STATE OF NORTH CAROLINA

COUNTY OF BUNCOMBE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
NO. 05-CVS-90

MITCHELL TEAGUE, on behalf of himself and others similarly situated,

Plaintiff,

v.

BAYER AG; BAYER POLYMERS, LLC N/K/A BAYER MATERIALSCIENCE, LLC; BAYER CORPORATION; CROMPTON CORPORATION, UNIROYAL CHEMICAL COMPANY, INC. N/K/A CROMPTON MANUFACTURING COMPANY, INC.; DOW CHEMICAL COMPANY; EI DUPONT DE NEMOURS & COMPANY; DUPONT DOW ELASTOMERS LLC; DSM COPOLYMER, INC.; DSM ELASTOMERS EUROPE B.V.; EXXON MOBIL CHEMICAL, a division or subsidiary of EXXON MOBIL CORP.,

Defendants.

DEFENDANTS' JOINT MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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Defendants Bayer Corporation, Bayer MaterialScience LLC (f/k/a Bayer Polymers LLC), Crompton Corporation, Crompton Manufacturing Company, Inc., DSM Copolymer, Inc., and ExxonMobil Chemical Company (collectively, "Defendants") respectfully submit this memorandum of law in support of their motion to dismiss the First Amended Complaint ("Am. Compl.") on the grounds that it fails to state a cause of action under Chapter 75 of the North Carolina General Statutes because Plaintiff Mitchell Teague ("Teague") lacks standing to assert his claims.

PRELIMINARY STATEMENT

Teague alleges violations of §§ 75-1 and 75-1.1 of Chapter 75 of North Carolina's General Statutes, claiming that Defendants have conspired to fix the prices of ethylene propylene diene monomer ("EPDM"). EPDM is a synthetic rubber used in varying amounts to produce a variety of other products. Teague did not purchase EPDM. Nor did he deal with any of the Defendants. Instead, he apparently bought one or more products containing EPDM, from sellers other than a Defendant, but he nowhere alleges what he bought, when he bought it, from whom he bought it, or how much he paid. One thing, however, is clear — Teague is a remote indirect purchaser who bought products other than the allegedly price-fixed product from someone other than a Defendant. Thus, under the analysis set forth in *Crouch v. Crompton Corp.*, No. 02 CVS 4375, 2004 WL 2414027 (N.C. Super. Ct. Oct. 28, 2004) (Attachment A), this case should be dismissed.

BACKGROUND

EPDM is a synthetic rubber that Defendants manufacture in a number of grades and forms. Defendants sell EPDM to companies (or to wholesalers that sell to companies) that use EPDM as a component to make products such as roofing materials and automobile parts, which those other companies sell to wholesalers, which sell those products to retailers, which sell them

to end-users such as Teague. Teague claims that Defendants conspired to fix the prices of EPDM, not any other product. (Am. Compl. ¶ 2.) Yet Teague did not buy EPDM from anyone, let alone from any of the Defendants, but claims that he paid more for another, undefined product that he bought from someone else.

ARGUMENT

TEAGUE LACKS STANDING TO ASSERT CLAIMS UNDER CHAPTER 75 OF THE NORTH CAROLINA GENERAL STATUTES

When ruling on a motion to dismiss under North Carolina Rule of Civil Procedure 12(b)(6), the court must determine "whether, as a matter of law, the allegations of the complaint . . . are sufficient to state a claim upon which relief may be granted." *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987).

The Court of Appeals of North Carolina has construed the North Carolina antitrust statute to grant standing to indirect purchasers who were directly injured by antitrust violations. *Hyde v. Abbott Labs., Inc.*, 123 N.C. App. 572, 473 S.E.2d 680 (1996). While Defendants argue that the panel's decision in *Hyde* is wrong, *see infra* Section III, that decision is inapposite because *Hyde* does not govern this case. Rather, as this Court has held in *Crouch*, not all indirect purchasers have antitrust standing to bring a claim under North Carolina antitrust laws. In *Crouch*, this Court held that plaintiffs such as Teague who purchase products that incorporate the allegedly price-fixed products lack standing as a matter of law because "there is a point beyond which the wrongdoer should not be held liable." *Crouch*, at *9 (quoting *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 728-29 (1977)). Just as in *Crouch*, Teague's allegations of injury are too remote to support standing. In fact, they are even more remote. In *Crouch*, the plaintiff bought tires that were made with small amounts of rubber processing chemicals, the allegedly price-fixed product. Here, the Plaintiff did not just buy one product, like the tires in *Crouch*. Instead, Teague and the

class he wants to represent bought a range of products, all using varying amounts of EPDM, the allegedly price-fixed product. So, any evaluation of claimed injury has to consider, not one, but multiple chains of production and distribution involving multiple products. Prudential limitations on standing bar such a case involving speculative harm in collateral markets. *See Crouch*, 2004 WL 2414027.

I. STANDING MUST BE ESTABLISHED TO ALLOW A CLAIM UNDER NORTH CAROLINA' S ANTITRUST STATUTES

A. Antitrust Background

The United States Supreme Court has held unequivocally that indirect purchasers do not have standing under federal antitrust law, and thus cannot sue for damages allegedly caused by price-fixing conspiracies. *Ill. Brick*, 431 U.S. at 728-29. In an earlier decision, the Supreme Court had barred a federal antitrust defendant from asserting that the plaintiff did not sustain damages because the plaintiff had "passed through" any overcharge to its own customers. *Hanover Shoe Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968). Thus, the Supreme Court in *Illinois Brick* determined that "allowing offensive but not defensive use of pass-on would create a serious risk of multiple liability for defendants," and declared itself "unwilling to 'open the door to duplicative recoveries' under § 4." *Ill. Brick,* 431 U.S. at 730, 731 (citation omitted). The Court also held that price-fixing claims by indirect purchasers were inappropriate due to the "intricacies of tracing the effect of an overcharge on the purchaser's prices, costs, sales, and profits," and the "difficulties and uncertainties involved in determining how the relevant market variables would have behaved had there been no overcharge." *Id.* at 743, 744. The Court concluded that the prospect of such evidentiary complexity would not only unduly burden the courts, but would discourage private plaintiffs from initiating private antitrust suits, thwarting Congress's intention to encourage private litigants to enforce the antitrust laws. *Id.* at 746; *see*

also William A. Landes and 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, 602-04 (1979).

Even though direct purchasers have standing to assert claims under federal law, the United States Supreme Court has recognized that the antitrust laws do not "provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 534 (1983) ("*AGC*"). Rather, whether a plaintiff has antitrust standing is resolved by evaluating "the plaintiff's [alleged] harm, the alleged wrongdoing by the defendants, and the relationship between them" to ascertain whether "a claim rests at bottom on some abstract conception or speculative measure of harm." *Id.* at 535, 543. Injuries that are too remote or speculative fall beyond the scope of a judicial remedy. *Id.* at 535.

B. Antitrust Standing for Indirect Purchasers in North Carolina

The standing requirements for private causes of action under North Carolina General Statutes § 75-16 parallel the standing requirements under § 4 of the federal Clayton Act, 15 U.S.C. § 15 (2003).[1] The North Carolina Supreme Court has held that the North Carolina antitrust statute should be interpreted consistently with federal court interpretations of comparable federal antitrust statutes. *See, e.g., Rose v. Vulcan Materials Co.*, 282 N.C. 643, 655, 194 S.E.2d 521, 530 (1973) (explaining that "the body of law applying the Sherman Act,

[1] Section 4 of the Clayton Act, 15 U.S.C. § 15, provides in pertinent part: "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 75-16 of the North Carolina Antitrust Act, the provision providing for civil remedies for antitrust violations, is nearly identical to its federal counterpart: "If any person shall be injured or the business of any person . . . shall be. . . injured by reason of any act or thing done by any other person . . . 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 done . . . for treble the amount fixed by the verdict."

although not binding upon this Court in applying G.S. § 75-1, is nonetheless instructive in determining the full reach of that statute"); *see also Crouch*, 2004 WL 2414027, at *10, *12. Thus, this Court has held that § 75-16 should be construed to include the United States Supreme Court's prudential standing rules, which bars plaintiffs with remote claims, such as those who did not purchase the actual product sold by the defendants, from pursuing damage claims for alleged price-fixing conspiracies. *Crouch*, 2004 WL 2414027, at *10, *18.[2]

II. TEAGUE LACKS STANDING TO SUE UNDER ANY OF THE *AGC* FACTORS ADOPTED BY THIS COURT IN *CROUCH*

In North Carolina, "standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 113, 574 S.E.2d 48, 51 (2002) (quoting *Aubin v. Susi*, 149 N.C. App. 320, 324, 560 S.E.2d 875, 878 (2002)). "The term ['standing'] refers to whether a party has a sufficient stake in an otherwise justiciable controversy so as to properly seek adjudication of the matter." *Neuse River Found.*, 155 N.C. App. at 114, 574 S.E.2d at 51-52 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 731-32, (1972)).

In the antitrust context, this Court has specified that indirect purchaser plaintiffs must have standing to assert a claim under North Carolina law. *Crouch*, 2004 WL 2414027, at *17-18. In defining the scope and breadth of that standing in *Crouch*, this Court observed that "state indirect purchaser cases are generally parasitic," "pose significantly complex proof issues both as to damages and liability," "can in fact result in double recovery," and are not only "difficult to administer from a settlement standpoint," but also that "the complexities and administrative costs and difficulties result in settlements that are something less than sterling from the consumer's

[2] While the Court of Appeals in *Hyde* has construed the North Carolina antitrust statute to grant standing to indirect purchasers who were directly injured by antitrust violations, the Supreme Court of North Carolina has yet to rule on this issue. *See Crouch*, 2004 WL 2414027, at *12.

point of view." *Id.* at *12. In the face of those realities, this Court denied standing to indirect purchasers that present claims of attenuated and speculative harm. *Crouch*, 2004 WL 2414027, at *24-25. In *Crouch*, consumers brought antitrust claims alleging that the manufacturers of certain rubber processing chemicals used in the production of automobile tires had fixed the prices of those chemicals, and that consumers, therefore, paid higher prices for tires. To determine at what point an alleged injury is too remote to meet the requirements of antitrust standing, this Court adopted the multi-factor test enumerated by the Supreme Court in *AGC*, 459 U.S. at 537-42 (1983). *Crouch*, 2004 WL 2414027, at *18-19. The factors adopted by the *Crouch* Court evaluate the plaintiff's harm, the alleged wrongdoing by the defendant, and the relationship between the two. *Id.* The five factors used to determine standing are:

> (1) whether the plaintiff is a consumer or competitor in the allegedly restrained market, (2) whether the injury alleged is direct and a first hand product of the restraint alleged, (3) whether there exists more directly injured parties with motivation to sue, (4) whether the damage claims are speculative and (5) whether the claims (a) risk duplicative recovery and (b) would require a complex apportionment of damages.

Crouch, 2004 WL 2414027, at *9 (citing *AGC*, 459 U.S. at 537-42).

Applying those factors in *Crouch*, this Court dismissed the case, explaining that "there are multiple factors which render valid economic analysis either impossible or unmanageably complex. . . . Each variation in manufacturer's process, price, size, quality, market, distribution method and changes in applicable externalities requires individual supply and demand analysis and may require multiple regression analyses in order to eliminate the speculative nature of any damage calculation. " *Id.* at *25. This Court concluded that "[g]iven the many variables, the

issues surrounding allocation of the alleged price fixing fund in this case would be exceptionally complex and the results of economic analysis speculative." *Id.* at *25.[3]

Such concerns are even more pronounced here where Teague purports to represent consumers purchasing not just a single product in which the allegedly price-fixed component was incorporated, but an array of different products subject to their own distinct manufacturing processes, using EPDM in different grades and amounts, and thereafter purchased for a variety of different purposes. Application of the factors enumerated in *Crouch* confirms that Teague lacks standing to bring his asserted claims.

A. The Nature of the Alleged Injury

This Court stated that this inquiry "focuses on the market the alleged restraint was designed to impact and the intent of the actor in engaging in the restraint." *Crouch*, 2004 WL 2414027, at *18. As such, this Court found that in the analysis of this factor "[o]ne key question is whether the plaintiff claims injury in a market collateral to the market in which the alleged restraint took place." *Id.* The antitrust laws are designed to see that customers in the relevant market receive the benefit of price competition. *See Crouch,* 2004 WL 2414027, at *18, *24. Accordingly, in *Crouch*, even though indirect purchasers of the allegedly price-fixed rubber processing chemicals may have had standing, indirect purchasers of a consumer product (tires) in a collateral market containing small amounts of the allegedly price-fixed rubber processing chemicals lacked standing to raise a similar claim. *Id.* at *24.

[3] The same conclusion has been reached in other states that similarly recognize standing limits for proposed antitrust claims involving remote and speculative injuries. *See e.g., Fucile v. Visa U.S.A., Inc.*, No. S1560-03 CNC, 2004 WL 3030037, at *3-4 (Vt. Super. Ct. Dec. 27, 2004) (dismissing indirect purchaser plaintiffs' antitrust claims because claims and damages were too attenuated, remote, and speculative) (Attachment B); *Southard v. Visa U.S.A., Inc.*, No. LACV 031729, 94491, 2004 WL 3030028, (Iowa Dist. Ct. Nov. 17, 2004) (dismissing state antitrust claims because plaintiffs were derivative purchasers and any alleged damages were speculative) (Attachment C) ; *Knowles v. Visa U.S.A., Inc.*, No. Civ.A CV-03-707, 2004 WL 2475284, at *6 (Me. Super. Ct. Oct. 20, 2004) ("To determine what portion of any overcharge was passed on by any given merchant, with respect to which products, and to which consumers is a task of monumental uncertainty and complexity.") (Attachment D).

