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

SETH E. MILLER*

I. INTRODUCTION 198
II. LOOKING AT *CAMPOS V. TICKETMASTER CORP.* 199
   A. *Factual Background* 200
   B. *Majority Opinion* 201
   C. *Dissenting Opinion* 203
III. LEGAL BASIS FOR THE EIGHTH CIRCUIT DECISION 204
   A. *The Passing-on Defense in* Hanover Shoe, Inc. v. United Shoe Machinery Corp. 204
   B. *Offensive Passing-on and the Indirect Purchaser Rule in* Illinois Brick 206
IV. INCONSISTENCY AND THE EVISCERATION OF THE *ILLINOIS BRICK* INDIRECT PURCHASER RULE 208
   A. *The Supreme Court Clouding the View* 208
      1. *Antitrust Standing in* Associated General Contractors of California, Inc. v. California State Council of Carpenters 208
      2. California v. ARC America Corp. 209
   B. *An Array of Inconsistent Lower Federal Court Interpretations of the Indirect Purchaser Rule* 211
      1. In re Lower Lake Erie Iron Ore Antitrust Litigation 211
      2. In re Brand Name Prescription Drug Antitrust Litigation 212
      3. Lucas Automotive Engineering, Inc. v. Bridgestone/Firestone, Inc. 214
      4. Sports Racing Services, Inc. v. Sports Car Club of America, Inc. 214
V. LOOKING AT *CAMPOS* THROUGH A NEW LENS 216
   A. *Are Purchasers of Concert Tickets Through Ticketmaster's Ticket Distribution Service Really Indirect Purchasers?* 216
   B. *Limiting* Illinois Brick*'s Indirect Purchaser Doctrine in Favor of a Comprehensive Case-by-Case Analysis* 218
      1. *The Need for Flexibility in Any New Analysis* 219
      2. *Revised Factors for Antitrust Standing Under Section 4 of the Clayton Act* 219
         (a) *Antitrust Injury* 219
         (b) *Remoteness of the Injury and the Availability of a Plaintiff with Greater Self-Interest to Bring an Action Against the Monopoly Firm* 220
         (c) *The Difficulty of "Incidence Analysis" if Courts Permit an Indirect Purchaser-Plaintiff to Bring an Action* 221
      3. *Aligning Federal Indirect Purchaser Jurisprudence with* ARC 222
   C. *Applying a More Pragmatic and Practical* AGC *to* Campos 222
VI. CONCLUSION 224

* B.A., Pennsylvania State University, 2001; J.D., with High Honors, Florida State University College of Law, 2004. Thanks to KT for your continued support. Special thanks to Megan Menagh, Andy George, and the rest of the *Law Review* staff for your thorough and diligent editorial work. And thank you to Mr. DuBose Ausley for the scholarship. All errors in this Comment are my own.

I. INTRODUCTION

In 1998, the Eighth Circuit Court of Appeals handed down its decision in *Campos v. Ticketmaster Corp.*,[1] which joined a group of Supreme Court[2] and lower federal court[3] cases which have, one by one, twisted and turned the Supreme Court's holding in *Illinois Brick Co. v. Illinois*[4] into an incomprehensible mess. The Eighth Circuit in *Campos* continued to muddy the waters of antitrust standing by reformulating[5] *Illinois Brick*'s "indirect purchaser doctrine"[6] to effectively create an insurmountable barrier to those plaintiffs injured by Ticketmaster's antitrust violations who wish to find their redress through compensation under section 4 of the Clayton Act.[7] These cases have helped not only to deny certain injured plaintiffs standing to sue but also to confuse the lower courts about how to apply this indirect purchaser analysis. It is also difficult for potential defendants to determine whether their actions violate *Illinois Brick*.

Part II of this Comment provides an in-depth overview of the Eighth Circuit's opinion in *Campos* and the underlying factual background that accompanies that decision. Part III discusses the legal basis for the indirect purchaser doctrine in *Illinois Brick* and its "mirror image"[8] predecessor, *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*[9] In Part IV, this Comment demonstrates the confusion surrounding the *Illinois Brick* decision by analyzing how, in subsequent opinions, the Supreme Court has grappled with its own indirect purchaser analysis and how the lower courts' incredible attempts to synthesize these mixed signals from the High Court have created a great amount of inconsistency. Lastly, this Comment posits

---

1. 140 F.3d 1166 (8th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999).

2. *See* California v. ARC Am. Corp., 490 U.S. 93 (1989); Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519 (1983); Blue Shield of Va. v. McCready, 457 U.S. 465 (1982).

3. *See* Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc., 140 F.3d 1228 (9th Cir. 1998); Sports Racing Servs., Inc. v. Sports Car Club of Am., Inc., 131 F.3d 874 (10th Cir. 1997); *In re* Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599 (7th Cir. 1997); McCarthy v. Recordex Serv., Inc., 80 F.3d 842 (3d Cir. 1996); *In re* Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144 (3d Cir. 1993).

4. 431 U.S. 720 (1977).

5. *See Campos*, 140 F.3d at 1169-70 (holding that indirect purchasers who bear some of the portion of the monopoly overcharge "only by virtue of an antecedent transaction between the monopolist and another, independent purchaser . . . may not sue to recover damages for the portion of the overcharge they bear").

6. *See Illinois Brick*, 431 U.S. at 729 (holding that only the overcharged direct purchaser, not any other purchaser farther down the manufacture or distribution chain, may have standing to pursue an action seeking treble damages under section 4 of the Clayton Act).

7. 15 U.S.C. § 15 (2000).

8. William M. Landes & Richard A. Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule Under* Illinois Brick, 46 U. CHI. L. REV. 602, 603 (1979).

9. 392 U.S. 481 (1968).

in Part V that we can better view *Campos* and other cases of this nature through a different lens—a more pragmatic approach to the common law antitrust standing doctrine announced by the Supreme Court in *Associated General Contractors of California, Inc. v. California State Council of Carpenters* (*AGC*).[10]

II. LOOKING AT *CAMPOS V. TICKETMASTER CORP.*

The path to the Eighth Circuit began in December 1994, when sixteen suits against Ticketmaster Corporation, the largest entertainment ticket distributor in the United States,[11] were consolidated in the Eastern District of Missouri for pretrial proceedings.[12] Each suit involved plaintiffs—individuals and groups of individuals who had purchased tickets through Ticketmaster—naming various members of Ticketmaster's management structure and the corporation itself as defendants.[13] In September 1995, after dismissal of eleven of these cases, the remaining five plaintiffs filed a new consolidated complaint solely against Ticketmaster Corporation.[14]

In their consolidated complaint, these plaintiffs alleged five counts of antitrust violation. Two counts alleged that Ticketmaster violated section 1 of the Sherman Act[15] by entering into exclusive agreements with various concert venues and promoters to fix ticket prices[16] and "conspiring with [such] venues and promoters to boycott performers who refused to allow the venue to use Ticketmaster's distribution services."[17] Because performers such as Pearl Jam[18] refused to contract to play at venues conspiring with Ticketmaster, the plaintiffs were allegedly injured by being prohibited from enjoying these boycotted performers.[19] Two counts alleged violations of section 2 of the Sherman Act[20] for Ticketmaster's elimination or attempt to eliminate competition in the market for ticket distribution services.[21] Lastly,

---

10. 459 U.S. 519 (1983).

11. Brett Atwood, *Web Ticket Sales to Pass $2 Bil. by 2001*, BILLBOARD, May 31, 1997, at 81 (stating that Ticketmaster "maintains its stranglehold on the [ticket] distribution system").

12. *In re* Ticketmaster Corp. Antitrust Litig., 929 F. Supp. 1272, 1275 (E.D. Mo. 1996), *rev'd sub nom.* Campos v. Ticketmaster Corp., 140 F.3d 1166 (8th Cir. 1998).

13. *Id.*

14. *Id*.

15. 15 U.S.C. § 1 (2000).

16. *In re Ticketmaster,* 929 F. Supp. at 1276.

17. Jill S. Kingsbury, Note, *The Indirect Purchaser Doctrine: Antecedent Transaction?*, 65 MO. L. REV. 473, 474 (2000).

18. *See* Lessley Anderson, *Tickets! Please*, INDUSTRY STANDARD, Oct. 4, 1999 (explaining that Pearl Jam was forced to play smaller clubs, and make less revenue, in order to make financial-friendly ticket distribution services available to their fans and avoid the excessive service charges levied by Ticketmaster).

