SUPREME COURT
STATE OF ARIZONA

BUNKER'S GLASS COMPANY, an Arizona corporation, on behalf fo themselves and all others similarly situated, Plaintiffs-Appellant/Respondent, v. PILKINGTON plc, a foreign corporation, et al., Defendants-Appellees/Petitioners.	No. CV-02-0140-PR Court of Appeals No. 1 CA-CV 01-0046 Superior Court, Maricopa County No. CV 2000-002282 CONSOLIDATED WITH
MICHAEL R. GRAY, M.D., on behalf of himself and all others similarly situated, Plaintiff-Appellant/Respondent, v. PHILIP MORRIS INC., et. al., Defendants-Appellees/Petitioners.	No. CV-02-0175-PR Court of Appeals No. 2 CA-CV 01-0121 Superior Court, Pima County No. C2000-0781

BRIEF OF AMICUS CURIAE

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Introduction

Amicus Curiae American Antitrust Institute (AAI) is an independent, non-profit education, research, and advocacy organization concerned with the integrity of antitrust enforcement. Its sixty-member Advisory Board includes three former Assistant Attorneys General for the Antitrust Division of the United States Department of Justice, a number of former high level Federal Trade Commission officials, several former prominent officials in state enforcement, and numerous distinguished practitioners, law professors, economists, and business leaders.[1]

[1] The members of the AAI's Advisory Board serve in a consultative capacity and their individual views may differ from positions taken by the AAI. None of the AAI's Advisory Board members or

Board of Directors involved in the decision to file this amicus brief or in its preparation represents any party to this litigation. AAI Board of Directors Member Jonathan Cuneo was recused from participation in this matter.

The AAI's website describes a mission "to increase the role of competition, assure that competition is fair, and challenge unduly concentrated power in the American and world economy." See www.antitrustinstitute.org. AAI believes that the unanimous decisions of two divisions of the Arizona Court of Appeals soundly recognize the right of indirect purchasers, including consumers, to bring damage claims under Arizona antitrust law for actual injury incurred. Private suits to enforce antitrust law are a vital component of an enforcement system that seeks to provide compensation for victims, and to deter perpetrators, of anticompetitive conduct. That message is of great importance to the AAI, which believes that without compensation to victims and effective deterrence of would-be offenders, the antitrust laws cannot maintain competition and protect consumers in our free market economy.

Statement of the Case

The issue before this Court is whether, under Arizona

antitrust law, indirect purchasers of goods can sue to recover for the injury that they incur from unlawful price fixing or other unlawful anticompetitive conduct. Plaintiffs in these two separate proceedings, purchasers of flat glass and cigarettes, allege injury based on their purchases of products subject to the defendant-manufacturers' price fixing activity. Because plaintiffs purchased their products through distributors or retailers and not directly from the manufacturers, the defendants contended that plaintiffs were precluded from bringing suit. In support of their argument, defendants cited a decision of the United States Supreme Court applying federal antitrust law and concluding that, subject to some exceptions, indirect purchasers injured when direct purchasers pass-on higher prices cannot sue for actual damages. *Illinois Brick Co. v. Illinois*, 431 U.S. 72O (1977).

The defendants' arguments were accepted by the superior courts in Maricopa and Pima counties, which dismissed the

complaints. On appeal, both divisions of the Arizona Court of Appeals separately reversed, unanimously holding that Arizona antitrust law allows indirect purchasers to sue for actual injury suffered from unlawful anticompetitive conduct.

Summary of Argument

Twenty-five years after it was handed down, the United States Supreme Court's decision in *Illinois Brick* continues to generate controversy. The Court subequently determined that *Illinois Brick* does not preempt state antitrust law governing indirect purchaser damage suits. *California v. ARC America Corp.*, 490 U.S. 93 (1989). Thus, neither the federal Constitution nor federal law requires this Court to follow *Illinois Brick.*

The policy underpinnings of *Illinois Brick* have been called into question. Beginning both before and continuing after *ARC America,* thirty-eight states, acting through legislative amendment or judicial interpretation, have accorded indirect

purchasers a damage remedy for actual injury incurred from antitrust violations. Strong policy considerations underlie the actions of these states. Both fairness to victims of antitrust violations and concern for the effectiveness of antitrust dictate that an indirect purchaser be accorded a remedy for actual injury suffered. These policy goals provide solid support for the Arizona Court of Appeals' twin decisions based on the plain meaning of the antitrust statutes and the Arizona Constitutional framework that underlies those statutes.