Just as the plaintiff in *Crouch*, Teague is neither a consumer nor a competitor in the allegedly price-fixed product market (EPDM), but "is in a market secondarily affected by the artificial influence" in the EPDM market. *Id.* Moreover, the plaintiffs Teague purports to represent, and arguably Teague himself, are participants in numerous secondary and collateral markets to the allegedly price-fixed product market. Thus, this "complicating factor" weighs against standing here. *Id.*

B. The Directness or Indirectness of the Injury

This factor focuses on the chain of causation between a plaintiff's alleged injury and the defendant's alleged anti-competitive acts. *Crouch*, 2004 WL 2414027, at *19, *AGC*, 459 U.S. at 540. "Vaguely defined" causal links cannot satisfy this requirement, nor can merely derivative injuries that are the "indirect result" of harm more proximately suffered by other persons or entities. *Id.* at 540-41. Moreover, this Court has found, under similar circumstances, that "the directness [of an injury] can be impacted by the nature of the item subject to price-fixing." *Crouch*, 2004 WL 2414027, at *24, *23 n.41 ("The Court simply notes that the nature of the component can make a difference.") Specifically, where the product at issue is completely subsumed into another, "[u]nlike a component that remains unchanged when incorporated in the final product, manufacturing costs are less directly passed through and may be affected by differing manufacturing processes used by producers. " *Id.*

Here, Teague admits neither he nor any member of the purported class purchased EPDM at all, let alone directly from any of the Defendants. As such, Teague is, at most, a purchaser of an unspecified end-use product in which EPDM of some unidentified grade, in some unidentified form, in some unidentified amount, is used or consumed in the production of that product. No causal link is "defined," even vaguely. The likelihood that the total final price paid by the end-user was impacted by any alleged price-fixing is unascertainably small. The putative class

members would have no way to determine what, if anything, they purchased contained EPDM manufactured by these Defendants, and no way to determine whether, or how much, they had been injured. This factor, therefore, also supports a conclusion that antitrust standing does not exist.

C. The Existence of More Direct Victims of the Alleged Conspiracy

The *Crouch* Court, adapting this factor from *AGC* to the indirect purchaser context, stated that this inquiry should focus on whether or not "other indirect purchasers in the chain of distribution" could bring a claim based upon the same alleged overcharge, resulting in duplicative liability for the defendants. *Crouch*, 2004 WL 2414027, at *24; *see also AGC*, 459 U.S. at 541 (recognizing that, when the claimed injury is remote from the alleged wrongdoing, it is appropriate for a court to consider whether other, more directly affected, purchasers could seek redress without implicating the inherent problems in the remote plaintiff's claims). In *Crouch*, this Court found this factor weighed against standing because "distributors and retailers" could "claim to have absorbed some of the price increase" despite the fact that no claims had yet been filed on their behalf. *Id.* Similarly, in the instant matter, there are more directly injured persons (such as indirect-purchasing distributors or retailers) with a motivation to sue over the price-fixing allegations. This case, therefore, presents the very concern that *AGC* observed when it contemplated "the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement [and whose existence] diminishes the justification for allowing a more remote party . . . to perform the office of a private attorney general." *AGC*, 459 U.S. at 542. Thus, just as in *Crouch*, the existence of distributors and retailers in the chain of distribution who may claim to have absorbed the alleged price increase weighs against antitrust standing.

D. The Speculative Nature of the Claimed Damages

For purposes of determining indirect purchaser standing, it is appropriate "'to consider whether a claim rests at bottom on some abstract conception or speculative measure of harm.'" *Crouch*, 2004 WL 2414027, at *19 (quoting *Blue Shield of Va. v. McCready*, 457 U.S. 465, 475 n.11 (1982)). Damages can be speculative due to the attenuated causal connection between the alleged misconduct and the claimed harm, or because it would be difficult to discern whether independent factors contributed to any alleged damages. *AGC*, 459 U.S. at 542; *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1451 (11th Cir. 1991). Both of those concerns are presented by the claims here.

EPDM, the product allegedly subject to price fixing, is only one component employed in the manufacture of the derivative products allegedly purchased by Teague. Those derivative products pass through their own chains of distribution before reaching end-use consumers. Thus, assuming for purposes of argument that there had been an initial overcharge by a manufacturer of EPDM to its direct customers, once EPDM passes from direct purchasers to manufacturers of derivative products and down separate and varied chains of distribution, the amount of the remaining alleged overcharge, if any, depends on many differing factors. These may include the other costs and components in the manufacture of the derivative products; the nature of supply and demand for those products; the amount of EPDM in the products; the bargaining power of the parties; and other specific market forces relating to those products at the time and place of a particular transaction. *See, e.g., Crouch,* 2004 WL 2414027, at *24 ("Unlike a component that remains unchanged when incorporated in the final product, manufacturing costs are less directly passed through and may be affected by differing manufacturing processes used by producers.").[4]

[4] Plaintiff's own class definition is limited to indirect purchasers of EPDM "other than for resale."

Under these circumstances, Teague could show only a highly theoretical link between any alleged overcharge for EPDM and the prices he paid for derivative products containing varying amounts, grades, and forms of EPDM. Teague's economic theories and hypotheses are speculative at best and weigh heavily against antitrust standing.

E. The Potential for Duplicative Recovery or Complex Apportionment

In *Crouch*, this Court stressed the importance of "keeping the scope of a complex antitrust trial within judicially manageable limits" and of "guard[ing] against multiple liability . . . and prejudice to absent victims or non-class members." *Crouch*, 2004 WL 2414027, at *19; *AGC*, 459 U.S. at 543-44 (stating that principles of antitrust standing also reflect "the strong interest . . . in keeping the scope of complex antitrust trials within judicially manageable limits" and "stress[] the importance of avoiding either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other").

The alleged price-fixing at issue here is already the subject of federal direct purchaser litigation.[5] As a result, the risk of duplicative liability for the same alleged misconduct exists. In the federal lawsuit, by virtue of *Illinois Brick*'s direct purchaser rule, those plaintiffs would be entitled to three times any overcharge they could prove, and Defendants would not be able to assert that any such overcharges could be or had been passed along. Yet, Teague seeks recovery of at least a portion (and maybe even the entirety) of the same claimed overcharge, trebled. This represents a classic example of the risk of multiple liability that this Court cautioned against when it recognized that "it is clear that the General Assembly did not intend that every purchaser in the distribution chain have a right of recovery or that there be duplicative recovery among indirect purchasers." *Crouch*, 2004 WL 2414027, at *19; *see also Ill. Brick*, 431 U.S. at 730.

In addition, to prove injury here, it would be necessary to determine whether any alleged overcharge was in fact passed through while EPDM moved through the chains of distribution to the unidentified derivative products Teague purchased. Even assuming one could establish a "pass on," the trier of fact would then have to determine how the prices of components of the end-use product, including EPDM, and the costs associated with the manufacture of those products relate to the price charged for the products by their manufacturers. The fact finder would then have to determine the portion of an overcharge (if any) that ultimately reached the end-use consumer and identify the source of the EPDM in each such product.

Finally, if certified as a class action, this exercise would need to be repeated for each of the thousands of consumers in North Carolina who purchased *any* product containing *any* amount of EPDM – no matter how small – during a nine-year period. In that regard, it is highly unlikely that consumers even know EPDM exists or what products are made with it. The "class notice" process would thus become an exercise in recruiting individual class members to fill up and justify the certified class. This extremely remote connection between any alleged wrongdoing and Teague's alleged injury, the number of Defendants, and the wide array of derivative products that incorporate varying amounts of EPDM would render any effort to apportion damages wholly unmanageable.

Application of the *AGC* factors as explained in *Crouch* permit only one conclusion; namely, that Teague lacks standing to pursue indirect purchaser claims:

- Teague is neither a consumer nor a competitor in the market for EPDM; rather, Teague is a purchaser at retail of products containing varying amounts of EPDM.

(continued...)

[5] Direct purchasers of EPDM have filed a series of lawsuits against Defendants alleging violations of § 1 of the Sherman Act, 15 U.S.C. § 1. *See In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 277 F. Supp. 2d 1373 (J.P.M.L. 2003).

- Like the rubber processing chemicals at issue in *Crouch*, EPDM is used in unknown amounts as an ingredient in end-use consumer products; therefore, the product that Teague actually purchased was several steps down the distribution chain, making the impact indirect and insubstantial.

- There clearly exist other indirect purchasers who are more direct victims of any alleged conspiracy.

- The effect of any overcharge in the price of EPDM on the ultimate purchase price of end-use products by consumers like Teague is *de minimis*, and at most, highly speculative.

- Any effort to trace any overcharge down the chain of distribution would be extremely complex, especially given that some unidentified grade of EPDM, in some unidentified form, in some unidentified amount was used in the production of end-use consumer products allegedly purchased by Teague.

In sum, this Court's decision in *Crouch* and the Supreme Court's decision in *AGC* both support a conclusion that Teague, as an indirect purchaser of a derivative product that incorporates the allegedly price-fixed product, lacks standing under the North Carolina antitrust laws. *See Crouch,* 2004 WL 2414027, at *28 ("State indirect purchaser cases should be designed to provide relief to those directly injured by antitrust violations . . . and should be narrowly construed.").

III. *HYDE* DOES NOT ALTER THE CONCLUSION THAT TEAGUE LACKS STANDING

Teague's self-characterization as an "indirect purchaser" suggests that he hopes to avoid dismissal of his case by pointing to the Court of Appeal's decision in *Hyde*. 123 N.C. App. at 577-78. While this Court has stated in *Crouch* that it feels constrained to follow *Hyde*, 2004 WL 2414027, at *19, Defendants continue to assert that, consistent with *Weaver v. Cabot Corp.*, No. 03 CVS 04760 (N.C. Super. Ct. Mar. 26, 2004) (Attachment E), this Court should decline to extend *Hyde* to such remote indirect purchaser claims.

Hyde was a relatively straightforward indirect purchaser case, involving allegations of wholesale price-fixing of unaltered infant formula brought by plaintiffs who were downstream

retail consumers of infant formula, *i.e.*, the same product. *See Hyde*, 123 N.C. App. at 573-74. The difficulties of proof in *Hyde* were, therefore, limited. In *Weaver*, by contrast, the state antitrust claims of consumers who purchased tires containing carbon black, an allegedly price-fixed component, were dismissed as a matter of law due to their inherently speculative nature. Judge Dennis Winner of Buncombe County — a former State Senator — stated that "the General Assembly never intended that the antitrust laws of this State be used in the manner in which the Plaintiff has attempted in this case, and that this case is therefore distinguishable from the *Hyde* case." *Id.* at 2. The *Weaver* court considered the inability of the plaintiffs to demonstrate that they sustained actual injury:

> [W]ithout some allegation and proof that the tire manufacturers themselves were an oligopoly and were fixing prices . . . it would be impossible to show the price the plaintiff paid was not set by the normal laws of supply and demand in our open economic system, and that even if it were possible to show that, there would be no way for the Court to, in any fair or just way, determine an amount the plaintiff was damaged.

Id. at 2. The same logic applies here, where Teague and the class members he seeks to represent are not downstream consumers of any product manufactured and sold by the Defendants. Defendants manufacture and sell EPDM. Teague did not purchase EPDM. Rather, Teague and the putative class members are purchasers of a variety of products containing EPDM as a component. Third party manufacturers, not Defendants, make or sell these products containing EPDM. In other words, compared to the plaintiffs in *Hyde* and similar indirect purchaser cases, Teague is at least one more significant step removed from the allegedly overpriced products.

These differences magnify the complexities of proof that were present to a lesser degree in *Hyde*. In particular, the extent to which an alleged overcharge in the price of EPDM affected the price of goods made partly with EPDM will be exceedingly difficult to determine and likely will vary greatly from manufacturer to manufacturer. Moreover, there will be insurmountable

traceability problems involved in determining whether and to what extent Defendants' EPDM was used in the manufacture of the various products purchased by Teague and the class members. Whatever might be said of the certainty of damages in a straightforward indirect purchaser suit, such as *Hyde*, adequate proof of damages in this case will be practically impossible. The alternative would be to base damages on guesswork and imprecise speculation. For these reasons, as was held in *Weaver*, this Court should not extend *Hyde* to new and more problematic derivative indirect purchaser cases, like this one, where Teague is not an indirect purchaser of the actual product sold by the Defendants. *See Crouch*, 2004 WL 2414027, at *18 (stating that "[i]f *Hyde* is correct, the General Assembly intended for persons *actually* injured to be able to recover for injuries resulting from violations of the state antitrust laws") (emphasis in original).

IV. TEAGUE' S REFERENCE TO § 75-1.1 DOES NOT AVOID DISMISSAL UNDER CROUCH

Perhaps because of the deficiency of the § 75-1 claim, Teague's First Amended Complaint adds references to N.C. Gen. Stat. § 75-1.1, the Unfair and Deceptive Trade Practices Act. (Am. Compl. ¶¶ 45, 46, 50). The elements of a claim in violation of § 75-1.1 are: "(1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or effecting commerce, (3) which proximately caused actual injury to the plaintiff or to his business." *Furr v. Fonville Morisey Realty, Inc.*, 130 N.C. App 541, 551-52, 503 S.E. 401, 408 (1998) (quoting *Spartan Leasing v. Pollard*, 101 N.C. App. 450, 460-61, 400 S.E.2d 476, 482 (1991)). Accordingly, as an essential element of a cause of action under § 75-1.1, Teague must plead facts showing that he has suffered actual injury as a "proximate result" of the Defendants alleged conduct. *Bailey v. LeBeau*, 79 N.C. App. 345, 351, 339 S.E.2d 460, 464 (1986).

For all the reasons outlined above, Teague lacks standing under § 75-1.1 as well. Due to the remoteness from Teague of any alleged "unfair" and "deceptive" (Am. Compl. ¶ 50) conduct, and the extraordinary attenuation between any such conduct and the purchase of whatever consumer product he ultimately bought, Teague has neither an identifiable injury nor the "sufficient stake" necessary to convey standing. *Neuse River Found.*, 155 N.C. App. at 114, 574 S.E.2d at 51-52 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 731-32 (1972)). Moreover, the alleged acts complained of are so remote from Teague, and the effect, if any, on the price he may have paid for whatever product he purchased so untraceable, that he cannot be said to have suffered any injury as a "proximate result" of any conduct by Defendants. *Walker v. Branch Banking & Trust Co.*, 133 N.C. App. 580, 585, 515 S.E.2d 727, 730 (1999). Accordingly, Teague's reference to § 75-1.1 does not confer any standing or avoid dismissal under the reasoning in *Crouch*.

CONCLUSION

To allow standing in this case would ignore the prudential standing concerns recognized by this Court in *Crouch* and enumerated by the United States Supreme Court in *AGC*. The injuries claimed and the damages sought by Teague are too remote, attenuated, and speculative to confer standing. For the reasons stated above, Defendants respectfully request that the Court dismiss the First Amended Complaint with prejudice for failure to state a claim upon which relief can be granted.

This the 27th day of May, 2005.

