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In re ATM Fee Litigation: Ninth Circuit Uses Illinois Brick to Build a High Wall For Indirect Purchasers

Meagan P. VanderWeele*

I. INTRODUCTION

Price fixing and other antitrust violations most frequently injure indirect purchasers¹, those who purchase goods through retailers and other intermediaries rather than directly from the antitrust violator.² The direct purchasers, typically retailers and other middlemen, generally escape injury by passing on any overcharges to their purchasers, who in turn pass on the costs to consumers and other ultimate purchasers.³ Thus, consumers and indirect purchasers are the true victims of passed-on overcharges because they are the ones who ultimately pay an artificially inflated price.⁴ One of the central objectives of antitrust laws in the United States is to promote consumer welfare. However, under the indirect purchaser rule set forth in Illinois Brick Co. v. Illinois⁵, the real victims of price-fixing are unable to obtain relief.⁶

Section 4 of the Clayton Act grants a right to sue for treble damages to “any person who shall be injured in his business or property by

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¹ An "indirect purchaser" is a buyer who is more than one step removed from the antitrust violator in the chain of distribution." Cynthia Urda Kassis, Comment, The Indirect Purchaser's Right to Sue Under Section 4 of the Clayton Act: Another Congressional Response to Illinois Brick, 32 AM. U.L. REV. 1087, 1087 n.1 (1983) (citation omitted). "Individual consumers, small businesses, and governmental bodies are usually indirect purchasers." Id. (citing S. REP. No. 96-239, at 2 (1979)).

² Id. at 1087.

³ "'Pass-on' is a process by which an entity in a chain of distribution adjusts its price upward to compensate for an overcharge by a prior party in the chain . . . [s]ellers normally pass on costs downward in the chain of distribution from the manufacturer to the ultimate purchaser." Id. at 1087 n.2 (citing Note, Antitrust Law—In re Beef Antitrust Litigation: A Crack Appears in the Illinois Brick Wall, 1981 Wis. L. REV. 185, 186 n.6 (1981); Jerry L. Beane, Passing-on Revived: An Antitrust Dilemma, 32 BAYLOR L. REV. 347, 349 (1980)).


⁶ See Kassis, supra note 1, at 1087.
reason of anything forbidden in the antitrust laws." By providing a private right of action for those injured by antitrust violations, section 4 is critical in order for injured consumers to recover from any passed-on costs. However, under the Illinois Brick rule, the Supreme Court has limited private treble-damage actions to antitrust violators' direct customers, leaving subsequent purchasers, who often suffer substantial harm from these overcharges, without a remedy.

The Ninth Circuit's recent opinion in In re ATM Fee Litigation further narrows the scope of section 4 standing by failing to extend critical exceptions to the Illinois Brick rule and by refusing to recognize an exception that the Ninth Circuit had previously stated. While the court provided important clarifications regarding the scope of two exceptions to the general rule set forth in Illinois Brick, the Ninth Circuit's decision in In re ATM Fee Litigation narrowly interpreted the exceptions to the Illinois Brick rule and held that the plaintiffs, who did not directly purchase the allegedly price-fixed product from the defendants, lacked standing to pursue their antitrust claims. Therefore, because of the Ninth Circuit's restricted application of Illinois Brick in In re ATM Fee Litigation, it has built a high wall for indirect purchaser suits. As a result, it will likely be impossible for indirect purchasers to bring antitrust claims under section 4 of the Clayton Act, which is inconsistent with section 4's requirement that private plaintiffs receive treble damages for injuries they have sustained as a result of an antitrust violation.

This Note argues that the Ninth Circuit's opinion in In re ATM Fee Litigation is problematic for two reasons. First, the court's opinion is inconsistent with the damage action provision of antitrust law, which encourages private antitrust litigation and entitles a person injured by an antitrust violation to treble damages. By severely narrowing the scope of section 4 standing for indirect purchasers, the court recog-
nizes standing for the direct purchaser, who has suffered little or no injury, while denying standing to the injured, indirect purchaser, which contradicts section 4's mandate that a person injured by an antitrust violation is entitled to treble damages.13 Second, by limiting section 4 standing to direct purchasers only, the Ninth Circuit incorrectly used *Illinois Brick* to build a high wall for indirect-purchaser suits, which is inconsistent with the public policy underlying antitrust law in general and section 4 of the Clayton Act, in particular.

II. BACKGROUND

A. Section 4 of the Clayton Antitrust Act

The Clayton Antitrust Act, which Congress enacted to strengthen federal antitrust laws put in place by the Sherman Act, prohibits anticompetitive price discrimination and exclusive dealing practices.14 The United States has a strong public policy of protecting competitiveness in markets and has implemented that policy through the enforcement of a series of antitrust laws.15 These antitrust laws, which proscribe cartel and monopolizing behavior, reflect the economic objective of enhancing consumer welfare by preventing practices that reduce competition.16 The Clayton Act, in particular, focuses on anticompetitive conduct and prohibits conduct that substantially lessens competition or that tends to create a monopoly in any line of commerce.17

Most significantly, the passage of the Clayton Act signaled the expansion of individual private parties' ability to sue for damages. Specifically, section 4 of the Clayton Act provides that any person who is injured by an antitrust violation "shall recover threefold the damages by him sustained, and the cost of suit, including a reasonably attorney's fee."18 Thus, section 4 mandates that private parties may recover treble damages for injuries suffered from antitrust violations.

By creating a private right of action for victims of antitrust violations, Congress was able to promote several policies. Section 4's treble damages provision provides ample relief and compensation to those

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13. See id.
16. Id. at 10–11.
17. Id. at 21.
injured by anticompetitive conduct, which in turn deters future antitrust violations. Furthermore, section 4 reflects Congress's intent to make the Clayton Act self-enforcing by encouraging private litigation through a treble damages incentive. The treble damages provision provides strong encouragement for private attorneys to enforce antitrust laws, which in turn deters potential violators from violating antitrust laws. Additionally, the enforcement and deterrence objectives underlying section 4 further the broad substantive goals of antitrust law generally: "to promote competition, economic efficiency, and consumer welfare; to prevent concentrations of economic and social power; and to protect small business from overreaching conglomerates."

Despite the benefits of section 4, courts have approached section 4 claims with caution for fear that the treble damages remedy will result in an over-deterrence of competition and will burden the courts with a flood of frivolous suits and speculative claims. Thus, courts have developed specialized standing rules for section 4 plaintiffs, including the indirect-purchaser rule established in Illinois Brick. However, by creating restrictive standing rules, victims of anticompetitive behavior are unable to find relief.

