Cleaning Up the *Illinois Brick* Mess

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I. INTRODUCTION TO THE *ILLINOIS BRICK* DOCTRINE

Price fixing and other antitrust violations most frequently injure indirect purchasers—those who purchase goods through retailers and other intermediaries rather than directly from the antitrust violator.[1] This latter group of retailers and intermediaries are referred to as "direct purchasers," and they generally evade injury by "passing on" any overcharges to their purchasers, who are often consumers. Pass-on is defined as the process whereby: "[A]n entity in a chain of distribution adjusts its price upward to compensate for an overcharge by a prior party in the chain . . . [s]ellers normally pass on costs downward in the chain of distribution from the manufacturer to the ultimate purchaser."[2] As a result, consumers and indirect purchasers ultimately become the ones paying an "artificially inflated price," making them the true victims of passed-on overcharges.[3] Despite this, it currently stands that indirect purchasers are unable to obtain any form of relief or compensation.[4]

Plaintiffs who wish to bring suit under federal antitrust laws must first demonstrate "antitrust standing," which is the doctrine that a claimant may not bring suit "unless the alleged injury suffered was proximately caused by the defendant's anticompetitive conduct."[5] In general, prospective plaintiffs may bring antitrust suits pursuant to Section 4 of the Clayton Act,[6] which provides a right to sue for treble damages[7] to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws."[8] Accordingly, Section 4 is critical for injured consumers to recover from any passed-on costs as it creates a private right of action for injuries caused by antitrust violations.[9] However, in the seminal case of *Illinois Brick Co. v. Illinois*[10]—and to a lesser extent, its predecessor *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*[11]—the Supreme Court limited private treble damage actions to antitrust violators' direct customers[12] or "direct purchasers." This left no remedy for subsequent purchasers or "indirect purchasers," the group that most frequently suffers substantial harm from such overcharges.[13]

The *Illinois Brick* doctrine[14] has not existed without controversy. Antitrust law is

1. 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, 1088 (1983).

2. Meagan P. VanderWeele, *In re* ATM Fee Litigation*: Ninth Circuit Uses* Illinois Brick *to Build a High Wall for Indirect Purchasers*, 12 DEPAUL BUS. & COM. L.J. 121, 121 n.3 (2013).

3. *Id.* at 121.

4. *Id.*

5. *Id.* at 125.

6. 15 U.S.C. § 15(a) (2018).

7. "Damages that, by statute, are three times the amount of actual damages that the fact-finder determines is owed." *Damages*, BLACK'S LAW DICTIONARY (11th ed. 2019).

8. 15 U.S.C. § 15(a).

9. VanderWeele, *supra* note 2, at 122.

10. Ill. Brick Co. v. Illinois, 431 U.S. 720, 720 (1977).

11. Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 487–88 (1968).

12. Kassis, *supra* note 1, at 1088 ("direct customers" are those who have dealt directly with an antitrust violator).

13. VanderWeele, *supra* note 2, at 122–23.

14. Also referred to as the "Indirect Purchaser Doctrine." Barak D. Richman & Christopher R. Murray, *Rebuilding* Illinois Brick*: A Functionalist Approach to the Indirect Purchaser Rule*, 81 S. CAL. L. REV. 69, 70 (2007) (stating that "indirect purchasers may not bring private actions against antitrust violators in federal court . . . ."). This doctrine is sometimes also referred to "First Purchaser Rule." Kassis, *supra* note 1, at 1088

traditionally understood to have two primary goals—compensation and deterrence. As such, the *Illinois Brick* doctrine is primarily criticized for effectively denying compensation to the very parties injured most frequently by antitrust violations.[15] Further, the doctrine has been condemned on grounds that it seemingly provides amnesty to antitrust violators and for the discord "between the justifications for the rule and the protracted effects of its application."[16] As one commentator notes, subsequent court decisions have "one by one, twisted and turned . . . *Illinois Brick Co. v. Illinois* into an incomprehensible mess."[17] Thus, such case law has not only denied injured plaintiffs standing to sue, but also confused lower courts on how to apply the indirect purchaser analysis and even made it difficult for potential defendants to know when their actions violate the doctrine.[18]

The Ninth Circuit's opinion in *In re Apple iPhone Antitrust Litigation*[19] arguably added to the post-*Illinois Brick* "mess" as it diverged from the Eighth Circuit's long-standing opinion in *Campos v. Ticketmaster Corp*.[20] Both cases were parallel in implicating questions of antitrust standing with respect to the technology industry and electronic commerce (e-commerce) practices.[21]

In *Ticketmaster*, the Eighth Circuit categorized purchasers of Ticketmaster tickets as "indirect purchasers" pursuant to *Illinois Brick*, and thus denied them standing to sue. On the other hand, in *In re Apple*, the Ninth Circuit deemed purchasers of Apple's iPhone and iPhone apps as "direct purchasers" within *Illinois Brick*, granting them the right to sue. Accordingly, the Court granted certiorari in *Apple Inc. v. Pepper*[22] to determine whether Apple consumers—that is, iPhone owners—indeed have federal antitrust standing to bring suit against Apple for the practices it employs when regulating its App Store. In a narrow 5-4 ruling, the Court in *Apple* found that consumers who bought apps from the Apple App Store were "direct purchasers" who could sue Apple for its alleged monopolization.

This Note argues that despite the Court's clarification of the reach of the *Illinois Brick* doctrine in *Apple*, underlying issues associated with the doctrine persist and exacerbate the consumers plight in vindicating their rights under Section 4 of the Clayton Act. Thus, the Court should seek reform of the *Illinois Brick* doctrine in a way that is consistent with the goals of antitrust law. Part II of this Note explores the line of cases related to the development of the *Illinois Brick* doctrine, followed by an in-depth look at the circuit split

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(stating that "only those who have dealt directly with an antitrust violator [can] sue that violator under section 4 of the Clayton Act").

15. Richman & Murray, *supra* note 14, at 81–83.

16. *Id.* at 71.

17. Seth E. Miller, *Seeing Over the Brick Wall: Limiting the* Illinois Brick *Indirect Purchaser Rule and Looking at Antitrust Standing in* Campos v. Ticketmaster Corp. *Through a New Lens*, 32 FLA. ST. U. L. REV. 197, 198 (2004) (footnote omitted).

18. *Id.*

19. *In re* Apple iPhone Antitrust Litig., 846 F.3d 313, 323 (9th Cir. 2017).

20. Campos v. Ticketmaster Corp., 140 F.3d 1166, 1174 (8th Cir. 1998).

21. Music fans who wish to attend a show at a major concert venue have virtually no choice but to purchase tickets through Ticketmaster, which holds exclusive ticket distribution contracts with almost all concert promoters in the United States. Similarly, iPhone owners who wish to purchase applications ("apps") must do so through Apple's App Store, as Apple does not allow its app developers to sell iPhone apps via any other platforms. As such, both Ticketmaster and Apple have been viewed as the "toll-keepers" of their respective markets. *See* Alison Frankel, *9th Circuit Apple Antitrust Ruling Splits with 8th, is Boon to Consumers*, REUTERS (Jan. 13, 2017), https://www.reuters.com/article/us-otc-apple/9th-circuit-apple-antitrust-ruling-splits-with-8th-is-boon-to-consumers-idUSKBN14X2HV (discussing Ticketmaster and Apple as toll-keepers).

