

Emerging Issues

The impact of the Class Action Fairness Act in Virginia

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The Class Action Fairness Act ("CAFA"), now codified at 28 U.S.C. §1332(d), expands subject matter jurisdiction of federal courts over class actions in which at least one plaintiff class member is diverse in citizenship from a defendant and where the amount in controversy exceeds \$5 million. In relevant part, CAFA sets forth the following:

- (2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and is a class action in which—
 - (A) any member of a class of plaintiffs is a citizen of a State different from any defendant;
 - (B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or
 - (C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.
- (6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of

\$5,000,000, exclusive of interest and costs.

28 U.S.C. §1332(d).

This significant expansion of federal jurisdiction will particularly impact indirect purchaser actions, which previously had to be filed based on state law in state courts (unless diversity jurisdiction existed) following the U.S. Supreme Court's decision in *Illinois Brick Co. v. State of Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977). CAFA's most significant impact, however, will likely be on states like Virginia where, heretofore, a class action mechanism did not exist. As discussed below, Virginia indirect purchasers will now likely have access to class action remedies heretofore denied them.

A. *Illinois Brick*

Illinois Brick Co. v. State of Illinois involved the issue of whether an indirect purchaser could sue under federal antitrust laws, specifically, §4 of the Clayton Act, for violation of §1 of the Sherman Act for illegal price fixing.¹ The U.S. Supreme Court held, based in part on its previous holding in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 88 S.Ct. 2224 (1968), that because defendants could not rely on a pass-on theory to avoid liability, plaintiffs could not rely on a pass-on theory to recover under federal antitrust laws.² The Court reasoned that permitting an offensive use of the pass-on theory while precluding a defensive use

of the theory, would create a serious risk of multiple liability for defendants. The Court was also concerned that indirect purchasers relying on a pass-on theory for recovery would create extremely complicated treble damage claims.³

However, *Illinois Brick* was not an unanimous decision, with Justice Brennan providing a blistering dissent, in which Justices Marshall and Blackmun joined.⁴ The U.S. Supreme Court later explicitly held that states are free to reject *Illinois Brick* if they so choose.⁵ Unlike most other federal antitrust decisions, *Illinois Brick* is far from universally followed by state courts or legislatures. Some states have enacted special legislation to address the indirect purchaser problem.⁶

However, even where such statutes are not enacted, a number of states have rejected *Illinois Brick* judicially.⁷ Those states rejecting *Illinois Brick* allow their residents to bring an indirect purchaser class action under their state antitrust or consumer protection statutes.

Those states rejecting *Illinois Brick*, either by statute or judicially, appear to agree with Justice Brennan's assessment: in many instances, the brunt of antitrust injuries is borne by indirect purchasers, often ultimate consumers of a product, as increased costs are passed along the chain of distribution. In these instances, the Court's decision frustrates both the compensation

and deterrence objectives of the treble-damages action. Injured consumers are precluded from recovering damages from manufacturers, and direct purchasers who act as middlemen have little incentive to sue suppliers so long as they may pass on the bulk of the illegal overcharges to the ultimate consumers.

Illinois Brick, supra, at 2076.

These states undoubtedly realize that a single indirect purchaser's damages are typically too small to warrant a lawsuit, but when combined with the thousands of other indirect purchasers who suffered the same fate, a class action mechanism is necessary to have their voices heard.

Now it appears, however, that CAFA has put indirect purchaser actions right back where they started: in federal courts. This was the point, of course, as those favoring CAFA hope this will mean that federal courts will certify fewer class actions under F.R.C.P. 23. But, at least for Virginia and Mississippi, the only two states which do not allow class actions,⁸ CAFA actually created something that did not exist before: a mechanism for indirect purchaser classes to be certified.

B. How does this impact Virginia?

Virginia does not have a mechanism for bringing a class action similar to the procedure set forth in Rule 23 of the Federal Rules of Civil Procedure. Thus, prior to CAFA, it did not really matter whether Virginia had rejected *Illinois Brick* because indirect purchasers in Virginia had no ability to sue as a class. But CAFA has changed that. Once the requirements are met for federal jurisdiction under CAFA, the issue of class certification is determined by F.R.C.P. 23 rather than state class certification standards. Assuming indirect purchasers in Virginia can meet the federal jurisdictional requirements of CAFA, which, given its broad reach, is likely, Virginians suddenly have a mechanism for bringing an indirect purchaser class action.