19. *In re Ticketmaster*, 929 F. Supp at 1276.

20. 15 U.S.C. § 2.

21. *In re Ticketmaster*, 929 F. Supp at 1276; Kingsbury, *supra* note 17, at 474.

one count alleged that Ticketmaster violated section 7 of the Clayton Act[22] through its illegal acquisition of its competitors, which has effectively inhibited entry into the ticket distribution industry.[23]

The plaintiffs sought injunctive relief from Ticketmaster's alleged violations under section 16 of the Clayton Act[24] and treble damages under section 4 of the Clayton Act.[25] The plaintiffs premised these damages on alleged overcharges in the form of excessive service fees arising from Ticketmaster's exercise of monopoly power in the ticket distribution market.[26]

The lower tribunal dismissed the action, holding that the plaintiffs were indirect purchasers of Ticketmaster tickets pursuant to the Supreme Court's holding in *Illinois Brick* and, therefore, lacked standing to sue.[27] Additionally, "[t]he district court also held that, even if the plaintiffs were not [classified as] indirect purchasers, they were nevertheless inappropriate plaintiffs under the standards set forth" in the Supreme Court's decision in *AGC*.[28] Lastly, the trial court found that three of the consolidated cases lacked proper venue.[29] This last holding is not relevant to the inquiry in this Comment. The plaintiffs appealed to the Eighth Circuit, contending that the lower court erred in all of its holdings.[30]

A. Factual Background

According to the complaint, "Ticketmaster is a monopoly supplier of ticket distribution"[31] and delivery services for a multitude of entertainment events, and it has long-term exclusive contracts with most large-scale venues and "with almost every promoter of concerts in the United States."[32] Because of the pervasiveness of Ticketmaster's contracting practices with concert promoters, Ticketmaster is guaranteed to hold the ticket distribution rights to most large-scale popular music events, regardless of whether they have an exclusive contract

---

22. 15 U.S.C. § 18 (2000).

23. *In re Ticketmaster*, 929 F. Supp at 1276; Kingsbury, *supra* note 17, at 474.

24. 15 U.S.C. § 26.

25. *Id.* § 15.

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

27. *Id.*

28. *Id.; see also* Kingsbury, *supra* note 17, at 476 (noting the district court's conclusion that plaintiffs lacked antitrust standing because plaintiffs "had not suffered an injury of the type that Congress sought to redress with the antitrust laws" and that "problems with calculating damages, duplicative recovery, and identifying proper members of plaintiffs' proposed class" precluded standing under *AGC*).

29. *Campos*, 140 F.3d at 1168.

30. *Id.*

31. *Id.* Because the consolidated case was dismissed by the district court on the pleadings, the Eighth Circuit treated "all factual allegations of the complaint as true." *Id.* (citing Haberthur v. City of Raymore, 119 F.3d 720, 723 (8th Cir. 1997)).

32. *Id.* at 1169.

with the venue.[33] This right gives Ticketmaster the ability "to distribute tickets over the telephone, at outlets such as [those at] retail [and department] stores, and at the venue" where the event will take place, as well as extracting from plaintiffs and other purchasers of tickets "supracompetitive fees" in the form of convenience and service charges, which can be as high as twenty dollars per ticket.[34] The plaintiffs contended that, by paying those fees, they suffered injury to their property and have standing to sue under section 4 of the Clayton Act.[35]

B. Majority Opinion

The court began by announcing the Supreme Court precedent from *Illinois Brick* and its progeny that only "the 'direct purchaser' from a monopoly supplier could sue for treble damages under § 4 of the Clayton Act."[36] The majority also included a collection of scholarly interpretations defining the term "indirect purchaser."[37] However, the court then concocted its own indirect purchaser recipe by saying that "[a]n 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."[38]

The Eighth Circuit proceeded to a necessary discussion of the economic assumptions underlying the indirect purchaser rule.[39] In hashing out the rule, the court assumed that the direct purchaser is a firm that has little choice but to buy its inputs from a monopoly at a monopoly price and "[t]he indirect purchaser, in turn, pays some por-

33. *Id.*

34. *Id.* Consequently, since the Eighth Circuit opinion, and even more so since the initial filing of the *Campos* complaint in 1994, sales and distribution through Ticketmaster's online service, www.Ticketmaster.com, have become the most prolific way for Ticketmaster to distribute tickets to concertgoers for events at large-scale venues. Anderson, *supra* note 18. Ticketmaster has capitalized on this new *convenient* method of distributing tickets. Face value ticket prices can soar into the multi-hundreds of dollars for events such as Woodstock '99 and the Rolling Stones. The Consumers' Association of Ireland is preparing a report on ticket prices which identifies an average convenience charge per ticket of 12.5% of the face value price for tickets sold through Ticketmaster's distribution services, allowing Ticketmaster to collect service charges equaling as much as thirty-five dollars per ticket. *Ticket Prices Are 'a rip off'*, STAGE, Apr. 10, 2003, at 7.

35. *Campos*, 140 F.3d at 1169.

36. *Id.*

37. *Id.*; *see also* Gregory J. Werden & Marius Schwartz, Illinois Brick *and the Deterrence of Antitrust Violations—An Economic Analysis*, 35 HASTINGS L.J. 629, 629 n.4 (1984) ("The term 'indirect purchaser' . . . means any party that purchases a product from any party in the vertical supply chain other than the party suspected of the antitrust violation . . . ."); Herbert Hovenkamp, *The Indirect-Purchaser Rule and Cost-Plus Sales*, 103 HARV. L. REV. 1717, 1717 (1990) (defining indirect purchasers are "those who bought an illegally monopolized . . . product or service through the agency of a dealer, distributor, or some other independent reseller who was not a participant in the antitrust violation").

38. *Campos*, 140 F.3d at 1169.

39. *Id.* at 1170.

tion of the monopoly overcharge only because the previous [direct] purchaser was unable to avoid that overcharge" and had to pass it on to the indirect purchaser.[40] The court admitted that the monopoly overcharge usually "injures both those who deal directly and those who deal derivatively with the monopolist."[41] The majority identified this phenomenon as "incidence analysis," or the "famously difficult" determination of "[p]recisely what part of the overcharge will be borne by the direct purchaser, and what [portion of the overcharge] will be borne by the indirect purchaser."[42] The court noted that the difficulty in apportioning damages between the direct and indirect purchaser may lead to duplicative recovery if both are granted standing to sue for treble damages, and it cited this reasoning as a justification for denying standing to indirect purchasers under section 4 of the Clayton Act.[43] Before reaching the merits of the case, the court opined that none of the exceptions to the indirect purchaser rule existed in this case.[44] More specifically, there was no "cost-plus" contract, no allegation of the indirect purchasers owning or controlling the direct purchaser, nor any "proper allegation that the direct purchasers have conspired with . . . Ticketmaster to commit antitrust violation[s]."[45]

The majority responded to the plaintiffs' assertion that because they paid fees directly to Ticketmaster they were direct purchasers of ticket distribution services with three specific rebuttals. First, the Eighth Circuit agreed with the Third Circuit by finding that Ticketmaster's service was more akin to a billing practice and, therefore, not determinative of indirect purchaser status.[46] Secondly, "[t]he plaintiffs' inability to obtain ticket [distribution] in a competitive market is simply the consequence of the antecedent inability of venues to do so" by virtue of "Ticketmaster's exclusive contracts with almost every promoter of concerts in the United States."[47] The majority concluded that this kind of "derivative dealing is the essence of indirect purchaser status," and in turn, constituted a bar to plaintiffs' suit for damages under the antitrust laws.[48]

Third, in response to the plaintiffs' assertion that Ticketmaster's monopoly power is benign with respect to the venues because the service fees are collected directly from buyers and are not part of the "full" ticket price, the court adopted the notion that the actual "face