22. Apple Inc. v. Pepper, 139 S. Ct. 1514, 1520 (2019).

between the Eighth Circuit and Ninth Circuit, and, finally, a detailed overview of the Court's decision in *Apple*. Part III analyzes the impact of the *Apple* ruling on the *Illinois Brick* doctrine and the technology industry as a whole. This Part will show that while the *Apple* Court moved in the right direction by affording consumers "direct purchaser" status, unresolved issues remain with the doctrine—especially in that consumers who are "indirect purchasers" still lack any recourse to bring private antitrust claims. In response to this, Part IV outlines recommendations to the *Illinois Brick* doctrine and specifies how the Court should proceed in future cases that invoke the *Illinois Brick* doctrine.

II. BACKGROUND OF *ILLINOIS BRICK* AND THE CIRCUIT SPLIT THAT LED TO *APPLE*

This Part will first take an in-depth look at the case history surrounding federal standing for damages in antitrust disputes. This will be followed by a discussion on the particular circuit split that emerged following the Ninth Circuit's ruling in *In re Apple*,[23] which seemingly departed from the Eighth Circuit's established ruling in *Ticketmaster*,[24] and ultimately led to the Court granting certiorari. Finally, the Court's recent decision in *Apple* will be examined in more detail.

A. The Foundations of Standing in Antitrust Cases

1. Hanover Shoe *Paves the Way to* Illinois Brick*'s "Mess"*

Within the realm of antitrust litigation, damages as a remedy have traditionally been granted "only to the immediate victims of the anticompetitive conduct ('direct purchasers'), and not to downstream parties claiming 'pass-through' damages ('indirect purchasers')."[25] "Pass-through" refers to the recurring issue whereby the effects of anticompetitive conduct are "passed-through" a distribution chain.[26] Thus, only the overcharged direct purchaser has standing to bring an action under Section 4 of the Clayton Act,[27] precluding others in the chain of manufacture or distribution.[28]

The Court first addressed the issue of standing in *Hanover Shoe*,[29] wherein a shoe manufacturer brought an action for treble damages under Section 4 of the Clayton Act against the manufacturer of shoe machinery for allegedly using its monopoly over the shoe-manufacturing-machinery market to lease machines to the shoe manufacturer at supracompetitive prices.[30] United attempted to prove that Hanover had no standing under the meaning of Section 4 of the Clayton Act because it had passed on any illegal overcharge to those who bought the shoes by virtue of raising the prices it charged for the shoes.[31] In other words, United contended the illegal overcharge was absorbed by Hanover's customers, indirect purchasers of United's shoe machinery, who were the persons actually

23. *In re Apple*, 846 F.3d at 313.
24. *Ticketmaster*, 140 F.3d at 1166.
25. Brief of Petitioner at i, Apple Inc. v. Pepper, 139 S. Ct. 1514 (2019) (No. 17-204).
26. *Id.* at 19.
27. 15 U.S.C. § 15(a) (2018) ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . and shall recover threefold the damages by him sustained.").
28. *In re Apple*, 846 F.3d at 320–21.
29. Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 483 (1968).
30. *Id.*
31. *Id.* at 491–92.

injured by the antitrust violation.[32] The Court rejected United's "defensive" use of the pass-on theory, finding that except in certain limited circumstances, a direct purchaser suing for treble damages under Section 4 of the Clayton Act is injured within the meaning of the statute by the full amount of the overcharge, no matter who ultimately bears the cost of that injury.[33]

The Court cited two primary reasons for barring this defense. First, the Court was unwilling to participate in treble damages actions, viewing it as too challenging to trace the effect of the overcharge on the purchaser's prices, sales, costs, and profits, and to show that these variables would have been different without the overcharge.[34] Second, the Court was concerned that unless direct purchasers were allowed to sue for the portion of the overcharge arguably passed on to indirect purchasers, antitrust violators "would retain the fruits of their illegality," as indirect purchasers "would have only a tiny stake in a lawsuit" and thus, little incentive to sue.[35] Following *Hanover Shoe*'s decision that the pass-on theory is precluded as a defense by an antitrust defendant, the Court in *Illinois Brick* addressed the "offensive" use of the theory by an antitrust plaintiff.[36]

2. Closer Look at Illinois Brick

In *Illinois Brick*, the state of Illinois brought an action for treble damages under Section 4 of the Clayton Act against a concrete block manufacturer for allegedly fixing the price of concrete blocks.[37] More specifically, the manufacturer had sold the blocks to masonry contractors who used the blocks to build masonry structures.[38] The masonry contractors then sold the structures to general contractors who put the structures in buildings ultimately sold to the state of Illinois.[39] However, Illinois alleged the contractors had passed on the manufacturer's illegal overcharge at both stages of the distribution chain, driving up the state's cost by three million dollars.[40]

The Court refused to recognize the passed-on overcharges as a basis for antitrust standing, deciding to adhere by *Hanover Shoe*. Specifically, the majority engaged in a two-step analysis aimed at (1) having a uniform rule regarding pass-on in antitrust actions that put both plaintiffs and defendants on equal footing when bringing treble damages suits; and (2) remaining faithful to the *Hanover Shoe* Court's construction of Section 4 of the Clayton Act as granting standing to direct purchasers.[41]

The Court first opposed precluding the defensive use of pass-on but allowing its offensive use, holding that doing so would "create a serious risk of multiple liability for defendants."[42] As a result, the Court found itself facing the following two options, "either . . . overrule *Hanover Shoe* (or at least narrowly confine it to its facts), or . . .

32. *Id.* at 492.
33. *Id.* at 494.
34. *Hanover Shoe*, 392 U.S. at 492–93.
35. *Id.* at 494.
36. Ill. Brick Co. v. Illinois, 431 U.S. 720, 726 (1977).
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at 727.
41. *Ill. Brick Co.*, 431 U.S. at 728.
42. *Id.* at 730.

preclude [the indirect purchasers] from seeking to recover on their pass-on theory."[43] The Court ultimately decided to prevent indirect purchasers from obtaining recovery pursuant to the Clayton Act. In relying on stare decisis, the Court found *Hanover Shoe*'s line of reasoning just as applicable to prohibiting offensive uses of pass-on theories as "it would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness."[44] However, it is critical to note the majority carved out two exceptions where indirect purchasers could recover if there is (i) a "pre-existing cost-plus contract" or (ii) the direct purchaser is owned or controlled by its customer.[45]

On the other hand, the dissent sought to ground its decision in the context of the Clayton Act's broad antitrust law objectives, which include compensating victims of antitrust violations and deterring any future violations.[46] In particular, the dissent pointed out that the Court had previously considered standing under Section 4 of the Clayton Act by ruling it "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."[47] The dissent found the majority's seeming departure from such a standard as not only frustrating the congressional goals of compensation and deterrence, but also undermining the purpose of the Act as an "instrument of antitrust enforcement," because antitrust injuries are more often than not brought by the consumers—that is, indirect purchasers.[48] Along the same lines, it further opined that *Hanover Shoe* should not be so stringently followed, as the interests at stake in offensive passing-on cases are different than those in defensive passing-on cases.[49] The dissent finally noted that while the majority's agreement with *Hanover Shoe*'s concern on the likely complex calculation of damages was realistic, it was not any different in other kinds of antitrust cases and thus, should not be grounds for dismissal of its use.[50]

a. Disparate Attitudes Towards Illinois Brick *and Subsequent Efforts to Mediate*

Nearly 40 years later, the Court's decision in *Illinois Brick* has remained the cornerstone of antitrust litigation, but not without controversy. Traditionally, antitrust law has had the twofold goal of "compensat[ing] victims of antitrust violations and [deterring] the commission of such violations."[51] Accordingly, the striking split surrounding the *Illinois Brick* doctrine primarily stems from how proponents and opponents weigh and consider the Court's treatment of the "compensation" prong, and by proxy, the purpose of Section 4 of the Clayton Act.