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ATTACHMENT A

C
UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of North Carolina,
New Hanover County and Harnett County,
Business Court.
Auley M. CROUCH, III, on behalf of himself and all others similarly situated,
Plaintiff,
v.
CROMPTON CORPORATION, Crompton Manufacturing Company, Inc., formerly named in North Carolina as Uniroyal Chemical Company, Inc., Uniroyal Chemical Company Limited, Flexsys NV, Flexsys America Limited Partnership of North Carolina, Bayer Ag, Bayer Corporation, and Rhein Chemie Rheinau GMBH, Defendants.
Timothy J. Morris, on behalf of himself and all others similarly situated,
Plaintiff,
v.
Visa U.S.A. Inc. and Mastercard International, Inc., Defendants.
Nos. 02 CVS 4375, 03 CVS 2514.

Oct. 28, 2004.

{1} The above captioned cases are before the Court on motions to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. They are treated together because they both present the same legal issues. The first issue is whether indirect purchasers have standing under N.C.G.S. § 75-16 to sue for violations of the state antitrust laws. The Court holds, as it has before, that the decision of the Court of Appeals in Hyde v. Abbott Laboratories, Inc., 123 N.C.App. 572, 473 S.E.2d 680 (1996), disc. rev. denied, 344 N.C. 734, 478 S.E.2d 5 (1996), is controlling, and indirect purchasers do have standing to sue under North Carolina's antitrust laws. If indirect purchasers have standing, the question becomes whether there are applicable limitations on that standing. The Court holds that indirect purchaser standing is not limitless; that there are standing requirements that apply to indirect purchasers. Application of those standards to the pleadings in each of these cases results in dismissal.

Lea, Rhine & Associates, PLLC by Christopher A. Chleborowicz and Joel R. Rhine; Lerach Coughlin Stoia Geller Rudman & Robbins LLP by Robert J. Gralewski, Jr. and Bonny E. Sweeney; The David Danis Law Firm by Alexander E. Barnett, Michael J. Flannery and James J. Rosemergy for Plaintiff Crouch.

Moore & Van Allen, PLLC by Joseph W. Eason; O'Melveny & Myers, LLP by Benjamin G. Bradshaw, Richard G. Parker and Ian Simmons for Defendants Crompton Corporation, Crompton Manufacturing Company, Inc. and Uniroyal Chemical Company Limited.

Womble Carlyle Sandridge & Rice by Pressley M. Millen; Gibson, Dunn & Crutcher, LLP by D. Jarrett Arp, James Slear and Daniel G. Swanson; Covington & Burling by Michael J. Fanelli, William D. Iverson and Vijay Shanker for Defendants Flexsys America, LP, Flexsys America Limited Partnership of North Carolina, and Flexsys NV.

Helms, Mulliss & Wicker, PLLC by Henry L. Kitchin, Jr. and Bradley R. Kutrow; Jones Day by Thomas Demitrack, William V. O'Reilly and J. Andrew Read for Defendants Bayer Corporation and Rhein Chemie Corporation.

Hardison & Leone, L.L.P. by Kenneth L. Hardison, Elizabeth A. Leone and Joseph W. Osman; Susman Godfrey, L.L.P. by Mark A. Evetts, Drew D. Hansen and Neal S. Manne; Markun Zusman Compton & David, L.L .P. by Kevin Eng, David S. Markun, Edward S. Zusman; Friedman & Shube by Noah Shube for Plaintiff Morris.

Ellis & Winters, LLP by Richard W. Ellis, Stephen C. Keadey, and Matthew W. Sawchak; Robinson, Bradshaw & Hinson, PA by Everett J. Bowman, Mark W. Merritt and John R. Wester; Heller Ehrman White & McAuliffe LLP by Stephen V. Bomse, David M. Goldstein and Rachel M. Jones; Arnold & Porter LLP by Robert C. Mason for Defendant Visa U.S.A., Inc.

Womble Carlyle Sandridge & Rice by Pressley M. Millen; Paul Weiss Rifkind Wharton & Garrison, L.L.P. by Gary R. Carney, Patricia C. Crowley and Kenneth A. Gallo for Defendant MasterCard International, Inc.

CORRECTED OPINION, ORDER AND JUDGMENT

I.

FACTUAL BACKGROUND IN *CROUCH*

***1** {2} Plaintiff Crouch is an individual residing in New Hanover County, North Carolina. Plaintiff purchased four B.F. Goodrich tires (Advantage GT model # P195-70R14 90SM+S) for his automobile on October 19, 2002 from Sam's Club of Wilmington. Plaintiff brings this claim individually and on behalf of all other persons who purchased tires, other than for resale, that were manufactured using the rubber-processing chemicals sold by Defendants since 1994. [FN1]

> FN1. Am. Compl. ¶ 20. At oral argument the Court understood plaintiff's counsel to say that the class would be limited to retail consumers, excluding, for example, customers who purchased used cars with new tires.

{3} Defendant Crompton Corporation ("Crompton") is a Connecticut corporation with its principal place of business in Greenwich, Connecticut. Crompton is a global marketer and manufacturer of specialty chemicals, polymer products and processing equipment, which includes chemicals used for the processing of rubber and tires. Crompton's actions have affected commerce within the State of North Carolina.

{4} Defendant Uniroyal Chemical Company Limited ("Uniroyal") is a Delaware corporation with its principal place of business in Akron, Ohio. It is a wholly-owned subsidiary of Crompton and is responsible either independently or jointly with Crompton Manufacturing Company, Inc. for the manufacture, sale and/or distribution of rubber-processing products as part of its ordinary and customary business. Uniroyal manufactures several rubber-processing products including specialty products for tires and industrial rubber goods. Uniroyal's actions have affected commerce within the State of North Carolina.

{5} Defendant Crompton Manufacturing Company, Inc., formerly legally named in North Carolina as Uniroyal Chemical Company, Inc. ("Crompton Manufacturing"), is a New Jersey corporation with its principal place of business in Greenwich, Connecticut. It is a wholly-owned subsidiary of Crompton and is responsible either independently or jointly with Uniroyal for the manufacture, sale and/or distribution of rubber-processing products as part of its ordinary and customary business. Crompton Manufacturing's rubber-processing products include specialty products for tires and industrial rubber goods. Crompton Manufacturing's actions have affected commerce within the State of North Carolina.

{6} Defendant Flexsys NV is a joint venture between Solutia, a United States company, and Akzo Nobel, a Netherlands company. Flexsys NV has its headquarters in Woluwe, Belgium.

{7} Defendant Flexsys America LP ("Flexsys") is the United States subsidiary of Flexsys NV. Flexsys is a Delaware corporation with its headquarters located in Akron, Ohio. Flexsys NV is the world's leading supplier of chemicals to the rubber industry. Flexsys' actions have affected commerce within the State of North Carolina.

{8} Defendant Flexsys America Limited Partnership of North Carolina ("Flexsys NC"), the legal name in North Carolina of Flexsys America LP, is the United States subsidiary of Flexsys NV. Flexsys NC is a Delaware corporation with its headquarters located in Akron, Ohio.

***2** {9} Defendant Bayer AG is a corporation organized and existing under the law of the Federal Republic of Germany and maintains its principal place of business in Leverkusen, Federal Republic of Germany. Bayer AG is the parent company of Bayer Corporation, the wholly-owned subsidiary that sells and markets rubber-processing chemicals in the United States.

{10} Defendant Bayer Corporation ("Bayer") is a wholly-owned subsidiary of Bayer AG. Bayer has its principal place of business in Pittsburg, Pennsylvania, and is incorporated under the laws of Pennsylvania. Bayer develops, manufactures, sells and distributes a variety of pharmaceutical and chemical products, including rubber-processing products.

{11} Bayer develops, manufactures, sells and distributes its rubber-processing products through its Fibers, Additives and Rubbers Division. The Division is headquartered in Akron, Ohio. The Division manufactures rubber-processing chemical products which have a variety of differing roles in rubber-processing.

{12} Defendant Rhein Chemie Rheinau GmbH

("Rhein GmbH") is a business organized under the laws of the Federal Republic of Germany with its principal place of business located in Mannheim, Federal Republic of Germany. Rhein GmbH, a subsidiary or affiliate of Bayer AG, manufactures, sells and distributes the relevant rubber-processing chemicals throughout the global market, including the United States.

{13} Defendant Rhein Chemie Corporation ("Rhein"), a New Jersey corporation and a wholly-owned subsidiary and/or affiliate of Rhein GmbH, is responsible for the manufacture, sale and/or distribution of the relevant rubber-processing products throughout the United States, including North Carolina.

{14} On September 26, 2002, inspectors from the European Commission's Competition Division, assisted by officials from the Commission's member states, carried out unannounced inspections at defendants' European offices. According to a memorandum issued by the Commission on October 10, 2002, the stated purpose of the inspections was to "ascertain whether there is evidence of a cartel agreement and related illegal practices concerning price fixing for rubber chemicals." (Am.Compl.¶ 43.) On October 14, 2002, the Associated Press reported that Crompton, Bayer and Flexsys made press releases verifying that their respective companies were under investigation for alleged price collusion in rubber chemicals both by U.S. and European Union authorities. [FN2] On May 27, 2004, Crompton pled guilty to participating in a conspiracy to suppress and eliminate competition by maintaining and increasing the price of certain rubber chemicals sold in the United States and elsewhere during the period between July 1995 to 2001. The U.S. federal court imposed a fine of $50 million. On May 28, 2004, Crompton pled guilty to one count of conspiring to lessen competition unduly in the sale and marketing of certain rubber chemicals in Canada. The Canadian federal court imposed a sentence requiring Crompton to pay a fine of $7 million. On July 14, 2004, Bayer pled guilty to charges filed by the U.S. Department of Justice in Federal District Court in the Northern District of California and agreed to a $66 million fine for participating in an international conspiracy to fix prices in the rubber chemicals market.

FN2. Miles Moore, *U.S., EU Probing Rubber Chemical Suppliers,* RUBBER & PLASTICS NEWS, Oct. 14, 2002, at 1.

*3 {15} Plaintiff filed this action on November 5, 2002, only thirty days after the European investigation was announced, alleging violations of North Carolina's Unfair and Deceptive Trade Practices Act ("UDTPA"), including N.C.G.S. § § 75-1.1, 75-2, 75-5, 75-16, 75-16.1. Plaintiff alleges that defendants "entered into an agreement, arrangement, contract, combination, conspiracy and/or understanding that was intended to and which did have the effect of fixing, raising, stabilizing and maintaining the price for the relevant rubber-processing chemicals." (Am.Compl.¶ 40.) Plaintiff alleges that defendants' "supracompetitive pricing" was reflected in the prices of automobile tires manufactured using these rubber-processing chemicals. (Am.Compl.¶ 41.) Therefore, plaintiff alleges that consumers who purchased these automobile tires, not directly from defendants but rather from tire retailers, paid more than they would have in the absence of the alleged anticompetitive agreement. (Am.Compl.¶ 55.) Similar suits have been filed in other jurisdictions that recognize indirect purchaser standing. Plaintiff seeks to represent only persons who purchased tires at retail.

{16} Direct purchasers have filed a nationwide class action lawsuit seeking to recover the alleged overcharge that is the subject of the state litigation. *In re Rubber Chemicals Antitrust Litig.*, Master Docket No. C-03-1496 (N.D. Cal. (Judge Martin J. Jenkins)).

{17} Defendants have responded by moving to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted based upon plaintiff's lack of standing to sue under North Carolina's antitrust laws.

{18} The case was assigned to this Court by Order dated April 19, 2004.

II.
FACTUAL BACKGROUND IN *MORRIS*

{19} Plaintiff, Timothy Morris, is a resident of North Carolina. Plaintiff brings this contemplated class action on behalf of all North Carolina consumers who purchased goods from merchants who accepted Visa and/or MasterCard credit cards and debit cards during the four years preceding the filing of the Complaint.

{20} Defendant Visa U.S.A. Inc. ("Visa") is a Delaware corporation. Visa's principal place of business is San Francisco, California. Visa transacts business within the State of North Carolina. At all relevant times, Visa was a national bankcard association whose members included more than

6,000 banks.

{21} Defendant MasterCard International, Inc. ("MasterCard") is a Delaware corporation. MasterCard's principal place of business is Purchase, New York. MasterCard transacts business within the State of North Carolina. At all relevant times, MasterCard was a national bankcard association whose members included more than 6,000 banks.

{22} In October 1996, Wal-Mart Stores, The Limited, Sears Roebuck, Safeway, Circuit City, the International Mass Retail Association, the National Retail Federation, the Food Marketing Institute, Bernie's Army-Navy Store, Auto-Lab of Farmington Hills, Burlington Coat Factory Warehouse, Sportstop, Payless Shoesource Shoes, Etc., the Coffee Stop, UCC Kwik Doc, Computer Supplies Unlimited, Denture Specialist, Inc./Geneva White D.M.D., Shark 3 Audio, 53, Inc., and Scrub Shop collectively filed a claim challenging the "Honor All Cards" rules of Visa and MasterCard that require all merchants accepting Visa and MasterCard credit cards to also accept their debit cards. The plaintiffs alleged that this requirement was a tying arrangement violating section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. Plaintiffs further asserted that Visa and MasterCard attempted and conspired to monopolize the debit card market in violation of section 2 of the Sherman Act, 15 U .S.C. § 2. Plaintiffs alleged that the defendants' actions resulted in excessive fees to merchants for the debit card processing services. *See In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. 68 (E.D.N.Y.2000) *aff'd*, 280 F.3d 124 (2d Cir.2001), *cert. denied*, 536 U.S. 917, 122 S.Ct. 2382, 153 L.Ed.2d 201 (2002).

*4 {23} In February 2000, a plaintiff class of approximately four million merchants who have accepted Visa and/or MasterCard credit cards and therefore were required to accept VisaCheck and/or MasterMoney debit cards under the "Honor All Cards" rule was certified. *Id.* Oral arguments on motions for summary judgment were heard on January 10, 2003. On April 1, 2003, the federal court granted the merchants' motion for summary judgment in part and denied it in part. The defendants' motions for summary judgment were denied in their entirety. In addition, MasterCard's motion for a severance was denied. *See In re Visa Check/MasterMoney Antitrust Litig.*, 2003 U.S. Dist. LEXIS 4965, at *27 (E.D.N.Y. Apr. 1, 2003).

{24} On the day that opening statements were to occur, April 28, 2003, MasterCard agreed to settle with the plaintiff class. *In re Visa Check/MasterMoney Antitrust Litig.*, 297 F.Supp.2d 503, 508 (E.D.N.Y.2003). Visa agreed to settlement two days later, April 30, 2003. On December 19, 2003, the federal court issued an order providing final approval of the settlements. Pursuant to the settlement, merchants who accept Visa and MasterCard credit cards were free to reject Visa and MasterCard debit cards. In addition, Visa and MasterCard will pay more than $3 billion into a settlement fund to be distributed to the merchant class. *Id.* at 506-08.