B. The Supreme Court & Section 4: Narrowing the Scope of Indirect Purchaser Standing

While both the federal government and the individual states have the power to enforce antitrust laws, private suits have been the

19. See Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979) ("Congress created the treble-damages remedy of § 4 precisely for the purpose of encouraging private challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations.") (emphasis in original); see also Daniel Berger & Roger Bernstein, An Analytical Framework for Antitrust Standing, 86 YALE L.J. 809, 809 n.1, 848-50 (1977).


22. Id. at 439 (citations omitted).

23. Id. at 439-40.
predominate form of antitrust litigation for the past forty years.\textsuperscript{24} Thus, section 4 of the Clayton Act is critical for consumers seeking to recover from injuries sustained as a result of antitrust violations because section 4 is the statutory mandate that entitles a person injured by an antitrust violation to treble damages. However, the Supreme Court has narrowly interpreted section 4, thereby limiting the class of parties that have standing to recover.

A plaintiff who brings suit under the federal antitrust laws must demonstrate "antitrust standing," a doctrine that embodies the notion that a plaintiff may not bring suit unless the alleged injury suffered was proximately caused by the defendant's anticompetitive conduct.\textsuperscript{25} Historically, section 4's "by reason of,"\textsuperscript{26} or causation, requirement has received the most attention in the courts.\textsuperscript{27} On its face, the statute appears to require only causation-in-fact in order for a plaintiff to have standing to sue. Courts initially interpreted section 4 of the Clayton Act as providing a private right of action to anyone who was injured as a proximate result of an antitrust violation.\textsuperscript{28} However, the Supreme Court ended this trend in 1977 with its opinion in \textit{Brunswick Corp. v. Pueblo Bowl-O-Mat}, in which the Court held that, in order to recover damages under federal antitrust laws, private plaintiffs must prove more than that anticompetitive conduct caused their injury.\textsuperscript{29} Instead, "[p]laintiffs must prove \textit{antitrust} injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."\textsuperscript{30} Thus, in determining whether a plaintiff has antitrust standing, courts use a two-prong approach: courts first consider whether the plaintiff has suffered an antitrust injury as described in \textit{Brunswick} and then evaluate several factors, including the directness or indirectness of the asserted injury, to determine whether the plaintiff is the proper one to assert a given claim.\textsuperscript{31}

\begin{itemize}
  \item 25. See Holmes v. Secs. Investor Prot. Corp., 503 U.S. 258, 268 (1992) (holding that respondent had no right to sue under RICO because the link was too remote between the stock manipulation alleged and the customers' harm, being purely contingent on the harm suffered by the broker-dealer).
  \item 27. Deffense, \textit{supra} note 21, at 441.
  \item 29. 429 U.S. 477 (1997).
  \item 30. \textit{Id.} at 489 (emphasis in original).
  \item 31. Barbur & Clarke, \textit{supra} note 28. Other factors that courts must consider under this second-prong in determining whether a private plaintiff has antitrust standing include the following:
\end{itemize}
The Supreme Court first began chipping away at indirect purchaser standing in the 1968 decision of *Hanover Shoe, Inc. v. United Shoe Machinery Corp.* The Court considered whether a defendant in an antitrust suit could avoid liability by proving that the plaintiff, a direct purchaser, had passed on to its customers any increased costs caused by an alleged price-fixing violation. The Court concluded that the use of a pass-on theory of damages as a defense tactic was impermissible.

Nine years later in *Illinois Brick*, the Court held that indirect purchasers cannot base a claim under section 4 of the Clayton Act on the theory that the seller had passed on illegal overcharges to them. Together, *Hanover Shoe* and *Illinois Brick* establish the indirect purchaser or *Illinois Brick* rule. Under this rule, only those who have dealt directly with an antitrust violator have standing to sue under section 4 of the Clayton Act.

In antitrust litigation, a direct purchaser, for example, is one who acquires a good directly from the defendant. Alternatively, an indirect purchaser acquires the good from a non-defendant further down the distribution chain, which may have several levels of indirect purchasers but only one direct purchaser. The Court's opinion in *Illinois Brick Co. v. Illinois*, which was decided during the same term as *Brunswick*, limited the scope of the second prong of the antitrust standing doctrine by recognizing standing for direct purchasers only.

"the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement; the speculativeness of the alleged injury; and the difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries." *Id.*

33. *Id.* at 487–88.
34. *Id.* at 494. The Court based its decision on two reasons. First, the Court found that because a variety of factors influence a company's pricing policy, it would be onerous to determine the effect of the antitrust violation on pricing and would make proving damages impossible in many situations. *Id.* at 49–93. Second, the Court reasoned that if it did not ban use of the pass-on defense, consumers would have little incentive to bring a private action because antitrust violators generally cause minimal damage to any single purchaser. *Id.* at 494. Thus, the Court rejected the use of the pass-on doctrine because it would allow antitrust violators to profit from their illegality and would reduce the deterrent effect of section 4's private treble-damage actions. *Id.* at 494.

Thus, as a result of the narrow scope of section 4 standing, consumers, the ultimate victims of antitrust violations, are finding it increasingly difficult to recover for injuries resulting from alleged antitrust violations.

C. A Closer Look at Illinois Brick

1. The Illinois Brick Decision

In Illinois Brick Co. v. Illinois, the State of Illinois and 700 local governmental entities brought an antitrust action under section 4 of the Clayton Act, alleging that petitioners, concrete block manufacturers, engaged in a price-fixing scheme in violation of section 1 of the Sherman Act.38 Concrete block manufacturers sell to masonry contractors, who in turn sell to general contractors, creating a chain of distribution.39 In this case, the plaintiffs did not directly pay the alleged fixed-fee but, rather, alleged that the subcontractors, who were hired by the contractors that the plaintiffs directly hired, engaged in price-fixing; therefore, the plaintiffs argued that they were indirect purchasers.40

First, the Supreme Court held in Illinois Brick that the plaintiffs could not use a pass-on theory of recovery for alleged antitrust violations.41 Because antitrust violators may not use a pass-on theory of damages defensively against a direct purchaser, the Court reasoned that an indirect purchaser may not use a pass-on theory offensively against an alleged antitrust violator.42 Defensive use of the pass-on theory posits that an allegedly illegal overcharge or fixed-fee does not injure a manufacturer because that overcharge or fee is passed on to the customers who purchase from the manufacturer.43

In Hanover Shoe, the Court rejected as a matter of law the defensive use of the pass-on theory.44 A pass-on theory of recovery is deemed offensive when the plaintiff attempts to argue that she was injured by an allegedly illegal overcharge or fixed-fee, even though the plaintiff indirectly paid the charge or fee, because it was passed-on to the plaintiff by the direct purchaser.45 The Court’s holding in Illinois Brick, that indirect purchasers may not use a pass-on theory to

38. Id. at 726–27.
39. Id. at 726.
40. Id.
41. Id. at 724.
43. Id. at 728–29.
recover damages, means that indirect purchasers do not have standing to bring an antitrust price-fixing case under section 4 of the Clayton Act.46

