cases where the plaintiff would “be unable to prove that the overcharge was passed-on” or the overcharge calculation would be only “approximately determinable.” *Ill. Brick Co.*, 420 U.S. at 759 (Brennan, J., dissenting). Justice Brennan acknowledged that such reasoned estimations were “required” in antitrust litigation. *Id.* At that point, a discernible jury could apply the *Zenith* and *RKO* standard. *See supra* notes 32-33 and accompanying text. In situations where the indirect purchasers’ damages are too remote, Justice Brennan recognized that the alleged antitrust violator should not be subjected to “multiple liability” and courts should use legal standing to prevent such cases from full litigation. *Ill. Brick Co.*, 420 U.S. at 761 (Brennan, J., dissenting). Of course, a modern antitrust case would have to satisfy the evidentiary requirements for expert witnesses in accordance with *Daubert* and *Kumho Tire*. *See supra* note 34 and accompanying text.

164. *See* *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1090 (D.D.C. 1997).

165. ORLEY ASHENFELTER ET AL., IDENTIFYING THE FIRM-SPECIFIC COST PASS-THROUGH RATE, Fed. Trade Comm’n, Working Paper No. 217, 1-7 (1998). Essential to the preliminary injunction enjoining consummation of the proposed Staples–Office Depot merger was the FTC showing that Staples expected pass-through efficiency to ultimate consumers was a mere fifteen to seventeen-percent savings, as opposed to Staples’ proclaimed two-thirds savings of the new market efficiency to the consumer. *FTC*, 970 F. Supp. at 1090.

166. ASHENFELTER ET AL., *supra* note 165, at 6-7.

167. Cotterill et al., *supra* note 159, at 45.

168. *Id.* at 47.

rate of 100% under "commonly observed" market demand elasticity<sup>169</sup> in competitive,<sup>170</sup> monopolistic,<sup>171</sup> and oligopolistic markets.<sup>172</sup> In comparison, if demand for the same product in the food manufacturing industry is linear, then the market would seek to maximize prices and the pass-through would be less than 100%.<sup>173</sup>

The key conclusion to calculating this HFCS price increase pass-through is recognizing that the demand curve for a respective market is non-linear.<sup>174</sup> Dr. Cotterill explained that the linear demand curve, or the classic linear supply-demand "X" curve, was a contrivance of economic textbooks, not empirical data.<sup>175</sup> In a monopolistic market with *non-linear demand* and *constant elasticity of demand*, the pass-

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169. *Id.* at 48. Even with perfect information, the 100% pass-through was met when both the prices of inputs other than HFCS remain constant when output drops due to higher retail prices and assuming constant returns to scale. *Id.* at 47-48. For more explanation of these assumptions, see *id.* at 48-49.

170. A competitive market "maximizes both allocative efficiency (making what the consumer wants) and productive efficiency (using the least amount of resources)." Ernest Gellhorn, *An Introduction to Antitrust Economics*, 1975 DUKE L.J. 1, 1 (1975). The market price in a competitive market can be characterized by numerous factors, including: (1) large numbers of buyers and sellers; (2) the quantity of products bought by an individual buyer or sold by an individual seller is so small as to not affect the overall market price; (3) products are homogeneous (buyers have no reason to choose a particular seller and vice versa); (4) all market members have perfect information; and (5) new competitors can freely enter the market. *Id.* at 24-25. Thus, a firm in a competitive market can maximize profits only by increasing output in response to consumer demand or lowering its own cost of marginal production. See *id.* at 28-29.