40. *Id*.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at 1171.
45. *Id*.
46. *Id.* (citing McCarthy v. Recordex Service, Inc., 80 F.3d 842, 853 n.18 (1996)).
47. *Campos*, 140 F.3d at 1171.
48. *Id.*

value" of the ticket and the cost of service fees "amount[ed] to the single cost of attending the concert, regardless of how that cost is divided."[49] The majority finally concluded that because this aggregate price of the ticket is "obviously a price [the concert-going] market will bear, a venue free from Ticketmaster's domination of ticket distribution would be able to charge that price itself" while having the ability to keep the supracompetitive fees.[50] The court affirmed the district court's holding that the plaintiffs were, in fact, indirect purchasers of Ticketmaster's services and therefore denied standing to sue for treble damages under section 4 of the Clayton Act.[51]

However, the majority held that, under *Illinois Brick*, section 16 of the Clayton Act did not preclude the plaintiffs from seeking injunctive relief.[52] Because the complexities of incidence analysis do not arise when the courts consider the merits of injunctive relief, and because the plaintiffs claimed to have purchased tickets from and paid the monopoly overcharge to Ticketmaster, the court held that the plaintiffs did have standing to sue for injunctive relief.[53]

C. Dissenting Opinion

Judge Arnold disagreed with the majority's classification of the plaintiffs in this case as indirect purchasers.[54] He noted that the term "antecedent transaction" appears nowhere in the cited authority nor does the mere existence of an "antecedent transaction" convert all purchasers of a monopolized good or service into indirect purchasers under *Illinois Brick*.[55] Judge Arnold embraced a two-prong analysis for determining whether a party is an indirect purchaser under *Illinois Brick*.[56]

Illinois Brick requires that the antecedent transaction, first, "must have been one in a direct vertical chain of transactions" and, second, "must have resulted in the 'passing on' of [a portion of the] monopoly [overcharge] from the direct purchaser to the indirect purchaser."[57] Judge Arnold concluded that no direct vertical chain of transactions existed because "[t]he monopoly product at issue in this

---

49. *Id.* at 1171-72 (citing Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 495 (1992) (Scalia, J., dissenting)).

50. *Campos*, 140 F.3d at 1172 (citing Kansas v. UtiliCorp United, 497 U.S. 199, 209 (1990); Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 492 (1968); United States Football League v. Nat'l Football League, 842 F.2d 1335, 1357-58 n.19 (2d Cir. 1988)).

51. *See id.*

52. *Id.*

53. *Id.*

54. *Id.* at 1174-75 (Arnold, J., dissenting).

55. *Id.* at 1174.

56. *Id.*

57. *Id.*

case [was] ticket distribution services, not tickets."[58] The antecedent agreement between the venues and Ticketmaster was not one in which the venues bought something from Ticketmaster for the purpose of reselling it to willing concertgoers.[59] Rather, Ticketmaster sold its services directly to the plaintiffs and it is irrelevant that Ticketmaster "would not be supplying the service but for its antecedent agreement with the venues."[60]

Judge Arnold concluded that the majority result unfortunately made it unlikely for this or any plaintiff to have the ability to ever bring a suit against Ticketmaster in the Eighth Circuit under section 4 of the Clayton Act.[61]

III. LEGAL BASIS FOR THE EIGHTH CIRCUIT DECISION

In section 4 of the Clayton Act, Congress has provided the ability to sue for the remedy of treble damages to any person "injured in his business or property by reason of anything forbidden in the antitrust laws" and the ability to "recover threefold the damages" sustained by him.[62] The Court in *Illinois Brick* identified a dual purpose for Congress providing this right of action: (1) "deterring [antitrust] violators and depriving them of the 'fruits of their illegality,'" and (2) compensating "victims of antitrust violations for their injuries."[63]

Despite this apparently inclusive Congressional grant of access to the courts for victims of antitrust injury, the Court has not heeded its own caution against creating restrictive burdens on this access.[64] Instead, the Court has constructed the indirect purchaser doctrine to bar certain plaintiffs standing to sue on antitrust claims. To best understand the concept of offensive passing-on and the restrictive indirect purchaser rule in *Illinois Brick*, we must begin with the idea of defensive passing-on in its predecessor, *Hanover Shoe*.

A. *The Passing-on Defense in* Hanover Shoe, Inc. v. United Shoe Machinery Corp.

Hanover Shoe, a manufacturer of shoes, brought an action under section 4 of the Clayton Act alleging that United Shoe Machinery Corp.'s ("United") "practice of leasing and refusing to sell its more complicated and important shoe machinery" forced Hanover to lease this machinery at an inflated price, which constituted unlawful mo-

---

58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.* at 1175.
62. 15 U.S.C. § 15(a) (2000).
63. Ill. Brick Co. v. Illinois, 431 U.S. 720, 746 (1977).
64. *Id.* at 755-56 (Brennan, J., dissenting) (quoting Radovich v. Nat'l Football League, 352 U.S. 445, 454 (1957)).

nopolization in violation of the antitrust laws.[65] Hanover prayed for the recovery of "the difference between what it paid United in shoe machine rentals and what it would have paid" had United, instead, sold those same machines at a noninflated price.[66]

United argued, in its defense, that (1) Hanover would have charged less and made the same level of profit had it bought, instead of leased, the machinery from United, and (2) Hanover "suffered no legally cognizable injury [because] the illegal overcharge . . . was reflected in the price charged for shoes sold by Hanover to its customers."[67] In other words, United argued that because the whole of this illegal overcharge was reflected in the price Hanover charged customers for its shoes, they "passed-on" not only that charge, but also the injury caused by that charge to those customers. If the Court accepted this argument, it would essentially relieve United of any liability to Hanover because Hanover's customers, not Hanover itself, would have been the appropriate plaintiffs.

Yet, the Supreme Court rejected United's assertion of a passing-on defense, holding that "when a buyer shows that the price paid by him . . . is illegally high and also shows the amount of the overcharge, he has made out a prima facie case of injury and damage within the meaning of [section 4 of the Clayton Act]."[68] The Court opined that the injury to Hanover occurred at the moment when it leased the machinery at an illegally high price and that Hanover was "equally entitled to damages if [it] raised the price for [its] own product."[69]

The Court laid out three reasons for its decision to reject a passing-on defense. First, the Court identified the nearly insuperable difficulty of showing that Hanover could have the ability to, or even would, raise its prices absent the overcharge.[70] Second, if this defense were available, it is doubtful that defendants would hesitate to proffer it, which would create "additional long and complicated proceedings involving massive evidence and complicated theories."[71] Lastly, the Supreme Court was concerned that the passing-on defense would reduce the effectiveness of treble damage actions due to the need to prove that the overcharge was passed onto individual customers. In this case, individual customers consisted of buyers of individual pairs of shoes with little interest or incentive to involve themselves in the suit.[72]

---

65. Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 483 (1968).
66. *Id.* at 484.
67. *Id.* at 487-88.
68. *Id.* at 489.
69. *Id.*
70. *Id.* at 493.
71. *Id.*
72. *Id.* at 494.

While this decision solves the question of whether a passing-on defense may be used, the Court left unanswered the difficult question of whether the concept of "passing-on" can be used offensively by indirect purchasers to prove injury and damages under the antitrust laws. The Court met this question head-on in *Illinois Brick*.[73]

B. *Offensive Passing-on and the Indirect Purchaser Rule in* Illinois Brick

When the Supreme Court decided *Illinois Brick Co. v. Illinois*[74] in 1977, it confronted the "mirror image"[75] of *Hanover Shoe*. The respondent, the State of Illinois, initially brought this suit on behalf of state and local government agencies against the petitioner, Illinois Brick, under section 4 of the Clayton Act.[76] Illinois argued that the petitioner had conspired to fix the prices of concrete blocks, contrary to the antitrust laws.[77] These state and local government entities did not directly purchase the concrete blocks from the petitioner.[78] Instead, the concrete block was primarily sold to masonry subcontractors who then submitted bids to general contractors, who, in turn, vied for government works contracts from the respondents.[79] Although the state and local governments were indirect purchasers of the monopolized concrete block, they contended that the whole or part of the monopoly overcharge taken on by the subcontractor purchasing the concrete block from the petitioner was passed on to them via the general contractor.[80] By virtue of absorbing all or part of this overcharge, the state and local government entities claimed that they sustained antitrust injury, giving them standing to sue under section 4 of the Clayton Act.[81] Illinois Brick rebutted that the respondents lacked standing to sue under *Hanover Shoe* because they were indirect purchasers.[82]

Regarding the concern of applying the concept of "passing-on" equally to both plaintiffs and defendants, the Court had a choice: overrule *Hanover Shoe* to allow offensive and defensive passing-on or apply *Hanover Shoe* to bar attempts to use the passing-on theory offensively.[83] The Court took the latter approach, choosing to uphold the construction of section 4 that it announced in *Hanover Shoe*—the

73. 431 U.S. at 726.
74. *Id.* at 722.
75. Landes & Posner, *supra* note 8, at 603.
76. *Illinois Brick*, 431 U.S. at 726.
77. *Id.* at 726-27.
78. *Id.* at 726.
79. *Id.*
80. *See id.* at 727.
81. *Id.* at 726-27.
82. *Id.*
83. *Id.* at 729.

