No. 18-3735

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

MARION HEALTHCARE, LLC, ET AL.,

Plaintiffs-Appellants,

v.

BECTON, DICKINSON & COMPANY, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Illinois

(Hon. Nancy J. Rosenstengel, No. 3:18-cv-01059)

Brief of Amicus Curiae Open Markets Institute in Support of Plaintiffs-Appellants

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-3735

Short Caption: Marion HealthCare, LLC, et al. v. Becton Dickinson & Company, et al.

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Attorney's Signature: s/ David M. Hundley Date: 4-25-2019

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None

Attorney's Signature: s/ Sandeep Vaheesan Date: 4-25-2019

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INTEREST OF AMICUS CURIAE[1]

The Open Markets Institute is a non-profit organization dedicated to promoting fair and competitive markets. It does not accept any funding or donations from for-profit corporations. Its mission is to safeguard our political economy from concentrations of private power that undermine competition and threaten liberty, democracy, and prosperity. The Open Markets Institute regularly provides expertise on antitrust law and competition policy to Congress, federal agencies, courts, journalists, and members of the public. The Open Markets Institute has moved for leave to file this amicus curiae brief in support of plaintiffs.

SUMMARY OF ARGUMENT

Consumers, businesses, and workers seeking treble damages for antitrust violations serve as key enforcers of the antitrust laws in the United States. *See Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972) ("Congress encouraged these persons to serve as 'private attorneys general.'"). Congress enacted a private right of action that grants "any person" injured by an antitrust violation the right to seek treble damages. 15 U.S.C. § 15(a). The Supreme Court has recognized that "Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations." *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982). Research suggests that private antitrust suits provides *more* deterrence against antitrust violations than criminal enforcement actions by the Department of Justice do. Joshua P. Davis & Robert H. Lande, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement*, 48 Ga. L. Rev. 1, 26 (2013). Vigorous private enforcement of the antitrust laws is

[1] No counsel for any party authored this brief in whole or part. Apart from amicus curiae, no person contributed money intended to fund the brief's preparation and submission.

especially important when markets are highly concentrated, as they are at present. Open Markets Institute, America's Concentration Crisis (2018), https://concentrationcrisis.openmarketsinstitute.org/; *Corporate Concentration*, Economist, Mar. 24, 2016, https://www.economist.com/graphic-detail/2016/03/24/corporate-concentration. The district court's decision, however, subverts the Clayton Act and private antitrust enforcement against vertical conspiracies. Indeed, the court's decision provides monopolists a playbook for structuring their exclusionary practices in a way that broadly insulates them from legal accountability.

The plaintiffs, who are health care providers, allege they are the victims of a sophisticated antitrust conspiracy in three markets for medical supplies. The plaintiffs purchase conventional syringes, safety syringes, and safety IV catheters and allege that Becton, Dickinson & Co. illegally dominated these three markets. Becton, Dickinson & Co., group purchasing organizations (GPOs), and distributors of medical supplies are accused of using a thicket of contracts and concerted practices to block rival medical supply makers. Specifically, through exclusive and other restrictive dealing arrangements and exclusionary rebates with GPOs and distributors, Becton, Dickinson & Co. has closed distribution channels and prevented rivals from entering the market and challenging its dominance. As a result of its actions, Becton, Dickinson & Co. has been able to charge higher prices for its products and impede the introduction of safer options, such as syringes with a much lower risk of needlesticks that transfer HIV, hepatitis B, and hepatitis C to nurses and other care providers. *See* Mariah Blake, *Dirty Medicine*, Wash. Monthly, July/Aug. 2010, (describing attempts to introduce safer products and Becton, Dickinson & Co.'s exclusionary practices in concert with GPOs and distributors). Plaintiffs seek

damages for the overcharges that they were forced to pay due to the exclusionary conspiracy among Becton, Dickinson & Co.'s, GPOs, and distributors.