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43. *Id.* at 736.

44. *Id.* at 737.

45. *Id.* at 736 & n.16.

46. *Ill. Brick Co.*, 431 U.S. at 748.

47. *Id.* (Brennan, J., dissenting) (citing Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948)).

48. *Id.* at 749.

49. *Id.* at 753–54 (stating that "[t]he attempt to transform a rejection of a defense because it unduly hampers antitrust enforcement into a reason for a complete refusal to entertain the claims of a certain class of plaintiffs seems an ingenious attempt to turn the decision [in *Hanover Shoe*] and its underlying rationale on its head").

50. *Ill. Brick Co.*, 431 U.S. at 758.

51. William M. Landes & Richard A. Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of* Illinois Brick, 46 U. CHI. L. REV. 602, 605 (1979).

Within the field of antitrust, the debate on the *Illinois Brick* doctrine has been met with "near religious fervor."[52] To better understand the controversy underlying the doctrine, it is worth briefly examining the arguments made by supporters and dissenters. In looking to proponents of the *Illinois Brick* doctrine, restricting standing to direct purchasers only has been viewed as appropriate on the grounds that direct purchasers are "more likely to discover antitrust violations, . . . encounter fewer costs in detecting and alleging violations, . . . [and] therefore serve as more accurate and less costly private policemen."[53] These deterrent-like benefits are seen as sufficient "even though it denies full compensation to some persons harmed by the violations."[54] On the other hand, opponents of the *Illinois Brick* doctrine interpret the Clayton Act as establishing a remedy for persons economically injured by "illegal monopolistic practices,"[55] and that by prohibiting indirect purchasers from bringing actions pursuant to the Act, the Court is effectively denying compensation to "the parties most injured by antitrust violations."[56] Further, in direct opposition to those in favor of the rule, opponents steadfastly hold that by passing on most overcharges to subsequent buyers, direct purchasers will not be motivated to uncover any violations—especially at the risk of disrupting "important supplier relationships"—making them unreliable policemen when compared to indirect purchasers.[57]

In light of the significance of the *Illinois Brick* doctrine itself and its accompanying widespread reactions, Congress made multiple attempts to reform the indirect purchaser rule.[58] However, these did not gain much momentum, ultimately leaving the *Illinois Brick* doctrine untouched to this day.[59] Faced with the lack of reform at the federal level, a majority of state legislatures responded by granting indirect purchasers "a cause of action to enforce state competition laws."[60] In other words, at the state level, most indirect purchasers have standing to bring a case for damages against antitrust violators. This wholesale rejection of *Illinois Brick* by states through statutes or case law is known as

52. Edward D. Cavanagh, Illinois Brick*: A Look Back and a Look Ahead*, 17 LOY. CONSUMER L. REV. 1, 3 (2004).

53. Richman & Murray, *supra* note 14, at 84.

54. Landes & Posner, *supra* note 51, at 605.

55. Lisabeth Harrison, Illinois Brick*: The Death Knell of Ultimate Consumer Antitrust Suits*, 52 ST. JOHN'S L. REV. 421, 423 (1978) (stating that there will be "a dampening if not deadening effect upon the growing trend toward affording the ultimate consumer a civil remedy for illegal practices that impair his economic interests").

56. Richman & Murray, *supra* note 14, at 70–71.

57. *Id.* at 85.

58. *Id.* at 83–89. The last significant effort by Congress to review and reevaluate antitrust rules of standing was via a report submitted to it by the Antitrust Modernization Commission (AMC) in 2007, which ruled for repealing *Hanover Shoe* and *Illinois Brick*. However, Congress has still not provided a legislative fix. *See generally* Edward D. Cavanagh, *The* Illinois Brick *Dilemma: Is There a Legislative Solution?*, 48 ALB. L. REV. 273 (1984) (describing various legislative attempts to overrule *Illinois Brick*); Matthew M. Duffy, *Chipping Away at the* Illinois Brick *Wall: Expanding Exceptions to the Indirect Purchaser Rule*, 87 NOTRE DAME L. REV. 1709 (2012) (explaining the ways in which the rationales of *Illinois Brick* do not apply); ANTITRUST MODERNIZATION COMMISSION: REPORT AND RECOMMENDATIONS 267–69 (2007), https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf (detailing the ways in which antitrust law should be modernized) [hereinafter AMC REPORT].

59. Duffy, *supra* note 58, at 1710.

60. Richman & Murray, *supra* note 14, at 85.

"Illinois Brick repealers."[61] Interestingly, the Court in *California v. ARC America*[62] upheld the state-wide movement away from the *Illinois Brick* doctrine, finding that the repealers are not preempted by federal law.[63] *Illinois Brick*'s polarization has continued to this day, extending to the technology industry and its potentially monopolistic practices. The circuit split between the Eighth Circuit and Ninth Circuit in particular represents the difficulty of applying the *Illinois Brick* doctrine with non-traditional chains of distribution.

B. The Circuit Split Giving Way to the Supreme Court Granting Certiorari in Apple

Hailing from the Eighth Circuit, *Ticketmaster* has been the primary case applying *Illinois Brick* in the era of e-commerce.[64] The case was brought by buyers of tickets to large-scale popular music concerts, alleging that Ticketmaster was a monopoly supplier of ticket distribution services.[65] Specifically, the buyers contended that because Ticketmaster had long-term exclusive contracts with almost all American concert promoters, it secured the right for Ticketmaster to deal with the vast majority of ticket sales for most large-scale popular music concerts in the United States.[66] As a result of this control, the buyers alleged that Ticketmaster would obtain "supracompetitive fees for ticket distribution services," and that payment of such fees qualified as an injury to their property pursuant to Section 4 of the Clayton Act.[67]

Relying on both *Hanover Shoe* and *Illinois Brick*,[68] the Eighth Circuit held that a "direct" or "indirect" purchaser turned on the following distinction:

> An indirect purchaser is one who bears some portion of a monopoly overcharge only by virtue of an antecedent transaction between the monopolist and another, independent purchaser. Such indirect purchasers may not sue to recover damages for the portion of the overcharge they bear. The right to sue for damages rests with the direct purchasers, who participate in the antecedent transaction with the monopolist.[69]

Applying such to the facts of the case, the court reasoned that by virtue of Ticketmaster's exclusive contracts with most all of the American concert promoters, venues seeking to host concerts were required to use Ticketmaster for ticket distribution to those concerts—as venues themselves could not get such ticket delivery services in the competitive market.[70] According to the court, ticket buyers could only buy Ticketmaster's services

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61. Practical Law Antitrust, *State* Illinois Brick *Repealer Laws Chart*, PRAC. L., https://us.practicallaw.thomsonreuters.com/8-521-6152 (last visited Sept. 30, 2019).