"overcharged direct purchaser, and not others in the chain of manufacture or distribution, is the party 'injured in his business or property.'"[84]

The Supreme Court cited a twofold rationale for choosing to congruently bar defensive and offensive passing-on theories. First, the majority concluded that allowing the offensive but not the defensive use of the passing-on theory would create the risk of inconsistent adjudications and duplicative liability for defendants.[85] The Court opined that in addition to the direct purchaser automatically recovering the full amount of the overcharge, the indirect purchaser(s) would also sue to recover the amount of the overcharge they absorbed.[86] If the majority were to accept this one-sided application of *Hanover Shoe*, it would be validating the presumption that the direct purchaser is entitled to a full recovery, "while preventing the defendant from using that [same] presumption against the other plaintiff[s]" to bar their recovery.[87]

The second rationale for announcing this indirect purchaser doctrine barring the use of offensive passing-on theory was the same rationale central to the Court's holding in *Hanover Shoe*.[88] The Court denied the passing-on defense in *Hanover Shoe* because of the difficulty in clearing the evidentiary hurdle in proving that the whole of the monopoly overcharge was passed-on to a subsequent purchaser.[89] The majority in *Illinois Brick* reasoned that this hurdle would be substantially exacerbated by the need for each subsequent purchaser-plaintiff in the chain of distribution to demonstrate that he or she bore the whole or a portion of the overcharge to prove injury.[90]

Although the Court recognized the statutory purpose of section 4—to compensate injured plaintiffs—in upholding *Hanover Shoe*, the Court validated the designation of the direct purchaser as the appropriate plaintiff to have standing to sue for antitrust injuries by virtue of a monopoly overcharge.[91]

---

84. *Id.* (quoting 15 U.S.C. § 15 (1976)).
85. *Id.* at 730.
86. *Id.*
87. *Id.* at 730-31.
88. *Compare* Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 493 (1968), *with Illinois Brick*, 431 U.S. at 732 (stating in both instances a concern for preventing long and complicated evidentiary proceedings giving parties the heavy burden of demonstrating the passing-on and extent of the overcharge through the chain of distribution to prove injury to subsequent, indirect purchasers).
89. *Hanover Shoe*, 392 U.S. at 493.
90. *Illinois Brick*, 431 U.S. at 732.
91. *Id.* at 734-35.

IV. INCONSISTENCY AND THE EVISCERATION OF THE *ILLINOIS BRICK* INDIRECT PURCHASER RULE

Despite the apparent clarity in the Court's annunciation of the indirect purchaser rule, subsequent decisions by the Supreme Court and lower courts seem to have clouded this clear view of antitrust injury and standing. The Supreme Court not only went on to create a comprehensive methodology for antitrust standing,[92] but the Court approved, under state antitrust laws, the same indirect purchaser actions that it had per se barred in the federal context.[93] Lower courts have interpreted the *Illinois Brick* indirect purchaser doctrine inconsistently since that decision.

A. The Supreme Court Clouding the View

1. Antitrust Standing in Associated General Contractors of California, Inc. v. California State Council of Carpenters

In *AGC*, the Court created a two-part test to determine whether a plaintiff shall have standing under section 4 of the Clayton Act. First, the plaintiff must demonstrate that he or she has suffered an injury of the type the antitrust laws were designed to prevent, and for which they provide a remedy.[94] Second, the Court proffered three factors for courts to consider. These include the remoteness of the injury,[95] the availability of a plaintiff with greater self-interest to bring an action against the monopoly firm,[96] and the difficulty of the litigation in determining damages if an alternate plaintiff shall be permitted to bring an action.[97]

Although this analysis is described as being "analytically distinct"[98] from that of *Illinois Brick*, many of the same concerns that exist in *Illinois Brick* are embodied in *AGC*. Both are concerned with not burdening courts with the complicated task of apportioning damages.[99] Some scholars have wondered, in light of the closeness of the two opinions, whether *Illinois Brick* would have been decided in the same manner if the Court had the luxury of having its antitrust

---

92. Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 540-43 (1983).

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

94. *AGC*, 459 U.S. at 540; *see also* Blue Shield of Va. v. McCready, 457 U.S. 465, 482 (1982) ("The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.").

95. *AGC*, 459 U.S. at 540.

96. *Id.* at 542.

97. *Id.* at 543-44.

98. *McCready*, 457 U.S. at 476.

99. *See AGC*, 459 U.S. at 544; Ill. Brick Co. v. Illinois, 431 U.S. 720, 745 (1977).

standing guidelines from *AGC* as the backdrop.[100] If this reversal of chronology actually took place, the Court may have decided *Illinois Brick* under the antitrust standing rubric set out in *AGC*, dispensing with the action based on the "remoteness of indirect purchasers, the complexity of the damage calculation, and the presence of potential plaintiffs . . . who would be motivated to bring an action."[101] Yet, the reality is that the Court failed to subsume *Illinois Brick* into the antitrust standing analysis, which leaves questions concerning how to correctly interpret *Illinois Brick* in light of *AGC*.

One possible interpretation is that if a plaintiff is identified as an indirect purchaser, courts can disregard the case-by-case analysis set out in *AGC* because, by their nature, indirect purchasers will rarely meet this standing test. This interpretation characterizes the way the indirect purchaser doctrine is presently applied.[102] However, a second, albeit less stringent, interpretation may be that not every indirect purchaser would automatically be barred from bringing an action for violation of the antitrust laws.[103] A discussion later in this Comment will address the dichotomy between these two interpretations and the preference for the second interpretation when courts are charged with deciding cases such as *Campos*.[104]

2. California v. ARC America Corp.

In addition to creating a test for courts to determine whether to grant antitrust standing to plaintiffs, the Supreme Court's decision in *California v. ARC America Corp.* (*ARC*)[105] has had a destabilizing effect on antitrust deterrence and enforcement. *ARC* involved state government plaintiffs who were indirect purchasers of cement—in much the same way as the plaintiffs in *Illinois Brick* were indirect purchasers of brick—bringing a treble damages action not only under section 4 of the Clayton Act but also under similar state antitrust laws that granted recovery to direct and indirect purchasers alike.[106] This decision turned on whether the interpretation of section 4 of the Clayton Act found in *Illinois Brick* preempted state antitrust laws,

100. *See* Roger D. Blair & Jeffrey L. Harrison, *Reexamining the Role of* Illinois Brick *in Modern Antitrust Standing Analysis*, 68 GEO. WASH. L. REV. 1, 17 (1999).

101. *Id.* Consequently, the indirect purchasers in *Illinois Brick* would most likely have met the antitrust injury component of the *AGC* test because the part of the monopoly overcharge that was passed on to them is the type of injury that the antitrust laws were designed to prevent.

102. *Id.*

103. *Id.* at 17-19.

104. *See infra* Part V.

105. 490 U.S. 93 (1989).