Second, the Court held that because the plaintiffs did not directly pay the allegedly fixed fee, they were indirect purchasers and, as such, did not have standing under section 4 of the Act.47 Consequently, the Illinois Brick rule prohibits plaintiffs from seeking damages for antitrust violations under section 4 of the Clayton Act if the plaintiffs did not directly pay the alleged fixed fee.48 Since the Supreme Court's decision in Illinois Brick, courts have generally refused to allow damage actions under federal antitrust laws by indirect purchasers.49

2. The Resulting Rule and Its Exceptions

There are several reasons supporting the Illinois Brick rule. The rule eliminates overly complicated efforts to apportion recovery of overcharges among potential plaintiffs.50 Estimating the amount of damages passed on to an indirect purchaser is complicated because tracing fixed-fees or overcharges through several levels of a chain of distribution would require additional complicated proceedings involving massive evidence and complicated theories.51 Additionally, the rule eliminates multiple recoveries.52 If offensive but not defensive use of the pass-on theory were allowed, it would create a serious risk of multiple liabilities for defendants.53 Overlapping recoveries would result because both the indirect and direct purchaser would be able to recover.54 Furthermore, the Illinois Brick rule promotes the vigorous enforcement of antitrust laws.55 The Supreme Court stated that it was reluctant to carve out exceptions to this rule; however, three important exceptions (and a possible fourth) exist.56

a. Cost-Plus Exception

Where a cost-plus contract exists between an indirect and direct purchaser, courts have held that the indirect purchaser has standing to

46. Id.
47. Id.
48. Id. at 724.
52. UtilitCorp, 497 U.S. at 212.
54. Id.
55. UtilitCorp, 497 U.S. at 214.
56. Id. at 216 (quoting Ill. Brick Co., 431 U.S. at 744).
seek damages for antitrust violations under section 4 of the Clayton Act.\textsuperscript{57} A cost-plus contract is a fixed-markup, fixed-quantity contract that parties negotiate prior to an illegal price increase.\textsuperscript{58} The direct purchaser adds a pre-specified dollar amount to its price for a product before resale or adds a pre-specified percentage of its cost to the sale price.\textsuperscript{59} When a preexisting cost-plus contract exists between the customer and direct purchaser, "the purchaser is insulated from any decrease in its sales as a result of attempting to pass on the overcharge, because its customer is committed to buying a fixed quantity regardless of price."\textsuperscript{60} The overcharge's effect is determined in advance, and the cost-plus contract circumvents the complex market interaction of supply and demand "that complicates the [overcharge] determination in the general case."\textsuperscript{61} Furthermore, there is no apportioning problem and no danger of duplicative recovery because the overcharge is fully passed on to the indirect purchaser under the terms of the contract.\textsuperscript{62}

Although the Supreme Court recognized a pre-existing cost-plus contract exception to indirect purchaser suits, the Court's decision in \textit{Kansas v. UtiliCorp United} severely limited this exception.\textsuperscript{63} In that case, the indirect purchasers were residents of Kansas and Missouri who claimed they had purchased natural gas from various utilities at inflated prices that were fixed by a pipeline and group of gas production companies.\textsuperscript{64} The direct purchaser was the utility company serving the indirect purchasers.\textsuperscript{65} The defendants claimed that the utility lacked standing because it passed the entire overcharge on to its customers.\textsuperscript{66} However, the Court held that the utility company had standing while its indirect purchaser customers, despite the existence of a contract between the utility company and its customers, did not.\textsuperscript{67}

Although the Court recognized the cost-plus exception to the \textit{Illinois Brick} rule, the Court held that the exception did not apply because the respondent utility company did not sell the gas, which the supplier pipeline company allegedly overcharged, to its customers.

\textsuperscript{57} \textit{Ill. Brick Co.}, 431 U.S. at 736; \textit{UtiliCorp}, 497 U.S. at 217-18.
\textsuperscript{58} Hovenkamp, \textit{supra} note 49, at 1720.
\textsuperscript{59} \textit{Id.}
\textsuperscript{60} \textit{Ill. Brick Co.}, 431 U.S. at 736.
\textsuperscript{61} \textit{Id.}
\textsuperscript{64} \textit{Id.}
\textsuperscript{65} \textit{Id.} at 205.
\textsuperscript{66} \textit{Id.}
\textsuperscript{67} \textit{Id.}
under a preexisting cost-plus contract.\textsuperscript{68} Rather, the utility company passed on its costs to the consumers as required by regulations and tariffs, which only resembled a cost-plus contract.\textsuperscript{69} The Court narrowly construed the cost-plus exception and refused to expand its scope to apply to instances that resemble that of a cost-plus contract.\textsuperscript{70}

**b. Co-Conspirator Exception**

An indirect purchaser may have standing to seek damages for alleged antitrust violations under section 4 of the Clayton Act under a "co-conspirator exception."\textsuperscript{71} An indirect purchaser may bring suit if he can establish a price-fixing conspiracy between the manufacturer and middleman.\textsuperscript{72} This exception applies when the direct purchaser conspires, either horizontally or vertically, to fix the price paid by the plaintiff bringing a claim under section 4.\textsuperscript{73} The Ninth Circuit has recognized and applied this exception; however, its application of the co-conspirator exception seems to be limited to instances in which the direct purchaser conspires to fix a price that consumers directly pay.

In *Arizona v. Shamrock Foods*, the Ninth Circuit outlined and applied the co-conspirator exception to the indirect-purchaser rule and held that the *Illinois Brick* rule did not apply because the defendants conspired to fix the price that the plaintiffs paid directly.\textsuperscript{74} Plaintiff consumers alleged that retail grocery stores conspired with dairy producers to fix the retail price of milk that the consumers paid.\textsuperscript{75} The court held that *Illinois Brick* did not apply and that the consumers were not estopped from proceeding with the litigation.\textsuperscript{76} The court reasoned that the consumer's theory did not rely on a pass-on theory because the consumers confined their claim for damages to the retail-level price-fixing conspiracy between the grocery store and dairy pro-

\textsuperscript{68} UtilityCorp, 497 U.S. at 218.
\textsuperscript{69} Id. at 217-18.
\textsuperscript{70} Id. at 218.
\textsuperscript{71} Del. Valley Surgical Supply, Inc. v. Johnson & Johnson, 523 F.3d 1116, 1123 n.1 (9th Cir. 2008).
\textsuperscript{72} Id. (citing Arizona v. Shamrock Foods, Co., 729 F.2d 1208 (9th Cir. 1984)).
\textsuperscript{73} Shamrock Foods, 729 F.2d at 1211. "Horizontal price fixing is an agreement among competitors" operating at the same level of distribution "to restrain price competition in some way." Paul Gift, *Price Fixing and Minimum Resale Price Restrictions are Two Different Animals*, 12 GraziaDo Bus. Rev. 2 (2009), available at http://gbr.pepperdine.edu/2010/08/price-fixing-and-minimum-resale-price-restrictions-are-two-different-animals/. Vertical price-fixing is a price restriction agreement between an "upstream manufacturer on downstream distributors, dealers, or retailers . . . [t]ypically, a manufacturer specifies a minimum price above which its retailers must sell its [product]." Id.
\textsuperscript{74} Shamrock Foods, 729 F.2d at 1211.
\textsuperscript{75} Id.
\textsuperscript{76} Id.
The court further reasoned that the rationale underlying the *Illinois Brick* rule was not present: there was no risk of double recovery and no need to apportion the overcharge paid by consumers because the overcharge was not passed on to the consumers through any other level in the distribution chain. Thus, because the grocery store vertically conspired to fix the price paid by the consumers, the *Illinois Brick* rule did not apply.