{25} Plaintiff filed this action on December 31, 2003, alleging violations of North Carolina's Unfair and Deceptive Trade Practices Act, N.C.G.S. § 75. Plaintiff asserts consumer antitrust claims that attack the manner in which the "Honor All Cards" rules of the MasterCard and Visa national payment systems are applied to merchants across the country. Plaintiff's claim in this action is founded upon the same alleged "tying" conduct by Visa and MasterCard that was at issue in the federal merchant class antitrust action. (*Compare* Compl. ¶ ¶ 2-6, 27(m), 28-57, *with In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. at 71-73.) Plaintiff alleges that consumers paid higher prices for goods sold by the merchants bringing the claim in the federal action. Plaintiff alleges that because merchants were "compelled to pay supracompetitive prices," merchants, in turn, passed along their extra costs to consumers by raising the price of goods. (Compl.¶ ¶ 57-58.)

{26} Defendants have responded by moving to dismiss under Rule 12(b)(6) based on two grounds: first, that plaintiff lacks standing to sue under North Carolina's antitrust laws; and second, that plaintiff seeks relief that would violate the Commerce Clause of the United States Constitution, which forbids states from regulating interstate commerce that requires uniform national regulation.

{27} The case was assigned to this Court by Order dated May 11, 2004.

III.
LEGAL STANDARD

{28} When ruling on a motion to dismiss under Rule 12(b)(6), the court must determine "whether, as a matter of law, the allegations of the complaint ... are sufficient to state a claim upon which relief may be granted." *Harris v. NCNB*, 85 N.C.App. 669, 670, 355 S.E.2d 838, 840 (1987). In ruling on a motion to dismiss, the court must treat the allegations in the

complaint as true. *See Hyde v. Abbott Labs., Inc.*, 123 N.C.App. 572, 575, 473 S.E.2d 680, 682 (1996). The court must construe the complaint liberally and must not dismiss the complaint unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. *See id.*

IV.

***5** {29} An understanding of the issues in these two cases necessarily begins with examination of the standing requirements under federal antitrust law. That examination begins with the study of two cases, *Hanover Shoe Co. v. United Shoe Machinery Corp.*, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968), and *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977). The interrelationship of those two cases is best described by William Landes and Richard Posner in their seminal article: *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of* Illinois Brick.

> In *Illinois Brick Co. v. Illinois,* the Supreme Court held that indirect purchasers do not have standing to sue for violations of the antitrust laws under section 4 of the Clayton Act, which authorized private treble-damage suits by individuals or firms injured in their business or property by a violation of those laws. To understand this decision, one must go back to *Hanover Shoe Co. v. United Shoe Machinery Corp.,* a suit by a shoe manufacturer against a manufacturer of shoe machinery who had earlier been found to have monopolized the shoe machinery industry in violation of section 2 of the Sherman Act. The defendant argued that it should be allowed to show that its customer had not in fact been injured by the antitrust violation because the customer had passed on the costs of the violation to its customers, the purchasers of shoes. The Supreme Court rejected this argument, holding that there is no "passing on" defense to a suit by a direct purchaser; the direct purchaser is entitled to get the overcharge back, trebled, whether or not he was really injured to that extent.
>
> *Illinois Brick* is the mirror image of *Hanover Shoe.* The plaintiffs in *Illinois Brick,* represented by the state of Illinois suing on behalf of itself and some 700 local government entities in the Chicago area, claimed overcharges in connection with various construction projects. The defendants, manufacturers and distributors of concrete block alleged to be in collusion, sold the block to masonry contractors who submitted bids to general contractors who in turn submitted bids to customers such as the plaintiffs. The *Illinois Brick* plaintiffs were therefore indirect purchasers of concrete block, standing in the same relation to the defendants as the buyers of shoes at retail stood to United Shoe Machinery Corporation. The predicate of the *Illinois Brick* suit was the passing on of all or part of the overcharge by the direct purchaser; without passing on, there could be no injury to indirect purchasers.
>
> Unless they are willing to countenance multiple liability, the courts cannot allow suits by indirect purchasers without also permitting the defendant to assert a "passing-on defense" against direct purchaser plaintiffs. As the Court recognized in *Illinois Brick,* there are only two ways of avoiding unacceptable multiple liability: (1) allow indirect purchasers to sue but overrule *Hanover Shoe* or (2) retain Hanover Shoe and preclude indirect purchasers from suing.

***6** 46 U. CHI. L.REV. 602, 602-03 (1979) (footnotes omitted).

{30} The rule governing indirect purchaser standing in federal antitrust cases has not changed since *Illinois Brick.* The fact that there has been no congressional or judicial repeal of the rule indicates that the policy behind it has proven effective. That policy holds that the direct purchaser suit is on balance a more effective instrument for enforcement of the antitrust rule prohibiting price fixing than the indirect purchaser suit.[FN3] Under the federal scheme, where avoidance of a double recovery is favored, the federal government has chosen the direct purchaser suit as the most effective means of enforcing the antitrust laws, particularly in price fixing cases.

> FN3. William Landes and Richard 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, 634-35 (1979). The authors stated: Our analysis has suggested that the rule of *Illinois Brick,* which bars indirect purchasers from bringing private antitrust damage actions, is probably the soundest rule from the standpoint of maximizing the effectiveness of antitrust enforcement. We anticipate the argument that, however abstractly desirable it may seem to confine enforcement to direct purchasers, to do so is to alter the fundamental character of the private antitrust action in a way that cannot be squared with the intent of Congress in creating private damage remedies for

> antitrust violations. One way of characterizing our position is that it allows someone who may not be injured (or not injured much)--the direct purchaser--to recover (treble) damages while denying the right to recover any damages to other people-- indirect purchasers--who may in fact be injured. There is an element of paradox in this result, but it is dispelled by careful analysis. As we have shown, even if indirect purchasers were given the nominal right to sue, they would often fail to receive significant compensation. And anyone troubled by the windfall element in the judgment received by the direct purchaser must in logic reexamine the entire structure of private antitrust enforcement. Two-thirds of *every* private antitrust damage judgment (the punitive component of the judgment) is a windfall to the purchaser. In a class action, much of even the compensatory portion of the judgment may end up in the pockets of lawyers or in state treasuries, rather than in the pockets of the people who were actually harmed by the antitrust violation. The windfall element cannot be purged by the private antitrust suit without a complete reworking of antitrust enforcement. Until that is done, society will be well-advised to allow some direct purchasers to enjoy windfalls if, as we have argued, the direct purchaser suit is on balance a more effective instrument for enforcing the antitrust rule prohibiting price fixing than the indirect-purchaser suit.
> *Id.* (footnote omitted).

{31} The choice made in the federal system had the effect of preventing indirect purchasers who were actually injured by a price fixing scheme from recovering their damages. It was a policy decision that was not well received in some states. There were rational arguments that the decision was wrong from a policy standpoint. Those arguments were made effectively by Justice Brennan in a well-reasoned dissent in *Illinois Brick.* A minority of states chose to alleviate the problems created for indirect purchasers by *Illinois Brick* by either passing statutes (*Illinois Brick* repealer statutes) or interpreting their existing statutes as permitting indirect purchaser standing under the state antitrust law based upon some differentiation in language between the state and federal statutes. For example, the District of Columbia passed a statute [FN4] which was modeled directly on Justice Brennan's dissent in *Illinois Brick.* It specifically provides for indirect purchaser standing and it adopts the "target area" test for standing mentioned by Justice Brennan in his dissent . [FN5] It is a model for states desiring to create a clear statutory framework for indirect purchaser cases.

> FN4. *See* D.C.Code Ann. § 28-4509(a) (1981).
>
> FN5. Justice Brennan suggested a target area test as one possible approach to standing, but did not actually endorse it as a test to be adopted. It is worthy of note that Justice Brennan was among the majority in its holding in *Associated General Contractors of California, Inc. v. California State Counsel of Carpenters,* 459 U.S. 519, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983) ("*AGC* "), which was decided subsequent to *Illinois Brick* and prior to the 1996 amendments to the North Carolina statute.

{32} The recognition of indirect purchaser standing by this minority of states created an unusual situation. In federal price fixing cases, direct purchasers were permitted to recover the artificially inflated price and treble damages even though they may have passed on the artificially inflated price to someone else in the distribution chain. They receive a windfall in some instances; but that windfall is predicated upon the policies that the federal scheme was (a) the most effective deterrent, (b) eliminated double recovery, (c) eliminated extraordinarily difficult damage proof [FN6] and (d) was economically rational. [FN7] When the minority states reacted by repealing *Illinois Brick,* they created a situation which (a) restored the ability of indirect purchasers to recover for injuries actually sustained as a result of anticompetitive behavior, (b) added a redundant and less effective deterrent, (c) condoned double recovery (trebled) against violators and (d) created the potential for extremely difficult damage proof issues.

> FN6. *See* Landes and Posner, *supra* note 3, at 609, 615, 619-20.
>
> FN7. *See* Landes and Posner, *supra* note 3, at 611-12, 617-18, 620, 625.

*7 {33} Not surprisingly, the state efforts to restore indirect purchasers' ability to recover for injuries sustained as a result of antitrust violations were challenged, primarily on the ground that state statutes were preempted by the federal scheme. That

challenge was directly rejected by the United States Supreme Court in *California v. ARC America Corp.*, 490 U.S. 93, 109 S.Ct. 1661, 104 L.Ed.2d 86 (1989). The Supreme Court held that states may allow an indirect purchaser to sue under state antitrust laws.

> When viewed properly, *Illinois Brick* was a decision construing the federal antitrust laws, not a decision defining the interrelationship between the federal and state antitrust laws. The congressional purposes on which *Illinois Brick* was based provide no support for a finding that state indirect purchaser statutes are pre-empted by federal law.

California v. ARC Am. Corp., 490 U.S. 93, 105-06, 109 S.Ct. 1661, 104 L.Ed.2d 86 (1989).

This Court has previously noted the problems created by this dual enforcement in *Adams v. Aventis, S.A.*, 2003 NCBC 7, at ¶ 23 (No. 01CVS2119, Craven County Super. Ct. August 26, 2003)(Tennille, J.). The Court stated:

> In 1995, the Section of Antitrust Law of the American Bar Association published a Report of the Indirect Purchaser Task Force outlining proposed legislative changes to address the "indirect purchaser problem." *Report of the Indirect Purchaser Task Force: Section of Antitrust Law American Bar Association*, 63 ANTITRUST L.J. 993 (Spring 1995). The report stated that the results of state *Illinois Brick* repealer laws are that:
>
> (1) The full amount of the overcharge, trebled, can be recovered by (i) direct purchasers who sue under federal law; (ii) the customers of those direct purchasers who sue under state law; and (iii) under most state *Illinois Brick* repealers, by indirect purchasers at every other stage of distribution down the line.
>
> (2) The overcharge that an indirect purchaser can have trebled may be a multiple of the overcharge to the direct purchaser because indirect purchasers can claim that their seller's markups on the original overcharge are also inflated because of that overcharge.
>
> (3) The direct purchaser cases can be prosecuted in federal court and the indirect purchaser cases can be prosecuted in state court(s). Indeed, the Supreme Court seemed to encourage that kind of multiple litigation in *ARC America* by broadly hinting to federal courts that they utilize pendent jurisdiction principles for state law indirect purchaser claims.
>
> (4) The results in the direct and indirect purchaser cases need not be consistent. The overcharge which is treated as the direct purchaser's in the federal court can be treated as the indirect purchaser's in the state court. In fact, if indirect purchaser cases are brought in several state courts, there may be inconsistencies in those decisions.
>
> Thus, defendants in horizontal price-fixing cases face not only the burden and expense of multiple treble-damage lawsuits, but also enormous potential liability--not just three, but multiples of three times the overcharge, if a lay jury finds liability. Few companies can afford to "roll the dice" on a jury verdict when the exposure is that high, no matter how innocent they believe they are.
>
> *8 Additionally, the current law turns judicial economy--the principal reason for the decisions in *Hanover Shoe* and *Illinois Brick*--on its head. Federal *and* state judicial resources are finite and precious. It makes little sense to permit, much less encourage, multiple litigation in federal and state courts. It makes even less sense to permit inconsistent judgments as to who bore the overcharge.

2003 NCBC 7, at ¶ 23.

{34} Thus, states may provide indirect purchaser recovery based upon state antitrust laws even though (1) the result may and almost assuredly will be a double recovery and (2) a preferable deterrent exists under federal law. It is clear then that the primary rational for enforcement of the state antitrust laws is to provide a recovery for indirect purchasers *actually* injured by antitrust violations. That goal should be kept in mind when interpreting and applying the statute.

{35} The inquiry into standing in federal antitrust cases does not end with *Hanover Shoe* and *Illinois Brick*. Those cases dealt only with apportionment of damages in price fixing situations.

{36} The Supreme Court specifically noted that its decision was not directed to standing. It said:

> Because we find Hanover Shoe dispositive here, we do not address the standing issue, except to note, as did the Court of Appeals below, that the question of which persons have been injured by an illegal overcharge for purposes of § 4 is analytically distinct from the question of which persons have sustained injuries too remote to give them standing to sue for damages under § 4.

Illinois Brick, 431 U.S. at 728 n. 7 (citation omitted).

{37} Since *Illinois Brick*, the federal courts have addressed standing in other situations involving indirect purchasers or persons indirectly injured by alleged antitrust activity. The leading federal case on standing in situations not involving price fixing is

Associated General Contractors of California, Inc. v. California State Counsel of Carpenters, 459 U.S. 519, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983) ("*AGC* "). [FN8] In that case, the Unions sought damages under section 4 of the Clayton Act. [FN9] They alleged that the employer group defendant had coerced some of its members to enter into business relationships with nonunion contractors and subcontractors, thus adversely affecting the trade of the unionized firms and consequently the unions themselves.

> FN8. The application of the *AGC* standing requirements was not originally argued in *Crouch,* but was argued in *Morris.* Subsequent to the oral argument in *Morris,* counsel in *Crouch* were afforded the opportunity to address the application of the *AGC* requirements as well as the application of a target area test to the fact situation in *Crouch.* Each side filed supplemental briefs on those questions.
>
> FN9. 15 U.S.C. § 15 (2004). That provision is the model after which the North Carolina statute is patterned. *See infra* ¶ 46.