106. *Id.* at 97-98.

regardless of explicit state statutory provisions allowing indirect purchasers to recover in a treble damages cause of action of this kind.[107]

The Court identified a path to follow in order to determine whether federal law preempts state law. Without an express statement by Congress of preemption, courts can find that state law is preempted "when Congress intends that federal law occupy a given field," or, if Congress has not occupied the field, when "the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[108] The Court, unconvincingly,[109] concluded that allowing recovery for indirect purchasers under state antitrust laws would not conflict with the policies expressed in *Hanover Shoe* and *Illinois Brick*. The Court held that nowhere in any of the Court's prior cases construing section 4 of the Clayton Act did a majority "identify a federal policy against States imposing liability in addition to that imposed by federal law."[110]

It is hard to imagine an overarching policy more clear than the policy announced in *Illinois Brick*: allowing offensive passing-on without the availability of defensive passing-on would lead to inconsistent adjudications, duplicity in recoveries, and unnecessary multiplicity in defendants' liability.[111] The Court persists in constructing an unnecessarily high wall which completely separates federal and state antitrust actions, each having no contingent effect on the other. Yet, in viewing state and federal antitrust actions from the standpoint of potential defendants, it is simple to realize that allowing indirect purchasers to recover damages under state antitrust laws directly conflicts with the federal policy of preventing multiple liability underlying the indirect purchaser doctrine. Potential defendants do not construct this same barrier, and they perceive potential liability and the possibility of duplicative recoveries from state and federal damages actions in the aggregate. While unpersuasively explaining away the obvious contradiction between its *ARC* opinion and past federal indirect purchaser cases, the Court, in allowing state law-sanctioned indirect purchaser actions, has effectively lessened, if not totally eliminated, a firm's ability to "determine the expected cost of taking any action that falls in the gray areas of antitrust."[112]

---

107. *Id.* at 100.
108. *Id.* at 100-01 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
109. *See* Blair & Harrison, *supra* note 100, at 12-13.
110. *ARC*, 490 U.S. at 105.
111. Ill. Brick Co. v. Illinois, 431 U.S. 720, 730 (1977).
112. *See* Blair & Harrison, *supra* note 100, at 13.

B. An Array of Inconsistent Lower Federal Court Interpretations of the Indirect Purchaser Rule

Adding to the contradictions surrounding the use of the indirect purchaser doctrine in Supreme Court decisions, the lower federal courts have levied inconsistent interpretations of *Illinois Brick* and of how the antitrust standing guidelines should be applied in relation to *Illinois Brick*. The following opinions demonstrate the confusion over the Supreme Court's decisions in this area and reveal the need for an announcement from the High Court of a method to consistently decide cases in this area.

1. In re Lower Lake Erie Iron Ore Antitrust Litigation

In the case of *In re Lower Lake Erie Iron Ore Antitrust Litigation*,[113] the Third Circuit was confronted with a suit by manufacturers of steel against railroad companies for halting the use of newly developed, less expensive means of transporting iron ore.[114] Because the railroad controlled the off-loading technology, the railroad was allegedly able to boycott nonrailroad-owned docks by not making its transportation technology compatible with the newer, and less expensive, off-loading equipment.[115] In addition, the railroad continued to charge the steel producers the more expensive rate for use of the older off-loading equipment.[116] Although the manufacturers of the newer, less expensive off-loading equipment were the entities most directly affected by the railroad's action, the plaintiff steel producers complained of damages stemming from the supracompetitive price they paid to the railroad, less the price that would have been paid by the steel manufacturers had the railroad allowed the newly developed technology to be used in off-loading iron ore.[117]

The Third Circuit, under *AGC*, granted standing to the plaintiff steel purchasers in this action.[118] While recognizing that, "in some sense, [the steel producers were] 'indirect' purchasers," the Third Circuit refused to simply bar recovery based on this point alone and noted that *AGC* instructed them to inquire into the remoteness of the injury and the "nature of the relationship between the parties."[119] While the railroad's anticompetitive actions caused injury to the component industries, the court concentrated on the brunt of the direct injury borne by the steel producers: the increased costs stemming from the railroad inhibiting the development of cheaper tech-

113. 998 F.2d 1144 (3d Cir. 1993).
114. *Id.* at 1152-53.
115. *Id.*
116. *Id.* at 1153.
117. *Id.* at 1154.
118. *Id.* at 1169.
119. *Id.* at 1168.

nology.[120] The steel companies were the only customers of the iron ore shipping industry, and the court recognized that, "indeed, th[at] industry existed [exclusively] for them."[121]

More importantly, the Third Circuit analyzed, under the guidelines in *AGC*, the possibility of duplicative recovery and the difficult issues involving apportionment of damages.[122] The type of duplicative recovery that *Illinois Brick* wished to prevent—parties all along the chain of distribution competing for the same limited amount of profits earned by the price-fixer from antitrust violations—was not present here.[123] This is because the steel producers' damages claim is characteristic of a typical monopoly overcharge, and the component industries are claiming lost profits.[124] The court made the distinct point that the existence of complexities in apportioning damages should not allow the court to avoid the litigation.[125] This makes good sense because standing is an initial determination in which the court inquires into whether the plaintiffs "have alleged a cause of action and have requested the recovery of damages that are cognizable under the law."[126] The Third Circuit brings some rationality to this discussion by noting that injured parties should not be further penalized and left without any redress simply because the trial court assumes that, in every instance of an action brought by an indirect purchaser, the ascertainment of damages will be a burden too great for the court to carry.[127]

2. In re Brand Name Prescription Drug Antitrust Litigation

The Seventh Circuit's decision in *In re Brand Name Prescription Drug Antitrust Litigation* (*Brand Name*),[128] written by Chief Judge Posner, also left the window open for private treble damages actions by indirect purchasers.[129] In this case, retail pharmacies brought an action against wholesalers and manufacturers of prescription drugs, claiming that the defendants conspired with each other to effectively boycott certain retailers by denying them discounts on brand-name prescription drugs that were given to other preferred customers, including HMOs and mail order pharmacies.[130] Although the court held that the plaintiffs were quintessential indirect purchasers that were

---

120. *Id.*
121. *Id.*
122. *Id.* at 1169.
123. *Id.*
124. *Id.*
125. *Id.* at 1169-70.
126. *Id.* at 1169.
127. *Id.*
128. 123 F.3d 599 (7th Cir. 1997).
129. *See id.* at 604-07.
130. *Id.* at 602-04.

barred from recovery of monopoly overcharges in an antitrust action, the court also determined that there was enough evidence of the existence of an alleged conspiracy for the plaintiffs to survive the defendant's motion for summary judgment.[131]

However, in the event the defendant wholesalers and manufacturers did not take part in a price-fixing conspiracy, Chief Judge Posner reasoned:

> We can imagine the present case reconfigured in a way that might take it out of the orbit of [*Hanover Shoe* and *Illinois Brick*]; it would not be a matter of carving a further exception. A number of pharmacies have tried to improve their bargaining position vis-à-vis the drug manufacturers by forming buying groups. . . . The manufacturers have been steadfast in refusing to grant discounts to such groups. If this refusal, taking as it does the form of a refusal to enter into direct contractual relations with certain retailers, such as the manufacturers have with their favored customers, were successfully challenged as a boycott, the *Illinois Brick* rule, which is a rule concerning overcharges, would fall away. The plaintiffs would be permitted to prove up whatever damages they could show had flowed from the boycott, provided they weren't seeking to recover overcharges, for that would entail the very incidence analysis that *Illinois Brick* bars.[132]

This scenario suggests the problem with *Illinois Brick*. If the plaintiffs are not deemed by a court to be indirect purchasers, then this alleviates the need to rely on a boycott theory. Yet, reliance by plaintiffs on a boycott theory would become a requirement if they were determined to be indirect purchasers.[133] Reliance on a boycott theory would necessitate a demonstration not of an overcharge but, rather, the lost profits that resulted from the existence of the boycott.[134] However, in determining the lost profits, the court would be charged with the task of identifying exactly what the discount, in this scenario, would have been had the plaintiffs not been disfavored by the manufacturers and wholesalers.[135] This calculation is the same as the basic overcharge analysis—identifying the price the indirect purchaser would have been charged had the supracompetitive overcharge not existed and not been passed on to them—which the Court supposedly prohibited in *Illinois Brick*.[136]

---

131. *Id.* at 606, 616.
132. *Id.* at 606 (internal citations omitted).
133. Blair & Harrison, *supra* note 100, at 20.
134. *Id.*
135. *Id.*
136. *Id.*; *see also* Ill. Brick Co. v. Illinois, 431 U.S. 720, 732 (1977).