In *Kendall v. Visa USA, Inc.*, the Ninth Circuit reaffirmed that the co-conspirator exception applies when the conspirators set the price paid by the consumer, thereby firmly limiting this exception so as to apply to direct purchasers only. The merchant plaintiffs sued credit card companies and banks alleging that they conspired to set the transaction fee charged to merchants for each transaction by setting the interchange fee. The court held that the plaintiffs had to allege a conspiracy to fix the price paid by the plaintiffs. The court reasoned that because the plaintiffs alleged a conspiracy to fix a price that they indirectly paid through the interchange fee, the co-conspirator exception did not apply. Therefore, the Ninth Circuit has limited the *Illinois Brick* rule's co-conspirator exception to instances in which there is a conspiracy to fix prices directly paid by plaintiffs, thereby rendering the exception unavailable to indirect purchasers. As a result, the co-conspirator exception is in effect not an exception at all but, rather, an altered application of *Illinois Brick*.

c. Ownership or Control Exception

The third exception to the *Illinois Brick* rule allows an indirect purchaser to seek damages for alleged antitrust violations when customers of the direct purchaser own or control the direct purchasers or when a conspiring seller owns or controls the direct purchaser. Under this ownership and control exception, an indirect purchaser may sue where a direct purchaser is a division or subsidiary of a co-conspirator.

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77. *Id.*
78. *Id.* at 1214.
80. *Kendall v. Visa USA, Inc.*, 518 F.3d 1042 (9th Cir. 2008).
81. *Id.* at 1049.
82. *Id.* at 1045.
83. *Id.* at 1050.
84. Dicta in *Illinois Brick* recognized an exception to the indirect purchaser rule "where the direct purchaser is owned or controlled by its customer." *Ill Brick Co. v. Illinois*, 431 U.S. 720, 736 n.16 (1977). Courts have extended this exception to situations in which the direct purchaser is owned or controlled by the violator. *See, e.g.*, Royal Printing Co. v. Kimberly-Clark Corp., 621 F.2d 323, 326 (9th Cir. 1990).
This exception was outlined in *Royal Printing v. Kimberly-Clark Corp.*\(^8^5\) Plaintiff printing company filed an action against ten of the nation's largest paper manufacturers for price fixing and other antitrust violations.\(^8^6\) The paper manufacturers sold their products through their wholesaling divisions or wholly-owned subsidiaries.\(^8^7\) The court held that, although the printing company was an indirect purchaser, it could maintain an antitrust action if the direct purchaser was a division or subsidiary of a co-conspirator.\(^8^8\) In this case, the paper manufacturers owned and controlled the subsidiaries from which the printing company bought its product.\(^8^9\) The court reasoned that an ownership and control exception should be recognized because when parental control exists (for example, a co-conspirator controls or owns the direct purchaser), applying the *Illinois Brick* rule would “close off every avenue for private enforcement of the antitrust laws in such cases.”\(^9^0\) Furthermore, the court reasoned that neither of the rationales underlying *Illinois Brick* were applicable: there was a small risk of multiple recovery and liability, and determining the portion of the illegal overcharge did not involve *Illinois Brick*-style complexities.\(^9^1\) Therefore, the indirect purchaser printing company was able to sue the direct purchaser paper manufacturer.

d. *Freeman* Exception: No Realistic Possibility that Direct Purchaser Will Sue

The Ninth Circuit recognized a fourth exception to the *Illinois Brick* rule in *Freeman v. San Diego Ass'n of Realtors*: an indirect purchaser can seek damages for alleged antitrust violations if there is no realistic possibility that the direct purchaser will sue.\(^9^2\) For example, in a chain of distribution in which a parent company controls the direct purchaser, it is highly unlikely that the direct purchaser would sue the parent company because its litigation decisions are likely subject to parental control.\(^9^3\) The parent company would forbid the direct purchaser to bring a lawsuit that would reveal the parent’s participation in a price-fixing scheme. Public policy underlying section 4 of the Clayton Act suggests that the indirect purchaser should have standing

\(^8^5\) *Royal Printing Co.*, 621 F.2d 323.
\(^8^6\) *Id.* at 324.
\(^8^7\) *Id.*
\(^8^8\) *Id.* at 326.
\(^8^9\) *Id.* at 324.
\(^9^0\) *Royal Printing Co.*, 621 F.2d at 327.
\(^9^1\) *Id.*
\(^9^2\) *Freeman v. San Diego Ass’n of Realtors*, 322 F.3d 1133 (9th Cir. 2003).
\(^9^3\) This rationale was previously articulated in *Royal Printing*, 621 F.2d at 326.
to sue. Section 4 entitles a person injured by an antitrust violation to treble damages, which reflects Congress's intent to make the Clayton Act self-enforcing by encouraging private litigation through a treble damages incentive. Thus, in instances in which there is no realistic possibility that the direct purchaser will sue, the indirect purchaser should have standing to bring an antitrust claim.

This fourth exception reflects the court's willingness to recognize standing for indirect purchasers who have no other course of redress. However, the Ninth Circuit recently rejected this exception, reasoning that standing existed in Freeman based on the control or co-conspirator exceptions, not a possible fourth exception. Although, the Supreme Court has not yet recognized the potential fourth exception under Freeman, an exception under Freeman is still conceivable.

The Illinois Brick rule and its exceptions have drawn consistent criticism. By limiting private treble damage actions to the antitrust violator's direct purchasers, subsequent purchasers, who often suffer substantial harm, are left without a remedy. While there are several reasons supporting the Illinois Brick rule, changes in the antitrust landscape have undermined the rationales underlying the denial of recovery to indirect purchasers in federal court. In response to these changes, the Antitrust Modernization Commission issued a report in 2007 recommending legislative repeal of Illinois Brick. Additionally, commentators have offered a myriad of ways to correct the indirect purchaser rule, calling for the Illinois Brick wall to come down. Despite these calls for reform, the Supreme Court has reaffirmed Illinois Brick and Congress has failed repeal it, leaving the Illinois Brick rule a high wall for indirect purchasers to overcome.

