Out From under the Brick— A Long Road to a "New" Antitrust Remedy for Connecticut Consumers[1]

By Michael Kurs

After four decades, Connecticut has fully joined the majority of states that allow consumer antitrust claims by, or in the name of, "indirect purchasers"—that is, consumers who did not buy directly from the allegedly bad actor or actors who singly or in conspiracy illegally fix prices and thus violate the state antitrust laws.[2] Connecticut accomplished this by adoption of "*Illinois Brick*" repealer bills passed during the 2017 and 2018 legislative sessions. (*Illinois Brick Co. v. Illinois* is the name of the United States Supreme Court case that foreclosed indirect purchaser damages claims brought under the federal antitrust laws.[3]) The Connecticut General Assembly adopted the 2018 legislation unanimously. The 2017 legislation authorized the assertion of claims for violations of state antitrust laws involving drugs, medicine, and medical devices. The 2018 bill removes the limitation of the 2017 state statutory change so that the repealer laws apply without regard to whether the claims concern drugs, medicine or medical devices. *Illinois Brick* repealer bills had failed many times in the Connecticut General Assembly before these most recent repealer successes. The 2018 bill becomes effective October 1, 2018.[4]

The four decade long road to Connecticut's adoption of an unlimited *Illinois Brick* repealer should not call into question Connecticut's commitment to consumers "indirectly" harmed by antitrust law violations. The long road is explained to some degree by a long-standing adherence to federal antitrust principles and to the rationale of the Supreme Court's decision.

Efforts to reverse the *Illinois Brick* decision legislatively at the federal level have traveled an even longer road that extends back to 1977, the year of the issuance of the *Illinois Brick* decision. According to one article, bills to overturn the result were introduced in the Senate and House of Representatives within weeks of the decision.[5] Congress still has not acted to reverse the decision. This means that the federal antitrust statutes do not provide a means for a person who suffers antitrust harm as a result of price fixing, for instance, to recover damages if she or he had not dealt directly with the violator.

The subject of *Illinois Brick* repealer legislation in Connecticut has garnered opinion page attention in the general press on at least two occasions six years apart—some indication that the matter of indirect purchaser standing has significance beyond the legal, legislative, and business communities that typically follow antitrust law developments more closely. In 1983, The *Hartford Courant* published an article carrying the title, "Letting Connecticut Consumers Out From Under the 'Brick.'"[6] The piece by Connecticut's then-assistant attorney general in charge of antitrust and consumer protection explains how the absence of a Connecticut Illinois Brick repealer statute unfavorable impacts Connecticut Consumers. *The New York Times* published an expanded version of the article in 1989.[7] By then the article, carrying the title, "Assembly Must Fill the Antitrust Void," counted 15 states, including California, Mississippi, and Rhode Island as having already provided for indirect purchaser recoveries under state law.

The history of the failure of repealer bills in Connecticut dates back to 1979. In 2002, the Connecticut Supreme Court commented upon the failure of repealer bills to pass the General Assembly over a period of several decades. The 2002 case, *Vacco v. Microsoft Corporation*,[8] concerned an antitrust claim brought by an individual who purchased a personal computer on which Windows 98 was pre-installed. The consumer brought the antitrust claim under the Connecticut Antitrust Act as well as an unfair business practices claim against Microsoft based on a theory that Microsoft had wielded its monopoly power to impose an excessive price for the Windows operating system. The Supreme Court affirmed the trial court's judgment that the consumer had no right to bring any such indirect purchaser claim related to the pre-installed software. It reasoned that Connecticut had intentionally patterned its antitrust act after the federal law, and that the United States Supreme Court's *Illinois Brick* decision amply supported the Connecticut Supreme Court's decision.

By 2002, the Connecticut Supreme Court could point to testimony by multiple Connecticut Attorneys General and representatives of the Connecticut Attorney General's Office who sought through their "unwavering support" to have state law eschew the rule of *Illinois Brick* in the context of state antitrust claims. These included unsuccessful efforts at passing an *Illinois Brick* repealer bill led by Attorneys General Ajello, Lieberman, Riddle, and Blumenthal. In *Vacco*, the Connecticut Supreme Court inferred from these unsuccessful attempts that Connecticut's legislature supported the rejection of indirect purchaser claims under the law as then applicable.