3. Lucas Automotive Engineering, Inc. v. Bridgestone/Firestone, Inc.

Unlike Chief Judge Posner's concentration on the substantive violation in *Brand Name*, *Lucas Automotive Engineering, Inc. v. Bridgestone/Firestone, Inc.* (*Lucas*)[137] represents an expansion of the per se application of *Illinois Brick* without respect to the substantive violation claimed by the plaintiff.[138] Here the plaintiff, a distributor of vintage automobile tires, filed an action to recover treble damages against its competitor for acquiring an exclusive right to manufacture and distribute Firestone vintage tires.[139] The court initially determined that, as a competitor, the plaintiff lacked the requisite antitrust injury and therefore lacked standing to sue for treble damages under section 4 of the Clayton Act.[140]

Alternatively, the plaintiffs alleged that they had standing since they were forced to purchase some of their stock of vintage tires from the defendant competing distributor as a result of this exclusive contract.[141] Noting that the plaintiffs had yet to actually purchase any tires from the defendants and were purchasing products directly from the primary supplier, who in turn used the defendant as a distributor, the court held that the plaintiffs were indirect purchasers.[142] While the Supreme Court of the United States had yet to apply the indirect purchaser rule to a claim of this type,[143] the Ninth Circuit expanded the indirect purchaser doctrine from applying only to price-fixing cases to applying it to most actions under section 4 of the Clayton Act.[144]

4. Sports Racing Services, Inc. v. Sports Car Club of America, Inc.

The defendants in *Sports Racing Services, Inc. v. Sports Car Club of America, Inc.* (*Sports Racing*)[145] were the organizers of amateur sports car racing events in which the plaintiff participated.[146] As organizer of these events, the defendants required all participants to

137. 140 F.3d 1228 (9th Cir. 1998).
138. *Id.* at 1233-34.
139. *Id.* at 1230-32.
140. *Id.* at 1233.
141. *Id.*
142. *Id.* at 1233-34.
143. The case law applying the indirect purchaser rule under section 4 of the Clayton Act had been limited to cases involving sections 1 and 2 of the Sherman Act while this opinion suggested the expansion of the doctrine to include those cases involving section 7 of the Clayton Act. *Id.*
144. *Id.*
145. 131 F.3d 874 (10th Cir. 1997).
146. *Id.* at 878. This Comment solely looks at how the court viewed plaintiff John Freeman; it does not discuss the Court's viewpoint of Freeman's business, plaintiff Sports Racing Services, Inc. (SRS).

purchase and use specific parts that, conveniently, the defendants exclusively sold via an independent distributor.[147] Plaintiff, therefore, did not purchase these automobile parts directly from the defendants. The plaintiff alleged that the defendants monopolized the particular market for sports racing cars and parts, and that the defendants illegally tied the plaintiff's ability to race in these events to the purchase of specified race cars and parts.[148]

The Tenth Circuit's analysis is strikingly similar to Judge Posner's opinion in *Brand Name*. The majority noted that "standing analysis must take into account the type of antitrust claim being asserted"[149] in holding that the plaintiff lacked standing to pursue his monopolization claim because he was an indirect purchaser of sports racing cars and parts.[150] However, at the same time, the majority concluded that the plaintiff was not barred from asserting his tying claim because the plaintiff was a "direct purchaser of the tying product and he was forced to purchase the tied product" from the distributor dictated by the defendants.[151] The court identified the tying product as "racing services" and the tied product as the cars and parts that the defendants specified for entrance into the races.[152]

The oddity of this holding is that the market at issue in the monopolization claim—the purchase of specified sports racing cars and parts—is precisely the same as the tied product market in the tying claim. Yet, the court barred the plaintiff from going forward with the former claim and allowed standing for the latter, although both claims were aimed at redressing the defendants' anticompetitive actions in the market for cars and parts. This method of analysis is much like that of Judge Posner's in *Brand Name*, in that the court relied exclusively on the label of the claim in determining its treatment, even though the defendants' actual actions were not different.[153]

Although the court characterized the plaintiff as an indirect purchaser under the monopolization claim, the court recognized the "first 'innocent' purchaser" notion that stems from *Illinois Brick* and applied it to the tying claim.[154] In *Sports Racing*, the direct purchaser of the tied item was merely a pawn for the defendants, and the de-

---

147. *Id.*
148. *Id.* at 878-79.
149. *Id.* at 882.
150. *Id.* at 882-84.
151. *Id.* at 886-87.
152. *Id.*
153. Chief Judge Posner concentrated on the idea that changing the label of the violation could allow an indirect purchaser to gain standing as long as this plaintiff did not base their damages claim on a theory of monopoly overcharge. *See In re* Brand Name Prescription Drug Antitrust Litig., 123 F.3d 599, 606 (7th Cir. 1997). However, the two opinions diverge because the *Sports Racing* court did not discuss damage calculations.
154. *Sports Racing*, 131 F.3d at 889.

fendants should not be able to avoid enforcement by designating an independent distributor to sell the tied product to the plaintiff.[155] Therefore, the court took the common-sense approach by granting standing to the indirect purchaser and appointing it as the "best" party to pursue this claim.[156]

V. LOOKING AT *CAMPOS* THROUGH A NEW LENS

A. *Are Purchasers of Concert Tickets Through Ticketmaster's Ticket Distribution Service Really Indirect Purchasers?*

In addition to Judge Arnold's dissent in *Campos*,[157] scholars have devoted a fair amount of academic discussion to the notion that the plaintiffs in *Campos v. Ticketmaster Corp.* were not in fact indirect purchasers.[158] The Eighth Circuit in *Campos* proposed that "[a]n 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."[159] The exclusive contracts between the venues and Ticketmaster were the antecedent transactions that rendered the plaintiffs in *Campos* indirect purchasers because the exclusive contracts identified from whom the plaintiffs would purchase tickets.[160] The majority reasoned that the ticket price and the service charge were two segments that combined to equal the overall price of admission to a concert.[161] The court assumed that this price was at a profit-maximizing level which the market could bear and that if Ticketmaster, or a similar distributor, was not involved in this arrangement, the venue would charge concertgoers the same price.[162] This allowed the *Campos* majority to view the venues as incurring the service charge themselves by permitting Ticketmaster to distribute tickets to events at these venues.

The Eighth Circuit's misapplication of *Illinois Brick* stems from the court's inability to properly identify the monopoly product; in this case, ticket distribution services. An example taken from your everyday barber shop best illustrates this misapplication.[163]

---

155. *Id.* at 887.

156. *Id.* This argument by the court is more akin to the examination of the merits of potential plaintiffs that is found in *AGC*.

157. Campos v. Ticketmaster Corp., 140 F.3d 1166, 1174-75 (8th Cir. 1998) (Arnold, J., dissenting).

158. *See* Joseph P. Bauer, *The Stealth Assault on Antitrust Enforcement: Raising the Barriers for Antitrust Injury and Standing*, 62 U. PITT. L. REV. 437, 447 (2001); Blair & Harrison, *supra* note 100, at 21-23.

159. *Campos*, 140 F.3d at 1169.

160. *Id.* at 1171.

161. *Id.*

162. *Id.* at 1172.

163. The following example is adapted from Kingsbury, *supra* note 17, at 488-89.

When a person wants a "crew cut,"[164] she can either go to the local barber shop and employ the services of the barber to cut her hair with clippers, or she can purchase a set of clippers directly from the manufacturer and perform the haircut herself. If the woman chooses to have her hair cut at the barber shop, she would be the direct purchaser of the barber's hair-cutting services and the indirect purchaser of the clippers that the barber uses to give the haircut. On the other hand, if the woman chooses to cut her own hair, she would be a direct purchaser of the clippers and would not even enter the market for the barber's hair-cutting services.[165]

Suppose the clipper manufacturer is the monopolist and the clippers are the monopoly product. If the woman chooses to have her hair cut by the barber, she will be an indirect purchaser of the monopoly product and will, in turn, bear the portion of the monopoly overcharge which the barber passes on to her. Thus, because of difficulties in apportioning damages and the avoidance of multiple liability, a court would anoint the barber the direct purchaser of the monopoly product. Moreover, the barber would be the appropriate plaintiff to bring suit against the monopoly manufacturer under *Illinois Brick*.[166] However, if the woman decides to purchase the monopoly product and cut her hair herself, then she obviously is the direct purchaser of the clippers and, furthermore, would be granted standing to sue the monopolist manufacturer under section 4 of the Clayton Act.[167]

Change the scenario. If the monopolist is the barber who is the only barber in town and the monopoly product is the hair-cutting services, then it is difficult to see how the woman could ever be an indirect purchaser of the monopoly product. If the woman employs the services of the barber to cut her hair, then she is a direct purchaser of the barber's hair-cutting services and she "would clearly be a direct purchaser of the monopoly product."[168] The woman can avoid paying the monopoly overcharge "by never entering the market for the monopoly product"[169]—purchasing the clippers and cutting her own hair. Under this revised scenario, any antecedent agreement that may exist between the manufacturer of the clippers and the barber would not affect the woman's purchaser status.