In ruling that the plaintiffs do not have the right to recover overcharges, the district court protected monopolists from public accountability. The court restricted who can sue a monopolist for illegal exclusive dealing and other anticompetitive non-price vertical restraints. The district court held that only the monopolist's vertical partners can seek damages for illegal overcharges and vindicate purchasers' interest. In this instance, the vertical "partners" are paid enforcers of a monopolist's exclusionary campaign—and thereby also antitrust violators and beneficiaries of an antitrust conspiracy. If the district court's decision stands, monopolists would have a recipe for illegally excluding rivals with broad impunity. Going forward, monopolists could use vertical non-price restraints to protect their dominance, buy off the only group of purchasers entitled to bring suit through rebates and other incentives, and obtain *de facto* legal protection from private suits for illegal overcharges. In short, monopolists and other dominant firms could use vertical non-price restraints to set up "insulated conspiracies." Edmund H. Mantell, *Denial of a Forum to Indirect-Purchaser Victims of Price Fixing Conspiracies: A Legal and Economic Analysis of* Illinois Brick, 2 Pace L. Rev. 153, 212 (1982).

The Supreme Court has stressed the importance of deterring antitrust violations in its interpretations of the Clayton Act's private right of action. To advance this deterrence objective, the Court has held that defendants cannot reduce their damages on the grounds that direct purchasers passed them down the supply chain to subsequent purchasers and that indirect purchasers downstream from the antitrust violator cannot recover damages based on intermediaries' passing on overcharges. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968); *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). In reading the Clayton

Act in this fashion, the Supreme Court reasoned that concentrating treble damages recoveries among direct purchasers would provide ample incentive and support for vigorous antitrust enforcement.

In accordance with the Supreme Court's emphasis on deterring antitrust violations, this Court adopted the first non-conspirator rule to "promote the vigorous enforcement of the antitrust laws" against vertical restraints. *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 214 (1990). This rule allows the first purchaser in a supply chain that was *not* party to an antitrust conspiracy to bring suit to recover treble damages for illegal overcharges. Without this rule, only a party to a vertical conspiracy would have the right to seek overcharge damages under federal antitrust law. In other words, effective antitrust enforcement against vertical conspiracies would depend on the public-mindedness of *participants in and beneficiaries of vertical conspiracies*. By permitting innocent purchasers to bring suit, the first non-conspirator rule ensures the "vigorous private enforcement of the antitrust laws." *Illinois Brick*, 431 U.S. at 745.

The district court's decision narrows the first non-conspirator rule and subverts the deterrence of anticompetitive vertical restraints. The court distinguished between price and non-price vertical conspiracies—a distinction that this Court has *not* made in interpreting the Clayton Act's private right of action. In limiting the first non-conspirator rule to vertical price conspiracies, such as resale price maintenance, the court undermined private antitrust enforcement against exclusive dealing, exclusionary rebates, and other anticompetitive non-price vertical restraints. By recognizing only one class of purchaser-plaintiffs, the court's decision encourages monopolists to conspire with and share some of their spoils with the immediate purchasers and buy off the only group that has the right to recover overcharges.

ARGUMENT

I. Private Enforcement Is a Pillar of Federal Antitrust Enforcement and Especially Important in Today's Highly Concentrated Economy

Antitrust suits filed by injured consumers, businesses, and workers are a pillar of antitrust enforcement in the United States. Congress enacted a private right of action that grants "any person" injured by an antitrust violation the right to seek treble damages. 15 U.S.C. § 15(a) Private antitrust enforcement, in addition to compensating injured parties, deters anticompetitive conduct. Indeed, private antitrust suits appear to provide greater deterrence against antitrust violations than the criminal enforcement program of the Department of Justice. At a time of high concentration across the economy, monopolists have great power to dominate and control markets. As a result, private antitrust suits are especially critical today for protecting the public from abuses of corporate power.

A. Congress Created a Robust Private Right of Action for Antitrust Violations

To ensure strong enforcement of the antitrust laws, Congress established a powerful remedy available to all injured parties. Section 4 of the Clayton Act reads "any 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, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15(a). This law creates potent private remedies and makes them available, without limitation, to *any person*. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979) ("On its face, § 4 contains little in the way of restrictive language."). Under the plain language of the Clayton Act, consumers, businesses, and workers injured by antitrust violations can obtain treble damages and attorneys' fees through a successful suit. And in creating the treble damages remedy (originally in the Sherman Act and subsequently in the Clayton Act), Congress sought to tap the self-interest of citizens in enforcing the law. *See*

Walton Hamilton & Irene Till, Antitrust in Action 10 (TNEC Monograph 16, G.P.O. 1941) ("In the thought of the nineties the law should be as nearly self-enforcing as possible. The main reliance seems to have been placed upon the private suit. A man knew when he was hurt better than an agency or government above could tell him. Make it worth their while—as the triple-damage clause was intended to do—and injured members could be depended upon to police an industry.").

