IN THE SUPREME COURT OF OHIO

MARIA JOHNSON, Plaintiff-Appellant, v. MICROSOFT CORPORATION, Defendant-Appellee.	:	Case No. 04-0304 On Appeal from the Court of Appeals for Hamilton County, Case No. C-020564

BRIEF OF *AMICUS CURIAE,* THE AMERICAN ANTITRUST INSTITUTE, IN SUPPORT OF PLAINTIFF-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

Amicus Curiae American Antitrust Institute (AAI) is an independent, nonprofit education, research, and advocacy organization concerned with the integrity of antitrust enforcement. Its seventy member Advisory Board consists of numerous distinguished practitioners, law professors, economists, and business leaders.[1]

The AAI's website describes a mission "to increase the role of competition, assure that competition works in the interests of consumers, and challenge abuses of concentrated economic power in the American and world economy." See www.antitrustinstitute.org. AAI believes that the Ohio Court of Appeals erred when it failed to recognize the right of indirect purchasers, including consumers, to bring damage claims under Ohio antitrust law for actual injury they suffered. Private suits to enforce antitrust law are a vital component of an enforcement system that seeks to provide compensation for victims of anticompetitive conduct and to deter perpetrators from undertaking 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

Amicus curiae, the American Antitrust Institute, seeks to address the issue of whether, under Ohio's antitrust law, the "Valentine Act," R.C. 1331.01, et seq., indirect purchasers of

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[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.

goods can sue to recover for their injuries that result from a defendant's unlawful, anticompetitive conduct.

The plaintiff purchased a personal computer ("PC") from a retail merchant. The PC came with an inoperable copy of defendant's Windows 98 operating system already installed. After the plaintiff brought the PC home, and before she could use the PC for anything else, the plaintiff was presented with an on-screen offer from defendant to enter into an End User License Agreement ("EULA"). The plaintiff accepted defendant's offer. She now seeks to recover damages for the injuries which she suffered as a result the defendant's efforts to thwart competition from Netscape and otherwise maintain its monopoly in the PC operating systems market. An action brought by the United States and several states, including Ohio, established that the defendant's conduct violated state and federal antitrust laws, including the Valentine Act, R.C. 1331.01 and 1331.02. *United States v. Microsoft* (C.A.D.C. 2001), 253 F.3d 34.

Nonetheless, the defendant argued that the plaintiff in this case may not recover for her injuries caused by the defendant's violations of Ohio's Valentine Act because she did not purchase her copy of Windows directly from the defendant. In support of its position, the defendant has cited a United States Supreme Court decision 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 (1977), 431 U.S. 720.*

The trial court dismissed the plaintiff's complaint. Although a divided Court of Appeals upheld the dismissal, *Johnson v. Microsoft Corporation* (2003), 155 Ohio App.3d 626 (*"Johnson I"*), on rehearing the Court of Appeals acknowledged that the rule established in *Illinois Brick* "seems largely unfair for consumers, who suffer the brunt of monopolistic pricing, and who

unlike retailers cannot 'pass-on' its consequences," but the majority felt this Court's decision in *C.K. & J.K., Inc. v. Fairview Shopping Center* (1980), 63 Ohio St.2d 201, left it no choice but to apply the federal law precedent. *Johnson v. Microsoft Corporation* (Ohio App. 2004), 805 N.E.2d 179, 182 *("Johnson II")*.

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 subsequently determined that *Illinois Brick* does not preempt state antitrust law governing indirect purchaser damage suits. *California v. ARC America Corp.* (1989), 490 U.S. 93. 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. As the Ohio Court of Appeals noted in the case at bar, "*Illinois Brick* was based upon broad assumptions concerning the reliability of pass-on theories, their propensity to complicate damage calculations, and the disincentives of plaintiffs [that] could prove to be false in the light of modern economic and damage theories." *Johnson II,* 805 N.E.2d at 182. Beginning both before and continuing after *ARC*, forty 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 law dictate that an indirect purchaser be accorded a remedy for actual injury suffered.