62. California v. ARC Am. Corp., 490 U.S. 93 (1989).

63. *Id.* at 105–06 (stating that "[t]he congressional purposes on which *Illinois Brick* was based provide no support for a finding that state indirect purchaser statutes are pre-empted by federal law").

64. Brief for appellant at 2, Apple Inc. v. Pepper, 139 S. Ct. 1514 (2019) (No. 17-204); *In re* Apple iPhone Antitrust Litig., 846 F.3d 313, 323 (9th Cir. 2017).

65. Campos v. Ticketmaster Corp., 140 F.3d 1166, 1168 (8th Cir. 1998).

66. *Id.* at 1169.

67. *Id.*

68. *Id.* at 1170 (citing to both *Hanover Shoe* and *Illinois Brick*, and explaining "[i]n the usual case, both the firm and its customers will bear some portion of the overcharge, and thus both will suffer injury from the antitrust violation").

69. *Id.* at 1169–70.

70. *Ticketmaster*, 140 F.3d at 1171.

because concert venues were required to buy those services first.[71] Finding that "such derivative dealing is the essence of indirect purchaser status," the court categorized the ticket buyers as indirect purchasers.[72]

Diverging from the majority's analysis in *Ticketmaster*, the Ninth Circuit in *In re Apple* found that iPhone owners who purchased apps from Apple's App Store indeed had standing pursuant to *Illinois Brick*. A year after releasing the iPhone, Apple launched the "App Store," an online store "where iPhone users can find, purchase, and download iPhone apps."[73] Though Apple develops apps that are sold in the store, many have been developed by third-party developers.[74] Every time customers purchase a third-party app for use on their iPhone, Apple receives a 30% commission from that payment, with the remaining 70% going to the developer.[75] Apple further prevents app developers from selling their iPhone apps through platforms other than the App Store, threatening to discontinue the app by any developer who violates this condition.[76] Correspondingly, Apple also dissuades its iPhone owners from downloading unauthorized apps, threatening to void iPhone warranties if they do so.[77] This practice is different from a company like Google, which also collects a commission on purchases of apps from the Google Play store for Android devices, but does not hold either a monopoly on phones or prevent the download of apps from other app stores or channels.[78]

The specific issue before the Ninth Circuit was whether app purchasers purchased their iPhone apps directly from the app developers or directly from Apple.[79] According to the court, an initial matter was determining whether Apple was a manufacturer or producer from whom app purchasers purchased indirectly, or whether Apple was a distributor from whom app purchasers purchased directly.[80] In the court's view, such a determination turned on "the function Apple serves rather than the manner in which it receives compensation for performing that function."[81] Ultimately, the court decided that Apple functioned as a distributor of iPhone apps because it sold them directly to purchasers via its App Store.[82] As such, app purchasers were granted standing under *Illinois Brick* to sue Apple for its alleged monopolization and attempt to monopolize iPhone app sales.[83]

Though the Ninth Circuit viewed its decision to categorize Apple as a distributor as comporting with the developed case law, Apple instead regarded its role as one that "interacts with and delivers goods 'directly' to consumers, but as an agent on behalf of third party sellers."[84] It ultimately disagreed with the Ninth Circuit disseminating the

71. *Id.*
72. *Id.*
73. *In re* Apple iPhone Antitrust Litig., 846 F.3d 313, 315–16 (9th Cir. 2017).
74. *Id.* at 316.
75. *Id.*
76. *Id.*
77. *Id.*
78. Louise Matsakis, *The Supreme Court Will Decide if Apple's App Store is a Monopoly*, WIRED (June 18, 2018, 6:59 PM), https://www.wired.com/story/pepper-v-apple-supreme-court-app-store-antitrust/.
79. *In re* Apple iPhone Antitrust Litig., 846 F.3d 313, 322 (9th Cir. 2017).
80. *Id.*
81. *Id.* at 324.
82. *Id.*
83. *Id.* at 325.
84. Petition for a Writ of Certiorari, *In re* Apple iPhone Antitrust Litigation, 846 F.3d 313 (2017) (No.17-204), 2017 WL 3393652, at *i.

notion that consumers may sue whichever entity delivers goods to them, and appealed to the Supreme Court. In granting certiorari, the Court was presented with the following question: "Whether consumers may sue for antitrust damages anyone who delivers goods to them, even where they seek damages based on prices set by third parties who would be the immediate victims of the alleged offense."[85] With a narrow 5-4 ruling, the Court issued its decision in *Apple* for the iPhone-owner group of consumers and ultimately affirmed the Ninth Circuit's judgment.

C. The Supreme Court's Decision in Apple

At the onset, the Court swiftly declared that because the iPhone owners directly purchased apps from Apple, they were effectively direct purchasers within the meaning of *Illinois Brick*.[86] As such, this particular group of consumers could bring suit against Apple for its alleged monopolistic practices. Writing for the majority, Justice Kavanaugh outlined two guiding principles for the Court's conclusion.[87] First, the Court considered the text of Section 2 of the Sherman Act and Section 4 of the Clayton Act. Specifically, the Court found that Section 4 of the Clayton Act was sufficiently broad enough to include "consumers who purchase goods or services at higher-than-competitive prices from an allegedly monopolistic retailer."[88] Second, the Court gave credence to its precedent.[89] In particular, the Court considered its previous applications of Section 4, which granted "immediate buyers" the right to bring suit against alleged antitrust violators and used principles of proximate cause when interpreting Section 4 to rule that "*indirect* purchasers who are two or more steps removed from the violator in a distribution chain may not sue."[90] That is, in the Court's opinion, the bright line rule of *Illinois Brick* was that indirect purchasers are those two or more steps removed from the antitrust violator in a distribution chain.[91]

Against such background, the Court differentiated the situation at hand from *Illinois Brick* on the grounds that there was not an intermediary in the distribution chain between Apple and its consumers. In the Court's view, the iPhone owners directly purchased apps from and paid the alleged overcharge to Apple—not the developers themselves.[92] Ultimately, the Court affirmed the Ninth Circuit's ruling in favor of the iPhone owner group of consumers and adopted its view that *Illinois Brick* meant "a consumer may not sue an alleged monopolist who is two or more steps removed from the consumer in a vertical distribution chain."[93]

The majority proceeded to call into doubt Apple's so-called "who sets the price" theory.[94] In essence, Apple interpreted the *Illinois Brick* doctrine as allowing consumers "to sue only the party who sets the retail price, whether or not that party sells the good or

85. *Id.*
86. Apple Inc. v. Pepper, 139 S. Ct. 1514, 1520 (2019).
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Apple*, 139 S. Ct. at 1520.
92. *Id.* at 1521.
93. *Id.* at 1519–20.
94. *Id.* at 1522.

service directly to the complaining party."[95] The Court discounted this theory on three grounds: (1) it contradicted Section 4's text, including the broad coverage of injured parties, as well as *Illinois Brick*'s goal of "effective and efficient" antitrust litigation;[96] (2) it would lead to "arbitrary and unprincipled" line among retailers and their financial arrangements with their manufacturers or suppliers;[97] and (3) it would lead to monopolistic retailers to structure transactions with their manufacturers or suppliers in such a way to "evade antitrust claims by consumers and thereby thwart effective antitrust enforcement."[98]