In interpreting the Clayton Act, the Supreme Court has recognized the central role of private antitrust enforcement. For example, it has observed that "the free-enterprise system envisaged by Congress. . . depends on strong competition for its health and vigor, and strong competition depends, in turn, on compliance with antitrust legislation." *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972). Private enforcement ensures this compliance. The Court wrote, "By offering potential litigants the prospect of a recovery in three times the amount of their damages, Congress encouraged these persons to serve as 'private attorneys general.'" *Id.* Affirming this public function of private enforcement, the Court wrote in 1982 that "Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations." *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982).

The importance of private antitrust enforcement is clear. Private antitrust suits accounted for more than 94 percent of all antitrust suits filed in federal district courts in 2012 and consistently represented more than 80% of all antitrust complaints in each year between 1975 and 2012. Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics Online: Antitrust Cases filed in United States District Courts by Type of Case, 1975-2012, https://www.albany.edu/sourcebook/pdf/t5412012.pdf. These suits yield significant

compensation for injured parties. In a study of 60 private antitrust settlements and judgments between 1990 and 2011, Professors Joshua Davis and Robert Lande found that consumers and injured businesses recovered $34-36 billion from alleged antitrust violators. Joshua P. Davis & Robert H. Lande, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement*, 48 Ga. L. Rev. 1, 26 (2013).

Private antitrust enforcement appears to provide greater deterrence against antitrust violations than criminal enforcement at the federal level does. Davis and Lande monetized the Department of Justice's entire criminal enforcement penalties, including prison sentences for individuals, from 1990 to 2011. They found that these actions generated deterrence of $11.7 billion. *See id.* ("From 1990 through 2011, the total of DOJ corporate antitrust fines, individual fines, and restitution payments totaled $8.18 billion. Disvaluing a year of prison at $6 million and a year of house arrest at $3 million adds another $3.588 billion in total deterrence from the DOJ's anti-cartel cases."). While significant, this figure is much smaller than the $34-36 billion recovered in the 60 studied private cases. *Id.* In other words, these 60 cases appear to generate more deterrence than the federal government's entire criminal antitrust enforcement activity during the same period.

B. Strong Private Enforcement Is Particularly Critical When Markets Are Highly Concentrated

Strong private antitrust enforcement is especially important today when industries and markets across the American economy are highly concentrated. Open Markets Institute, America's Concentration Crisis (2018), https://concentrationcrisis.openmarketsinstitute.org/; *Corporate Concentration*, Economist, Mar. 24, 2016, https://www.economist.com/graphic-detail/2016/03/24/corporate-concentration. In monopolistic and oligopolistic markets, firms have

extraordinary power to collude, exclude rivals, and engage in other unfair practices. Vigilance from both private and public enforcers is essential to maintain at least a degree of healthy rivalry.

Dominant and other powerful corporations can use vertical restraints to exclude rivals. For example, monopolists can use exclusive dealing contracts with customers or distributors and block market access to competitors. Jonathan M. Jacobson, *Exclusive Dealing, "Foreclosure," and Consumer Harm*, 70 Antitrust L.J. 311, 353, 355-56 (2002). In recent decades, multiple courts have found monopolists liable for using exclusive dealing or exclusionary rebates with distributors and improperly excluding competitors. *See, e.g.*, *McWane, Inc. v. FTC*, 783 F.3d 814, 840, 842 (11th Cir. 2015) (affirming FTC decision that McWane engaged in illegal exclusive dealing), *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 289 (3d Cir. 2012) ("Having concluded that there was sufficient evidence from which a jury could determine that the [long-term agreements] functioned as unlawful exclusive dealing agreements, we have no difficulty concluding that there was likewise sufficient evidence that Plaintiffs suffered antitrust injury."); *United States v. Dentsply International, Inc.*, 399 F.3d 181, 196 (3d Cir. 2005) ("Dentsply's grip on its 23 authorized dealers effectively choked off the market for artificial teeth, leaving only a small sliver for competitors. . . . We conclude that on this record, the Government established that Dentsply's exclusionary policies . . . violated Section 2.").