ARGUMENT

Amicus Curiae's **Proposition of Law No. 1:**

OHIO'S ANTITRUST LAW, THE VALENTINE ACT, DOES NOT REQUIRE THE PLAINTIFF TO HAVE PURCHASED A PRODUCT DIRECTLY FROM THE DEFENDANT IN ORDER TO SEEK RECOVERY OF DAMAGES.

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 Ohio 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 1890. 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 impact non-merger cases. Private plaintiffs bring the bulk of reported antitrust cases. These private actions help ensure effective enforcement that 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* (1982), 457 U.S. 465, 472, 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

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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).

ample compensation to the victims of antitrust violations . . . ."

Anticompetitive conduct harms consumers. A principal purpose of antitrust laws is to prevent overcharges to consumers. *Premier Electrical Construction Co. v. National Electrical Contractors Assoc.* (C.A.7, 1987), 814 F.2d 358, 368. 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.* (Iowa 2002), 646 N.W.2d 440, 450 (recognizing that "direct purchasers likely will not enforce antitrust laws out of fear of retaliation by their suppliers" and will "pass the overcharge onto indirect consumers"); Lawrence A. Sullivan & Warren S. Grimes, The Law of Antitrust An Integrated Handbook §17.2c3, 92-30 (2000).

Passing-on a full price increase to the next level will not occur in every instance.[4] But such passing-on behavior is common. Passing-on will occur in any market where 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*

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[3]Indeed, in Ohio certain laws passed by the Legislature prohibit consumers from being direct purchasers in a large segment of the economy. *See, e.g.,* R.C. 4301.01, *et seq.,* (wine from out of state wineries). 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.

[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).

Monopoly Overcharge: A Comprehensive Policy Analysis, 128 U. Pa. L. Rev. 1516 (1979).[5] The Iowa Supreme Court recognized this reality 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: Another Congressional Response to Illinois Brick,* 32 Am. U.L. Rev. 1087 (1983)).

Ultimate consumers often pay not only the overcharge attributable to the anticompetitive conduct, but an additional sum that the middleman and/or retailer pockets. An anticompetitive 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 markup 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 as a result of anticompetitive conduct, 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 $1.00 to $1.50, earning an additional $.50 on each item sold.[6]

Under such circumstances, a direct purchaser who resells the product has little incentive to challenge the seller's anticompetitive conduct. But indirect purchasers, who have no economic

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[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).

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

subservience to the antitrust violators, will have a strong incentive to sue for the damages they suffer. As the Court of Appeals conceded, a class action on behalf of indirect purchasers provides "the perfect vehicle to insure that there is incentive enough to pursue such claims." *Johnson II,* 805 N.E.2d at 182. 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. Finally, it will avoid windfalls for direct purchasers who have passed on their added costs and even benefited by marking them up.[7]

***Amicus Curiae's* Proposition of Law No. 2:**

THE CONCERNS EXPRESSED IN ILLINOIS V. ILLINOIS BRICK CO. (1977), 431 U.S. 720, DO NOT APPLY TO OHIO ANTITRUST LAW.

The policy concerns present in *Illinois Brick* simply do not apply to Ohio antitrust. When the United States Supreme Court decided *Illinois v. Illinois Brick Co.* (1977), 431 U.S. 720, it held that, subject to two exceptions,[8] 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

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[7]In the words of a leading commentator, "one of the more egregious obstacles to an appropriate level and distribution of private enforcement of the antitrust laws is the *Illinois Brick* rule, which denies recovery to downstream, indirect purchasers who would otherwise be able to show real harm, while often permitting windfall recovery - trebled - to direct purchasers who may have been able to pass on any overcharge resulting from the defendant's antitrust violation." Joseph P. Bauer, *Multiple Enforcers and Multiple Remedies: Reflections on the Manifold Means of Enforcing the Antitrust Laws: Too Much, Too Little, or Just Right?,* 16 Loy. Consumer L. Rev. 303, 324 (2004).