{38} In holding that the Union was not a person injured by reason of a violation of the antitrust laws within the meaning of section 4 of the Clayton Act, the Supreme Court adopted a five factor standing test which it derived in part by looking at the standard applied in common law damage actions when the Clayton Act's predecessor was originally passed in 1890.

{39} Significantly, the Supreme Court rejected the argument made by both plaintiffs in these cases that because the language in the statutes (section 4 of the Clayton Act and Chapter 75) is broad and unrestricted, it covers any and every arguable injury flowing from an antitrust violation. [FN10] In rejecting a limitless interpretation of the language the Supreme Court said:

> FN10. *See* Pl.'s Opp'n Defs.' Mot. Dismiss at 8-9 in *Morris;* Pl.'s Mem. Opp'n Defs.' Mot. Dismiss at 4-9 in *Crouch.*

> *9 A literal reading of the statute is broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation. Some of our prior cases have paraphrased the statute in an equally expansive way. But before we hold that the statute is as broad as its words suggest, we must consider whether Congress intended such an open-ended meaning. *AGC,* 459 U.S. at 530 (footnote omitted).

{40} The Court then went on to hold:

> As this Court has observed, the lower federal courts have been "virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Hawaii v. Standard Oil Co.,* 405 U.S. 251, 263, n. 14, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972). Just last Term we stated:
>
> An antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy; but "despite the broad wording of § 4 there is a point beyond which the wrongdoer should not be held liable." [*Illinois Brick Co. v. Illinois,* 431 U.S.], at 760 (BRENNAN, J. dissenting). It is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property. *Blue Shield of Virginia v. McCready,* 457 U.S. 465, 476-477, 102 S.Ct. 2540, 73 L.Ed.2d 149 (1982).
>
> *Id.* at 534-35.

{41} The Supreme Court found that there was no single bright line test that could be applied in determining standing. Rather, it required federal judges to evaluate the plaintiff's harm, the alleged wrongdoing by the defendant and the relationship between the two according to five factors. The five factors to be used by federal courts in determining standing as set forth in *AGC* are: (1) whether the plaintiff is a consumer or competitor in the allegedly restrained market, (2) whether the injury alleged is direct and a first hand product of the restraint alleged, (3) whether there exists more directly injured parties with motivation to sue, (4) whether the damage claims are speculative and (5) whether the claims (a) risk duplicative recovery and (b) would require a complex apportionment of damages.

{42} The holding in *AGC* has been followed consistently in the federal courts. *See, Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.,* 828 F.2d 211, 219 (4th Cir.1987) (affirming dismissal because "though there obviously is a causal relation between the conduct and harm as alleged, it is remote rather than direct"); *Eagle v. Star-Kist Foods, Inc.,* 812 F.2d 538, 539-43 (9th Cir.1987) (affirming dismissal because plaintiffs "were neither consumers nor competitors in the relevant market," who alleged injuries derivative of others who also had sued

defendants); *Henke Enters., Inc. v. Hy-Vee Food Stores, Inc.*, 749 F.2d 488, 489-90 (8th Cir.1984) (affirming dismissal because plaintiff "was neither a competitor, participant, nor consumer within the [allegedly restrained] market" and its alleged injury was "an incidental by-product of the conspirators' claimed anticompetitive action"). Viewed in the broader context of standing enunciated in *AGC*, *Illinois Brick* appears as a per se disqualification of indirect purchasers in price fixing cases under application of factors 2, 3 and 5. *Illinois Brick* and *AGC* are logically consistent.

***10** {43} If *Hyde* is correct that the North Carolina statute created indirect purchaser standing and if the courts of this state are required to interpret our antitrust statutes consistently with federal law [FN11], reconciling *Illinois Brick* and *AGC* in this state requires that factor 3 be modified and that the application of factors 2 and 5 be limited by the statutory recognition of indirect purchaser claims. The courts of this state may not deny standing based upon *Illinois Brick* but must still determine standing based upon relevant factors.

> FN11. *See infra* ¶ 49; N.C.G.S. § 75-1 (1999); Act of June 3, 1996, ch. 550, 1995 N.C. Sess. Laws 550 (titled "An Act to Revise the Statutes Regarding Antitrust Law to Ensure That These Provisions are Internally Consistent and Consistent with Federal Antitrust Laws").

{44} "Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 115 N.C.App. 110, 113, 574 S.E.2d 48, 51 (2002) (*quoting Aubin v. Susi*, 149 N.C.App. 320, 324, 560 S.E.2d 875, 878 (2002)). "The term ['standing'] refers to whether a party has a sufficient stake in an otherwise justiciable controversy so as to properly seek adjudication of the matter." *Neuse River Found.*, 115 N.C.App. at 114, 574 S.E.2d at 51-52 (*quoting Sierra Club v. Morton*, 405 U.S. 727, 731-32, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972)). Standing consists of three elements:

> (1) "injury in fact"--an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is *fairly traceable* to the challenged action of the defendant; and (3) it is *likely, as opposed to merely speculative,* that the injury will be redressed by a favorable decision.

Neuse River Found., 155 N.C.App. at 114, 574 S.E.2d at 52 (*quoting Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)) (emphasis added).

"The gist of standing is whether there is a justiciable controversy being litigated among adverse parties with substantial interest affected so as to bring forth a clear articulation of the issues before the court." *Street v. Smart Corp.*, 157 N.C.App. 303, 305-06, 578 S.E.2d 695, 698 (2003) (*quoting Texfi Industries v. City of Fayetteville*, 44 N.C.App. 268, 269-70, 261 S.E.2d 21, 23 (1979), *aff'd*, 301 N.C. 1, 269 S.E.2d 142 (1980)). "Standing most often turns on whether the party has alleged 'injury in fact' in light of the applicable statutes or caselaw." *Neuse River Found.*, 115 N.C.App. at 114, 574 S.E.2d at 52.

V.

{45} The federal law and the issue of preemption of state antitrust laws by federal law being clear, the Court turns to a review of the North Carolina experience in indirect purchaser cases.

A.

{46} That review begins with the statute and its history. The only appellate decision interpreting the statute is *Hyde v. Abbott Laboratories, Inc.*, 123 N.C.App. 572, 473 S.E.2d 680 (1996), *disc. rev. denied*, 344 N.C. 734, 478 S.E.2d 5 (1996). As this Court has previously noted:

> The *Hyde* decision is the only North Carolina appellate decision dealing with indirect purchaser standing. That case was settled after the Court of Appeal's decision and before review by the North Carolina Supreme Court. In *Hyde,* plaintiffs filed a class action against manufacturers of infant formula, alleging violations of North Carolina's antitrust laws. 123 N.C.App. at 573, 473 S.E.2d at 681. The purported class consisted of ultimate consumers who purchased infant formula from parties other than the manufacturer. *Id.* at 574, 473 S.E.2d at 681-82. The defendants filed a motion to dismiss alleging that plaintiffs were indirect purchasers and therefore lacked standing to sue under N.C.G.S. § 75-16. *Id.* The Superior Court granted the motion to dismiss, and plaintiffs appealed. *Id.*

***11** The Court of Appeals reversed the Superior Court and found that under North Carolina's antitrust statute, an indirect purchaser may sue a manufacturer for antitrust violations. The Court of Appeals based this finding upon a review of the plain language of N.C.G.S. § 75-16. North Carolina's antitrust 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 done, and if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict. N.C.G.S. § 75-16 (1999).

The current version of N.C.G.S. § 75-16 was amended in 1969. Prior to the amendment, the first sentence of the provision began: "If the business of any person, firm, or corporation shall be broken up...." 1913 N.C. Sess. L. 66, 70. The *Hyde* court found it significant that, in amending the statute, the legislature decided to add the phrase "if *any person* shall be injured" to the beginning of the provision. 123 N.C.App. at 578, 473 S.E.2d at 684. The court found that this evidenced an intent to expand the class of persons with standing to sue under Chapter 75, and thus provide a recovery "for all consumers," including indirect purchasers. *Id.* at 577-78, 473 S.E.2d at 684. A review of the legislative history also leads to the conclusion that the General Assembly intended to create indirect purchaser standing to sue under the state antitrust laws when it amended the statute. There is simply no logical reason for the amendment other than the creation of indirect purchaser standing.

In holding that indirect purchasers have standing to sue under North Carolina antitrust law, the Court of Appeals specifically declined to interpret the statute consistent with federal antitrust law. As originally enacted in 1913, the North Carolina antitrust statute was modeled after federal antitrust law, codified as Section 7 of the Sherman Act. *See* An Act to Declare Illegal Trusts and Combinations in Restraint of Trade, Ch. 41, § 14, 1913 Sess. Laws 66. Section 7 of the Sherman Act was recodified as Section 4 of the Clayton Act. Both federal and state law have been amended throughout the years; however, the language of the North Carolina statute has remained similar to the language of the Clayton Act.

Bruggers v. Eastman Kodak Co., 2000 NCBC 3, at ¶ ¶ 5-8 (No. 97CVS11278, Wake County Super. Ct. March 17, 2000) (Tennille, J.).

{47} This Court has previously held that unless and until *Hyde* is overruled by the Supreme Court or new legislation is passed, this Court is bound by the decision in *Hyde* to the extent that it holds that indirect purchasers have standing under the North Carolina antitrust laws. *See, Bruggers*, 2000 NCBC 3, at ¶ 17; *Adams*, 2003 NCBC 7, at ¶ 8; *MJM Investigations, Inc. v. Microsoft Corp.* (No. 00CVS4073, Wake County Super. Ct.; No. 00CVS1246, Lincoln County Super. Ct., N.C. Aug. 2, 2004) (Tennille, J.) (Order Approving Settlement). In *Hyde*, the Court of Appeals was only asked to consider the question of whether the statute provided indirect purchaser standing. It was not called upon to delineate the scope and breadth of standing under the statute.

***12** {48} Since *Hyde* was briefed and argued there have been several developments which might have impacted the scope, if not the actual outcome, of that decision. Those developments demonstrate that the landscape upon which these types of claims are viewed has changed significantly since *Hyde* was decided.

{49} First, in June 1996 the General Assembly ratified a bill entitled "An Act to Revise the Statutes Regarding Antitrust Law to Ensure That These Provisions Are Internally Consistent and Consistent With Federal Antitrust Laws." Act of June 3, 1996, ch. 550, 1995 N.C. Sess. Laws 550 ("1996 amendments"). That legislative history is important for two reasons. First, if the General Assembly had desired to change the statute to provide for an *Illinois Brick/Hanover Shoe* limitation, it could have done so then. It did not, and it has done nothing to change the law since the *Hyde* decision. Second, and equally important, the General Assembly signaled a clear intent for the state courts to follow federal decisional guidance in interpreting and enforcing state antitrust laws. Clearly, counsel for the parties did not bring the 1996 amendments to the attention of the *Hyde* court. [FN12] The statutory direction to follow federal guidance has a bearing on this Court's decisions in these two cases, requiring the Court to reconcile the indirect purchaser standing statute with the federal standing requirements enunciated in *AGC*.

> FN12. The *Hyde* court held: "Unlike Texas, our General Assembly has not mandated that our antitrust laws be construed in harmony with federal antitrust laws." 123 N.C.App. at 581, 473 S.E.2d at 686.

{50} Second, a track record is available which provides information not available to the *Hyde* court. [FN13] The track record to date establishes that state indirect purchaser cases are generally parasitic. They are not self-generating or supporting but almost always are dependent on some triggering federal action for their genesis. The track record also

establishes that these cases pose significantly complex proof issues both as to damages and liability. [FN14] The track record establishes that they can in fact result in double recovery. [FN15] That same track record discloses that these types of cases are difficult to administer from a settlement standpoint and that the complexities and administrative costs and difficulties result in settlements that are something less than sterling from the consumer's point of view. [FN16] None of that information was available to the court in *Hyde*. This Court has previously pointed out the problems with settlement of these kinds of cases. In approving the *Microsoft* indirect purchaser class action settlement, the Court noted:

> FN13. *See* discussion *infra* Part V.B (describing the indirect purchaser litigation since *Hyde* was decided).
>
> FN14. The *Hyde* court specifically found that there were no complex damage or proof issues before it and further held that there was nothing in the record in that case to establish that other cases would pose difficult damage and administrative issues. The *Hyde* court said:
> It is clear that a suit by indirect purchasers under our antitrust laws will be complex. However, when asked at oral argument whether "chaos reigned" in states which have allowed indirect purchaser suits, defendants were unable to cite a single example. This failure to cite a single indirect purchaser case in which a court has been faced with an impossible complex situation counsels us that a fear of complexity is not a sufficient reason to disallow a suit by an indirect purchaser....
> 123 N.C.App. at 584, 473 S.E.2d at 687-88.
> The facts in *Hyde* presented a fairly simple case. The product was a commodity which was not altered or incorporated in another product in the distribution chain, and the price fixing took place at the wholesale level, only one level removed from the consumer. Direct impact on the consumer and pass through were not difficult issues to prove. The question of whether the fixed price was absorbed by the consumer was not difficult. The complexity presented by *Morris* and *Crouch* differs dramatically from *Hyde*.
>
> FN15. The *Hyde* court found: "However, there are few, if any, reported instances of a defendant paying treble damages to two different classes of purchasers based on a single antitrust violation." 123 N.C.App. at 583, 473 S.E.2d at 687. In *Crouch*, plaintiffs seek to recover the same damages for which direct purchasers such as tire companies may seek treble damages. In *Morris*, defendants have already agreed to a multibillion dollar settlement with the direct purchaser class. In *Bruggers*, the class recovered for the same offenses which were the subject of federal direct purchaser actions. Likewise, in *Microsoft*, the plaintiffs recovered on the same claims which were asserted by direct purchasers. The problems recognized with possible double recovery are obvious.
>
> FN16. The settlements in *Long v. Abbott Laboratories*, 1999 NCBC 10 (No. 97CVS8289, Mecklenburg County Super. Ct. July 30, 1999) (Tennille, J.), *Bruggers* and *Microsoft* demonstrate the difficulties inherent in consumer class action cases. *Long* was a *cy pres* settlement that provided no benefit to the class. *Bruggers* resulted in a settlement that went to class members under a cumbersome administrative process which did not likely reach anything more than a small minority of the class. *Microsoft* is a classic example of the complex administrative problems that can be created. It will likely result in primarily a *cy pres* settlement. All of these cases fit the forecast of difficulties made by Landes and Posner in their article. *See supra* note 3.