Significant business opposition to repealer legislation over the years before 2017 contributed to the long road to Connecticut's adoption of the 2017 and 2018 repealer bills. Reasonably enough, proposed repealer legislation has at times engendered concern on the part of business interests of significant potential liability.[9] Besides taking this position before the legislature, the Connecticut Business & Industry Association participated in an amicus brief arguing for Connecticut to adhere to the *Illinois Brick* approach to indirect purchaser claims in the 2002 Connecticut Supreme Court *Vacco* case.[10] The brief, also on behalf of the Association for Competitive Technology and the New England Legal Foundation, warned of the "enormous" potential

liability for Connecticut companies from allowing multiple parties at multiple levels in the chain of distribution to sue for both antitrust and CUTPA violations."[11] The brief argued that policies underlying *Illinois Brick* supported a holding by the Court that indirect purchasers lacked standing under Connecticut's Antitrust Act.[12]

Business has not uniformly opposed repealer legislation. Testimony before the Connecticut General Assembly Committee on Judiciary by Douglas Ross, Special Counsel for Legal Affairs in 1983 for the National Association of Attorneys General, identifies the Computer and Communications Industry Association, MCI Communications, and the Associated Retail Bakers of America as having endorsed efforts to reverse *Illinois Brick* by federal legislative action.[13]

At the time, Mr. Ross told the committee: "The amendment you are considering today is no more anti-business than a dentist is anti-tooth. The antitrust laws are key to a competitive marketplace in which honest businessmen can flourish."

In 2017, Connecticut's General Assembly found itself finally convinced of the wisdom of a partial *Illinois Brick* repealer as a means of addressing concerns about predatory pricing of pharmaceuticals. During the 2017 legislative session Attorney General George Jepsen testified that allowing his office to pursue claims for damages on behalf of consumers who are "indirect purchasers" would permit his office to recover damages for the state and Connecticut consumers regardless of whether the State of Connecticut or consumers purchased an illegally priced product directly from the manufacturer who fixed the prices or from a wholesaler who merely passed along the extra cost onto consumers. He noted that repealer legislation of this sort does not cause any new category of conduct to be considered illegal. Rather it would allow for the recovery of compensatory damages when, without the bill, damages under Connecticut law would be limited to disgorgement damages and a civil penalty. At the time, he also noted his belief that it makes sense to pass a repealer that addresses all goods and services.[14]

Long ago, the US Supreme Court in *California v. ARC America Corp.*, held that the *Illinois Brick* indirect purchaser rule does not prevent indirect purchasers from recovering damages under *state* antitrust laws when the applicable state law otherwise allows such recoveries.[15] The attraction of *Illinois Brick* repealer laws to states lies in the size of potential recoveries available under treble damages antitrust provisions. The literature on the subject includes estimates of billions of dollars in recoveries on behalf of indirect purchasers under other states' repealer laws.[16] (The Fiscal Note for the 2018 Connecticut repealer legislation says that the potential for increased revenue to Connection is limited by several factors, "including prevalence of antitrust activity and availability of resources within the Office of the Attorney General to pursue additional cases."[17])

The *Illinois Brick* decision embraced the notion that indirect purchasers did not have sufficient standing, i.e., they were not in privity with the price fixers in order to establish their damages, with three justices in dissent. The State of Connecticut, along with the vast majority of states, filed amicus briefs in support of the State of Illinois. The United States also filed an amicus brief supporting the position of the State of Illinois.

The majority decision in *Illinois Brick*, authored by Justice White, justified the result in part based upon the majority's desire not to depart from the principles of its 1968 *Hanover Shoe* decision.[18] In *Hanover Shoe, Inc. v. United Shoe Machinery Corp*, the Court rejected a defense by a manufacturer that sought to show that indirect purchasers rather than the direct purchasers were the parties harmed by an antitrust violation. Justice White also reasoned that "allowing offensive but not defensive use" of indirect injury claims would create a risk of multiple liability for defendants. An additional significant concern arose from the perception that "uncertainties and difficulties" characterized indirect purchaser claims in the real world. The concern was that "complex economic adjustments to a change in the cost of a particular factor of production" would greatly complicate "already protracted trebled damages proceedings" and transform the actions into "massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge from direct purchasers to middlemen to ultimate customers."

While the *Illinois Brick* decision foreclosed indirect purchaser claims under federal law, the US Supreme Court in *California v. ARC America Corp*., 490 U.S. 93 (1989) subsequently ruled that state *Illinois Brick* repealer statutes are not preempted by federal law. Since the Court's decision in *ARC America* the courts have come to grips with the economic and other complexities of indirect purchaser claims—not always in favor of the indirect purchaser claims of injury. For instance, last year in a case in Illinois involving steel containing products, *Supreme Auto Transport LLC v. Arcelor Mittal*, the trial court found that "the products that plaintiffs purchased contained a wide variety of materials each of which influences the retail price and cannot easily be segregated and priced after the fact."[19]

In *Re: Class 8 Transmission Indirect Purchaser Antitrust Litigation* supplies another example of a court finding that the "the complex distribution chain" worked against the prospects of determining the amount of pass through damages for classes of indirect purchasers.[20] In that case, which involved allegations of illegal monopoly pricing against a supplier of heavy duty truck transmissions, "unique sales incentives" including increased trade-in values, preferred buy back-terms and special financing arrangements resulted in a denial of class certification where 8 of 11 proposed state classes presented issues that interfered with establishing that illegal pass through damages could be shown to harm a sufficient number of indirect purchaser class plaintiffs. The claims in the case encompassed hundreds of thousands of sales across several states.