Argument

I. Damage Suits By Indirect Purchasers Are Essential For Meaningful Enforcement of the Antitrust Laws

Antitrust enforcement in the United States is tripartite. Enforcement actions are brought by the federal government (the U.S. Department of Justice and the Federal Trade Commission), by state and local governments (including suits

brought by the Arizona Attorney General), and by private persons (pursuing claims under both federal and state antitrust law). Private enforcement of federal antitrust law was authorized when the Sherman Antitrust Act was enacted in 189O. One measure of the private suit's prominence in modern antitrust enforcement is that most of the United States Supreme Court's antitrust docket over the past three decades has consisted of the review of private enforcement actions.[2]

The government agencies lack the resources to attack more than a small fraction of the instances of anticompetitive conduct and generally limit their enforcement activities to merger enforcement and some important cartel and other high

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[2] For an overview of private enforcement, see Steven Salop & Lawrence White, *Private Antitrust Litigation: An Introduction and Framework*, in Private Antitrust Litigation, New Evidence, New Learning (L. White ed. 1988).

impact non-merger cases. The bulk of reported antitrust cases are brought by private plaintiffs. These private actions help ensure that enforcement is effective and reaches the roots of our free market economy. The goals of private enforcement, as described by the U.S. Supreme Court, are deterrence of anticompetitive conduct and compensation for the victims of that conduct. In *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 472 (1982), the Court ascribed to Congress a design to create an enforcement system "that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations . . . ."

Anticompetitive conduct harms consumers. As the Arizona Court of Appeals noted in *Bunker's Glass Company*, a principal purpose of antitrust laws is "to prevent overcharges to consumers." *Bunker's Glass Co., ¶17 (citing Premier Electrical Construction Co. v. National Electrical Contractors Assoc.*, 814

F.2d 358, 368 (7th Cir. 1987)). Although consumers seldom purchase directly from the perpetrators of unlawful conduct, their interests might be vindicated if direct purchasers could be counted on to challenge the unlawful conduct. For a variety of reasons, however, that often does not occur.[3] Direct purchasers are often reluctant to challenge the conduct of powerful suppliers without whom the purchaser cannot stay in business. Moreover, the direct purchaser will not suffer significant injury if it can pass along any increase in price to its own buyers. *Comes v. Microsoft Corp.*, 646 N.W. 440, 450 (Iowa 2002)(recognizing that "direct purchasers likely will not enforce antitrust laws out of fear of retailiation by their suppliers" and will "pass the overcharge onto indirect consumers"); Lawrence A.

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Indeed, in Arizona certain laws passed by the Legislature prohibit consumers from being direct purchasers in a large segment of the economy. See, A.R.S. § 28-4460 (cars), A.R.S. § 4-244 (beer, wine and liquor). There would be little logic in a policy that forced consumers to be indirect purchasers and then barred those consumers from any remedy for unlawful anticompetitive conduct.

Sullivan & Warren S. Grimes, The Law of Antitrust: An Integrated Handbook §17.2c3, 929-30 (2000).