94. Fowler, supra note 20, at 689.
95. In re ATM Fee Litig., 686 F.3d 741, 756–57 (9th Cir. 2012).
III. SUBJECT OPINION: \textit{In re ATM Fee Litigation}

In \textit{In re ATM Fee Litigation}, the Ninth Circuit unanimously affirmed a grant of summary judgment for defendant banks in an antitrust suit involving alleged price-fixing of ATM fees.\textsuperscript{99} The Ninth Circuit held that the plaintiff cardholders were indirect purchasers within the meaning of \textit{Illinois Brick} and could not satisfy any of the exceptions to the \textit{Illinois Brick} rule, which deprives indirect purchasers of standing to bring federal antitrust claims.\textsuperscript{100} Because the plaintiff cardholders lacked standing to bring suit under section 4 of the Clayton Act, the District Court’s grant of defendants’ motion for summary judgment was affirmed.\textsuperscript{101}

A. Facts

The defendants in this case were STAR Network\textsuperscript{102} member banks that both issued ATM cards and owned ATM machines.\textsuperscript{103} In 2001, Defendant Concord, a publicly traded Delaware corporation, acquired STAR.\textsuperscript{104} As a result of Concord’s acquisition of STAR, banks that were previously members of STAR’s network (including the bank defendants in this case) no longer had control of STAR based on ownership and board appointment.\textsuperscript{105} Prior to Concord’s acquisition, STAR’s member banks set interchange fees paid by members.\textsuperscript{106} After the acquisition, Concord revised an agreement with its members and established a Network Advisory Board composed of larger member banks that advised Concord’s board on policy and pricing decisions.\textsuperscript{107} However, the Board had no authority to determine or veto interchange fee changes.\textsuperscript{108}

Customers at most banks receive an ATM card that allows them to make withdrawals from their accounts electronically.\textsuperscript{109} ATM cards typically permit withdrawals from the bank’s ATMs as well as ATMs owned by other banks.\textsuperscript{110} When an ATM cardholder withdraws

\textsuperscript{99} In re ATM Fee Litig., 686 F.3d 741, 744 (9th Cir. 2012).
\textsuperscript{100} Id.
\textsuperscript{101} Id.
\textsuperscript{102} Id. at 745 (An “ATM Network [is] . . . the entity that connects the ATM owners with card-issuing banks . . . and administers agreements between card-issuing banks and ATM owners to ensure that customers can withdraw money from network member ATMs.”).
\textsuperscript{103} Id.
\textsuperscript{104} In re ATM Fee Litig., 686 F.3d at 745.
\textsuperscript{105} Id.
\textsuperscript{106} Id.
\textsuperscript{107} Id. at 744.
\textsuperscript{108} Id. at 746.
\textsuperscript{109} In re ATM Fee Antitrust Litig., 768 F. Supp. 2d 984, 987 (N.D. Cal. 2009).
\textsuperscript{110} Id.
money from another ATM, several fees are generated.\footnote{111}{In re ATM Fee Litig., 686 F.3d at 746.} One fee is a "foreign ATM fee" that the cardholder must pay to the bank that issued her ATM card.\footnote{112}{Id.} Another is known as an "interchange fee" that is paid by the card-issuing bank to the owner of the foreign ATM.\footnote{113}{Id.} The card-issuing bank sets the amount of the foreign ATM fee, while interchange fees are set by entities known as ATM networks, which are responsible for administering agreements between card-issuing banks and foreign ATM owners.\footnote{114}{Id. at 744.}

In this case, plaintiffs, a class of ATM cardholders, alleged that several banks colluded with STAR to fix the interchange fees paid by the banks, which the banks then passed on to the plaintiffs.\footnote{115}{Id. at 750.}

B. Procedural History

On July 2, 2004, plaintiff cardholders filed suit alleging horizontal price-fixing of ATM interchange fees.\footnote{116}{In re ATM Fee Litig., 686 F.3d at 746.} The cardholders alleged that the card-issuing banks and STAR Network colluded to set artificially high interchange fees and passed those fees along to customers.\footnote{117}{Id.} The cardholders claimed that the interchange fees were marked up and charged to cardholders in the separate foreign ATM fee.\footnote{118}{In re ATM Fee Litig., 686 F.3d at 744.} The cardholders brought an antitrust suit under section 4 of the Clayton Act, alleging that Concord and the card-issuing banks engaged in horizontal price fixing in violation of federal antitrust law.\footnote{119}{Id.} Defendants filed a motion to dismiss, arguing that the cardholders lacked standing to allege an antitrust violation because they were indirect purchasers and, as such, did not directly pay the interchange fee; rather, the bank defendants paid the interchange fee and then passed on the cost of the fee through the foreign ATM fees.\footnote{120}{Id. at 746.}

\footnote{111}{In re ATM Fee Litig., 686 F.3d at 746.}
\footnote{112}{Id.}
\footnote{113}{Id.}
\footnote{114}{Id.}
\footnote{115}{Id. at 744.}
\footnote{116}{In re ATM Fee Litig., 686 F.3d at 746.}
\footnote{117}{Id.}
\footnote{118}{In re ATM Fee Litig., 686 F.3d at 746}
\footnote{119}{Id.}
\footnote{120}{Id. at 750.}
On September 4, 2009, the United States District Court for the Northern District of California denied the defendant’s motion to dismiss for lack of standing. The court found that there was no realistic possibility that the bank defendants would sue STAR and that the plaintiffs were purchasing directly from the price-fixing conspirators. Thus, accepting all of the plaintiff’s allegations as true and construing the pleadings in the light most favorable to the plaintiffs, two of the exceptions to Illinois Brick were applicable. Subsequently, the defendants moved for summary judgment, arguing that the Illinois Brick rule barred the cardholders as indirect purchasers from recovering treble damages in an antitrust suit.

On September 17, 2010, the district court granted summary judgment, dismissing the suit on the basis that the cardholders lacked standing under Illinois Brick’s indirect purchaser rule. The court found the cardholders to be indirect purchasers because they did not directly pay the alleged fixed interchange fee. The card-issuing banks paid the interchange fee and passed on the cost to the cardholders through the foreign ATM fee. Furthermore, the court found that no exception to the Illinois Brick rule was applicable. The plaintiff cardholders appealed to the United States Court of Appeals for the Ninth Circuit.