There is no definitive decision from the North Carolina Supreme Court ruling upon the issue of indirect purchaser standing in North Carolina, nor is there a clear legislative history. Accordingly, every plaintiff argues that there is indirect purchaser standing, and every defendant argues that there is no standing under North Carolina law. The stakes are almost always too high for either side to risk trial and an appeal. Further, numerous issues flowing from indirect purchaser standing remain unanswered. For example, who has the burden of proof on pass-through issues, and what must be shown? How indirect can the purchaser be? Who has the burden of showing that an indirect purchaser did not pass through the price increase to another consumer? Are there reliable means to determine pass through and the amount thereof?

The answers to these questions dramatically affect liability and the potential for recovery. It is no surprise that neither plaintiffs lawyers nor defendants have wished to incur the expense of trial and appeal which would be necessarily incurred in getting the answers to these questions. It is likely that more than one trial would be required to get all the required answers.

***13** Additionally, there were significant questions concerning the application of the law of damages and how damages were to be determined in this case. The federal case which spawned this and other indirect purchaser cases was not a price fixing case. It involved anticompetitive behavior and not price fixing. The cost of Microsoft products at issue had decreased relatively speaking over the time in question. While there had been a determination in the federal action that Microsoft had a monopoly, there was no finding that it had used that monopoly to artificially increase prices. Proving damages by pass through of artificially inflated prices would have raised numerous novel questions of law. Proving damages to indirect purchasers by anticompetitive actions (which may have included artificially deflated prices) would raise a whole host of other issues for which there is no statutory or case law guidance.

In short, the process of trying this case and going through an appeal and possible retrial meant that the case would not be finally resolved for at least four or five years. Final judgment would have been entered some ten years after the alleged damages were incurred. For reasons explained more fully below, that time lag was a significant issue.

While there is a possible philosophical argument that this uncertainty has a salutary effect in promoting settlement of cases, this court does not believe it is the function of the law to create ambiguity and uncertainty. If consumers have a cause of action they should be entitled to full recovery, not a compromise amount. On the other hand, if no cause of action exists or damages are limited to direct pass through of artificially inflated prices, businesses ought not to have to pay for unfounded claims even if they are compromised. Under the present system, only the lawyers really benefit from the uncertainty. One of their clients is paying an unnecessary price.

....

Two factors are critical to the Court's decision to approve the terms of this settlement affecting purchasers of Microsoft products--timing and purchaser identification. Most indirect purchaser cases involve common problems--how to identify the class members and distribute small amounts of money to them. This case is no different. Plaintiff's counsel and Microsoft have represented to the Court that a means of identifying all consumers who purchased the software at issue does not exist and cannot be created. Thus, there will be a claim process of some sort no matter the outcome of settlement or trial. As counsel for one of the interveners has suggested, even in cash refund cases, the claims process is abysmally ineffective, with only single-digit percentages of potential beneficiaries making claims. It thus appears to the Court that there will have to be a claims process no matter the outcome. If the case were tried and some amount awarded for damages to purchasers of specific products, a mechanism would have to be put in place for identification of products purchased, claims and payment. If that process were to be put in place three to five years from now and it covered products purchased in the late 1990s, it is unlikely that the claims process would result in any significant payout. Most of these technology products will have been replaced well before any claims process begins. If the funds were not paid out, Microsoft would get to keep the money. Purchasers would be required to prove purchases which occurred many years before the claim process begins. That will be difficult enough now, and perhaps impossible years from now. Settlement now, while there is some prospect that purchasers will have records of their purchases, is far more beneficial to the class. Here, most of the purchasers are businesses that arguably have better records of their purchases. For consumers, the settlement has the benefit of not requiring proof of purchase for smaller claims. The combination of the more current claim process and the *cy pres* component of the settlement make acceptance of the coupon aspect of the settlement acceptable, even if it is not the most desirable process. Given the rapid advancements in technology, it is also likely that computer owners will make purchases of new hardware and software, making the coupons more valuable than they would be for products not likely to be replaced.

***14** *MJM Investigations, Inc. v. Microsoft Corp.* (No. 00CVS4073, Wake County Super. Ct.; No. 00CVS1246, Lincoln County Super. Ct., N.C. Aug. 2, 2004) (Tennille, J.) (Order Approving Settlement).

{51} Third, there are cases from other indirect purchaser states which provide some guidance with respect to limitations on standing. The case law has evolved from interpretations of state statutes to determine if they provide for indirect purchaser standing (as happened in *Hyde*) to a more detailed

examination of standing requirements. Not unexpectedly, the far reaches of the claims against Visa and MasterCard in the various indirect purchaser states have prompted some of that evolution.

{52} At least eight other courts have rejected standing for plaintiffs with claims identical to those presented in the *Morris* case. Each of those states recognizes indirect purchaser claims. In South Dakota the court simply dismissed the case without detailed explanation. [FN17] In North Dakota the plaintiff's case was dismissed with the holding: "As 'non-purchasers' of defendants' debit card services to merchants, the Court believes that plaintiffs lack standing to sue for the alleged restraint of trade in such services. Their alleged injury is simply too remote." [FN18]

FN17. *Cornelison v. Visa U.S.A., Inc.*, Civ. No. 03-1350 (Pennington County Cir. Ct., S.D. Sept. 29, 2004).

FN18. *Beckler v. Visa U.S.A., Inc.*, Civ. No. 09-04-C-00030, at 5 (Cass County Dist. Ct., N.D. Aug. 23, 2004).

{53} In Michigan [FN19] the trial court applied the five *AGC* factors directly in dismissing similar claims, finding that each failed to support standing. Significantly, the Michigan court rejected an argument similar to that made by plaintiffs in these two cases that the broad language of the state statute trumped application of the *AGC* factors. In addition, the court found that plaintiff was not an indirect purchaser under the statute.

FN19. *Stark v. Visa U.S.A., Inc.*, No. 03-055030-CZ (Oakland County Cir. Ct., Mich. July 23, 2004).

{54} In Minnesota the courts have also applied *AGC* factors in determining standing for indirect purchasers even though *Illinois Brick* was not applied to preclude indirect purchaser claims. In a well-reasoned opinion in the *Gutzmiller* [FN20] case, the court applied factors 1, 4 and 5 under *AGC* in denying standing to plaintiffs under the Minnesota statute, which is similar to North Carolina's antitrust law.

FN20. *Gutzwiller v. Visa U.S.A., Inc.*, No. 14-C4-04-000058 (Clay County Dist. Ct., Minn. Sept. 15, 2004).

{55} In New York, the Commercial Court in *Ho* [FN21] rejected standing for plaintiffs under circumstances identical to the *Morris* case. The court applied several of the *AGC* factors in determining that the plaintiffs lacked standing under New York antitrust laws.

FN21. *Ho v. Visa U.S.A., Inc.*, No. 112316/00, 2004 N.Y. Misc. LEXIS 577 (New York County Super. Ct., N.Y. Apr. 21, 2004).

{56} In California the trial judge hearing the consolidated cases against Visa and MasterCard dismissed all the claims arising under the Cartwright Act, Cal. Bus. & . Prof.Code § 16720, *et seq.*, applying the *AGC* factors to find no standing. The court also held that plaintiffs were neither direct nor indirect purchasers of card services. [FN22]

FN22. Credit/Debit Card Tying Cases, No. CJC-03-004335 (City and County of San Francisco Super. Ct., Cal. Oct. 14, 2004).

{57} In Nebraska, the trial court applied the five *AGC* factors in dismissing the identical claims by plaintiff. Specifically, the court held that the plaintiff failed to satisfy factors 2 and 3 under *AGC*. The court also held that the plaintiff was not an indirect purchaser within the scope of the state statute, which expressly grants standing to indirect purchasers. [FN23]

FN23. *Tackitt v. Visa U.S.A., Inc.*, No. C103-740 (Lincoln County Dist. Ct., Neb. Oct. 19, 2004).

***15** {58} In Maine the trial court rejected standing for the plaintiffs under an application of the *AGC* factors. The court held that factors 3, 4 and 5 particularly weighed against standing. [FN24]

FN24. *Knowles v. Visa U.S.A. Inc.*, No. CV-03-707 (Cumberland County Super. Ct., Me. Oct. 20, 2004).

{59} In Superior Court in Buncombe County, North Carolina, Judge Dennis Winner dismissed the plaintiff's indirect purchaser claim, which was virtually identical to the claim in *Crouch*, stating:

> It is the opinion of the undersigned that notwithstanding the enactment of the amendment in 1996, the *Hyde* decision is still the law of this State with respect to the issue of suit by an indirect purchaser. Nevertheless, this Court believes that

the General Assembly never intended that the antitrust laws of this State be used in the manner in which the Plaintiff has attempted in this case, and that this case is therefore distinguishable from the *Hyde* case. To rule otherwise would put this Court in an impossible position of attempting to determine whether the alleged price-fixing by an oligopoly of an ingredient used to make tires had anything to do with the price paid by the Plaintiff when he bought the tires. This Court believes that without some allegation and proof that the tire manufacturers themselves were an oligopoly and were fixing prices, that it would be impossible to show the price the Plaintiff paid was not set by the normal laws of supply and demand in our open economic system, and that even if it were possible to show that, there would be no way for the Court to, in any fair or just way, determine an amount the Plaintiff was damaged.

Therefore, it is the opinion of this Court that the General Assembly could not have intended that our Antitrust Statue be used by an indirect purchaser of tires against the manufacturers of an ingredient placed in those tires.

Weaver v. Cabot Corp., No. 03CVS04760 (Buncombe County Super. Ct., N.C. Mar. 29, 2004) (Winner, J).

B.

{60} A review of indirect purchaser cases in North Carolina is informative. The Court does not believe the North Carolina experience differs substantially from the national experience. State indirect purchaser cases have common characteristics. They are seldom *sui generis*. More commonly they originate after a federal triggering event. Those triggering events include a guilty plea to federal price fixing, a class action suit by direct purchasers, or notice of a settlement of antitrust claims with private plaintiffs or the Department of Justice. *Morris* is an excellent example. Sometimes only the announcement in an SEC filing that there is an investigation underway will trigger suit. The *Crouch* case is an excellent example. Almost all of the cases are brought as class actions. [FN25] Discovery tracks the federal action permitting class counsel to piggyback on the work of the government or counsel for the direct purchasers. Both plaintiffs and defendants have a vested interest in seeing the federal action proceed first. Cases are filed in most if not all states having indirect purchaser standing, frequently by the same lawyers. The cases are seldom, if ever, tried. They get settled far short of trial. [FN26] Often and not unexpectedly, the settlements in the various indirect purchaser standing states track each other closely. The *Microsoft* case is an excellent example. Sometimes the state and federal actions are settled together. [FN27] The Court is unaware of any case in which the settlement reflected treble damages. Rather, most settlements are less than a whole recovery of the alleged overcharge and are not particularly satisfying from the perspective of the consumer class member. *Cy pres* settlements are not uncommon since the difficulties inherent in distributing tiny amounts among large numbers of consumers are daunting and expensive. The settlement in *Long v. Abbott Laboratories*, 1999 NCBC 10 (No. 97CVS8289, Mecklenburg County Super. Ct. July 30, 1999)(Tennille, J.) is an excellent example. The North Carolina cases mirror the national characteristics.

FN25. The *Adams* case is an exception. In that case the plaintiffs were individual hog farmers who opted out of a class action settlement that they believed was disadvantageous.

FN26. The reasons for settlement are aptly described in the ABA Report of Indirect Purchaser Cases at *supra* ¶ 33.

FN27. See the settlements in *Adams*, and *Thai Holding v. Archer Daniels Midland Co.* (No. 03CVS15096, Mecklenburg County Super. Ct ., N.C. Aug. 24, 2004) (Tennille, J.) (Order Staying Action).

***16** {61} This Court has presided over a number of class action settlements involving indirect purchaser claims, beginning with *Long v. Abbott Laboratories*. That case is instructive for a number of reasons. It was parasitic in the sense that it was filed after a federal direct purchaser antitrust case was filed and discovery consisted of following discovery in the federal case. Similar cases were filed in ten other states by the same counsel appearing in North Carolina. Fortunately for the plaintiffs, a class action settlement of the various state claims was reached prior to trial of the federal action. The federal case was decided adverse to the plaintiffs, and no antitrust violations were found. Since a settlement agreement had been reached, it was enforced. The agreement provided for a settlement fund of approximately $9 million for North Carolina residents of which class counsel sought approximately twenty-five percent. [FN28] Since the settlement could not be distributed to the class, which consisted of all North Carolinians who purchased a prescription drug at a retail drugstore, a *cy pres* fund for people who could not

afford their medications was created. Class members received nothing, and the defendants [FN29] paid a cost of litigation settlement although no underlying claim was ever proved.

FN28. The court reduced the request to approximately ten percent based on the poor results for the class.

FN29. Twenty three of the largest drug companies in the world.

{62} In *Bruggers,* the state claim was filed after federal triggering events, including a federal action. 2000 NCBC 3, at ¶ 15. Claims were filed in other indirect purchaser states. [FN30] The defendants were alleged to have fixed the price of x-ray film. The class consisted of all consumers of x-ray film in North Carolina. The problems created by the great variety of purchasers and the number of distribution chains made settlement difficult. In the end, a settlement fund of approximately $200,000 was created and divided among claimants on a two fund basis. One fund went to purchasers based upon the pro rata amount of film they purchased and the other fund provided one lump sum payment to anyone who filed a claim, determined per capita based on the number of claims. In total, 116 claimants sought recovery through the settlement fund. However, only 100 claims were found valid. Potential claimants numbered in the thousands. In this instance, money actually went to class members although the payment was small and the cost of administration high. Class counsel sought and obtained a reasonable fee based upon the amount recovered for the class. Counsel for both sides urged the Court to approve the settlement based upon the uncertain state of the law in North Carolina and the difficulty of proof involving so many different purchasers and distribution methods. The pass through issues were extremely difficult, including questions of whether hospitals absorbed the cost or passed it on to patients and insurance companies and whether the dentist or patient ended up paying the cost for dental x-ray film. The Court is convinced that the vast majority of class members declined to take advantage of the settlement because the dollar amount was not worth the effort required by the claims process.

FN30. The original complaint sought a nationwide class consisting of residents of all states which had indirect purchaser standing. The complaint was amended to limit the claims to North Carolina.