---

164. A crew cut is "a style of man's or boy's haircut in which the hair is cropped close to the head, but left bristly on top to look like a brush." WEBSTER'S NEW WORLD COLLEGE DICTIONARY 342 (4th ed. 2000). A woman is used in this scenario as an homage to a woman who would love a "crew cut" but, according to WEBSTER'S definition, can never have one.

165. Kingsbury, *supra* note 17, at 488-89.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

This example magnifies the importance of courts correctly identifying the monopolist and the monopoly product. With this example in mind, the court may have interpreted the plaintiffs in *Campos* more accurately as direct purchasers if it would have simply construed the monopoly product as ticket distribution services and, therefore, Ticketmaster as the monopolist.[170]

The example[171] also illustrates the need for there to be a distinction between goods and services. In the barber shop example, the clippers are a good which buyers can purchase and resell, making the indirect purchaser doctrine an issue because of the concerns of difficulty in apportioning damages and duplicative liability arising out of the possibility of subsequent purchasers. However, the barber's haircutting services do not implicate the indirect purchaser doctrine because once the service is rendered, the hair is gone and it is swept away. The value of the service cannot be resold and can only be realized by the direct purchaser.[172] Therefore, when the monopoly product is a service, it is irrelevant whether the service provider uses other goods, such as clippers or, in the case of *Campos*, tickets in the rendering of that service.

B. *Limiting* Illinois Brick*'s Indirect Purchaser Doctrine in Favor of a Comprehensive Case-by-Case Analysis*

The inquiry must not end here. Even assuming the Eighth Circuit was correct in its interpretation of preceding case law—that the plaintiffs in *Campos* were, in fact, indirect purchasers[173]—this decision raises many concerns about the availability of points of entry into the judicial process for similarly situated plaintiffs and the wisdom of such a rigid rule. Despite the pronouncement of the Supreme Court that it is an "unwarranted and counterproductive exercise to litigate a series of exceptions" to the indirect purchaser rule, even though the "economic assumptions underlying the *Illinois Brick* rule

---

170. The Eighth Circuit viewed Ticketmaster as the monopolist which sold its ticket distribution services to the direct purchaser venues which, in turn, sold tickets to the indirect purchaser-plaintiffs. However, the plaintiffs alleged monopoly overcharges arising out of Ticketmaster's services and not from the purchase of tickets. Campos v. Ticketmaster Corp., 140 F.3d 1166, 1174-75 (8th Cir. 1998).

171. The barber shop example provides a better metaphor for the indirect purchaser analysis than Kingsbury's house-painting example. *See* Kingsbury, *supra* note 17, at 488-89. Certainly, if a subsequent buyer of a painted house assumes a portion of the overcharge that the previous owner incurred as a result of the previous owner's purchase of the monopoly product (painting services), then the subsequent purchaser may be considered an indirect purchaser of the painting services. Once one employs the services of a monopolist barber, the hair is gone and the value of this service cannot be passed on to a subsequent purchaser.

172. *Id.*

173. *Campos*, 140 F.3d at 1171.

might be disproved in . . . specific case[s],"[174] the Court has left much to be desired in indirect purchaser jurisprudence by not granting certiorari on any of the inconsistent lower court decisions in this area. This neglect, coupled with an announcement of general antitrust standing in *AGC* and the allowance of indirect purchaser actions on the state level, has rendered this line of jurisprudence in need of direction.

1. The Need for Flexibility in Any New Analysis

A new doctrine must not be rigid and should be flexible enough to deal with most factual situations that confront it. A more prophylactic rule, akin to *AGC*, which courts can apply on a case-by-case basis will allow courts to effectively weigh a number of factors in a pragmatic manner. Thus, this rule will allow plaintiffs to knock down the per se barrier that has been placed in front of them in these antitrust cases and bestow upon parties who are injured by monopolists a clear point of entry into our judicial system.

2. Revised Factors for Antitrust Standing Under Section 4 of the Clayton Act

This Comment does not necessarily propose any new factors for courts to consider on the issue of antitrust standing. However, in order for courts to apply the *AGC* criteria in a pragmatic fashion, courts must view these criteria through a more practical and flexible lens. *AGC* announced a two-pronged analysis for determining whether a plaintiff has standing to press an antitrust claim. First, the plaintiff must demonstrate that he or she has suffered an injury that the antitrust laws were designed to prevent and redress.[175] Second, the Court proffered three factors for courts to consider in determining whether to permit the indirect purchaser-plaintiff to bring an action: the remoteness of the injury,[176] the availability of a plaintiff with greater self-interest to bring an action against the monopoly firm,[177] and the difficulty of determining damages and its effect on the overall difficulty of the litigation.[178]

(a) Antitrust Injury

Courts deem antitrust plaintiffs who fail the first prong of the *AGC* test to have not incurred the type of injury that the antitrust

---

174. Kansas v. UtiliCorp United, 497 U.S. 199, 217 (1990).

175. Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519 (1983); *see also supra* note 94 and accompanying text.

176. *AGC*, 459 U.S. at 540.

177. *Id.* at 542.

178. *Id.* at 543-44.

laws protect. Yet, even if plaintiffs have suffered a sufficient antitrust injury and have satisfactorily met the factors within the second prong of the *AGC* standing test, as indirect purchasers, courts bar them from pressing this claim in price-fixing suits.[179] However, *Brand Name* has suggested that indirect purchasers who recharacterize their injury as stemming from some violation other than price-fixing would satisfy the antitrust injury prong of this test.[180]

This reconfiguring of a complaint to fit the substantive violation into the appropriate *pigeon hole* is the height of form over substance. Whether the plaintiff alleges price-fixing violations or, for example, a group boycott, the injury and resulting damages are likely to be the same. Indirect purchasers seem likely to satisfy the antitrust injury prong of the *AGC* test because the monopoly overcharge, which eventually passes on to them, is the type of injury that the antitrust laws were designed to prevent. To insure the requisite flexibility and pragmatism in the application of *AGC*, *Illinois Brick* should not be viewed as foreclosing the possibility of moving onto the second prong of *AGC*. If the indirect purchaser-plaintiff can sufficiently plead an antitrust injury, the court should evaluate the merits of granting an antitrust plaintiff of this type standing under the second prong of *AGC*.

(b) Remoteness of the Injury and the Availability of a Plaintiff with Greater Self-Interest to Bring an Action Against the Monopoly Firm

In addition, *AGC* requires courts to consider the directness or indirectness of the alleged injury and whether "an identifiable class of persons [exists] whose self-interest would normally motivate them" to pursue the claim against the monopolist in order to vindicate the public interest in enforcement of the antitrust laws.[181] Under the current paradigm, however, it is insignificant that the indirect purchaser-plaintiffs have suffered the most direct injury and have the greatest motivation, in light of the directness of that injury, to bring the claim forward because a per se application of *Illinois Brick* denies these plaintiffs the opportunity to do so.

Lower Lake Erie,[182] with this concern at the core of its rationale, suggests that the plaintiff with the greatest motivation to bring the claim and with the most direct injury may have standing under section 4 of the Clayton Act even if the court identifies this plaintiff as

---

179. Blair & Harrison, *supra* note 100, at 17 n.147.
180. *In re* Brand Name Prescription Drug Antitrust Litig., 123 F.3d 599, 606 (7th Cir. 1997).
181. *AGC*, 459 U.S. at 540, 542.
182. *In re* Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144 (3d Cir. 1993).

an indirect purchaser.[183] Moreover, taking into account the exception to the indirect purchaser rule regarding a direct purchaser owned or controlled by the firm fixing prices, which is sanctioned in *Illinois Brick*,[184] the Supreme Court itself has suggested that indirect purchasers "would have federal standing when the . . . direct purchaser has little motivation to bring an action" to vindicate the public interest in antitrust enforcement.[185] *Sports Racing* echoes this suggestion by rejecting an overly restrictive indirect purchaser doctrine.[186] Such a doctrine would not only favor a direct purchaser who is not the best plaintiff to seek redress from the anticompetitive actions of the monopolist—regarding the direct purchaser's motivation to bring suit—but also would bar indirect purchasers *at all costs*, all at the expense of "vigorous private enforcement of the antitrust laws."[187] Under this pair of factors in the second prong of *AGC*, courts should give great weight in their standing determinations to a demonstration that the indirect purchaser-plaintiff is most directly injured by the antitrust violation and that there is no other party, including the direct purchaser, who has a greater motivation to pursue this claim.