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

majority had little support in the way of precedent or authority. Indeed, six of the seven U.S. Courts of Appeals that addressed the issue had upheld the right of indirect purchasers to recover damages.[9] The United States Justice Department had filed an amicus brief in *Illinois Brick* urging the Court to leave the door open for indirect purchaser suits. Brief for the United States as Amicus Curiae in *Illinois Brick Co. v. Illinois,* No. 76404 (Jan. 1977). The three dissenting Justices agreed with 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." *Illinois Brick*, . 431 U.S. 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 of substantial criticism in the theoretical literature.[10] Critics of the decision have 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. For example, Donald Baker, the former head of the Antitrust Division of the U.S. Department of Justice, wrote that "the dissenters seem to have the better of it . . . . To

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[9]*Bunker's Glass Company v. Pilkington, P.C.* (2003), 75 P.3d 99, 103 n.1 (Ariz.).

[10]The list of academic criticism includes what is perhaps the most widely cited antitrust treatise, Philip E. Areeda, Roger D. Bair & Herbert Hovenkamp, Antitrust Law, ¶346 at 378 & n. 13 (2000).

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 to go unchallenged, with consumers paying the anticompetitive overcharge.

Critics also stress that the risk of duplicative recovery is overstated. Professor Lande, for example, found that duplicative recovery "is only a theoretical construct that has never occurred in the real world." Robert H. Lande, *Multiple Enforcers and Multiple Remedies: Why Antitrust Damage Levels Should Be Raised,* 16 Loy. Consumer L. Rev. 329, 334 (2004). Duplicative damages have been alleged (three times damages for direct and three times damages for indirect purchasers), but Professor Lande could not find "even a single case where a cartel's total payouts have ever exceeded three times the damages involved." *Id.* Finally, given antitrust's lack of prejudgment interest, the fact that no damages are awarded for the allocative inefficiency effects of market power or the umbrella effects of market power, etc., then "treble" damages probably are, at most, only single damages. *Id.* at 337-39 Yet if only 1/3 of all cartels are caught, damages really should be at the threefold level. Even a hypothetical nominal "treble" damages to direct purchasers plus another nominal "treble" damages to indirect purchasers probably only equals true double damages. *Id.*

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.[11] The burden remains on the indirect purchaser to establish both existence and the

[11] *See Hyde v. Abbott Labs.* (N.C. Ct. App. 1996), 473 S.E.2d 680, 687-88 (noting the lack of "impossibly complex" damages case and rejecting "fear of complexity" as a ground for disallowing indirect purchaser suits).

amount of the pass-on. 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 in order to prevent excessive or multiple recoveries.

In the last analysis, the theoretical risk of excessive recovery is not a basis for denying a remedy for the very real injury suffered by consumers or other indirect purchasers of products. 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.

Similarly, *Illinois Brick's* assertion that its indirect purchaser rule would increase private enforcement does not withstand scrutiny. As the Arizona Supreme Court recently noted in *Bunker's Glass Company v. Pilkington, P.C.* (2003), 75 P.3d 99, 109 n.9 (Ariz.), the incentives for private enforcement actually work against *Illinois Brick*: "An auto dealer who relies on the manufacturer for delivery of popular models of cars does not strike us as likely to sour the relationship with the manufacturer by suing over a price increase, especially if it can pass along overcharges to purchasers. In such a case, the indirect purchaser is the truly injured party, and likely the only party with impetus to sue to redress the antitrust injury."