Passing-on a full price increase to the next level will not occur in every instance.[4] But, as both divisions of the Arizona Court of Appeals recognized, such passing-on behavior is common. In *Philip Morris*, Division Two was sensitive to conditions in the cigarette market, noting that "consumer demand, or indirect purchaser demand, is 'largely inelastic' and does not dwindle in the face of a price increase," making it easy for distributors simply to "pass the illegally high prices on to consumers." *Gray v. Phillip Morris,* at ¶5. An analyst who reached the same conclusion about passing-on in the cigarette industry is Robert Steiner, ANTITRUST BULLETIN (2001). Of course, passing-on will occur not only in the cigarette market,

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[4] For example, a direct purchaser may be unable to pass along the full price increase if its buyers are highly price sensitive (and unwilling to continue buying at the increased price).

but in any market also in which the reseller confronts relatively inelastic demand (most buyers will continue to purchase in the face of a price increase). After a comprehensive analysis, two prominent theorists concluded that "passing on monopoly overcharges is not the exception: it is the rule" Harris & Sullivan, *Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis*, 128 U. Pa. L. Rev. 1516 (1979).[5] This reality was recognized by the Iowa Supreme Court in *Comes v. Microsoft*, 646 N.W. 2d at 450 (citing Cynthia Urda Kasis, *The Indirect Purchaser's Right to Sue Under Section 4 of the Clayton Act:*

[5] The Harris and Sullivan analysis provoked a response from two supporters of *Illinois Brick*, who argued that passing-on was not a common occurrence. Landes & Posner, *The Economics of Passing On: A Reply to Harris and Sullivan*, 128 U. Pa. L. Rev. 1274 (1980)(arguing that competitive resale markets would tend to prevent passing-on). In reply, Harris and Sullivan offered a renewed and strengthened analysis in support of their conclusion. Harris & Sullivan, *Passing On the Monopoly Overcharge: A Response to Landes & Posner*, 128 U. Pa. L. Rev. 1280 (1980). See also Robert L. Steiner, *The Third Relevant Market,"* 45 Antitrust Bull. 719, 745-758 (2000)(reporting that tobacco wholesalers and retailers passed on more than the price increases of tobacco manufactures).

Another Congressional Response to Illinois Brick, 32 Am. U.L. Rev. 1087 (1983)).

Ultimate consumers often pay not only the overcharge attributable to the price-fix, but an additional sum that the middleman pockets. An anti-competitive overcharge is part of any subsequent seller's cost of goods. Among many resellers, the convention is to mark up a product by a percentage of its purchase price. Thus, if a 100 percent mark-up convention is in place, a retailer would charge the consumer twice the price that the retailer paid to purchase the product. If the price paid by the retailer is increased from $1.00 to $1.50, the retailer following the 100 percent convention would raise the price charged to the consumer from $2.00 to $3.00. The price increase actually allows the retailer to increase its markup from

$1.OO to $1.5O, earning an additional $.5O on each item sold.[6]

Under such circumstances, both divisions of the Arizona Court of Appeals correctly recognized that a purchaser of a price-fixed product has little incentive to challenge the seller's anticompetitive conduct. But indirect purchasers, who have no economic subservience to the antitrust violators, will have a strong incentive to sue for the damages they suffer. A damage suit by indirect purchasers will thus serve both objectives of private enforcement identified by the United States Supreme Court: (1) it will deter anticompetitive conduct and (2) it will compensate the buyers actually injured by the anticompetitive conduct.

II. The Counter Reaction to *Illinois Brick*

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For a discussion of the use of mark-up conventions, see Harris & Sullivan, *Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis*, 128 U. Pa. L. Rev. 269, (1979).

In 1977, the United States Supreme Court decided *Illinois v. Illinois Brick Co.*, 431 U.S. 720 (1977). The Court held that, subject to two exceptions,[7] indirect purchasers could not sue for damages for violations of the Federal antitrust laws. The Court reasoned that its holding would (1) encourage antitrust enforcement by giving direct purchasers maximum incentive to sue (because they could not be forced to share damages with indirect purchasers) and (2) eliminate duplicate recovery and the concomitant risk of drawn out damage apportionment proceedings. In reaching this result, the majority (written by Justice White) declined to follow the counsel of the United States Justice Department, which in an amicus brief had urged that the door be left open for indirect purchaser suits. Brief for the United States as Amicus Curiae in *Illinois Brick Co. v. Illinois*, No. 76-404 (Jan. 1977). The three dissenting Justices agreed with

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[7] The Court recognized exceptions for cost plus contracts and for sellers who are owned or controlled by an upstream antitrust violator.

the Justice Department. Justice Brennan wrote that the majority had ignored the fundamental antitrust policy of compensating victims: "Lack of precision in apportioning damages between direct and indirect purchasers is thus not a convincing reason for denying indirect purchasers an opportunity to prove their injury and damages." Id. at 730. Another dissenter, Justice Blackmun, wrote that the Court's opinion adopted "a wooden approach . . . entirely inadequate when considered in the light of the objectives of the Sherman Act." Id. at 737.