"Although indirect purchaser actions are brought pursuant to state antitrust or consumer protection statutes – and although under *Erie R.R. v. Tompkins*, federal courts sitting in diversity are required to apply state substantive law – it is well established that federal courts sitting in diversity still utilize federal procedural rules in adjudicating diversity cases."⁹ There is one unique section in the Virginia Antitrust Statute, Va. Code. §§59.1-9.1 *et seq.*, which probably prevents it from being utilized in federal court. Section 59.1-9.8 of the Virginia Code makes clear that "actions and proceedings for violations of this chapter shall be brought in the circuit courts of this Commonwealth."¹⁰ (Emphasis added). While state antitrust statutes are the typical mechanism for bringing an indirect purchaser action, there are alternatives.

Fortunately, Virginia has two other statutes which, when used together, should provide the

necessary means by which to sue on behalf of business and consumer indirect purchaser classes: (1) the Virginia Consumer Protection Act; and (2) the Virginia business conspiracy statute.¹¹

1. The Virginia Consumer Protection Act

The Virginia Consumer Protection Act, Va. Code §§59.1-198 *et seq.*, provides standing to consumers only to obtain redress for violations of its provisions. Section 59.1-204 of the Virginia Code sets forth the following damages an individual may recover for falling prey to a violator of the Virginia Consumer Protection Act:

A. Any person who suffers loss as the result of a violation of this chapter shall be entitled to initiate an action to recover actual damages, or \$500, whichever is greater. If the trier of fact finds that the violation was willful, it may increase damages to an amount not exceeding three times the actual damages sustained, or \$1,000, whichever is greater.

B. Notwithstanding any other provision of law to the contrary, in addition to any damages awarded, such person also may be awarded reasonable attorneys' fees and court costs.

Thus, suing under the Virginia Consumer Protection Act can provide significant recoveries given its provisions allowing for treble damages for a willful violation and the recovery of attorneys' fees and court costs, regardless of willfulness.

The Virginia Consumer Protection Act defines "consumer transaction" as, *inter alia*, the "advertisement, sale, lease, license or offering for sale, lease or license, of goods or services to be used primarily for personal, family or household purposes."¹² The resale of a product to consumers in Virginia, which is needed to qualify as an "indirect purchaser", would qualify as a "consumer transaction" within this definition. Likewise, your typical defendants in an indirect purchaser action would qualify as "suppliers" within the definition of Va. Code. §59.1-198, which describes "suppliers" as "a seller, lessor or licensor who advertises, solicits or engages in consumer transactions, or a manufacturer, distributor or licensor who advertises and sells, leases or licenses goods or services to be resold, leased or sublicensed by other persons in consumer transactions."

Typical price-fixing allegations will result in a violation of Va. Code Ann. §59.1-200, subparagraphs A.3 and A.14, set forth below:

3. Misrepresenting the affiliation, connection, or association of the supplier, or of the goods or services, with another;

14. Using any other deception, fraud, false pretense, false promise, or misrepresentation in connection with a consumer transaction;

2. The Virginia Business Conspiracy Statute

The Virginia business conspiracy statute, Virginia Code §§18.2-499, 500, provides standing to businesses only to obtain redress for violations of its provisions. Section 18.2-500(A) of the Virginia Code provides for the following damages:

Any person who shall be injured in his reputation, trade, business or profession by reason of a violation of §18.2-499, may sue therefor and recover three-fold the damages by him sustained, and the costs of suit, including a reasonable fee to plaintiff's counsel, and without limiting the generality of the term, "damages" shall include loss of profits.

Thus, suing under the Virginia business conspiracy statute can also provide for significant recoveries given its provisions allowing for treble damages and the recovery of attorneys' fees and courts costs. Most indirect purchaser actions involve conspiracies, such as price-fixing, and fit nicely within the confines of Va. Code. §18.2-499(A) and (B):

Any two or more persons who combine, associate, agree, mutually undertake or concert together for the purpose of (i) willfully and maliciously injuring another in his reputation, trade, business or profession by any means whatever or (ii) willfully and maliciously compelling another to do or perform any act against his will, or preventing or hindering another from doing or performing any lawful act, shall be jointly and severally guilty of a Class 1 misdemeanor. Such punishment shall be in addition to any civil relief recoverable under §18.2-500.

Any person who attempts to procure the participation, cooperation, agreement or other assistance of any one or more persons to enter into any combination, association, agreement, mutual understanding or concert prohibited in subsection A of this section shall be guilty of a violation of this section and subject to the same penalties set out in subsection A.

Note, however, that the Virginia Consumer Protection Act and the Virginia business conspiracy statute must be used together in order to include both consumers and businesses in a class. This will require naming two plaintiffs and having a subclass for each. The authors' firm filed what we believe to be the first such action in the Richmond Division of the U.S. District Court for the Eastern District of Virginia in the Dynamic Random Access Memory antitrust litigation. The case was filed in September 2005, and shortly thereafter transferred to the Northern District of California under the federal multi-district litigation rules.