In a dissent led by Justice Gorsuch, the Court's majority was scrutinized for imparting a "revisionist version" of *Illinois Brick* that inappropriately focuses on whether there is "an intermediary in the distribution chain" between the plaintiff and defendant.[99] The dissent especially took issue with the majority's seeming replacement of the traditional proximate cause question with the question of who is in privity of contract with whom.[100] Instead, the dissent urged adherence to the longstanding principle within antitrust law, which is to look at the underlying economics of a transaction, in lieu of "formal conceptions of contract law."[101] The dissent ultimately cautioned against what was, in its view, a slippery slope when deciding at which point in a causal chain plaintiffs can bring claims.[102]

III. ANALYSIS OF *APPLE*'S IMPACT ON THE *ILLINOIS BRICK* DOCTRINE AND TECHNOLOGY INDUSTRY

The Court's decision in *Apple* is especially notable for extending standing to a group of consumers—specifically, consumers who are "direct purchasers" or "immediate buyers." This Part will evaluate the implications of *Apple*, focusing on the consequences for consumers and high-tech companies moving forward. Finally, this Part will attempt to show how *Illinois Brick* and *Apple* can exist alongside one another, ultimately providing an analysis for how to approach future cases.

A. Implications of the Apple *Ruling*

Though the *Apple* Court made strides towards mediating *Illinois Brick*'s effect of stymieing consumers from bringing antitrust actions for treble damages under Section 4 of the Clayton Act, there are practical consequences to the ruling. For one, *Illinois Brick* limited the kind of plaintiff who could bring an antitrust suit for treble damages to manufacturers' "direct purchasers."[103] With this decision, it was unlikely the Court envisioned consumers to be "direct purchasers," as it was not typical of the traditional chain of distributions at the time. Thus, the Court in *Illinois Brick* most probably arrived at its ruling with the idea that the "direct purchasers" would more often than not be the

95. *Id.* at 1521.
96. *Apple*, 139 S. Ct. at 1522.
97. *Id.* at 1522–23 ("Apple's line-drawing does not make a lot of sense, other than as a way to gerrymander Apple out of this and similar lawsuits.").
98. *Id.* at 1523.
99. *Id.* at 1529 (Gorsuch, J., dissenting).
100. *Id.*
101. *Apple*, 139 S. Ct. at 1529.
102. *Id.* at 1531.
103. *Id.* at 1521.

intermediary within a chain of distribution.

On the other hand, *Apple* expanded the realm of possible plaintiffs by allowing consumers who were "direct purchasers" or "immediate buyers" of the manufacturer in a chain of distribution to proceed with a claim for treble damages.[104] That is, where an intermediary is considered to not be present, the consumer will be deemed a "direct purchaser" in relation to the manufacturer. It is important to note the Court did not consider the iPhone owners to be "indirect purchasers," thus consumers who are indeed indirect purchasers will likely still be subject to the limited scope of *Illinois Brick*. This ruling is significant within the technology industry. Given there are a number of other high-tech companies with similarly functioning digital platforms as Apple, the potential wave of private antitrust litigation against such companies is stronger than ever before. Specifically, consumers dealing directly with similar e-commerce practices may now structure their antitrust claims like the iPhone owners in *Apple* and face considerable success in being granted standing.

This power over the technology industry is unprecedented and shows that not only is the Court unwilling to cede to high-tech giants engaging in what could be monopolistic practices, but also that the Court appreciates the predicament of consumers in today's technology-dominated world. Such a shift means high-tech companies will likely not be as insulated as they would have been had the Court adhered to the limited form of the doctrine. Though the *Apple* ruling puts the entire technology industry on notice as to the current scope of *Illinois Brick*, potential downsides do exist with a newfound understanding of what the Court may accept instead. Moving forward, these companies may restructure their unique chains of distribution to evade liability for their monopolistic practices by integrating clear intermediaries[105] and, ultimately, dissuade consumers from bringing actions for treble damages under Section 4 of the Clayton Act. For Apple in particular, this may mean moving away from a model that collects commissions from app developers, and instead, positioning the app developers as "direct purchasers" of Apple's App Store services and consumers as "indirect purchasers" in such a distribution relationship. Thus, the chance for these high-tech companies to mimic the traditional chains of distribution like those found in *Hanover Shoe* and *Illinois Brick* presents challenges to consumers who seek to vindicate their rights.

Another major consequence is that the *Apple* decision effectively overrules the long-standing authority of *Ticketmaster*, which had been adhered to by the Third[106] and Eighth[107] Circuits. The plaintiffs in *Ticketmaster*, who were buyers of tickets to popular music concerts, were similarly situated to the iPhone owner plaintiffs in *Apple*—that is, both lacked meaningful interaction with an intermediary, instead dealing directly with the respective companies by virtue of purchasing a product or service on their platform. Against *Apple*'s ruling, Ticketmaster may be at risk for a renewed antitrust claim at the hands of ticket buyers, who have the basis to argue "direct purchaser" status for the same reasons as the plaintiffs in *In re Apple* did.

Though *Apple* clarified the split between the Eighth Circuit and Ninth Circuit to some

104. *Id.*

105. Per *Apple*, the app developers were not deemed an intermediary "direct purchaser." Apple Inc. v. Pepper, 138 S. Ct. 1514, 1524 (2019).

106. Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc., 424 F.3d 363, 366 (3d Cir. 2005).

107. Campos v. Ticketmaster Corp., 140 F.3d 1166, 1172 (8th Cir. 1998).

extent, the Court limited its holding solely to whether *Illinois Brick* barred the iPhone owners' suit. As such, questions will likely emerge as lower courts attempt to apply this interpretation of *Illinois Brick* in future antitrust litigation. This is especially true for cases focused on alleged antitrust violations involving transactions not typically considered with traditional manufacturing chains of distribution, like those at issue in *Illinois Brick* and *Hanover Shoe*. Thus, it is useful to understand how these cases will be dealt with moving forward.

B. How Illinois Brick *and* Apple *Can be Reconciled*

By affirming the Ninth Circuit's ruling in *In re Apple*, the Court took its first steps towards moving to a more plaintiff/consumer-friendly version of the *Illinois Brick* doctrine than was previously considered. To understand how *Illinois Brick*—which was notoriously less plaintiff/consumer-friendly with its ruling—and *Apple* stand together, a set of questions can be asked to determine whether a consumer has standing to bring an action for treble damages under the Clayton Act. More specifically, this approach will aim at determining if the consumer is either a "direct purchaser," allowing them to proceed with the antitrust suit, or alternatively, an "indirect purchaser," precluding them from proceeding with the antitrust suit.

The first question to be considered is whether the manufacturer accused by the consumer of monopolistic practices, is acting as a producer/supplier or a distributor. In other words, this inquiry requires looking to the function the manufacturer serves.[108] A manufacturer-producer/supplier is an entity responsible for producing or supplying a particular product. In *Hanover Shoe* and *Illinois Brick*, this was a supplier of machinery for making shoes and a manufacturer of concrete blocks, respectively. If a manufacturer-producer/supplier is deemed to be present, the likely analysis will be that iterated in cases like *Hanover Shoe* and *Illinois Brick*. This analysis necessarily implies a less plaintiff/consumer-friendly notion of the *Illinois Brick* doctrine, as it will more often than not involve an intermediary considered to be the "direct purchaser," whereas the consumer will be readily categorized as the "indirect purchaser" in the chain. Thus, the consumer will more often than not be unable to proceed with an action for treble damages.