In any event, this Court is not bound by *Illinois Brick*. In *California v. ARC America Corp.* (1989), 490 U.S. 93, the U.S. Supreme Court unanimously held that *Illinois Brick* did not preempt state laws that permit indirect purchaser suits for antitrust violations. 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,[12] state court decisions construing state antitrust law,[13] and state court decisions allowing antitrust related damages under non-antitrust statutory claims.[14]

The Iowa Supreme Court in *Comes* found 36 states that allow indirect purchaser damage suits by one or the other of these avenues. The list continues to grow. The Supreme Courts of Iowa, Massachusetts and Vermont allowed indirect purchaser lawsuits in 2002, and earlier this year the Supreme Court of Nebraska decided to allow indirect purchaser lawsuits, bringing the total number of states to 40.[15] Furthermore, during the past year the Arizona Supreme Court upheld the decisions of its Courts of Appeal to allow indirect purchaser suits, *Bunker's Glass*

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[12]*E.g.,* Cal. Bus. & Prof. Code §16750(a) (enacted in 1978); D.C. Code Ann. §28-4509 (1980); Haw. Rev. Stat. §480-3, 480-14 (enacted in 1987); 740 III. Comp. Stat. §10-7(2) (West 1997); Kan. Stat. Ann. 10 §1104 (enacted in 1989); Md. Code Ann., Com. Law I §11-209(b)(2)(ii) (enacted in 1982); Mich. Comp. Laws Ann. §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 §340(6) (enacted in 1980); S.D. Codified Laws §37-1-33 (enacted in 1980); Wis. Stat. §133.18(1)(a) (enacted in 1979).

[13]At least five states have, through judicial interpretations, allowed indirect purchaser damage suits under state antitrust law. *Arthur v. Microsoft* (2004), 676 N.W.2d 29 (Neb); *Bunker's Glass Company v. Pilkington, P.C.* (2003), 75 P.3d 99 (Ariz.); *Sherwood v. Microsoft Corp.* (2003), 2003 Tenn. App. LEXIS 539; 2003-2 Trade Cas. (CCH) ¶74,109; *Comes v. Microsoft Corp.* (2002), 646 N.W.2d 440 (Iowa); *Hyde v. Abbott Labs.* (1996), 473 S.E.2d 680, 687-88 (N.C. Ct. App.).

[14]*E.g., Richard L. Elkins v. Microsoft Corp.* (2002), 174 Vt. 328 (Vt.) (recognizing indirect purchaser claim for antitrust injury under Vermont Consumer Fraud Act); *Ciardi v. F. Hoffmann-La Roche, Ltd.* (2002), 762 N.E.2d 303 (Mass.) (indirect purchasers have a cause of action under the Massachusetts little-FTC Act); *Mack v. Bristol Myers Squibb Co.* (1996), 673 So.2d 100 (Fla. Ct. App.) (allowing indirect purchaser suits for deceptive trade practice).

[15]*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, Massachusetts,Vermont and Nebraska were added to the list); *see also* Daniel R. Karon, "Your Honor, Tear Down That *Illinois Brick* Wall!" *The National Movement Toward Indirect Purchaser Antitrust Standing And Consumer Justice,* 30 Wm. Mitchell L. Rev. 1351, 1401 (2004) Therefore, in 40 states, comprising nearly 80% of the nation's population, indirect purchasers are today allowed a right of action. The assertion that following *Illinois Brick* fosters uniformity fails under the weight of this history.

Company v. Pilkington, P.C. (2003), 75 P.3d 99 (Ariz.), and the Tennessee Court of Appeals twice rejected attempts by defendants to eliminate indirect purchaser suits. *Freeman Industries, LLC v. Eastman Chemical Co.* (2004), 2004 Tenn. App. LEXIS 321; 2004-1 Trade Cas. (CCH) ¶74,412; *Sherwood v. Microsoft Corp.* (2003), 2003 Tenn. App. LEXIS 539; 2003-2 Trade Cas. (CCH) ¶74,109.

CONCLUSION

Recognizing an indirect purchaser's right to sue under Ohio's Valentine Act stands 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. And it rests on the plain meaning of the Valentine Act (which does not limit the term "person" to direct purchasers) and the strong legacy of private enforcement that permeates both federal and state antitrust law. This Court should reverse.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served upon the following by U.S. Mail, first class postage prepaid, this 19th day of July, 2004.

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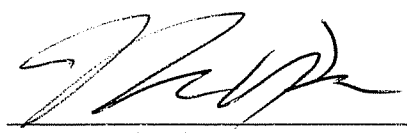

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