Especially in light of present economic concentration, courts should give broad effect to the Clayton Act's private right of action. Injured consumers, businesses, and workers have an essential role in policing markets and rooting out collusive, exclusionary, and other unfair corporate conduct. Indeed, evidence from antitrust settlements suggests *increased* damages and penalties are necessary to ensure adequate or optimal deterrence of antitrust violations. *See* John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 Cardozo

L. Rev. 427, 476 (2012) ("[W]e find that on average the total value of imposed [anti-cartel] sanctions have been only 9% to 21 % as large as they should have been."); Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?*, 54 Ohio St. L.J. 115, 171 (1993) (finding that treble damages are, in practice, often single damages and noting that "[a]ntitrust damage awards should be significantly greater than the actual damages caused by these violations to account for detection problems, proof problems, and risk aversion"). In a similar spirit, Judge Easterbrook wrote that in evaluating damages multipliers for concealable antitrust violations, "If three is the wrong number, it is too small." Frank H. Easterbrook, *Treble What?*, 55 Antitrust L.J. 95, 95 (1986).[2]

II. This Court's First Non-Conspirator Rule Promotes the Deterrence of Antitrust Violations

In interpreting the Clayton Act's private damages action, the Supreme Court has stressed the importance of deterring antitrust violations. It has limited both claims of passed-on damages by downstream indirect purchasers and reductions in defendants' damages due to direct purchasers passing on overcharges to purchasers down the supply chain. The Court has reached these decisions, in part, on deterrence grounds, theorizing that concentrating treble damages recoveries among direct purchasers promotes vigorous antitrust enforcement.

This Court's first non-conspirator rule furthers the deterrence of antitrust violations and does not implicate the policy concerns raised by the Supreme Court in *Illinois Brick*. The Court identifies the first party in a supply chain *outside* a vertical antitrust conspiracy as the direct purchaser. A party to an antitrust conspiracy, whether vertical or horizontal, can share in the

[2] Public enforcers' limited resources and lack of interest in challenging powerful corporations only further underscore the need for strong private rights of action. Kadhim Shubber, *Staffing at Antitrust Regulator Declines under Donald Trump*, Fin. Times, Feb. 7, 2019; Matthew Buck & Sandeep Vaheesan, *Trump's Big Tech Bluster*, N.Y. Times, Mar. 6, 2019.

spoils of the antitrust conspiracy. In a vertical conspiracy, the immediate purchaser, as a participant, may be a beneficiary of antitrust violations and have little or no reason to challenge this illegal but profitable arrangement through a damages lawsuit. This Court's rule ensures that a *bona fide* victim—the first purchaser outside the conspiracy—has the right to obtain damages and deter vertical conspiracies. This rule functions like the ownership or control exception to *Illinois Brick* and does not raise concerns about duplicative recoveries or unduly complicated damages calculations.

A. The Supreme Court Has Stressed the Importance of Deterrence in Its Interpretation of the Clayton Act

The Supreme Court has stressed the importance of deterring antitrust violations in its interpretation of the Clayton Act's private damages remedy.[3] In generally limiting the right to seek antitrust damages for overcharges to parties that purchased the affected good or service directly from the violator, the Court has reasoned that this rule promotes the deterrence of antitrust violations. To advance the objective of deterrence, the Court has not demanded a rigid ban on indirect purchaser suits. Instead, it has identified two situations in which purchasers further downstream should have the right to obtain damages under the federal antitrust laws.

In *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), the Supreme Court underscored the importance of deterring antitrust violations. The Court declined to reduce antitrust violators' damages because purchaser-plaintiffs raised their own prices and passed illegal overcharges on to their customers. *Id.* at 494 (1968). In other words, direct

[3] Sounding a similar theme, the Court has emphasized the deterrence objective in addressing the relationship between federal and state antitrust laws. In declining to preempt state laws allowing indirect purchaser suits for damages, the Court stated, "State laws to this effect are consistent with the broad purposes of the federal antitrust laws: deterring anticompetitive conduct and ensuring the compensation of victims of that conduct." *California v. ARC Am. Corp.*, 490 U.S. 93, 102 (1989).

purchasers are entitled to recover the full amount of overcharges even if they mitigated their own harm by passing on some of the overcharge to downstream purchasers. The Court rejected this reduction in overcharge damages because it would greatly diminish the incentive for direct purchasers to bring suit for damages. Without vigorous enforcement by direct purchasers, the Court stated that "those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality[.]" *Id.*

In *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the Supreme Court once again stressed the importance of vigorous enforcement of the antitrust laws. The Court held that purchasers who bought products indirectly from an antitrust violator through an intermediary could not recover damages from the antitrust violator even if the intermediary passed on some of the illegal overcharge by raising prices. *Id.* at 746-47. The Court theorized that rejecting a general restriction on such indirect purchaser suits would promote deterrence, citing the "longstanding policy of encouraging vigorous private enforcement of the antitrust laws." *Id.* at 745. The Court concluded that "the legislative purpose in creating a group of 'private attorneys general' to enforce the antitrust laws . . . is better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them[.]" *Id.* at 746.