C. Ninth Circuit’s Opinion

On July 12, 2012, the Ninth Circuit affirmed the district court’s grant of summary judgment, holding that the plaintiff cardholders lacked standing to seek damages for the alleged antitrust violations. The Ninth Circuit applied the indirect purchaser rule from Illinois Brick and agreed with the district court’s determination that the cardholders were indirect purchasers and, as such, lacked antitrust standing. The cardholders conceded that they never directly paid the interchanges fees. They argued that, nonetheless, the court should

121. Id. at 746.
122. Id.
123. The co-conspirator exception and the fourth exception under Freeman were applicable in In re ATM Fee Litigation. See supra pp. 9–12.
124. In re ATM Fee Litig., 686 F.3d at 746.
125. Id.
126. Id.
127. Id. at 750.
128. Id. at 744.
129. In re ATM Fee Litig., 686 F.3d at 747.
130. Id. at 744.
131. Id.
132. Id. at 749–50.
consider them direct purchasers because the foreign ATM fee that they paid was an illegally fixed fee, which included the passed-on interchange fee. However, the Ninth Circuit refused to recognize the cardholders as direct purchasers of the fixed interchange fee at issue. The *Illinois Brick* indirect-purchaser rule applied, stripping the cardholders of antitrust standing.

Furthermore, the court found that none of the three exceptions to the *Illinois Brick* rule applied to the cardholders. First, there was no preexisting cost-plus contract between the cardholders and the card-issuing banks, and the cardholders did not contend that they had a preexisting cost-plus contract with any of the defendants. Second, the co-conspirator exception did not apply because, even though the cardholder’s theory of recovery depended on pass-on damages, the cardholders did not pay the interchange fee directly but, rather, paid the fee via the foreign ATM fee. The Ninth Circuit held that the co-conspirator exception is strictly limited to situations where the alleged conspiracy directly fixed the price actually paid by the plaintiff. Here, the cardholders alleged a conspiracy to fix interchange fees, which the defendant banks paid, not the cardholders. The court reasoned that it was insufficient that the foreign ATM fees paid by the cardholders were paid by an alleged co-conspirator.

Third, the ownership and control exception did not apply because neither the bank defendants nor STAR were divisions or subsidiaries of the other. The banks collectively owned only about 10% of STAR’s common stock. Furthermore, the court reasoned that there was no evidence that the bank defendants had control of STAR’s board of directors. Mere alleged collusion between a direct purchaser (the bank defendants) and the entity setting the price (STAR), without an ownership or control relationship, was not enough. Therefore, the ownership and control exception could not help the plaintiffs overcome the *Illinois Brick* rule.

Lastly, the Ninth Circuit refused to recognize the fourth exception under *Freeman*. The court rejected the cardholders’ argument that

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133. Id.
134. In re ATM Fee Litig., 686 F.3d at 750.
135. Id.
136. Id. at 752.
137. Id. at 752-53.
138. Id. at 755-56.
139. In re ATM Fee Litig., 686 F.3d at 756.
140. Id. at 757.
141. Id.
142. Id.
they should have standing to sue as indirect purchasers because there was no realistic possibility that the bank defendants would bring an antitrust suit against STAR. The Ninth Circuit declined to extend the Freeman exception to situations in which the seller does not own or control the direct purchasers because it would undermine the Illinois Brick rule. Therefore, because the cardholders were indirect purchasers and could not satisfy any of the exceptions to Illinois Brick, the defendants' grant of summary judgment was affirmed.

IV. ANALYSIS

In essence, the indirect purchaser rule from Illinois Brick has effectively wiped out indirect purchaser standing under section 4 of the Clayton Act. By limiting private treble damage actions to the antitrust violator's direct purchasers, subsequent purchasers, who often suffer substantial harm, are left without a remedy. The Supreme Court must expand standing for indirect purchasers in antitrust litigation because under the high wall built by Illinois Brick, indirect purchasers will likely always be found to lack standing, thereby prohibiting private parties from bringing antitrust claims under section 4 of the Clayton Act. Consequently, the Act's statutory mandate entitling a person injured by an antitrust violation to treble damages has been rendered ineffective and meaningless.

The Ninth Circuit's decision in In re ATM Fee Litigation is problematic for several reasons, and, as a result, the court erroneously used Illinois Brick to build a high wall for indirect purchasers to overcome. First, the court failed to extend critical exceptions to the Illinois Brick rule and refused to recognize an exception that it had previously stated nine years earlier. Specifically, the court failed to extend the co-conspirator exception to apply to conspiracies that fix the price indirectly paid by plaintiffs. Furthermore, the court had an opportunity to expand the cost-plus exception to apply to instances in which the relationship between the direct and indirect purchasers resembles that of a cost-plus contract. However, the court failed to elaborate on and expand this exception, leaving it unavailable to indirect purchasers. Additionally, the court refused to recognize a fourth exception under Freeman that would recognize standing for indirect purchasers to seek damages for alleged antitrust violations if there is no realistic possibility that the direct purchaser will sue.

143. Id.
144. In re ATM Fee Litig., 686 F.3d at 757.
145. Id. at 758.
146. See generally id. at 741.
Second, the Ninth Circuit's decision severely narrows the scope of section 4 standing for indirect purchasers. The court recognizes standing for the direct purchaser who has suffered little or no injury, and denies standing to the injured, indirect purchaser. This contradicts antitrust law and section 4's mandate that a person injured due to an antitrust violation is entitled to treble damages. Limiting section 4 standing solely to direct purchasers is inconsistent with the public policy underlying antitrust law in general and section 4 of the Clayton Act in particular. The Ninth Circuit's holding and opinion in *In re ATM Fee Litigation* completely undermines the Clayton Act's expansion of a party's right to bring antitrust suits. By narrowing the scope of section 4 standing, the Ninth Circuit has effectively invalidated the underlying purpose of the Clayton Act. As a result of the Ninth Circuit's decision, indirect purchasers cannot avoid "run[ning] squarely into the *Illinois Brick* wall," which the Ninth Circuit has substantially fortified.

A. The Ninth Circuit Failed to Expand and Recognize the Illinois Brick Exceptions

The Ninth Circuit incorrectly refused to extend the co-conspirator exception to *Illinois Brick* so as to apply to conspiracies that fix the price indirectly paid by plaintiffs. The court correctly determined that the plaintiff cardholders were indirect purchasers, under *Illinois Brick*'s indirect purchaser rule because the cardholders explicitly conceded that they never directly paid the interchange fees; rather, they indirectly paid the interchange fee via the foreign ATM fee. Additionally, the court correctly held that the cost-plus exception did not apply in this case because the plaintiff cardholders did not contend that such a contract existed with the defendants. However, the court refused to broaden the co-conspirator exception to include plaintiffs who allege a conspiracy to fix a price that they indirectly paid. In doing so, the Ninth Circuit effectively rendered the co-conspirator exception illusory.