Now that Connecticut has embraced indirect purchaser claims under its own antitrust laws, it remains to be seen whether federal antitrust law might move in the same direction sometime soon. The Unit-

ed States Justice Department's Antitrust Division is reportedly looking into the possibility of pursuing civil damages on behalf of taxpayers in antitrust cases with an eye toward the United States Supreme Court revisiting its *Illinois Brick* decision,[21] a result that, if successful, could be expected to reduce the complications associated with the multiplicity of state law damages claims under the state repealer statutes upon which they now rely.

Regardless of the path federal law takes in the future, we can certainly expect Connecticut and other plaintiffs who bring claims under Connecticut's antitrust laws to be front and center in the pursuit of indirect purchaser damages under our new state law whether in state or federal court.[22]

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Notes

1. The author extends his thanks to Robert M. Langer of Wiggin and Dana LLP for the insights, suggestions, editing assistance, and the time he has devoted to producing this article. Two of Mr. Langer's articles, authored while an assistant attorney general in charge of Connecticut 's antitrust and consumer protection cases, are mentioned in this piece. See discussion above and notes 6 and 7.
2. Public Act 18-22 signed by Governor Dannel P. Malloy on May 29, 2018 and effective October 1, 2018, contains the new repealer provision which provides that in any action brought under subsection (c) of 35-32 (antitrust actions brought by the Attorney General) or seeking treble damages under section 35-35 (antitrust actions brought by the state or any person), a defendant may not assert as a defense that the defendant did not deal directly with the person on whose behalf the action is brought.
3. 431 U.S. 720 (1977)
4. Public Act 18-22, § 1.
5. Thomas Demitrack, Treble Damages and the Indirect Purchaser Problem: Considerations for a Congressional Overturning of Illinois Brick, 39 Ohio State L.J. 543 (1978).
6. Robert M. Langer, Letting Connecticut Consumers Out From Under the 'Brick,' Hartford Courant (April 13, 1983), p. 19.
7. Robert M. Langer, Assembly Must Fill The Antitrust Void, New York Times (May 7, 1989), p. 163.
8. 260 Conn. 59 (2002)
9. Testimony of Marshall R. Collins, Assistant General Counsel, Connecticut Business and Industry Association on Senate Bill 1119 on April 7, 1983 before the Judiciary Committee, Joint Standing Committee Hearings, Part 5, p. 1604.
10. Brief of Amicus Curiae Connecticut Business & Industry Association, The Association for Competitive Technology and The New England Legal Foundation in Support of Defendant-Appellee, State of Connecticut SC 16566 (July 10, 2001), available in Connecticut Supreme Court Records and Briefs, Oct/Nov 2001, Part 10, Robert M. Langer authored the amicus brief along with his colleague from Wiggin and Dana, Erika L. Amarante.
11. *Id.* at vi.
12. *Id.* at 1-2.
13. Testimony on Committee Bill No. 1119, Joint Standing Committee Hearings, Part 5, p,. 1738.
14. Testimony of Attorney General George Jepsen before the Connecticut General Assembly Public Health Committee of March 7, 2017, Available at: https://www.cga.ct.gov/2017/PHdata/Tmy/2017SB-00442-R000307-Jepsen,%20George%20,%20Attorney%20General-State%20of%20Connecticut-TMY.PDF (Last visited June 4, 2018).
15. 490 U.S. 93 (1989)
16. Robert H. Lande, 61 Alabama L. R. 447, 448 (2010)
17. Office of Fiscal Analysis Fiscal Note, https://www.cga.ct.gov/2018/FN/2018HB-05252-R000562-FN.htm
18. Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968)
19. 238 F. Supp. 3d 1032 (N.D. Ill. 2017)
20. 679 Fed. Appx. 135 (3d Cir. 2017)
21. Mary Strimel, The Latest: Trump DOJ's Next Target: the Illinois Brick Indirect Purchaser Rule, The National Law Review, February 2, 2018, https://www.natlawreview.com/article/latest-trump-doj-s-next-target-illinois-brick-indirect-purchaser-rule (Last viewed June 4, 2018)
22. Attorney General Jepsen's testimony in support of the 2018 repealer legislation included an Illinois Brick Repealer by State map prepared by his office in 2017 and a State Illinois Brick Repealer Laws Chart identified as, Practical Law Checklist 8-521-6152 (2017).