In declining to make special rules for antitrust suits involving utilities, the Supreme Court again underscored the importance of deterrence. *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199 (1990). The Court stated that "our interpretation of § 4 must promote the vigorous enforcement of the antitrust laws." *Id.* at 214. It reasoned that maintaining the *Illinois Brick* rule promotes deterrence of antitrust violations. *Id.* Highlighting the importance of deterrence in the energy markets at issue, the Court observed that "utilities . . . have an established record of diligent

antitrust enforcement, having brought highly successful § 4 actions in many instances." *Id.* at 215.

To promote the deterrence of antitrust violations, the Court has established only a presumptive, not a categorical, prohibition on indirect purchaser suits. It has identified two possible legal exceptions to the rule. In both instances, the direct purchaser would have either no incentive or no ability to bring an antitrust suit for damages, meaning an inflexible application of *Illinois Brick* would frustrate the vigorous enforcement of the antitrust laws. First, the Court has stated that indirect purchasers may be permitted to sue for damages if the direct purchaser "is committed to buying a fixed quantity regardless of price." *Illinois Brick*, 431 U.S at 736. *See also UtiliCorp*, 497 U.S. at 218 ("[W]e do not alter our observations about the possibility of an exception for cost-plus contracts[.]"). Second, the Court acknowledged that applying *Illinois Brick* and *Hanover Shoe* may not be warranted "where the direct purchaser is owned or controlled by its customer." *Illinois Brick*, 431 U.S at 736 n.16.

Lower courts have formally recognized and applied both exceptions identified in *Illinois Brick*. *See, e.g.*, *Royal Printing Co. v. Kimberly-Clark Corp.*, 621 F.2d 323, 326 (9th Cir. 1980) ("There is little reason for the price-fixer to fear a direct purchaser's suit when the direct purchaser is a subsidiary or division of a co-conspirator. . . . Allowing Royal Printing to sue under these circumstances will not pose the same risk of multiple liability held objectionable in Illinois Brick."); *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1163-65 (5th Cir. 1979) (applying exception for cost-plus contracts); *In re Sugar Industry Antitrust Litigation*, 579 F.2d 13, 19 (3d Cir. 1978) (holding that control exception allows indirect purchaser plaintiffs to sue antitrust violator).

B. This Court's First Non-Conspirator Rule Advances Deterrence and Is Faithful to *Illinois Brick*

In implementing the Supreme Court's guidance on the Section 4 of the Clayton Act, this Court has adopted the first non-conspirator rule to deter vertical antitrust conspiracies. This rule ensures that a purchaser outside an antitrust conspiracy can recover damages for the harm it sustained. Without this rule, the deterrence of vertical antitrust conspiracies would be severely undermined because only a participant in—and presumed beneficiary of—an antitrust conspiracy could recover damages for illegal overcharges. This rule functionally resembles the control and ownership exception the Supreme Court identified in *Illinois Brick* and similarly advances the objective of deterring antitrust violations. Importantly, the first non-conspirator rule does not raise the concerns of administrability and duplicative recovery that informed the *Illinois Brick* decision.