We have discussed the procedural mechanism

through CAFA to bring a class action in federal court based on Virginia substantive law, but the critical question is: will Virginia reject *Illinois Brick* and recognize standing for indirect purchasers?¹³

C. Why Virginia should reject *Illinois Brick*

Currently, at least 36 states and the District of Columbia have rejected *Illinois Brick* and permit private rights of action for indirect purchasers.¹⁴ The courts in states like Virginia, which did not enact legislation one way or the other following *Illinois Brick*, look instead to the actual language of their antitrust statute and any "harmonization" requirements to determine whether to allow indirect purchaser standing. This will likely be the case in Virginia, even though Virginia's Antitrust Statute contains a procedural limitation probably restricting lawsuits to state courts. This is so because it is technically the state counterpart of the Sherman Act, which *Illinois Brick* addressed. However, without class actions statutes or rules in Virginia, state circuit courts are unlikely to have the opportunity to address this issue. While individual indirect purchaser actions are possible and always have been, it is rare that a single individual indirect purchaser will sustain damages justifying proceeding alone.

Virginia grants broad private recovery rights to victims of antitrust violations. Virginia's antitrust standing statute allows:

(a) *Any person* threatened with injury or damage to his business or property by reason of a violation of this chapter may institute an action or proceeding for injunctive relief when and under the same conditions and principles as injunctive relief is granted in other cases.

(b) *Any person* injured in his business or property by reason of a violation of this chapter may recover the actual damages sustained, and, as determined by the court, the costs of suit and reasonable attorney's fees. If the trier of facts finds that the violation is willful or flagrant, it may increase damages to an amount not in excess of three times the actual damages sustained.

Va. Code §59.1-9.12 (emphasis added).

Section 59.1-9.17 states that this "chapter shall be applied and construed to effectuate its general purposes in harmony with judicial interpretation of comparable federal statutory provisions." Since there is no case law in Virginia addressing this standing issue, a comparison to other states is helpful.¹⁵

1. Iowa has rejected *Illinois Brick* judicially.

Iowa's antitrust standing statute allows:

The state or a *person* who is injured or threatened with injury by conduct prohibited under this chapter may bring suit to: (1) prevent or restrain conduct prohibited

under this chapter... (2) recover actual damages resulting from conduct prohibited under this chapter.

See Iowa Code §553.12 (emphasis added).

Moreover, Iowa Code §553.2 provides that Iowa antitrust law “shall be construed to complement and be harmonized with the applied laws of the United States.” (Emphasis added.) Notwithstanding this strict harmonization requirement, the Iowa Supreme Court, in a thorough, well-reasoned opinion, expressly rejected application of *Illinois Brick* to Iowa indirect purchaser claims.¹⁶

a. The Iowa standing statute explicitly authorizes indirect purchaser suits.

In *Comes*, the court first noted the standing provisions of Iowa Code §553.12 (1) were intended to “create a cause of action for all consumers, regardless of one’s technical status as a direct or indirect purchaser.”¹⁷ The Iowa Legislature “did not specifically limit standing to direct purchasers, but instead it simply authorized ‘[a] person who is injured’ to sue.”¹⁸ In Iowa, “the clear, broad language” of the standing statute mandates that all injured individuals are entitled to be compensated for their injuries.¹⁹

b. Iowa rejected *Illinois Brick* even though its “harmonization” requirement was substantially restrictive.

The Iowa Supreme Court rejected *Illinois Brick* despite a statutory requirement that Iowa courts “shall” construe and harmonize their law with federal antitrust law.²⁰ The Court explained that harmonization does not “constitute a delegation of state authority to the federal government.”²¹ The Court acknowledged that it was “bound by the purpose of [their] harmonization provision,” but it clarified that a harmonization provision “is not aimed at defining who can sue.”²² Rather, the harmonization requirement is designed to establish a uniform standard of conduct:

The purpose behind both state and federal antitrust law is to apply a uniform standard of conduct so that businesses will know what is acceptable conduct and what is not acceptable conduct. To achieve this uniformity or predictability, we are not required to define who may sue in our state courts in the same way federal courts have defined who may maintain an action in federal court. Rather, our guiding principle in interpreting [state antitrust law] is to do so in such a way as to prohibit “restraints of economic activity and monopolistic conduct.”

Id. at 446.