***17** {63} The Court's most recent experience has been in the settlement of indirect purchaser claims against Microsoft. [FN31] Again, the action was filed after a federal triggering event, the determination in the government's federal case of abuse of monopoly power by Microsoft. Lawsuits were filed in numerous states and discovery coordinated with federal actions by direct purchasers. The direct purchasers recovered little in the federal action, and their counsel intervened in the state actions to try to obtain some of the attorney fees in the state actions even though they had no agreements with local counsel and had made no appearances in the cases. The settlement was complicated and had a significant *cy pres* component. [FN32] Counsel for the plaintiffs and Microsoft urged approval of the settlement over significant objections based in part on the complicated proof of damages and the uncertain state of the North Carolina law. Like *Morris,* that case did not involve allegations of price fixing among competitors.

FN31. *MJM Investigations, Inc. v. Microsoft Corp.* (No. 00CVS4073, Wake County Super. Ct.; No. 00CVS1246, Lincoln County Super. Ct., N.C. Aug. 2, 2004) (Tennille, J.) (Order Approving Settlement).

FN32. See the description at *supra* ¶ 50.

{64} The Court is aware of other cases in this state. A class action settlement was approved in an alleged price fixing scheme involving vitamins. Those cases followed guilty pleas to federal criminal charges. That case was not before this Court, but a number of large hog farmers opted out of what they believed was an inadequate class settlement and filed their own indirect purchaser actions. This Court ruled that they had standing. [FN33] The defendants declined the Court's suggestion to seek appellate review of that decision, and those cases have settled without necessity of court approval since they were individual and not class actions. Another case involving price fixing of monosodium glutamate products has been stayed in this Court pending a global settlement covering the federal claims and all state indirect purchaser claims. [FN34] Such settlements are preferable, but rare. They produce a more rational allocation of the liability fund.

FN33. *Adams,* 2003 NCBC 7, at ¶ 31.

FN34. *Thai Holding v. Archer Daniels Midland Co.* (No. 03CVS15096, Mecklenburg County Super. Ct., N.C. Aug. 24, 2004) (Tennille, J.) (Order Staying

Action).

{65} The Court is not aware of any North Carolina class action that did not have a federal triggering event. The Court is not aware of any indirect purchaser case in North Carolina that has proceeded to trial, presumably because there is a federal triggering event establishing liability. In each case before this Court, the argument is made that the case must be compromised because the proof of damages is difficult and uncertain. Such arguments lead to a question of whether standing is appropriate. Settlements are to be encouraged, but they should have some basis in reality, and class counsel should be prepared to show the court more than the simple fact that the issues are difficult. That preparation undoubtedly requires some time and expense on the part of class counsel. Some investigation before rushing to the courthouse after a federal triggering event might generate better results or prevent dismissal on a challenge to standing.

VI.

{66} The following policy considerations are relevant in deciding the standing requirements in indirect purchaser cases in North Carolina.

***18** {67} If *Hyde* is correct, the General Assembly intended for persons *actually* injured to be able to recover for injuries resulting from violations of the state antitrust laws.

{68} The General Assembly has directed the state courts to follow federal guidelines in determining standing.

{69} There is already an adequate deterrent to violation of the antitrust laws in the federal system. Accordingly, the focus of state law should be recovery for those *actually* injured: i.e., victim compensation.

{70} State indirect purchaser standing creates the prospect of double recovery, both as between direct and indirect purchasers and between indirect purchasers at different levels in the distribution chain. Double recovery is not favored, and where, as here, it is permitted between direct and indirect purchasers, it should be narrowly construed to ameliorate the adverse consequences.

{71} Indirect purchaser cases are expensive, inefficient and low-yield for consumers. The cost of obtaining information relevant to pass through of added costs from antitrust violations and investigating the pricing decisions made in the distribution chain is high. Apportionment among various tiers in the distribution chain involves extremely difficult problems of economic analysis and measurement. The practical difficulties of estimating both supply and demand elasticity at any one level and then over and among multiple tiers in the distribution chain results in speculative damage estimates. From an economics perspective, indirect purchasers face negligible price increases in comparison to direct purchasers.[FN35] Apportionment results in added cost of litigation and uncertainty. The actual recovery for class members in consumer class actions is relatively small and is frequently outweighed by the cost of administration and attorney fees. The yield is low given the potential expense of litigation. That is one explanation for the settlements which do not reflect actual injury as much as the costs of litigation.

FN35. *See* Landes and Posner, *supra* note 3, at 617.

{72} There is no single bright line test that works in every case. Each standing case must be decided based on its own factual situation.

{73} Given those policy considerations, the decision of the Court of Appeals in *Hyde,* the developments since *Hyde,* the history of the amendment of the statute and the subsequent directions from the General Assembly to follow federal guidelines, and the clear federal approach to standing, the Court believes that the North Carolina courts would apply a multifactor test to determine standing in indirect purchaser cases. The requirements would recognize indirect purchaser standing, but engraft upon the statute the requirements of standing enunciated in *AGC,* modified to recognize the right to recover for injury created by statute for indirect purchasers. The factors would include:

1. *Whether the plaintiff is a consumer or competitor in the allegedly restrained market.* This inquiry focuses on the market the alleged restraint was designed to impact and the intent of the actor in engaging in the restraint. One key question is whether the plaintiff claims injury in a market collateral to the market in which the alleged restraint took place. This factor recognizes that the antitrust laws are designed to see that customers in the relevant market get the benefit of price competition. This factor would have supported standing in *Hyde.*

***19** 2. *The directness of the impact on the plaintiff.* This factor is modified to eliminate the restriction

of *Illinois Brick* against indirect purchaser standing. Being an indirect purchaser does not preclude standing. However, the causal connection between the act and the claimed injury cannot be too remote. Purchasers in the direct chain of distribution are more likely to be able to show sufficiently direct injury than those outside the chain of distribution. Purchasers who buy the product which is the subject of the restraint are more likely to be able to show sufficiently direct injury than those who purchase a product with a component which is the subject of the restraint. Purchasers of products whose manufacture was impacted by the restraint face significant hurdles showing sufficiently direct impact. Within the chain of distribution, the relative positions of the purchaser and the actor can be significant, depending on the length and complexity of the distribution chain. Even though a purchaser is removed from the direct restraint, he or she may still show direct injury. *See* Blue Shield of Va. v. McCready, 457 U.S. 465, 478-81, 102 S.Ct. 2540, 73 L.Ed.2d 149 (1982). This factor would have supported standing in *Hyde*.

3. *Whether there exist other indirect purchasers in the distribution chain who are more directly impacted by the alleged violation.* The nature of the market is significant here. Courts must look at the nature of the product and the market for the product as well as the chain of distribution to determine the likelihood of direct pass through of the cost of the restraint or inflated price. The nature of the restraint must also be considered. Double recovery among indirect purchasers should be avoided. This factor would have supported standing in *Hyde* where the distribution chain was short.

4. *The speculative nature of the damage claims.* As damage claims move from direct to indirect and the distribution chain becomes more complex, the possibility of factors intervening to affect causation and price multiplies, and claims become more speculative. It is appropriate for purposes of determining indirect purchaser standing "to consider whether a claim rests at bottom on some abstract conception or speculative measure of harm." McCready, 457 U.S. at 475 n. 11. In *McGready* the Court noted that the courts were required to be cautious when dealing with speculative, abstract and impractical damage theories. *Id.* This factor would not have prevented standing in *Hyde*. This factor focuses on sound economic analysis. Important factors would include reliable demand and supply curve studies and sufficient regression analysis to eliminate other factors in pricing.

5. *The risk of duplicative recovery and danger of complex apportionment of damages.* While these factors are limited by the General Assembly's creation of indirect purchaser standing, they should not be totally eliminated when considering the state claims. The courts still have the same interest in keeping the scope of a complex antitrust trial within judicially manageable limits. AGC, 459 U.S. at 543. The factors are simply taken down a level and the *Hanover Shoe/Illinois Brick* restrictions eliminated. State cases may present apportionment issues which are simply too complex and for which there exists no measure of recovery which is not speculative. It is clear that the General Assembly did not intend that every purchaser in the distribution chain have a right of recovery or that there be duplicative recovery among indirect purchasers. Such an interpretation would be contrary to the clear guidance to follow federal precedent and harmonize state antitrust law with federal law. Rather, it should be clear that the General Assembly intended that those who can show with some degree of certainty that they were directly impacted by the alleged acts in restraint of trade should be able to recover even though they are indirect purchasers. The courts must be cognizant that the problems between direct and indirect purchaser cases replicate themselves in state indirect purchaser cases where there are multiple levels in the distribution chain and multiple distribution chains. There should only be one fund constituting the amount of the alleged overcharge to North Carolina residents, and the courts must guard against multiple liability for the fund and prejudice to absent victims or non-class members. The complexity of the distribution chain and the variety of consumers in *Bruggers* highlight the issues this factor would implicate. As the Supreme Court noted in *AGC* and *Illinois Brick*, massive and complex damages litigation undermines the effectiveness of treble damage suits. The poor results obtained in settlement in the North Carolina cases confirms this view.

***20** {74} There is no bright line test: each situation must be considered on its facts and the factors applied. Different factors might be important in different cases. Accordingly, the Court turns to the application of those factors to these two cases.

VII.

A. The *Crouch* Case

{75} The Court's analysis is premised on the underlying proposition that defendants have engaged in illegal price fixing in the market for rubber

chemicals.

{76} Both Crompton and Bayer have pled guilty to conspiring to fix prices and suppress competition in the sale of certain rubber compounds and chemicals. On October 13, 2004, the Associated Press reported that Bayer pled guilty to a criminal charge involving a rubber compound used in hoses, belts, seals, adhesives and sealants. Crompton pled guilty in Canada to fixing prices on chemicals used in the manufacture of tire-quality rubber and non-tire applications such as automobile parts, conveyor belts, weather stripping and rubber latex gloves from July 1995 to 2001. Certain of the findings in the Agreed Statements of Facts in the *Crompton* plea agreement are instructive. It states:

> On a commercial basis, rubber chemicals are produced synthetically through highly sophisticated processes. It is apparent that rubber chemicals are now a commodity product and over capacity in the industry has been a constant restraint upon profitable operation and re-investment. Rubber chemicals are significant in the production of useable modern rubber products, principally tires. There are no practical or reasonable economic substitutes to certain rubber chemicals which are the subject of this proceeding, although innovation in both application and production does from time to time cause some products to be superseded. The accused and its co-conspirators are best situated from the perspective of size, experience and incentive to participate in such developments. Based upon facts obtained by the Commissioner, which Crompton is not aware of but does not contest for the purposes of this proceeding, rubber chemicals are said to constitute about 1% of the value of finished tires, they are a practical sine qua non to the manufacture of over $2 billion worth of tires produced in Canada annually. An additional approximately 30% of rubber chemical sales are devoted to non-tire uses in various automobile parts, surgical gloves and other commercial, industrial and health applications.
>
> The rubber chemical producers identified above manufactured and/or sold the substantial majority of the rubber chemicals that were sold or distributed in Canada during the period of the offence for use in the tire, automobile parts, industrial applications and health industries. Indeed a significant amount (approaching 50% in some instances) of the rubber chemicals manufactured in Canada are exported. Each of the above referred to entities participate, to varying degrees, in the globally organized tire manufacturing industry. The principal Tire Producers buy centrally (not in Canada) for delivery to their regional production facilities. The rubber chemical producers in turn organize their delivery logistics to best meet customer demands and their own production facilities. There is a significant buyer power within the tire-destined rubber chemical business.
>
> ***21** ....
>
> It is a matter of some debate between Crompton and the Commissioner as to the quantum of commerce affected by the illegal activity herein referred to. This requires specifically a consideration of the "lasting effect" of various price increases on certain specific rubber chemicals. This analysis however, given the prevailing conditions in the market, does not give credit to the fact that price increases may not have been appropriate at all and one or more producers may have had to exit the market, in the absence of such restraints upon the normal market processes. If Crompton's analysis is correct the gap between the opposing views of affected commerce may be measured in hundreds of millions of dollars. In any event it is agreed that the assessment of competitive injury is largely one of judgment in all of the relevant circumstances.

The Queen v. Crompton Corp., [May 2004] F.C. ---- (Can.) (Agreed Statement of Facts).

{77} The Canadian plea agreement highlights two problems significant to the standing determination. First, the calculation of the impact on prices of the conspiracy will be difficult to determine. As noted, "In any event, it is agreed that the assessment of competitive injury is largely one of judgment in all of the relevant circumstances." That factor is complicated by the significant buyer power within the tire-destined rubber chemical business. Second, the impact on the retail consumer will be minimal. The example in paragraph 79 below highlights the degree of impact on the retail purchaser.

{78} The problems inherent in the *Crouch* claims are the same alluded to by Judge Posner in his noted article on pass through economic analysis. [FN36] First, the price-fixed item is a product consumed or altered in the manufacturing process. Accordingly, its use will vary with the type of rubber product being made. It may also vary with the nature of the product (chemical) being used and how it is used in the manufacturing process. Different direct purchasers (here, tire manufacturers) might use the various chemicals in various ways in differing products.

FN36. *See* Landes and Posner, *supra* note 3,

at 615-21.

{79} The price today for a set of four BF Goodrich® Touring T/A SR4-P195/70R14 90S tires, which are similar in size and quality to those purchased by Crouch, is $222.64 at Sam's Club's posted price on the Internet. If the value of the chemicals represents 1% of the value of the tires, [FN37] the chemicals in the tires have a total value of $2.23 or $0.56 per tire. If we assume that in an industry with overcapacity and strong buyer power the conspirators were able to artificially inflate prices by as much as 20 % [FN38] and assume that all of that can be proven to be passed through to retail consumers, Crouch's injury can be calculated to be $0.44 for the set of tires or $0.11 per tire. Bigger tires will cost more, smaller tires less. Thus, it is likely that the recovery per tire sold in North Carolina will be in the range of $0.01 to $0.11. That number represents a remote impact on its face. Certainly it would not represent a meaningful recovery for consumers. In any event, the costs associated with litigation and administration of any settlement would far outweigh the benefits to consumers. Few consumers are likely to fill out a claim form for $0.44 or even $1.32 (trebled damages). While the above calculations would affect class certification, they also are relevant to a determination of the remoteness of injury.

FN37. One percent was the actual number used by Canadian authorities in their case against Crompton. *See supra* ¶ 76.

FN38. The calculation of this number will be difficult, but it is difficult to conceive of prices being artificially inflated at a higher level in a market with strong buyer power and overcapacity. It is also unlikely that 100% of the inflated cost was passed through to consumers or that it affected consumer prices.