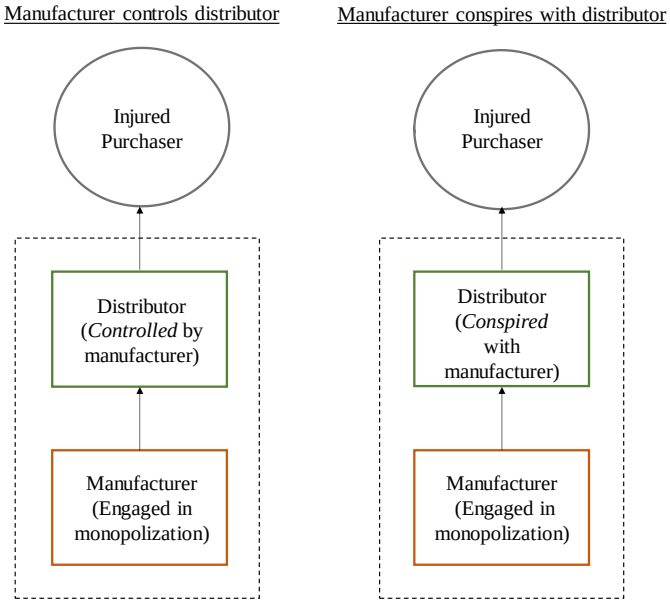
This Court has recognized a first non-conspirator rule to ensure a party outside a vertical antitrust conspiracy can recover antitrust damages. The Court has stated that it is "not satisfied that the *Illinois Brick* rule directly applies in circumstances where the manufacturer and the intermediary are both alleged to be co-conspirators in a common illegal enterprise resulting in intended injury to the buyer." *Fontana Aviation, Inc. v. Cessna Aircraft Co.*, 617 F.2d 478, 481 (7th Cir. 1980). *See also In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F.3d 599, 604 (7th Cir. 1997) ("It is true that if we . . . reinstated the wholesalers as defendants, and if the plaintiffs went on to obtain a judgment against the wholesalers and manufacturers, any indirect-purchaser defense would go by the board, since the pharmacies would then be direct purchasers from the conspirators."). Building on this principle, the Court has held that "[t]he first buyer from a conspirator is the right party to sue." *Paper Systems Inc. v. Nippon Paper Industries Co.*, 281 F.3d 629, 631 (7th Cir. 2002).

Other circuits have developed and applied a functionally similar rule, sometimes under the rubric of a "co-conspirator exception."[4] The Third Circuit has recognized such an exception provided the co-conspirators are joined as defendants in the first non-conspirator's antitrust lawsuit. *Howard Hess Dental Laboratories Inc. v. Dentsply International, Inc.*, 424 F.3d 363, 370-71 (3d Cir. 2005). The Eighth Circuit has held that "indirect purchasers may bring an antitrust claim if they allege the direct purchasers are 'party to the antitrust violation' and join the direct purchasers as defendants." *Insulate SB, Inc. v. Advanced Finishing Systems, Inc.*, 797 F.3d 538, 542 (8th Cir. 2015). Similarly, the Eleventh Circuit has ruled that "*Illinois Brick* does not apply to a single vertical conspiracy where the plaintiff has purchased directly from a conspiring party in the chain of distribution." *Lowell v. American Cyanamid Co.*, 177 F.3d 1228, 1232 (11th Cir. 1999).

This Court's first non-conspirator rule "promote[s] the vigorous enforcement of the antitrust laws" against vertical restraints. *UtiliCorp*, 497 U.S. at 214. It allows the first purchaser in a supply chain that was *not* a party to an antitrust conspiracy to bring suit to recover treble damages for illegal overcharges. The rule ensures that a party that suffered actual harm—and has clear incentive to sue—has the right to bring a treble damages suit against parties involved in a vertical antitrust conspiracy. Without this rule, only a party to a vertical conspiracy would have the right to seek overcharge damages under federal antitrust law. In other words, effective antitrust enforcement against vertical conspiracies would depend on the public-mindedness of participants in, and beneficiaries of, vertical conspiracies.

[4] This Court wrote in *Paper Systems* that "[t]he right to sue middlemen that joined the conspiracy is sometimes referred to as a co-conspirator 'exception' to *Illinois Brick*, but it would be better to recognize that *Hanover Shoe* and *Illinois Brick* allocate to the first non-conspirator in the distribution chain the right to collect 100% of the damages." 281 F.3d at 631-32.

The first non-conspirator rule is an analog to the Supreme Court's ownership or control exception. When a direct purchaser is owned or controlled by the antitrust violator, it is bound to the antitrust violator through property or property-like arrangements. *See, e.g.*, *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984) ("A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one."). When a direct purchaser is party to a vertical conspiracy, it is acting in concert with the antitrust violator through contract or contract-like arrangements. The first purchaser typically either cannot sue the violator or does not have an incentive to sue the violator. In both cases, typically "there is no realistic possibility that the direct purchaser will sue its supplier over [an] antitrust violation." *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1145 (9th Cir. 2003).