The policy concerns driving antitrust “harmonization” requirements revolve around substantive conduct. That is, the purpose of uniform interpretation across jurisdictions is to establish clear and

consistent rules for permissible business conduct. The pursuit of *substantive* uniformity does not imply that *procedural* uniformity is equally desirable, and the Iowa Supreme Court therefore rejected *Illinois Brick*’s application to Iowa antitrust suits.²³

2. North Carolina has rejected *Illinois Brick* judicially.

North Carolina’s statute provides:

If any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury.

See N.C. Gen. Stat. §75-16.

Moreover, North Carolina courts “consider as persuasive authority federal cases interpreting antitrust law.”²⁴ Notwithstanding the “persuasive authority” of federal cases, North Carolina also rejected *Illinois Brick* judicially.²⁵

a. The North Carolina standing statute explicitly authorizes indirect purchaser suits.

Hyde begins by examining the intent of North Carolina’s antitrust standing statute. The court held that “any person” means “any person” – that the North Carolina antitrust standing statute is “intended to provide a recovery for all consumers.”²⁶

b. North Carolina rejected *Illinois Brick* even though North Carolina’s “harmonization” requirement was restrictive.

The North Carolina courts “consider as persuasive authority federal cases interpreting antitrust law.”²⁷ The role of harmonization in North Carolina is to “interpret North Carolina antitrust laws in a manner ... most consistent with the purposes behind [the] antitrust laws.”²⁸ The court stated that allowing indirect purchasers to sue “will best advance the legislative intent that such violations be deterred, and that private consumers have a private cause of action.”²⁹ In other words, *Hyde* reaches the same decision as *Comes* – harmonization requirements are concerned with pursuing substantive uniformity, not procedural conformity.³⁰

3. Arizona has rejected *Illinois Brick* judicially.

Arizona also offers injured parties broad antitrust standing rights:

A person threatened with injury or injured in his business or property by a violation of this article may bring an action for appropriate injunctive or other equitable relief, damages sustained and, as determined by the court, taxable costs and reasonable attorneys fees. If the trier of fact finds that

the violation is flagrant, it shall increase recovery to an amount not in excess of three times the damages sustained.

Ariz. Rev. Stat. § 44-1408 (B)
(emphasis added).

Arizona courts “may use as a guide interpretations given by federal courts to comparable federal antitrust statutes.”³¹ Notwithstanding this directive, the Arizona Supreme Court determined that *Illinois Brick* did not apply to Arizona’s standing statute.

a. The Arizona standing statute explicitly authorizes indirect purchaser suits.

In *Bunker’s Glass*, the court began by analyzing the intent of Arizona’s antitrust standing legislation.³² The Arizona Court concluded that the term “person” indicated legislative “intent to allow indirect purchasers to sue, because individuals are rarely direct purchasers.”³³ Like the Iowa Supreme Court in *Comes*, the Arizona Supreme Court found it obvious that “nothing in the plain language of [the standing statute] prohibits indirect purchasers who suffer injury from illegal anti-competitive conduct from suing.”³⁴ Because “the Arizona statute broadly grants a right of action to any ‘person,’ ” indirect purchaser suits are authorized under Arizona antitrust law.³⁵

b. Arizona rejected *Illinois Brick* in light of a “harmonization” requirement.

The Court acknowledged that the Arizona legislature had authorized Arizona courts to “use as a guide interpretations given by federal courts to comparable federal antitrust statutes.”³⁶ The Court noted that the purpose of Ariz. Rev. Stat. §44-1412 was to achieve “uniformity” between state and federal antitrust law.³⁷ But like the courts in *Comes* and *Hyde*, the Arizona Supreme Court clarified that “the goal of the [Arizona antitrust statutes] appears to be uniformity in the *standard of conduct* required, not necessarily in *procedural matters such as who may bring an action*.”³⁸ It is substantive conduct, not the procedural standing, at which harmonization is aimed.

D. Application of Virginia’s Antitrust Statute & Harmonization Clause

In each of these states, a state court refused to extend *Illinois Brick* even though that state had “harmonization” requirements equal to or greater than Virginia’s “in harmony with” standard. Notwithstanding those requirements, those states have correctly determined that applying *Illinois Brick* to state antitrust claims would frustrate the intent and purpose of their antitrust standing provisions. They have also correctly identified the true purpose of harmonization requirements – to ensure substantive uniformity and consistent *conduct* rules across jurisdictions. Refusing to adopt a highly controversial federal *procedural* rule would not frustrate this purpose. Virginia should follow this analysis and likely would.³⁹ And in each of those cases, the court based its decision upon statutory “standing” or “who can

sue” language virtually identical to or *less* favorable than Virginia’s. Virginia’s antitrust laws provide a remedy for “any person” injured by an antitrust violation. As stated by the North Carolina court, “any person” means “any person” and is “intended to provide a recovery for all consumers.”⁴⁰