(c) The Difficulty of "Incidence Analysis" if Courts Permit an Indirect Purchaser-Plaintiff to Bring an Action

Lastly, courts must determine whether, if the indirect purchaser is granted standing to pursue its claim, judges and juries will be saddled with the "famously difficult" task of determining what price the indirect purchaser would have been charged had the direct purchaser not incurred the whole or part of the monopoly overcharge.[188] Chief Judge Posner in *Brand Name* applied the rigid dictates of *Illinois Brick* by assuming that any indirect purchaser pleading an injury from a monopoly overcharge will certainly charge the court with the complex task of apportioning damages that accompany this incidence analysis and which *Illinois Brick* expressly prohibited.[189] Yet, Posner alerted the public to a detour around the indirect purchaser doctrine by not only suggesting that an antitrust plaintiff plead an alternate

---

183. *Id.* at 1168-69.

184. Ill. Brick Co. v. Illinois, 431 U.S. 720, 732 n.12 (1977).

185. Blair & Harrison, *supra* note 100, at 14. The ownership-and-control exception permits the indirect purchaser to pursue her claim because the direct purchaser is not independent from the monopolist and, therefore, has little, if any, interest to pursue the claim on behalf of the public interest in antitrust enforcement. *Id.* at 14 n.116.

186. *Id.*

187. Sports Racing Servs., Inc. v. Sports Car Club of Am., Inc., 131 F.3d 874, 889 (10th Cir. 1997).

188. Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Contractors, 459 U.S. 519, 543-44 (1983); *see also* Campos v. Ticketmaster Corp., 140 F.3d 1166, 1170 (8th Cir. 1998).

189. *In re* Brand Name Prescription Drug Antitrust Litig., 123 F.3d 599, 606 (7th Cir. 1997).

substantive violation but also suggesting that this plaintiff may pray for relief from injury that takes the form of lost profits instead of a monopoly overcharge.[190] This suggestion to plaintiffs would require courts to take part in a similar, and sometimes difficult, damage calculation. If the same analysis is involved in either calculation, why does the Seventh Circuit allow the court to take on this task to determine lost profits while, in the same breath, shunning the similar task by denying standing to plaintiffs who ask the court to grant relief from monopoly overcharges?

The Third Circuit's holding in *Lower Lake Erie* is equally as curious in regards to this question. The court refused to prohibit standing to indirect purchasers merely because of assumed complexities in apportionment of damages.[191] Reliability of damage theories should not be determined at this stage of the litigation simply because they are presented in a complex way.[192] Rather, a court should only deny standing when the initial allegation of damages appears "incapable of accurate calculation."[193] According to Chief Judge Posner, calculation of lost profits and, in turn, the monopoly overcharge is not as "famously difficult" as the *Illinois Brick* Court once thought.

3. *Aligning Federal Indirect Purchaser Jurisprudence with* ARC

It would be unrealistic to open the federal courts to indirect purchasers in the same manner that *ARC* approved state statutes that did so.[194] However, liberalization of the indirect purchaser doctrine through the more pragmatic application of *AGC* described above[195] would go a long way toward bringing state and federal courts in step with each other. This alignment should facilitate a greater expectation on the part of defendants of the costs of their actions in the antitrust realm.

C. *Applying a More Pragmatic* AGC *to* Campos

Assuming that the plaintiff-concertgoers were indirect purchasers, the factual background of *Campos* does not lend itself to the per se application of *Illinois Brick* used by the Eighth Circuit. The plaintiffs in *Campos* complained of being subjected to a monopoly overcharge in the form of supracompetitive service fees.[196] These overcharges satisfy the antitrust injury prong of the *AGC* test because they con-

---

190. *Id.*; Blair & Harrison, *supra* note 100, at 20.
191. *In re* Lower Lake Erie Iron Ore Antitrust Litig., 998 U.S. 1144, 1169 (3d Cir. 1993).
192. *Id.*
193. *Id.*
194. *See* California v. ARC Am. Corp., 490 U.S. 93, 105 (1989).
195. *See supra* Part V.B.2.
196. Campos v. Ticketmaster Corp., 140 F.3d 1166, 1168 (8th Cir. 1998).

stitute the type of injury that the antitrust laws were designed to prevent.

The plaintiff class of concertgoers is the only party injured by Ticketmaster's anticompetitive activity. The supracompetitive service fees charged by Ticketmaster are directly borne, in full, by every consumer who orders tickets for popular entertainment events by waiting in line at a sanctioned Ticketmaster outlet in a local shopping mall, by logging onto Ticketmaster's online ordering system (which is often slow and frequently crashes), or by calling Ticketmaster's charge-by-phone system and having the privilege of getting past a busy signal.[197] Even under the Eighth Circuit's characterization of concert venues as direct purchasers, these venues bear no resemblance to an injured direct purchaser who passes on the whole or part of the monopoly overcharge down the chain of distribution.[198] Rather, concert venues fit the mold of an unharmed bystander—the venues, although labeled as direct purchasers by the Eighth Circuit, do not seem to have sustained any sort of cognizable injury. Quite the opposite result is present, and concert venues receive part of the monopoly overcharge in exchange for granting to Ticketmaster the exclusive right to distribute tickets for events which will take place at these venues.[199] Under this more realistic setting, the plaintiff-indirect purchasers have sustained the most direct injury, and these concertgoers can hardly depend on the concert venues to have the necessary motivation to vindicate Ticketmaster's antitrust violations on their behalf.

Lastly, although the notion of incidence analysis may present difficulties for courts in apportioning damages, these complexities are lacking under the factual background in *Campos*. Ticketmaster passes on the whole of the monopoly overcharge to concertgoers. Moreover, the court in *Campos* misconstrued the record by characterizing the monopoly overcharge and the price of the ticket as one fee that the venue would charge in the absence of any exclusive contract with Ticketmaster. The court was not required to determine what price the indirect purchaser-plaintiffs would have been charged in the absence of the supracompetitive convenience fee in order to accurately apportion damages to the plaintiffs in this suit. When tickets are purchased directly from the box offices at popular entertainment

---

197. Ticketmaster offers these three ways to obtain tickets to most any entertainment event. I speak, not sarcastically, from many personal frustrating experiences that accompany attempts at being lucky enough to get tickets to see my favorite band. While it is certainly a joyous moment when I am successful in this endeavor, being charged exorbitant *convenience* fees for something that is hardly convenient makes this moment bittersweet.

198. *Campos*, 140 F.3d at 1174 (Arnold, J., dissenting).

199. *Id.*

venues, convenience charges are not levied on concertgoers.[200] Therefore, courts would not be confronted with the same complex apportionment calculations that accompany factual situations consisting of a direct purchaser only passing on part of the monopoly overcharge to indirect purchasers. Viewed in this way, the plaintiffs in *Campos* fall short of those in *Illinois Brick* and other indirect purchaser cases of this type.

VI. CONCLUSION

The outcome in *Campos* certainly seems less logical when viewed through the more pragmatic lens of *AGC* proposed in this Comment. *AGC* embodies the notion that not all indirect purchasers are created equal. A pragmatic application of its two-pronged analysis, coupled with a relaxation of the strictures of *Illinois Brick*, will make this notion a reality. It will open the doors of the federal courthouse to plaintiffs who resemble, in their antitrust injuries, favored plaintiffs under the current paradigm, but who are denied standing, even after favorably meeting the criteria in *AGC*, solely based on an across-the-board application of an arbitrary label. This logical shift in doctrine is absolutely necessary if the American legal system wishes to take seriously the task of facilitating vigorous private enforcement of the antitrust laws.

---

200. Most venues do not charge any fees in excess of the face value ticket price for ticket purchases directly from the venue box office. While venues are not precluded from charging this excessive monopolistic fee, those that do, do not do so in such an excessive dollar amount as does Ticketmaster.