On the other hand, a manufacturer-distributor is an entity responsible for solely distributing a particular service or product—not for producing the actual service or product itself.[109] This distinction includes Apple's App Store, which distributes apps that provide all ranges of services and products, and even Ticketmaster, which is considered a ticket distributor service.[110] The issue of an intermediary in this kind of chain is more evasive than the traditional form involving a manufacturer-producer/supplier because it requires

108. *See In re* Apple iPhone Antitrust Litig., 846 F.3d 313, 324 (9th Cir. 2017) (explaining that "[t]he key to the analysis is the function Apple serves rather than the manner in which it receives compensation for performing that function").

109. This also distinguishes a manufacturer-producer/supplier from a manufacturer-distributor. A manufacturer-producer/supplier is involved in producing the product, while the distributor "'supplies the product directly to' plaintiffs." *See id.*at 323 (citing *Ticketmaster*, 140 F.3d at 1174 (Arnold, J., dissenting)).

110. This classification remains debatable. The *Apple* Court does not rule definitively on the status of *Campos v. Ticketmaster Corp*. However, according to the lone dissent in *Ticketmaster*, which was supported by the Ninth Circuit, "Ticketmaster *supplies the product directly* to concert-goers; it does not supply it first to venue operators who in turn supply it to concert-goers." *Ticketmaster*, 140 F.3d at 1174 (emphasis added); *In re Apple*, 846 F.3d at 323.

further evaluation of the intermediary's role. That is, whether there is an intermediary will affect how plaintiff/consumer-friendly a given case will be.

Some guidance may be taken from *Hanover Shoe* and *Illinois Brick* where traditional chains of distribution were at issue. In such cases, there appeared to be a break between the manufacturer-producer/supplier and intermediary before the product was consumer-ready.[111] Further, intermediaries appeared to be somewhat independent from the manufacturer-producer/supplier—meaning they were not at the control of manufacturers with how to handle the supracompetitive prices, but rather at their own discretion to deal with integrating it in the price points of their products as they saw fit.[112]

On the other hand, *Apple* serves as a more useful example for considering an intermediary in a manufacturer-distributor chain. In *Apple*, the Court made it a point to mention, more than once, that there was no intermediary between Apple and the iPhone owners—not even the app developers were viewed as intermediaries. A potential reason for this could be that because the app developers are subject to Apple's control[113] and conduct their business via Apple's App Store platform, Apple is viewed as having the ultimate control, and thus any and all actions by other parties (including the app developers) in the chain are attributed to Apple instead. In other words, the app developers and Apple are not seen as separately functioning entities, rather they are closer to functioning as the same entity. As such, the app developer is virtually eliminated from the distribution chain, leaving the manufacturer-distributor and consumer as the remaining parties. In this way, the manufacturer-distributor and consumer are directly dealing with each other, making the latter party the "direct purchasers," and enabling them to proceed with an action against the manufacturer—an inherently more plaintiff/consumer-friendly result.

There is an argument to be made that in *Apple*, the app developers were indeed intermediaries. The Court rejected the notion that the app developers would transform to intermediaries by virtue of setting the final price of the app. However, the app developers acted as intermediaries in other, albeit limited, ways, ranging from having full ownership of their apps to the kind of app they released. Accordingly, the app developers could have been deemed intermediaries by the Court, bringing them within the definition of "direct purchasers" and leaving the iPhone owners as "indirect purchasers." This is naturally a less plaintiff/consumer-friendly notion of *Illinois Brick*, as it lessens the chance a consumer will be able to move forward with an action for treble damages. However, in further reviewing *Apple*, it appears the Court needed the app developers to act more independently and away from the oversight of Apple. It would arguably be another result if the app developers did not need to pay both a $99 annual membership fee to Apple in order to sell an app in the App Store and a 30% commission on every app sold.[114]

Overall, what exactly defines an intermediary in a manufacturer-distributor chain will likely require further attention. Based on the limited line of cases, it seems that whether an intermediary exists turns on the degree to which they are subject to the control of the

111. That is, the intermediary incorporated or transformed the manufacturer-producer/supplier's product in some way with their own product before making it available to the masses.

112. On the flip side, there is an argument to be made that due to supracompetitive pricing by the manufacturer-producer/supplier, the intermediaries have no choice but to pass on overcharges to their consumers and reap back what was lost.

113. In the form of paying Apple a $99 annual membership fee and Apple taking 30% commission on every app sale. *See* Apple Inc. v. Pepper, 139 S. Ct. 1514, 1519 (2019).

114. *Id.*

manufacturer. Where the intermediary is acting within a manufacturer's strict set of parameters and on a manufacturer-run platform, it follows that they are more at the control of such manufacturer.[115] Accordingly, the actions of the would-be intermediary are attributed to the manufacturer instead. The resulting analysis in this scenario is likely similar to the one found in *Apple*: where no intermediary is found to exist, the consumer is considered a "direct purchaser" due to its dealings with the manufacturer-distributor and has standing to bring a claim for treble damages. However, where the intermediary is acting sufficiently independent of the manufacturer, much like traditional intermediaries, the likely analysis will be the same as that in *Hanover Shoe* and *Illinois Brick*. That is, the existence of an intermediary will mean that they are actually "direct purchasers" dealing with the manufacturer-distributor, whereas the consumer will be an "indirect purchaser" in the chain. Accordingly, consumers will not have standing to proceed with a claim for treble damages.

Apple served to further clarify the scope of the *Illinois Brick* doctrine and expand the rights of consumers categorized as "direct purchasers." However, the Court failed to fully acknowledge the continuing plight of consumers who are viewed as "indirect purchasers." As such, it remains the Court has not fully promoted the goals of the Clayton Act or antitrust law in general. Given that future antitrust litigation in this realm is more likely than ever to surge in the face of *Apple*, it is important to consider how the doctrine may be reformed moving forward.

IV. RECOMMENDATIONS TO REFORMING THE *ILLINOIS BRICK* DOCTRINE

The *Apple* Court provides consumers with a distinct advantage against possible monopolists by granting standing to those who are "direct purchasers," or "immediate buyers" of the manufacturer alleged of such antitrust violations in an action for treble damages under Section 4 of the Clayton Act. It remains, however, that the *Illinois Brick* doctrine has long been problematic and inconsistent in its effects, especially towards indirect purchasers—an aspect that *Apple* did not fully deal with, much less acknowledge.[116] As such, the *Apple* Court's seeming gloss over these ongoing and unresolved issues is likely to present problems in future antitrust litigation. Thus, it is important for the Court to give further thought to reforming the *Illinois Brick* doctrine.

The first half of this Part will briefly lay out some innovative legislative and scholarly proposals that seek to address the issues created by the *Illinois Brick* doctrine. Although these are not by any means the only solutions, such proposals are the most compelling in that they effectively focus on promoting the two prongs of antitrust law—deterrence and compensation—and the purpose of the Clayton Act's provision on damages.[117] The second half of the Part will focus on recommendations to the Court should it at some point in the

115. Based on *Apple*, it appears that retailers operating on a commission basis—permitting the manufacturer to set the ultimate price but retaining a commission for each sale—will be unlikely to use the *Illinois Brick* doctrine in its favor against consumers bringing monopolization suits. *See generally id.*

116. At no point did the *Apple* Court discuss the controversial nature of the *Illinois Brick* doctrine and its incongruent effects on "indirect purchasers." *See generally id.*

117. The *Apple* Court observed the importance of the Clayton Act, evaluating its text and purpose more than its predecessors. *Compare id.* at 1520 (emphasizing "any person" language of § 4 of the Clayton Act), *with id.* at 1526 (Gorsuch, J. dissenting) (emphasizing interpreting § 4 of the Clayton Act "against the backdrop of the common law").

future seek large-scale or minimal reform of the *Illinois Brick* doctrine.