Assuming, however, that the courts in Virginia do not look to Virginia’s Antitrust Statute because of its probable procedural limitation to filing in state courts, the odds are even better that Virginia will allow indirect purchasers to have standing. First, it is likely that the *Illinois Brick* argument would not even apply because there would be no harmonization requirement. Neither the Virginia Consumer Protection Act nor the Virginia business conspiracy statute has harmonization requirements. *Illinois Brick* specifically addressed federal antitrust laws and therefore, theoretically at least, would not be applicable to a claim under a state consumer protection or business conspiracy statute with no federal counterpart. Nevertheless, one can anticipate that Defendants will raise the issue arguing that the applicable law should follow the conduct—antitrust conspiracy—and not the statute under which the cause of action is pursued.

As the Virginia Consumer Protection Act and the Virginia business conspiracy statute are pure Virginia statutes – not patterned after a federal statute – the courts in Virginia should and most likely would look to the plain language of each and determine if indirect purchasers have standing. Since both use the broad language “any person”, a plain language interpretation would have to include indirect purchasers.⁴¹ Thus, should the courts in Virginia look to these statutes instead of the Virginia Antitrust Statute when deciding whether or not to allow standing to indirect purchasers, the argument is even more compelling that standing should be granted.

E. Modern support for *Illinois Brick* is essentially non-existent

In the 29 years since *Illinois Brick* was announced, numerous commentators have voiced their criticism of the Supreme Court’s decision and conclusions.⁴²

One of the primary criticisms is that indirect purchaser suits have actually worked well in practice. This criticism alone is fatal to continued support of *Illinois Brick*. For example, in his article, Professor Michael Jacobs traces the history of state indirect purchaser claims in connection with the Prescription Drugs Antitrust Litigation (“PDAL”) matter, cases in which our firm is involved. In concluding that the Supreme Court should reconsider *Illinois Brick*, Jacobs notes:

Since the decision in *Illinois Brick*, while federal courts have had almost no experience with indirect purchasers and their supposed problems, state courts

have proven increasingly hospitable to their claims. As demonstrated by PDAL, one upshot of this particular instance of antitrust federalism has been to shift cases from federal to state courts, accomplishing little of substance except to disqualify from suit those plaintiffs still tethered to the federal rule. At the same time, the fact that state courts are willing, and even eager, to entertain the claims of indirect purchasers strongly suggests that the rationale of *Illinois Brick* is open to serious question. In this respect, the state actions paralleling the litigation in PDAL have offered us the best that federalism has to give – useful counter-examples to the federal rule, evidence that there is another and perhaps a better way, and an opportunity to reconsider antitrust standing.

Jacobs, 42 St. Louis L. J. at 86-87.

Another article notes that the concerns motivating the majority opinion in *Illinois Brick* had been proven unjustified by the experience of the states allowing indirect purchaser claims:

Although the reasons for the Court's decision in *Illinois Brick* have not been forgotten, the recent experience with multistate indirect damages actions suggests that these concerns were, at least in part, ill-founded.

O'Connor, 15-SUM Antitrust 34, *37.

O'Connor notes that defendants have not been exposed to multiple liability, that apportionment problems appear to be tractable, and that indirect purchasers have demonstrated that they have sufficient incentives to sue.⁴³

In their research, Harris and Sullivan conduct a detailed economic analysis of the "passing on" phenomenon, ultimately concluding that economic and antitrust policy goals are best served by allowing indirect purchaser suits in most cases.⁴⁴ But Harris and Sullivan did not base their analysis solely upon economic theory. They also conducted an empirical review of recent government price-fixing cases, demonstrating that "pass through" of overcharges to indirect purchasers is common, and that it can in most cases be estimated without undue difficulty.⁴⁵ Harris and Sullivan also challenge a number of the Supreme Court's other assumptions. For example, they note that in the long-run, virtually all antitrust overcharges are passed on to consumers in their entirety.⁴⁶ They also dispute the Court's "deterrence" conclusions, arguing that denying indirect purchasers the right to sue often actually weakens deterrence rather than strengthens it.⁴⁷

Although commentators have occasionally written in support of the *Illinois Brick* rule, its primary scholarly defenders have long been Judge Richard