The first non-conspirator rule does not raise concerns of duplicative judgment or administrative complexity in computing damages. First, the direct purchaser is a conspirator—and presumably a beneficiary—of the antitrust violation. As such, it is unlikely to sue and obtain

duplicative damages.[5] Indeed, more generally, evidence of duplicative recoveries is practically non-existent even in states that have rejected the *Illinois Brick* rule and permit both indirect and direct purchasers to recover illegal overcharges. *See* Antitrust Modernization Commission, Report and Recommendations 274 (2007) ("no one [among the commenters and witnesses] identified an instance of unfair or multiple recovery"); J. Thomas Prud'homme, Jr. & Ellen S. Cooper, *One More Challenge for the AMC: Repairing the Legacy of* Illinois Brick, 40 U.S.F. L. Rev. 675, 684 (2006) ("[The multiple liability] justification has proven, in the almost thirty years since *Illinois Brick*, to be entirely hypothetical.").

Second, concerns about complicated damages calculations are mitigated by the joint and several liability rule in antitrust. Under joint and several liability, a single antitrust conspirator can be liable for a plaintiff's *entire damages* from an antitrust conspiracy. To the extent computing prices but-for the antitrust violation and damages would be difficult, this difficulty arises in every antitrust suit for damages. This Court recognized that the standard intricacies of antitrust litigation do not justify depriving first non-conspirator purchasers of their rights under the Clayton Act. *See Paper Systems*, 281 F.3d at 633 ("It remains necessary to determine the amount of the overcharge, and if this cannot be established in any other way (for example, by the conspirators' own agreement) then it is necessary to determine the elasticities of supply and demand. But this prospect is present in every cartel case; it is not occasioned solely by the presence of intermediaries. The monopoly overcharge is the excess price at the initial sale-here, from the five manufacturers to their initial customers.").

[5] Just as a subsidiary *could* sue its parent's antitrust co-conspirators, *Royal Printing*, 621 F.2d at 326, a conspirator *could* "snitch" and sue its upstream partner. *Paper Systems*, 281 F.3d at 632. But until the conspirator actually does snitch and sue the upstream co-conspirator, the first non-conspirator rule has force. *Id.*

III. The District Court's Decision Narrows the First Non-Conspirator Rule and Undermines the Deterrence of Antitrust Violations

The district court's decision narrows the first non-conspirator rule and subverts the deterrence of anticompetitive vertical restraints. The court drew a distinction between price and non-price vertical conspiracies—a distinction that this Court has *not* made in interpreting the Clayton Act's private right of action. In limiting the first non-conspirator rule to vertical price conspiracies, such as resale price maintenance, the district court undermined private antitrust enforcement against exclusive dealing, exclusionary rebates, and other anticompetitive non-price vertical restraints. By recognizing just one class of purchaser-plaintiffs against vertical restraints, the court's decision encourages monopolists to conspire and share some of their spoils with direct purchasers and buy off the only group that has the right to recover overcharges.

A. The District Court Erroneously Limited the First Non-Conspirator Rule to Vertical Price-Fixing Conspiracies

The district court drew a distinction between price and non-price vertical restraints that is not found in this Court's decisions. This Court's articulation of the first non-conspirator rule has established no such distinction. The district court also misread the allegations in two decisions of this Court and ignored how joint and several liability greatly attenuates concerns about undue complexity of computing damages in *all* vertical conspiracies.

This Court, in developing the first non-conspirator rule, has not distinguished vertical price conspiracies from vertical non-price conspiracies. In *Fontana*, the Court stated it would not apply *Illinois Brick* to bar suits for damages "in circumstances where the manufacturer and the intermediary are both alleged to be co-conspirators in a common illegal enterprise resulting in intended injury to the buyer." 617 F.2d at 481. This language makes no distinction between price and non-price restraints. Similarly, in *Paper Systems*, the Court held, without qualification, that "[t]he first buyer from a conspirator is the right party to sue." 281 F.3d at 631.

Furthermore, the district court, in limiting the scope of the first non-conspirator rule, misread the allegations in *Fontana* and *Paper Systems* as vertical price fixing. The plaintiff in *Fontana* alleged that bundling practices reduced competition. *Fontana*, 617 F.2d at 479-80. And in *Paper Systems*, the plaintiffs alleged a *horizontal* price-fixing conspiracy among manufacturers of paper in which some resellers of paper also participated. *See Paper Systems*, 281 F.3d at 631 ("Five manufacturers of thermal facsimile paper-a product now obsolete-are accused in this class action of conspiring to reduce output and raise price in this business from 1990 to 1992."); *id.* ("The complaint alleges that Elof and the two Mitsubishi trading firms are members of the conspiracy, which makes plaintiffs the first purchasers from *outside* the conspiracy."). Like in *Paper Systems*, the plaintiffs here accuse entities from whom they purchased the affected good or service of being enforcers of an antitrust violation.