171. While strict definitions of monopolistic markets vary, factors useful in identifying a monopolistic market are: 1) a single seller; 2) unique products; 3) substantial barriers to entry into the market; and 4) imperfect market knowledge. Gellhorn, *supra* note 170, at 29. Idealistically, a monopoly seller's output produces the output of the entire industry; realistically, the monopoly seller is one whose output is sufficiently large enough in proportion to the total amount demanded by consumers that he can set his market price to maximize his own profits. *Id.* at 29-30. Such a seller is insulated from the loss of consumers by the threat of entry by new competitors or replacement by substitute products (often called market inelasticity). *Id.* at 33. Lastly, a monopolistic market is one where the single seller achieves supra-normal surplus profits at the cost of considerable allocative inefficiency (also dead-weight loss) due to resource misallocation without regard to consumer demand. *Id.* at 35.

172. In an oligopolistic market, sellers are so few that their price and output decisions become interdependent. Gellhorn, *supra* note 170, at 38. Because there are so few sellers in the market, any price or output change by one member can be cancelled immediately by another seller by changing their respective price or output. *Id.* Thus, these oligopolists act independent of consumer demand in setting prices and achieve supra-normal prices and returns, much like in a monopolistic market. See *id.* at 41.

173. Cotterill et al., *supra* note 159, at 50.

174. *Id.* at 51.

175. *Id.*

through rate is always greater than 100%.<sup>176</sup> Furthermore, even if elasticity demand became infinite to the monopolistic manufacturer, the pass-through rate decreases *only* to 100%.<sup>177</sup>

## VI. CONCLUSION

While the Rule of *Illinois Brick* in Maryland has been decided by the court of special appeals, private party indirect purchasers have fewer avenues open to them for relief. Pursuant to the Maryland Commercial Code, injunctive relief from an indirect purchaser's litigation, or undefined equitable relief from a court's discretion in a state's attorney general's action, remain as possible alternate remedies.<sup>178</sup>

A more aggressive private party indirect purchaser will need to either lobby for legislation that amends the Maryland Commercial Code to explicitly "repeal" the Rule of *Illinois Brick* or attempt to survive summary judgment under the current statute and the decision of *Davidson*. Lifting the Rule of *Illinois Brick* may increase the complexities of antitrust litigation initially, but state courts can relieve themselves of this additional burden with special masters to determine the extent of the pass-on.<sup>179</sup> While it is possible that a current appeal to the Supreme Court may modify or eliminate the Rule of *Illinois Brick* altogether, a private party litigant will likely need to overcome the substantial barrier in *Davidson*. To counter this bar, a private party indirect purchaser may be able to use a combination of the applied

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176. *Id.* at 50. In contrast, Dr. Cotterrill also explained that the pass-through rate is always 100% in a competitively structured, profit-maximizing market. *Id.* Monopoly or oligopoly markets may also exist with 100% pass-through where the demand curve is between constant elasticity and linear. *Id.* at 50-51.

177. *Id.* at 50. As elasticity of demand becomes infinite, consumers select substitute products for the monopoly product and the monopoly market becomes broadened into a competitive market, including the broader market of the substitute products. *Id.* Analyses of theoretical markets by other scholars refute Dr. Cotterill's assertion that the pass-through could be greater than 100%. See, e.g., Harris & Sullivan, *supra* note 3, at 274-98 (explaining that a competitive market reseller would pass-through nearly 100% of the monopoly price, while a monopolist reseller would likely absorb more of the monopoly price and pass-through less than 100%).

178. MD. CODE ANN., COM. LAW II § 11-209 (2000).

179. Greene et al., *supra* note 3, at 1155. Greene, O'Connor, and Hubbard explain that such special masters have been used effectively in pass-on determinations in oil overcharge litigation. *Id.* (citing *In re Stripper Well Exemption Litigation*, 578 F. Supp. 586 (D. Kan. 1985)). The *Stripper Well* court believed that the burden of persuasion was on intermediate purchasers to prove that they had not passed-on the overcharge to ultimate consumers, which would be analogous to pass-on determinations for indirect purchaser litigation. *Id.*

and intrinsic economic analysis tools outlined in Part V to buttress its argument and survive summary judgment.<sup>180</sup>

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180. See *supra* notes 149-77 and accompanying text.