Posner and his University of Chicago colleague William Landes. Writing approximately one year after the Supreme Court issued its decision, Posner and Landes offered an economic analysis of the rule in which they tentatively concluded that antitrust's overarching goals were furthered by a ban on indirect purchaser suits.⁴⁸ Although the article is something of a *tour de force* example of the "Law & Economics" literature, the authors acknowledged at the time of publication that their work was based upon a number of critical assumptions. Time has proven those assumptions incorrect, and has largely vindicated the analysis of Harris and Sullivan, whose article criticized Posner's approach. Posner himself has softened his stance over time. In 2004, Posner noted that "[a]lthough I personally think the *Illinois Brick* doctrine is sound, this is far from certain; its contours moreover are controversial and it is valuable to have diversity and experimentation in this area, from which a consensus may someday emerge."⁴⁹

In sum, virtually all of the criticism of *Illinois Brick* has been deserved. *Illinois Brick* categorically denies recovery to the single most important group of victims in most antitrust conspiracies – the indirect purchasers to whom the illegal overcharges are passed by middlemen. In so doing, the decision flies in the face of the express terms of the Clayton Act, which authorizes suit by "any person who shall be injured" by reason of an antitrust violation. Even though the decision has been criticized for myriad reasons, its most offensive tenet is its flagrant ignoring of the unambiguous statutory language in favor of judicial policy making. In doing so, *Illinois Brick* relies on direct purchasers to file suit, despite the little incentive they have to do so, since they act as middlemen with the suppliers and typically pass on the bulk of the illegal overcharges to the ultimate consumers. This alone has been sufficient to lead a significant majority of states to reject *Illinois Brick* in the context of their own antitrust laws and similar statutory standing provisions. Moreover, *Illinois Brick* actually exacerbates the problems it was designed to resolve, because it creates an environment in which potential antitrust violators are *less* deterred than they would be if indirect purchasers were allowed to pursue federal antitrust claims.

Contrary to the Supreme Court's 1978 assumption, indirect purchaser victims are perhaps *best* suited to accomplish the private enforcement goals of the antitrust laws. In fact, *Illinois Brick* is based upon an entire set of assumptions that have proven inconsistent with reality. At best, *Illinois Brick* was a mistaken exercise in speculative pragmatism – a failed and counterproductive attempt to address future concerns that even its staunchest supporters now acknowledge may have been substantially overblown. Since its issuance, more than 35 states have reached the same conclusion, explicitly rejecting *Illinois Brick* in the context of state antitrust

claims. The U.S. Supreme Court has expressly authorized these rejections. The consistent experience of these states has demonstrated that the concerns motivating the *Illinois Brick* decision were not valid. And when the opportunity presents itself, as it most assuredly will, hopefully Virginia will join the ranks of those states rejecting *Illinois Brick*. In fact, given the opportunity CAFA now presents, is it too much to hope that the 2007 General Assembly will entertain legislation to establish indirect purchaser standing in Virginia and amend our antitrust statute to allow suits under it in federal court?