A. Proposed Legislative and Scholarly Solutions

1. Replacing the Illinois Brick *Doctrine*

As Part II[118] touched upon, Congress's efforts to rectify the issues of the *Illinois Brick* doctrine never took off—even in light of the AMC's recommendation that *Illinois Brick* and *Hanover Shoe* be overruled.[119] The AMC's overall focus was on reducing the "complexity and costs generated by the existing conflict between federal and state policies."[120] In particular, the AMC recommended the following:

> Direct and indirect purchaser litigation would be more efficient and more fair if it took place in one federal court for all purposes, including trial, and did not result in duplicative recoveries, denial of recoveries to persons who suffered injury, and windfall recoveries to persons who did not suffer injury.[121]

It further outlined a statutory scheme that would enable direct and indirect purchasers to sue to recover for actual damages from federal antitrust law violations. The AMC first suggested—subject to a showing of actual damages—capping damages at the overcharges incurred by the direct purchasers, and subsequently apportioning them among all purchaser plaintiffs, including both direct and indirect purchasers.[122] The following steps were also recommended: (i) enabling "removal of indirect purchaser actions brought under state antitrust law to federal court to the full extent permitted under Article III; (ii) enabling "consolidation of all direct and indirect purchaser actions in a single federal forum for both pre-trial and trial proceedings;" and, (iii) enabling "certification of classes of direct purchasers, consistent with current practice, without regard to whether the injury alleged was passed on to customers of the direct purchasers."[123] Although Congress never followed through with the aforementioned scheme, it is still a viable alternative that could bring about uniformity and promote the goals of antitrust law.

Other commentators have also advocated for a model similar to the AMC's. In particular, Richman and Murray observe that *Illinois Brick* has proven inadequate primarily due to its failure in deterring violations, not compensating injured parties, and producing substantial administrative complexity.[124] Instead, they propose a model where federal standing is extended to indirect purchasers, which ultimately increases the number of potential plaintiffs and secures compensation for all the injured parties.[125] Specifically, Richman and Murray urge for a "three-part administrative mechanism" that involves (1) a mandatory consolidated action; (2) a court-appointed lead plaintiff; and (3) an administrative hearing to allocate damages.[126]

The first factor would provide for a single consolidated action against antitrust

118. *See supra* Part II.A.2.a.
119. AMC REPORT, *supra* note 58, at 267.
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. Richman & Murray, *supra* note 14, at 101.
125. *Id.*
126. *Id.* at 109.

violators that allows all injured parties—including both direct and indirect—to join the same suit.[127] This suit could be initiated by either a direct or indirect purchaser, and all other parties facing the same injury could then join.[128] According to Richman and Murray, having all causes of action in one federal suit will alleviate the complexities of litigation as well as associated administrative costs as it prevents other parallel litigation from coming into play.[129]

The second factor seeks to provide a "responsible monitor for the antitrust action."[130] This lead plaintiff would be expected to articulate the "theory of the claim" so as to both assist the court and increase the chances of the plaintiffs' success in receiving judgment.[131] Further, the lead plaintiff would be involved in overseeing the settlement process, the stage wherein "most antitrust claims are effectively resolved."[132]

The third factor would ultimately be triggered at the end of litigation or settlement and provides the opportunity to "allocate the total sum of damages among the separate parties."[133] This factor targets the Court's fears as articulated in *Hanover Shoe* and *Illinois Brick*—the complexity of calculating damages. In Richman and Murray's view, the Court can either follow other academic proposals of calculating damages that are not so demanding[134] or calculate damages as they do in other antitrust cases.[135]

2. Modifying Illinois Brick *Repealers Statutes at the State Level*

As mentioned in Part II,[136] faced with the lack of reformation by Congress, *Illinois Brick* repealer statutes emerged at the state level to deal with the problems inherent in the doctrine. Accordingly, these repealers have been viewed as one area wherein relief is accorded to indirect purchasers. However, as expected, there is divergence among the states in the ways such repealers function. Some of the repealers expressly allow for indirect purchasers to bring suit for recovery of damages under their antitrust statutes.[137] Other states without repealer statutes have put it in the hands of their courts to decide whether their antitrust statutes should be interpreted in line with *Illinois Brick*.[138] Finally, in states with no specific repealer statutes, some have decided that their own antitrust statutes do not preclude indirect purchaser damages lawsuits—a rejection of *Illinois Brick*.[139] Other states hold "that their general antitrust statute[s] should be interpreted consistently with Illinois Brick."[140] It is notable that whether a state has or has not enacted repealer statutes, a state "may provide that state officials—through . . . *parens patriae* actions—can sue on

127. *Id.* at 103.
128. *Id.*
129. Richman & Murray, *supra* note 14, at 103.
130. *Id.* at 107.
131. *Id.*
132. *Id.*
133. *Id.* at 108.
134. Richman & Murray, *supra* note 14, at 108 (referring to Hovenkamp's various calculation proposals, including yardstick determinations).
135. *Id.*
136. *Supra* Part II.A.2.a.
137. Jonathan T. Tomlin & Dale J. Giali, *Federalism and the Indirect Purchaser Mess*, 11 GEO. MASON L. REV. 157, 161 (2002).
138. *Id.*
139. *Id.*
140. *Id.*

behalf of indirect purchaser residents for damages, restitution and/or disgorgement for violations of the state's antitrust laws."[141] Thus, the repealer statutes have played a crucial role in signifying dissatisfaction with *Illinois Brick*.

One commentator notes that repealers should not be understood to automatically confer standing to indirect purchasers.[142] Rather, repealers are best understood to implicate the federal test of antitrust standing as formulated by the Court in *Associated General Contractors of California v. California State Council of Carpenters* (AGC).[143] In that case, the Court highlighted five factors to guide antitrust standing analysis:

> (1) Whether the plaintiff is a participant in the allegedly restrained market; (2) the directness or indirectness of the alleged injury; (3) whether there exists an identifiable class of persons better situated to bring suit; (4) whether the plaintiff's alleged injuries are speculative; and (5) the risk of duplicative liability and the complexity of apportioning damages.[144]

Accordingly, it is recommended that the AGC test should apply to states with such repealers—albeit in some modified form.[145] In particular, factor two should not disqualify potential plaintiffs just because they are not direct purchasers, but at the same time, the causal connection between the act and claimed injury should not be too remote.[146] Factor three should be eliminated as it directly contravenes with *Illinois Brick*.[147] Specifically, the concern should be to compensate victims as opposed to finding an efficient enforcer as well as to deal with *Illinois Brick*'s fallacy that direct purchasers are in the better position and more likely to bring suit.[148] Factor five should soften its stance on the risk of complex damages apportionment, while also preventing against the risk of duplicative liability.[149]

B. How the Supreme Court Should Proceed in Future Cases Where Illinois Brick *is Invoked*

1. Large-Scale Reform the Court Could Implement

If, at some point down the line, the Court were to look more favorably upon consumers who are "indirect purchasers," it should strongly consider following the statutory recommendations made to Congress by the AMC—or at the very minimum, enact a similar model given its support by other scholars. In the context of antitrust law, the AMC model fully addresses the goals of deterrence and compensation as well as the purpose of the Clayton Act's provision on damages, which was lacking when the Court first formulated its rule in *Illinois Brick*.