The co-conspirator exception, as construed by the Ninth Circuit, is meaningless because it applies to direct purchasers only. As a result, the co-conspirator exception to *Illinois Brick* is no longer an exception but, rather, a recapitulation of the indirect purchaser rule set forth in *Illinois Brick* and an application of the ordinary rules of joint and several liability in antitrust cases. A purchaser that directly pays the price

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149. *In re ATM Fee Litig.*, 686 F.3d at 757.
illegally fixed by a conspiracy is entitled to sue all members of the conspiracy, while *Illinois Brick* bars a purchaser that paid a price affected by the fixed priced.

The Ninth Circuit outlined the co-conspirator exception in *Shamrock Foods*, in which the court held that the co-conspirator exception applies only when the price that was fixed by the conspirators was the same end price paid by the plaintiff, so that the plaintiff's recovery does not depend on a pass-on theory of damages.\(^{150}\) Thus, the co-conspirator exception applies to purchasers who directly paid the illegally fixed price. The Ninth Circuit's application of the co-conspirator exception in *Shamrock Foods* limited the exception to instances in which there is a conspiracy to fix prices directly paid by plaintiffs.\(^{151}\) The court did not apply the *Illinois Brick* rule because the consumers paid the fixed price directly.\(^{152}\) Thus, indirect purchasers would still lack standing to bring an antitrust claim, thereby rendering the co-conspirator exception meaningless.

In *In re ATM Fee Litigation*, the plaintiffs paid the foreign ATM fee, not the bank interchange fee that the defendants allegedly fixed. Therefore, the court found that plaintiffs did not qualify for the co-conspirator exception because the plaintiffs indirectly paid the allegedly fixed price.\(^{153}\) The foreign ATM fees that the plaintiff cardholders paid were fixed in the sense that the conspiracy had the purpose and effect of fixing the foreign ATM fees. Nonetheless, the court rejected such a broad definition of price-fixing for standing purposes.\(^{154}\)

By refusing to recognize that the co-conspirator exception must allow standing for purchasers of fixed downstream prices, the court transformed the co-conspirator exception so that it only applies to direct purchasers. Thus, the co-conspirator exception to the *Illinois Brick* rule is not really an exception at all because it does not apply to indirect purchasers. The Ninth Circuit should have extended the co-conspirator exception to include plaintiffs who allege a conspiracy to fix indirectly paid prices in order to give indirect purchasers standing to bring an antitrust suit.

Furthermore, the Ninth Circuit failed to recognize and apply the fourth exception to the *Illinois Brick* rule, which the court had previously established in *Freeman*. The *Freeman* exception allows indirect purchasers to sue for damages when there is no realistic possibility

\(^{150}\) See generally Arizona v. Shamrock Foods Co., 729 F.2d 1208 (9th Cir. 1984).

\(^{151}\) Id. at 1211–12.

\(^{152}\) Id.

\(^{153}\) In re ATM Fee Litig., 686 F.3d at 753–54.

\(^{154}\) Id.
that the direct purchaser will sue.\textsuperscript{155} In \textit{Royal Printing}, the Ninth Circuit articulated the ownership and control exception to \textit{Illinois Brick} and allowed indirect purchasers to sue "where the direct purchaser is a division or subsidiary of a co-conspirator."\textsuperscript{156} Subsequently, in \textit{Freeman}, the Ninth Circuit, citing \textit{Royal Printing}, enunciated a similar, yet distinct, exception to \textit{Illinois Brick}. The court recognized that "indirect purchasers can sue for damages if there is no realistic possibility that the direct purchaser will sue its supplier over the antitrust violation."\textsuperscript{157} Although the court relied in part on the ownership and control exception, the court explicitly created a new exception in recognition of the fact that denying standing to indirect purchasers merely because the defendants sold their services through another entity rather than to consumers directly would open a major loophole for resale price maintenance and retailer collusion.\textsuperscript{158}

In \textit{Freeman}, co-conspiring realtor associations conspired to fix prices paid by the direct purchaser, who then passed on a portion of that inflated fee to consumers.\textsuperscript{159} The court recognized standing for the indirect purchasing consumers because it was unlikely that the direct purchaser, which the realtor associations owned, would sue.\textsuperscript{160} The court said that "[t]his is precisely the type of injury [that] antitrust laws are designed to prevent."\textsuperscript{161} Similarly, in \textit{In re ATM Fee Litigation}, it was extremely unlikely that the bank defendants (the direct purchaser) would sue STAR Network. Although STAR did not own the bank defendants, STAR was the ATM network that administered agreements between the bank defendants and ATM owners to ensure that customers could withdraw money from network member ATMs.\textsuperscript{162} STAR's role in connecting ATM owners and card-issuing banks, like the bank defendants, translates into a level of control sufficient to deter the bank defendants from suing since a lawsuit would likely result in termination of the bank defendant's membership with STAR network.

In its opinion in \textit{In re ATM Fee Litigation}, the Ninth Circuit made a feeble attempt at arguing that it would not recognize an exception to \textit{Illinois Brick} when there is "no realistic possibility that direct purchas-

\begin{itemize}
\item \textsuperscript{155} See generally Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133 (9th Cir. 2003).
\item \textsuperscript{156} Royal Printing Co. v. Kimberly Clark Corp., 621 F.2d 323, 326 (9th Cir. 1980).
\item \textsuperscript{157} Freeman, 322 F.3d at 1145-46.
\item \textsuperscript{158} Id. at 1146.
\item \textsuperscript{159} Id. at 1145.
\item \textsuperscript{160} Id.
\item \textsuperscript{161} Id. at 1146.
\item \textsuperscript{162} In re ATM Fee Litig., 686 F.3d 741, 745 (9th Cir. 2012).
\end{itemize}
ers will sue.”163 The court declined to extend the ownership and control exception noted in *Royal Printing* to situations where the seller does not own or control the direct purchasers because it did not want to undermine the *Illinois Brick* rule.164 However, the court failed to realize that denying indirect purchasers standing, despite no realistic possibility that that direct purchaser will sue, is inconsistent with and completely undermines section 4 of the Clayton Act and its mandate entitling a person injured by an antitrust violation to treble damages. Although the plaintiffs in *Freeman* relied on the ownership and control exception to find standing, doing so did not undermine the explicit exception outlined by the court in its opinion in *Freeman*.