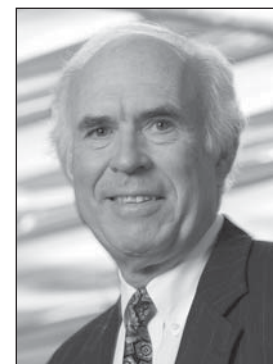
Endnotes

1. Section 1 of the Sherman Act, 15 U.S.C. § 1, provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . ."
2. *Illinois Brick*, 431 U.S. at 724-25, 730-31, 97 S.Ct. at 2064-67.
3. *Illinois Brick*, 431 U.S. at 735-36, 97 S.Ct. at 2069-70.
4. *Illinois Brick*, 431 U.S. at 748, 97 S.Ct. at 2076.
5. *California v. ARC America Corp.*, 490 U.S. 93, 103, 109 S.Ct. 1661 (1989).
6. See, e.g., Cal. Bus. & Prof. Code Ann. §16750(a) (allowing recovery "regardless of whether such injured person dealt directly or indirectly" with the defendant); Minn. Stat. §325D.57 (allowing recovery by any person "injured directly or indirectly"; Ala. Code §6-5-60(a) (allowing recovery by any person "injured or damaged. . . , direct or indirect").
7. See, e.g., *Comes v. Microsoft*, 646 N.W.2d 440 (Iowa 2002); *Bunker's Glass v. Pilkington*, 206 Ariz. 9 (2003); *Hyde v. Abbott Labs, Inc.*, 123 N.C.App. 572, 473 S.E.2d 680 (N.C. Ct. App. 1996).
8. A concurring opinion in a recent Mississippi case states that "Mississippi is the only state that permits no class actions of any kind, whether through common or statutory law." *Janssen Pharmaceutica, Inc. v. Armond*, 866 So.2d 1092, 1102 (Miss. 2004) (Justice Graves, specially concurring). The case goes on in a footnote to state that "While Virginia does not have a state rule governing class actions, it allows class actions in equity 'when a single right is asserted by one side, which affects all the parties on the other side in the same way, or a single wrong is complained of, which falls on them all simultaneously and together.'" *Id.* at n8 (quoting *Bosher v. Richmond & H.L. Co.*, 89 Va. 455, 16 S.E. 360, 361 (Va. 1892)). While *Bosher* is still technically good law as §1-200 of the Code of Virginia states that English common law, up to the time of the American Revolution, is good law in Virginia unless the General Assembly passes a statute to the contrary, there are no recent reported cases following *Bosher*. The last Supreme Court of Virginia case citing to *Bosher* is from 1925. In fact, the most recent cases make clear that Virginia does not permit class action lawsuits – period. "Virginia is not a class-action state, and 'an individual does not acquire standing to sue in a represented capacity by asserting the rights of another unless authorized to do so.'" *Nationwide Mut. Ins. Co. v. Housing Opportunities Made Equal, Inc.*, 259 Va. 8, 22, 523 S.E.2d 217 (2000) (quoting *W. S. Carnes, Inc v. Bd. of Supervisors*, 252 Va. 377, 383, 478 S.E.2d 295, 300 (Va. 1996)).
9. Ian Simmons & Charles E. Borden, *The Defense Perspective: The Class Action Fairness Act of 2005 and State Law Antitrust Action*, ANTITRUST, Fall 2005, at 21.
10. It might be argued that since the word "only" is omitted, the legislature intended only to deprive general district courts of jurisdiction, but not federal courts. However, since the language is explicitly directive on where the actions are to be filed, it most likely excludes federal courts.
11. Note, however, that courts in other jurisdictions have gone both ways regarding whether a suit can be brought under another statute when the antitrust statute is unavailable. See, e.g., *Mack v. Bristol-Myers Squibb Co.*, 673 So.2d 100, 109 (Fla. Dist. Ct. App. 1996) (although indirect purchaser cannot sue under state antitrust act, she can sue under the Florida Deceptive and Unfair Trade Practices Act); *Vacco v. Microsoft Corp.*, 260 Conn. 59, 793 A.2d 1048, 1058, 1066 (Conn. 2002) (because of broad harmonization provision, consumer cannot sue under state antitrust act; consumer can also not sue under the Connecticut Unfair Trade Practices Act); *Davidson v. Microsoft Corp.*, 143 Md. App. 43, 792 A.2d 336, 344-45 (Md. Ct. Spec. App. 2002) (indirect purchaser cannot sue under either state antitrust act or Maryland Consumer Protection Act); *Ciardi v. F. Hoffmann-LaRoche, Ltd.*, 436 Mass. 53, 762 N.E.2d 303, 314 (Mass. 2002) (indirect purchaser who cannot sue under state antitrust act can sue under Massachusetts consumer protection statute).
12. Va. Code §59.1-198.
13. Under current law, this question will most likely be answered either by the federal court: (1) certifying such a question to the Supreme Court of Virginia; or (2) forecasting how the Supreme Court of Virginia would answer such a question.
14. Kevin J. O'Connor, "Is the *Illinois Brick* Wall Crumbling?," *Antitrust*, Summer 2001, at 34, 35.
15. In the context of *Illinois Brick*, we discuss Virginia's antitrust statute because it is antitrust behavior that constitutes the gravamen of the wrongful conduct, even though in Virginia the issue will most likely arise under the Consumer Protection Act or the business conspiracy statute.
16. See *Comes*, 646 N.W.2d 440.
17. *Comes*, 646 N.W.2d at 445 (emphasis in original).
18. *Id.*
19. *Id.*
20. See Iowa Code § 553.2.
21. *Comes*, 646 N.W.2d at 446.
22. *Id.* at 445. (emphasis added).
23. *Comes*, 646 N.W.2d at 445; see also *California v. ARC America Corp.*, 490 U.S. 93, 109 S.Ct. 1661 (1989) (explicitly authorizing states to reject *Illinois Brick* rule as to state antitrust claims).
24. See *Hyde*, 473 S.E.2d at 684 (citing *Madison Cablevision v. City of Morganton*, 325 N.C. 634, 656 (1989); *Johnson v. Phoenix Mutual Life Ins. Co.*, 300 N.C.