In particular, the consolidation and damage allotment components of the AMC model

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141. *Id.* at 163.

142. Kellen S. Dwyer, *With the* Illinois Brick *Wall Down, What's Left?: Determining Antitrust Standing Under State Law*, 3 J. BUS. ENTREPRENEURSHIP & L. 255, 257 (2010).

143. Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519 (1983); Dwyer, *supra* note 142, at 257.

144. Dwyer, *supra* note 142, at 257.

145. *Id.* at 271.

146. *Id.* at 276.

147. *Id.*

148. *Id.*

149. Dwyer, *supra* note 142, at 277.

appear to most-effectively target the concerns of the *Illinois Brick* majority as well as the doctrine's unforeseen ramifications. For example, the model remedies one of the major shortcomings that ultimately resulted from *Illinois Brick*, in that direct purchasers rarely bring suit due to the risk of destroying relationships with their manufacturers. By allowing any injured party to join a cause of action, the pressure on direct purchasers of whether to bring suit is lifted, and, either way, indirect purchasers may try to recover damages.

If the Court does not reform the rule in accordance with the AMC's proposed model, it could feasibly overrule the *Illinois Brick* doctrine and replace it with the modified five-prong test discussed in Part IV.[150] In this way, both the federal government and the states would have a uniform rule when it comes to antitrust standing—clarifying any confusion caused by *Illinois Brick*.

In light of *Apple*, there is also a strong possibility that manufacturer-distributors will seek to restructure their chains of distribution so that consumers will be categorically viewed as "indirect purchasers." As such, these models are effective because they allow consumers to vindicate their rights under Section 4 of the Clayton Act and not be stalled by the *Illinois Brick* doctrine.

2. Minimal Reform the Court Could Implement

At the onset, the Court should take heed of the nation's movement away from the *Illinois Brick* doctrine, as evidenced by the repealer statutes. The lack of enforcement of the doctrine at the state level indicates that it is no longer a feasible rule to abide by. As previously mentioned, the Court itself has declared repealer statues are not subject to preemption by federal law.[151] Thus, while *Illinois Brick* is longstanding in the Court's jurisprudence, deferring to states is well within the realm of feasible routes the Court could follow.

On the other hand, the Court may also narrow its focus and expand the exceptions of the *Illinois Brick* rule. This occurred in the Ninth Circuit case of *Freeman v. San Diego Association of Realtors*,[152] wherein the court declared that "an indirect purchaser can seek damages for alleged antitrust violations if there is no realistic possibility that the direct purchaser will sue."[153] As mentioned, *Illinois Brick* sought to remedy any antitrust violations via direct purchasers as they presumably had more of the means to do so when compared to the complexities fraught in claims brought by indirect purchasers. However, this has proven untrue, as direct purchasers fear straining relationships with their suppliers, and often end up not bringing suit. Thus, the Court needs to acknowledge this unforeseen development from *Illinois Brick* and attempt to mediate it accordingly.

Accordingly, the Court should officially recognize an exception to the indirect purchaser rule when there is no conceivable chance the direct purchaser will sue. Within this rule, however, a burden-shifting process should exist. In other words, as an initial matter, the indirect purchaser should make a good-faith effort to investigate whether the direct purchaser will bring suit against a violator. This would require direct purchasers to have a device or mechanism whereby indirect purchasers can either check or request the likelihood of a direct purchaser bringing suit. Once the indirect purchaser has established

150. *Supra* Part IV.A.2.
151. *Supra* Part II.A.2.a.
152. Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133, 1145–46 (9th Cir. 2003).
153. VanderWeele, *supra* note 2, at 132.

a direct purchaser's unwillingness to sue, the indirect purchaser should be able to proceed with a cause of action under Section 4 of the Clayton Act. The burden would then shift to the direct purchaser as to why it refuses to bring a suit instead. The reasonability of the justifications for refusal would be for a court to decide. If proven unsatisfactory, a court can allow an indirect purchaser to proceed with suit.

There is much to be discussed about the specifics of this process, such as issues of timing from when indirect purchasers inquire or request to the direct purchaser confirming they are unable or unwilling to bring suit. Nevertheless, this exception will place more pressure on direct purchasers to either bring suit or own up to why they will not bring suit, and at the same time, give indirect purchasers an opportunity for obtaining relief via private litigation. Even more, this kind of exception will place potential violators on notice, breaking down part of the protective bubble they have been placed in as a result of the indirect purchaser rule. This ultimately reconciles the *Illinois Brick* doctrine with the purpose of Section 4 of the Clayton Act, and thus, antitrust law's broader goals.

V. CONCLUSION

In an era dominated by technology and e-commerce, it is more apparent than ever that the particular pattern of antitrust violations found in cases from *Illinois Brick* to *In re Apple* will continue. At the same time, the *Illinois Brick* doctrine remains problematic and ineffective in vindicating the statutory rights of affected consumers under Section 4 of the Clayton Act. The circuit split between the Eighth Circuit and Ninth Circuit best reflects the particular problems of *Illinois Brick* in resolving antitrust violations at the hands of manufacturers in chains of distribution.

The *Apple* Court clarified the scope of the *Illinois Brick* doctrine by extending standing to consumers deemed "direct purchasers" of a manufacturer, rather than automatically categorizing them as "indirect purchasers." Consequently, a specific subset of the consumer population now has the ability to bring private treble damage suits under Section 4 of the Clayton Act against antitrust violators. However, it is important to note that from *Apple*, the manufacturer's function in a particular chain of distribution will give way to the viability of a consumer's antitrust claim. Thus, as a plaintiff-friendly result is not always guaranteed, the status of consumers in antitrust litigation remains uncertain.

As mentioned, the confusion over the scope of the rule is not recent in any way and has existed for some time now. Beyond the sharp academic debate, this division is most apparent in the divergent approaches taken by state governments and the federal government. Most states have either modified or overruled the indirect purchaser rule via repealer statutes in order to provide standing to indirect purchasers, and the Court has allowed for it—ruling against preemption of the federal doctrine.

In light of this, the Court still must recognize the almost contradictory nature and consequences of *Illinois Brick*'s indirect purchaser rule with antitrust law in general. When deciding cases similar to *Apple* in the future, the Court should, in accordance with Part IV of this Note, either: (a) replace the *Illinois Brick* doctrine with a model similar to that outlined by the AMC and subsequent scholars; (b) take note of the statewide shift away from the indirect purchaser rule via repealer statutes and possibly follow suit; or (c) expand the exceptions recognized by the *Illinois Brick* Court or recognize an official exception that grants standing to indirect purchasers in circumstances where direct purchasers are unable or unwilling to bring suit. In doing so, the Court can continue to move away or, at the very

least, modify the *Illinois Brick* doctrine in a way that fulfills the goals of antitrust law and ensures consumers are protected from potential monopolists.