Lastly, the Ninth Circuit refused to expand the cost-plus exception to *Illinois Brick* so as to apply to contracts resembling a cost-plus contract. A cost-plus contract is a “fixed-markup, fixed-quantity contract that [is] negotiated prior to an illegal price increase.”165 The direct purchaser adds a pre-specified dollar amount to its price for a product before resale or adds a pre-specified percentage of its cost to the sale price.166 When a preexisting cost-plus contract “specifies both the direct purchaser’s markup and the quantity to be delivered to the indirect purchaser, an indirect purchaser can show that the dealer passed on [the overcharge under the contract].”167

Under the cost-plus exception to the *Illinois Brick* rule, the indirect purchaser has standing when a preexisting cost-plus contract with the direct purchaser exists.168 Herbert Hovenkamp argues that, as practical matter, “few contracts qualify for this exception.”169 As Hovenkamp points out, courts have recognized the cost-plus exception when a contract between the indirect and direct purchaser specifies a fixed-markup, fixed-quantity, and the illegally-fixed price.170 Although contracts that specify a markup or price are common, contracts that specify both a markup and a quantity are not. Therefore, while a cost-plus exception to the *Illinois Brick* rule exists, few contracts qualify for this exception, rendering this first exception meaningless.171

163. *Id.* at 757.
164. *Id.* (“'[t]he possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule’”) (quoting *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 216 (1990)).
166. *Id.* at 1721.
167. *Id.* at 1720.
170. *Id.* at 1720–21.
171. *Id.*
In order for the cost-plus exception to the *Illinois Brick* rule to have any real meaning for indirect purchasers, courts should broaden the exception to apply to contracts that resemble a cost-plus contract. One way to breathe life into this exception would be to extend standing to indirect purchasers that have the functional equivalent of a cost-plus contract with the direct purchaser.

In sum, the Ninth Circuit refused to recognize new exceptions or extend existing exceptions to the *Illinois Brick* rule in *In re ATM Fee Litigation*. In doing so, the Ninth Circuit has built a high wall for indirect purchaser suits. Thus, it will likely be impossible for indirect purchasers to bring antitrust suits under section 4 of the Clayton Act.

B. The Ninth Circuit's Opinion is Inconsistent with the Clayton Act

The indirect-purchaser rule from *Illinois Brick* is inconsistent with antitrust law in general and section 4 of the Clayton Act in particular. Section 4 is an antitrust damage provision entitling a person injured by an antitrust violation to three times the damages sustained. As previously discussed, section 4 is a critical means of recovery for consumers injured by antitrust violations. However, under *Illinois Brick*, a direct purchaser who acts as the middleman in the chain of distribution is entitled to an antitrust damage action for an illegally fixed fee despite the fact that the fee is passed on to the direct purchaser's customers, who lack standing as indirect purchasers. By recognizing antitrust standing for a direct purchaser despite the fact that it is the indirect purchaser who is harmed, the *Illinois Brick* rule is inconsistent with section 4 of the Clayton Act.

The United States has a strong public policy of protecting competitiveness in markets and has implemented that policy through the enforcement of a series of antitrust laws. These antitrust laws, which proscribe cartel and monopolizing behavior, reflect the "economic objective of enhancing consumer welfare by preventing practices that reduce competition." In order to effectively enforce antitrust laws, Congress has authorized private enforcement. Congress first authorized private enforcement under section 7 of the Sherman Act. Congress designed the Sherman Act to deter anticompetitive behavior by subjecting violators to both government prosecution and private

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173. *Id.* at 10–11.
treble-damage actions.\textsuperscript{174} Private enforcement of the Act played two important functions: deterrence and compensation. By trebling the damages, Congress intended to both compensate victims and deter antitrust violators by encouraging private parties to enforce the laws.

Passage of the Clayton Act signaled the expansion of individual private parties' ability to sue for damages.\textsuperscript{175} Section 4 of the Clayton Act provides that any person who is injured by an antitrust violation "shall recover treble the damages by him sustained, and the cost of suit, including a reasonably attorney's fee."\textsuperscript{176} Thus, section 4 mandates that private parties may recover treble damages for injuries suffered from antitrust violations.

By creating a private right of action for victims of antitrust violations, Congress was able to promote several polices. Section 4's treble damage provision provides ample relief and compensation to those injured by anticompetitive conduct, which in turn deters future antitrust violations.\textsuperscript{177} Furthermore, section 4 reflects Congress's intent to make the Clayton Act self-enforcing by encouraging private litigation through a treble damages incentive.\textsuperscript{178} The treble damages provision "provides strong encouragement for private attorneys general to enforce antitrust laws, which in turn deters potential [violators] from violating antitrust laws."\textsuperscript{179} Additionally, the enforcement and deterrence objectives underlying section 4 further the broad substantive goals of antitrust law generally: "to promote competition, economic efficiency, and consumer welfare; to prevent concentrations of economic and social power; and to protect small business from overreaching conglomerates."\textsuperscript{180}

The Supreme Court's decision in \textit{Illinois Brick} and the Ninth Circuit's opinion in \textit{In re ATM Fee Litigation} undermine the policy objec-

\begin{itemize}
\item \textsuperscript{175} 15 U.S.C. § 15(a).
\item \textsuperscript{176} \textit{Id.}
\item \textsuperscript{177} \textit{See} Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979) ("Congress created the treble-damages remedy of § 4 precisely for the purpose of encouraging private challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations."); \textit{see also} Berger & Bernstein, \textit{supra} note 19, at 848–50.
\item \textsuperscript{178} Fowler, \textit{supra} note 20, at 689. \textit{See} Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130–31 (1969) (permitting treble damage actions encourages enforcement of federal antitrust laws); \textit{see also} Mech. Contractors Bid Depository v. Christiansen, 352 F.2d 817, 821 (10th Cir. 1965) (Congress intended private treble damage actions to stimulate private initiative and diligence in enforcing antitrust laws).
\item \textsuperscript{179} Deffense, \textit{supra} note 21, at 438.
\item \textsuperscript{180} \textit{Id.} at 439 (citations omitted).
\end{itemize}
tives of section 4. By limiting private treble damage actions to an antitrust violator's direct customers, subsequent purchasers, who often suffer substantial harm from these overcharges, are left with no remedy. This result is inconsistent with section 4's purpose of providing compensation to those injured by anticompetitive conduct. Additionally, Illinois Brick and In re ATM Fee Litigation are inconsistent with the self-enforcing objectives underlying the Clayton Act. Congress sought to encourage the private enforcement of the Clayton Act by authorizing private actions against antitrust violators by those injured by such violations. However, by preventing the true victims of antitrust violations from bringing private action, the indirect purchaser rule undermines this objective.

V. Conclusion

The Ninth Circuit's decision in In re ATM Fee Litigation will have serious negative implications for indirect purchasers who seek monetary damages under section 4 of the Clayton Act for alleged antitrust violations. By declining to expand the co-conspirator and the cost-plus exception to Illinois Brick, and by refusing to recognize a fourth exception under Freeman, the Ninth Circuit has built a high wall for indirect purchaser suits. The Ninth Circuit has made it impossible for an indirect purchaser to avoid "run[ning] squarely into the Illinois Brick wall."181 Thus, it will likely be impossible for indirect purchasers to bring antitrust suits under section 4 of the Clayton Act.