- 247, 262 (1980)).
25. See *Hyde*, 473 S.E.2d 680. The *Hyde* decision is controlling authority in the state of North Carolina in the absence of a Supreme Court decision. Furthermore, several lower North Carolina courts have expressly followed the ruling in *Hyde*. See, e.g., *Long v. Abbott Labs*, 1999 WL 33545517 at *2 (N.C. Sup.Ct. 1999) (unpublished); *Bruggers, D.D.S. v. Eastman Kodak Co.*, 2002 WL 31044228 at *6 (N.C. Sup.Ct. 2002) (unpublished) [stating “the decision of the Court of Appeals in the *Hyde* case is controlling authority in this state on the question of indirect purchaser standing.”].
 26. *Hyde*, 437 S.E.2d at 684.
 27. *Madison Cablevision v. City of Morganton*, 325 N.C. 634, 656 (1989); see also *Hyde*, 473 S.E.2d at 684.
 28. *Hyde*, supra, at 687.
 29. *Id.*
 30. See, *Id.*
 31. Ariz. Rev. Stat. §44-1412.
 32. *Bunker’s Glass*, 206 Ariz. at 12.
 33. *Id.*
 34. *Id.*
 35. *Id.* at 17.
 36. *Bunker’s Glass*, 206 Ariz. at 12; see also Ariz. Rev. Stat. § 44-1412.
 37. *Id.* at 14.
 38. *Id.* at 16 (emphasis added).
 39. The Supreme Court of Virginia has stated, on several occasions, that it follows the “plain meaning” of a statute. See, e.g., *HCA Health Services of Virginia, Inc. v. Levin*, 260 Va. 215, 220, 530 S.E.2d 417, 420 (2000) (“When statutory language is clear and unambiguous, there is no need for construction by the court; the plain meaning of the enactment will be given it”); *Johnson v. Windsor Ins. Co.*, 597 S.E.2d 31, 34 268 Va. 197, 201 (2004) (“where the legislature has used words of a plain and definite import the courts cannot put upon them a construction which amounts to holding the legislature did not mean what it has actually expressed”); *Va. Tech v. Interactive Return Services*, 626 S.E.2d 436, 438, 271 Va. 304, 309 (2006) (“When the language in a statute is clear and unambiguous, we apply the statute according to its plain language”).
 40. *Hyde*, 437 S.E.2d at 684.
 41. See Va. Code. §§18.2-500(A) and 59.1-204.
 42. See, e.g., *Areeda & Hovenkamp*, *Antitrust Law* ¶¶346a; Robert G. Harris & Lawrence A. Sullivan, *Passing On the Monopoly Overcharge: A Comprehensive Policy Analysis*, 128 U. Pa. L. Rev. 269 (1979); The Harris & Sullivan article spawned a lively debate with then-Professor Richard A. Posner, *Illinois Brick’s* most influential early supporter. Even Posner has softened his tone over time. Moreover, Posner’s early analysis was based upon a number of assumptions that have proven incorrect in the crucible of actual experience; O’Connor, “Is the *Illinois Brick* Wall Crumbling?,” *Antitrust*, Summer 2001, at 34; Cavanagh, 17 Loy. Consumer L. Rev. 1; Baker 17-Fall *Antitrust* 14 (In this article, the former chief federal antitrust enforcer sided with Brennan: “The dissenters seem to have the better of it. *Hanover Shoe* was about assuring that somebody recover, while *Illinois Brick* is about as-

sureing that the various victims not recover too much. These are different issues that really demand different treatment conceptually. A “sauce for the gander” rule is simply too blunt. To say to a clear victim that ‘you don’t even have standing to make a claim and try to prove it’ is inconsistent with modern tort policy and appears unfair.”); Hovenkamp, 103 Harv. L. Rev. 1717 (1990); Jacobs, 42 St. Louis U. L. J. 59 (1998); Karon, 30 Wm. Mitchell L. Rev. 1351 (2004); Note: 62 Boston U. L. Rev. 1241 (1982); Comment: 33 U. Balt. L. Rev. 69 (2003); Watson, 9 *Antitrust Law & Economics Review* 69 (1977); Mantell, 2 Pace L. Rev. 153 (1982).

43. See *Id.* at 37-38. See also Calkins, 39 *Ariz. L. Rev.* 413, 419-23 (Noting that private class actions, including indirect purchaser claims, have been successful in recent years, even in the absence of prior government enforcement actions).
44. See Robert G. Harris & Lawrence A. Sullivan, “Passing On the Monopoly Overcharge: A Comprehensive Policy Analysis,” 128 *U. Pa. L. Rev.* 269, 275, 338-354 (1979).
45. *Id.* at 321-338.
46. *Id.* at 290-94.
47. *Id.* at 349-54.
48. See William M. Landes & Richard A. Posner, “Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of *Illinois Brick*,” 46 *U. Chi. L. Rev.* 602 (1979).
49. See Posner, “Federalism and the Enforcement of Antitrust Laws by State Attorneys General,” 2 *Geo. J. L. & Pub. Pol’y* 5 (2004) (emphasis added).



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