Illinois Brick immediately generated major controversy. The reaction came in the form of Congressional hearings, of state repealer statutes that allow indirect purchaser suits under state antitrust law (enacted by more than 20 states), and, as the Court of Appeals noted in *Bunker's Glass Co., ¶ 42,* of substantial criticism in the theoretical literature.[8] Critics of the

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[8] The Court of Appeals cited academic criticism by a list of noted

decision emphasized that denying indirect purchasers the right to sue for damages undercut both the deterrence and compensation goals of the private enforcement system. Indeed, even theorists who are concerned about duplicative recovery have been critical of the Court's holding. As former U.S. Antitrust Division head Donald Baker wrote recently, "the dissenters seem to have the better of it. . . . To say to a clear victim that 'you don't even have standing to make a claim and try to prove it' is inconsistent with modern tort policy and appears unfair." Baker, *Hitting the Potholes on the Illinois Brick Road*, 17 Antitrust 14, 15-16 (2002). Because direct purchasers often have little incentive to sue, the antitrust violation is likely

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commentators, including perhaps the most widely cited antitrust treatise, Philip E. Areeda, Roger D. Bair & Herbert Hovenkamp, Antitrust Law, ¶346 at 378 & n. 13 (2000). *Bunker's Glass Co.*, ¶42. A recent addition to this list of critical literature is Donald I. Baker, *Hitting the Potholes on the Illinois Brick Road*, 17 Antitrust 14 (2002)(supporting the Court's objective of eliminating duplicative recovery but strongly critical of the Court's reasoning and decision to deny indirect purchasers a remedy).

to go unchallenged, with consumers paying the anticompetitive overcharge. Critics also stress that the risk of duplicative recovery is overstated.

Although supporters of *Illinois Brick* continue to raise the specter of massive duplicative recoveries and complex litigation, they have failed to cite or substantiate actual instances of such occurrences.[9] The burden remains on the indirect purchaser to establish a pass-on and the amount it was damaged. Although it is possible that different classes of plaintiffs will pursue inconsistent damage theories in different courts, the defendants will surely bring these inconsistencies to the attention of courts empowered to prevent excessive or multiple recoveries.

In the last analysis, the theoretical risk of excessive recovery

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[9] See *Hyde v. Abbott Labs.*, 473 S.E. 3d 68O, 687-88 (N.C. Ct. App. 1996)(noting the lack of "impossibly complex" damages case and rejecting "fear of complexity" as a ground for disallowing indirect purchaser suits).

is not a basis for denying a remedy for the very real injury suffered by consumers or other indirect purchasers of price fixed products. This common sense proposition was recognized by the two divisions of the Court of Appeals in *Phillip Morris*, ¶11, and in *Bunker's Glass Company*, ¶44. Neither this Court, nor any other state or federal court, is powerless to address instances of injustice if and when excessive recovery is genuinely threatened.