B. The District Court's Decision Severely Undermines the Deterrence of Anticompetitive Non-Price Vertical Restraints

By misinterpreting this Court's precedents, the district court's decision undermines private enforcement against vertical non-price restraints. Instead of interpreting the Clayton Act to "promote the vigorous enforcement of the antitrust laws," *UtiliCorp*, 497 U.S. at 214, the district court, in denying injured non-conspirators the right to recover overcharges, thwarted the enforcement of the antitrust laws. The district court's restrictive interpretation of Section 4 of the Clayton Act perversely encourages aspiring antitrust violators to use non-price vertical restraints and thereby insulate themselves from lawsuits for overcharges.

The district court's decision neuters private enforcement against vertical non-price restraints. Under the court's narrow reading of the first non-conspirator rule, only participants in

a vertical non-price conspiracy could seek to recover damages for overcharges.[6] In other words, the court held that only participants in, and presumed beneficiaries of, an antitrust violation should have the right to recover purchaser damages.

By solely entrusting antitrust conspirators to represent purchaser interests, the district court's ruling ensures that vertical non-price remedies will go unchallenged and unremedied. Depending on conspirators to vigorously enforce the antitrust laws is akin to relying on the subsidiaries of antitrust violators to sue their parent companies for treble damages. While a conspirator could "snitch" on its co-conspirator, purchasers with clean hands—and a clear interest in enforcing the antitrust laws—should not be denied their right to redress in the meantime. *Paper Systems*, 281 F.3d at 632.

Under the district court's interpretation of the first non-conspirator rule, in an exclusionary rebate case, for example, *only* a monopolist's vertical conspirator and recipient of rebates can seek damages for overcharges and vindicate purchasers' interests. Innocent purchasers outside this vertical conspiracy are out of luck. In interpreting the Clayton Act so narrowly, the district court converted *Illinois Brick* into a protective Illinois Wall for many antitrust violators. Maarten Pieter Schinkel, Jan Tuinstra & Jakob Rüggeberg, *Illinois Walls: How Barring Purchaser Suits Facilitates Collusion*, 39 RAND J. Econ. 683 (2008).

[6] A competitor foreclosed from a market by a monopolist's exclusive dealing could still seek damages under the district court's decision. But the rival's damages—lost profits—are distinct and separate from a purchaser's damages—overcharges. *See McCready*, 457 U.S. at 484 n.21 ("If a group of psychiatrists conspired to boycott a bank until the bank ceased making loans to psychologists, the bank would no doubt be able to recover the injuries suffered as a consequence of the psychiatrists' actions. And plainly, in evaluating the reasonableness under the antitrust laws of the psychiatrists' conduct, we would be concerned with its effects not only on the business of banking, but also on the business of the psychologists against whom that secondary boycott was directed.").

Instead of encouraging vigorous antitrust enforcement, the district court's decision encourages monopolists and other powerful firms to pursue certain exclusionary tactics. Firms can use vertical non-price restraints and set up "insulated conspiracies." Edmund H. Mantell, *Denial of a Forum to Indirect-Purchaser Victims of Price Fixing Conspiracies: A Legal and Economic Analysis of* Illinois Brick, 2 Pace L. Rev. 153, 212 (1982). For instance, a monopolist can offer rebates to distributors that exclusively or mainly carry the monopolist's products. These contracts can exclude rivals and cement the monopolist's dominance. *See, e.g.*, *LePage's Inc. v. 3M*, 324 F.3d 141, 157 (3d Cir. 2003) (en banc) (affirming jury's verdict that 3M used bundled rebates to exclude rival maker of tape). And under the district court's decision, no party outside this conspiracy can recover illegal overcharges.

CONCLUSION

The district court improperly limited the first non-conspirator rule and severely undermined the enforcement of the federal antitrust laws. Accordingly, this Court should reverse the district court's granting of the defendants-appellees' motion to dismiss.

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Dated: April 25, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this date, I caused a true and correct copy of the foregoing to be served on counsel of record for all parties via ECF.

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