In any event, this Court is not bound by *Illinois Brick.* In *California v. ARC America Corp*., 490 U.S. 93 (1989), in an opinion by Justice White (the author of the *Illinois Brick* majority opinion), the Court unanimously held that state law that permits indirect purchaser suits for antitrust violations is not preempted by *Illinois Brick.* Arizona, along with Alabama, California and Minnesota, were successful parties in *ARC.*

Perhaps the clearest signal of the unfairness of *Illinois Brick* has been the response of state legislators and state courts

to the holding. Long before the Supreme Court's retreat in *ARC*, the states had moved to restore the indirect purchaser's right to recover damages. The response has taken the form of repealer statutes,[10] state court decisions construing state antitrust law,[11] and state court decisions allowing antitrust-related damages under non-antitrust statutory claims.[12]

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E.g., Cal. Bus. & Prof. Code §1675O(a)(enacted in 1978); D.C. Code Ann. §28-45O9 (198O); Haw. Rev. Stat. §§48O-3, 48O-14 (enacted in 1987); 74O Ill. Comp. Stat. §1O-7(2) (West 1997); Kan. Stat. Ann. 1O §11O4 (enacted in 1989); Md. Code Ann., Com. Law I §11-2O9(b)(2)(ii) (enacted in 1982); Mich. Comp. Laws Ann., Com. Law I §445.778(2)(enacted 1984); Minn. Stat. Ann. §325D.57 (enacted in 1984); N.M. Stat. Ann. §57-1-3(A)(1979); N.Y. Gen. Bus. Law §34O(6)(enacted in 198O); S.D. Codified Laws §37-1-33 (enacted in 198O); Wis. Stat. §133.18(1)(a)(enacted in 1979).

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At least three states other than Arizona have, through judicial interpretations, allowed indirect purchaser damage suits under state antitrust law. *Comes v. Microsoft Corp.*, 646 N.W. 2d 44O (Iowa 2OO2)(opinion with multiple affirmative cites to the Arizona Court of Appeal's decision in *Bunker's Glass Co*); *Hyde v. Abbott Labs.*, 473 S.E. 2d 68O, 687-88 (N.C. Ct. App. 1996); *Blake v. Abbott Labs.*, 1996-1 Trade Cas. ¶71,369 (Tenn. Ct. App. 1996).

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E.g., *Richard L. Elins v. Microsoft Corp.*, 2OO2-2 Trade Cas.

According to the Iowa Supreme Court in *Comes*, there are now 38 states that allow indirect purchaser damage suits by one or the other of these avenues.[13] The list continues to grow, as Iowa

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(CCH) ¶73,864 (S. Ct. Vermont)(recognizing indirect purchaser claim for antitrust injury under Vermont Consumer Fraud Act); *Mack v. Bristol-Myers Squibb Co.*, 673 So.2d 1OO (Fla. Ct. App. 1996)(allowing indirect purchaser suits for deceptive trade practice).

[13] *Comes v. Microsoft Corp.*, 646 N.W. 2d at 448 nn. & 7-8 (counting 36 states, the District of Columbia, and Puerto Rico, before Iowa and Vermont were added to the list). Therefore, in 38 states, comprising nearly 8O% of the nation's population, indirect purchasers are today allowed a right of action. Appellants' position is not well taken in the face of 38 states

and Vermont were added to the list during the last year.

Conclusion

The twin decisions of both divisions of the Arizona Court of Appeals recognizing an indirect purchaser's right to sue under Arizona antitrust law stand on the strongest policy and legal foundation. That foundation has its roots in the simple proposition that a victim of unlawful conduct should not be left without a remedy. The holdings rest on the plain meaning of Arizona antitrust law (which does not limit the term "person" to direct purchasers) and are buttressed by the framework of the Arizona Constitution and the strong legacy of private enforcement that permeates both federal and state antitrust law. This Court should affirm.

RESPECTFULLY SUBMITTED this 10th day of January, 2003.

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having found ways around *Illinois Brick*. The assertion that following *Illinois Brick* fosters uniformity fails under the weight of this history.

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CERTIFICATE OF COMPLIANCE WITH RULES 14 AND 16, RULES OF CIVIL APPELLATE PROCEDURE

Undersigned counsel for the American Antitrust Instiute certifies that it has complied with Rules 14 and 16 of the Rules of Civil Appellate Procedure regarding pleading length, line spacing and type face by using a proportionately spaced, arial typeface, not exceeding thirtyfive pages in length.

DATED this 10th day of January, 2003.

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CERTIFICATE OF FILING AND SERVICE

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