***22** {80} In this instance, Crouch would be required to establish tire prices in North Carolina by manufacturer both before and after the alleged conspiracy period. Because this case involves a product used in the manufacturing process, regression analysis would be required to disaggregate any effect of other changes in the manufacturing process for each manufacturer for each product category. Further regression analyses would be required to disaggregate the impact on price, if any (by product category and by manufacturers), of other influences on the manufacturer's price. As the product moved down the distribution chain into various avenues of distribution, each step would require additional regression studies to disaggregate other impacts on prices until the final price paid by a consumer for different products purchased in different markets is determined. To perform such studies the economists will require enormous amounts of information, parts of which will constitute trade secrets or confidential information of nonparties, principally tire manufacturers. Many manufacturers are foreign companies. Determining a price differential per tire for tires sold in North Carolina which were manufactured using price-fixed chemicals during the relevant time period would be a Herculean task and one which the Court believes would not be free from speculation given the enormous number of disaggregating factors to be considered in the process.

{81} Clearly, the tires made for SUVs will differ from those made for compact cars. The market for these tires will vary. There is a range in quality and price of the products made using the price-fixed chemicals. If, as is usually the case, there is cheating among the price fixers, additional variations are created. [FN39] In this situation there are a small number of large producers, some or all of which could exert great pressure on price. Thus, at the outset the multiple of variations in pass through analysis is daunting. The discovery involved in ascertaining the production methods, costs and pricing strategies of tire manufacturers would intrude into their most fundamental confidential business information and trade secrets, insuring a long and difficult battle over access. If that information is available, the demand and supply curves must then be calculated for this myriad of products and suppliers and the prices determined by the intersections of those curves tested against rigorous regression analysis to insure that no external factors affected the pricing and pass through at the manufacturer level.

FN39. Price fixing schemes frequently fall apart because the temptation to cheat to get market share is great.

{82} Then the process of determining the subsequent pass through begins. Demand and supply curves and regression analysis must be created for the various lines of distribution and for the various companies and for the various products. Here, it is significant that consumers are at least three steps removed from the original offense. That makes apportionment of damages/pass through extremely difficult and raises a greater risk of double recovery.

***23** {83} Again, the distribution processes may vary with producers and products. Are there tires on the market which were made with non-price-fixed chemicals? If so, how do they affect price? What is the effect of foreign competition? Do company owned stores or franchises sell at different prices than Sam's Club or Wal-Mart? Does the corner gas station price yet another way? Must the pass through expense be determined with reference to the customer base? These are but a sampling of the difficulties inherent in determining pass through in this case. [FN40]

> FN40. *See,* Michele Molyneaux, Comment, *Quality Control of Economic Expert Testimony: The Fundamental Methods of Proving Antitrust Damages,* 35 ARIZ. ST. L.J. 1049, 1074-75 (2003).

{84} Each case must be analyzed individually. There will be cases where the economic analysis is not difficult. *Hyde* may have been one of those cases. There could be other examples where a component, such as a computer chip, is price fixed, and its costs passed through directly to purchasers of the product in which it is incorporated. [FN41] Individual cases will vary, and the factors must be considered in each case. The relevant reliability of economic analysis is a key factor in applying those factors. The economic analysis cannot be oversimplified. *See In re Aluminum Phosphide Antitrust Litig.,* 893 F.Supp. 1497, 1503 (D.Kan.1995). There, the court rejected an expert report which failed to apply standard economic methodology to test the conclusions reached. In ruling on a motion *in limine* the court said:

> FN41. The Court notes that certain manufacturers of DRAM chips used in a variety of computer products have been accused of price fixing. *See,* Stephen Labaton, *Infineon To Pay a Fine In the Fixing Of Chip Prices,* N.Y. TIMES, Sept. 16, 2004, at C6. The Court expresses no opinion on standing in that situation. Each case must be judged on its own merits, and that case is not before the Court. The Court simply notes that the nature of the component can make a difference.

> The goal of a prudent economist in performing the "before and after" analysis is to determine the hypothetical or "counter-factual" prices that would have prevailed during the conspiracy period, but for the conspiracy. In applying the "before and after" model of damages, it is fundamentally necessary to explain the pattern of forces outside the violation period using factors that might have changed (i.e., supply, demand, and the differences in competition) to predict the prices during the conspiratorial period. In this context, as in most economic problems, failure to keep "other things equal" is one of the known "pitfalls ... in the path of the serious economist." Samuelson, P. and Nordhaus, W.D., *Economics* (13th ed.) at p. 7. This case presents two potential normative periods, a "before" period and an "after" period that have distinctly different price levels. One therefore must identify the reasons for the disparate price levels. According to Dr. Siegfried, the field of economics supplies a statistical methodology for making this determination on a scientific basis, and the generally accepted means of predicting the prices that would have prevailed absent the conspiracy is regression analysis. At a minimum, regression analysis addresses supply and demand factors by looking at price trends over time. A prudent economist must account for these differences and would perform a minimum regression analysis if utilizing the "before and after" model.
> *Id.* at 1503-04 (footnotes omitted).

{85} The five key factors are analyzed with respect to *Crouch* below.

***24** 1. *The relevant market.* The chemical manufacturers accused of price fixing sold to rubber manufacturers. Because the number of sellers and the number of buyers was relatively small, the price fixing scheme had to have at its core an effort to affect price pressure from the oligopolists in the tire manufacturing business. The antitrust laws are designed to see that customers in the relevant market get the benefit of price competition. This is a mixed case, as there are two relevant markets: the first is the market for chemicals, and the second is the market for rubber products indirectly affected by the artificial influence in the chemical market. As a purchaser at retail of a rubber product, Crouch is in a market secondarily affected by the restraint in the original chemical market. That is a complicating factor for standing. This factor weighs slightly against standing, as the alleged price fixing was directed at the market for chemicals, not the market for tires. Prices were allegedly fixed for chemicals used to manufacture other rubber products. However, the plaintiff purchased a product the price of which *may* have been influenced by the illegal restraint.
2. *Directness of impact on plaintiff.* The fact that the artificially restrained price impacts the

manufacturing process removes it at least one level of directness. Unlike a component that remains unchanged when incorporated in the final product, manufacturing costs are less directly passed through and may be affected by differing manufacturing processes used by producers. While it is clear that in most instances some portion of a price-fixed cost gets passed along, the directness can be impacted by the nature of the item subject to price fixing, be it a component, labor cost, or something used in the manufacturing process.

The nature of the item can influence the directness of the impact on the price of the end product at retail. Because these chemicals are products used in a manufacturing process, the direct impact at retail is less clear and subject to variation among manufacturers using the chemicals. The smaller the component, the less likely there will be impact on the final price. Here the chemicals only comprise 1% of the value of a tire, reducing the likelihood that total final price was significantly affected.

There is also an additional question of the length of the distribution chain. While plaintiff purchased from Sam's Club, which may have purchased directly from a manufacturer, other class members may have purchased through other lengthier distribution chains.

This factor weighs against standing.

3. *Other indirect purchasers.* This is the factor which gets most confusing when *Illinois Brick* is eliminated. State courts should focus this inquiry on whether or not the existence of other indirect purchasers in the chain of distribution gives rise to other claims against the fund representing the amount by which the price of the retail item has been artificially inflated. It becomes more of an examination of whether there will be double recovery on the state claim (eliminating the concern about double recovery created by standing holdings in *Hanover Shoe/Illinois Brick*). Here the other indirect purchaser claimants may be distributors and retailers who claim to have absorbed some of the price increase. No claims have been filed on their behalf. This factor would adversely impact standing in *Crouch* based on this record.

***25** 4. & 5. *Speculative nature of damage claims and complexity.* These items sometimes overlap. That is the case with *Crouch.* In this case there are multiple factors which render valid economic analysis either impossible or unmanageably complex. While the number of manufacturers is not great, each will have different manufacturing processes. Those processes and the use of alleged price-fixed chemicals will vary from product to product. Products will vary in size, quality and costs. There will be different markets for the products-- retailers like Wal-Mart, Sam's Club, K-Mart and Sears, local tire stores, gas stations, company franchise stores and Internet sales. In a typical price fixing scenario, some, if not a substantial portion, of the price increase is absorbed at the earliest stages in the distribution chains. Some retailers will buy direct; some will buy from distributors. Foreign competition, not insignificant in the tire industry, can affect price. Tracing the price of the processing chemicals through foreign manufacturers provides other problems. The price of tires may be affected by external factors such as high gas prices, which could lower demand. Each variation in manufacturer's process, price, size, quality, market, distribution method and changes in applicable externalities requires individual supply and demand analysis and may require multiple regression analyses in order to eliminate the speculative nature of any damage calculation. Given the many variables, the issues surrounding allocation of the alleged price fixing fund in this case would be exceptionally complex and the results of economic analysis speculative.

Unlike direct purchasers who may recover for costs which they do not incur, state indirect purchasers may recover only for injury actually incurred. Thus, they must prove pass through of the artificially inflated cost. To prevent double recovery for the same alleged injury there must be a reliable means of allocating the effects of the price fixing among the various participants in the distribution chain. It must take into account other externalities. For example, how would purchasers of tires that were recalled and replaced be treated? Factor 5 takes this complexity into account when drawing the line on remoteness of claims. The size of the impact on tire prices is relevant here. As demonstrated in paragraph 78 above, any increase in tire prices will be relatively insignificant. In *Crouch,* factors 4 and 5 dictate heavily against standing.

There may well be occasions on which the Court should defer a standing determination until there has been far ranging discovery and expert evidence produced on pass through and allocation. The problem inherent in delay is the enormous cost involved in getting the information and expert analysis. If it proves insufficient, substantial resources will be wasted. Where, as here, it is apparent from the pleadings that any analysis will either be speculative or allocations enormously complex, the Court should rule on standing early in

the process. Where, as here, counsel have not made any attempt to ascertain facts relating to standing prior to filing suit, the court's job is made more difficult. The rush to file in indirect purchaser states works against adequate investigation prior to filing.

***26** {86} Considering all five factors, Crouch lacks standing to pursue indirect purchaser claims.

B. The *Morris* Case

{87} The *Morri* s case presents a far easier analysis. It is not a price fixing case.

{88} In *Morris,* the underlying antitrust claim is for illegal tying of credit and debit cards under the "Honor All Cards" policy. For purposes of analysis here, the Court assumes the tying arrangement was illegal. Tying cases present unique damages issues.

In tying cases, the measure of damages to an injured purchaser is described as "the difference between the price actually paid for the tied product and the price at which the product could have been obtained on the open market." However, several courts have held that damages can be recovered only if the combined fair market value of both the tying and tied products is exceeded by the amount actually paid for both.

Private Antitrust Suits, A.B.A. SEC. ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 875 (5th ed.2002) (footnotes omitted).

{89} Here, not only would Plaintiff be required to show the underlying complicated damage to merchants, [FN42] but also how those damages got passed on in each and every consumer transaction by the merchant. In the case of a hot product which sells on its label (Calvin Klein jeans, for example) so that the price is unrelated to costs of sale, manufacture or distribution of the product, how could plaintiff possibly show what part of the price included a pass through cost resulting from the tying arrangement which would not have been included in the absence of the tying arrangement? [FN43] How could the Court administer a trial where every consumer transaction might be subject to that proof for every merchant? It cannot be done. More compelling is the fact that a determination would have to be made for every product since price elasticity varies between products. [FN44]

FN42. For cases discussing the difficulty of proof in tying cases see, *Will v. Comprehensive Accts. Corp.,* 776 F.2d 665 (7th Cir.1985); *Kypta v. McDonald's,* 671 F.2d 1282 (11th Cir.1982); *Siegel v. Chicken Delight,* 448 F.2d 43 (9th Cir.1971).

FN43. *Gutzwiller v. Visa U.S.A., Inc*, No. 14-C4-04-000058 (Clay County Dist. Ct., Minn. Sept. 15, 2004). Judge Vaa presented an illustrative example:

Assume that Plaintiff purchased an item at a K-Mart store which accepted Visa and MasterCards, on March 1, 2003. To recover damages, Plaintiff would first need to prove that as a result of Defendants' alleged restraint of trade in providing debit card services to that K-Mart store, K-Mart paid excessive debit fees. Plaintiff would then need to prove that K-Mart did not absorb any such excess debit fees by making less profit, or in some other non-monetary way, such as by hiring fewer employees and/or not making major repairs to its building, but instead passed on the excess debit fees in the price of the items sold to consumers. Plaintiff would then need to prove that some identifiable portion of the item was not attributable to any factors which might affect the price of that item on that specific date. Plaintiff would then need to make the same offer of proof for any item sold by the K-Mart store not only on March 1, 2003, but for every other day in issue, and would have to make the same offer of proof relative to every other merchant involved in his claim. *Id.* at 16.

FN44. This fact alone would render class certification impossible since each customer would have different damages depending on each individual purchase they made.

{90} The five key factors with respect to *Morris* are analyzed below.

1. *The relevant market.* Defendants refer to plaintiff as a "non-purchaser." That is shorthand for not being a purchaser in a relevant market. The relevant market in *Morris* is the sale of credit and debit card services. Morris did not make a purchase in that market. Morris simply made purchases of consumer goods. Antitrust laws are designed to see that customers in the relevant market get the benefit of price competition. In this case the customers in the relevant market would be the retailers who purchase debit and credit card services, not all consumers of retail products. This factor alone would strongly support a finding of no standing in *Morris.*

2. *Directness of impact.* The underlying restraint

alleged in *Morris* was a tying arrangement, not price fixing. It is founded on the proposition that retailers paid more for debit card services than necessary without the tying arrangement. Morris does not even allege he is a debit card holder. He seeks to represent a class consisting of consumers who paid by a credit card, paid cash, paid by check, bought on credit or used a debit card. The impact of the alleged tying arrangement (which applied only to retailers using debit card services) on consumers is as remote as this Court can conceive.

***27** 3. *Other indirect purchasers.* Since consumers are not a part of the relevant market for credit/debit card services, there are no other indirect purchasers. This is a situation where the impact, if any, of the tying arrangement falls directly on the direct purchaser.

4. *Speculative nature of damage claims.* This is not a price fixing case. It is at bottom a tying case which carries additional proof problems affecting the speculative nature of damages to indirect purchasers. Indirect purchasers would first have to prove what the damages were to retailers. Retailers would be required to show that the tied price of debit and credit cards was higher than the price of each sold separately in competitive markets. Indirect purchasers would then be required to show how those damages got passed through or had a direct impact on each consumer purchase they made in North Carolina, whether by cash, check, credit card or debit card. Two examples come to mind. When a teenager pays $100 cash for a pair of designer label jeans that cost $10 to make because they are the hot fashion item, are they paying more than they would have paid had there been no tying arrangement involving debit or credit cards? How could that be proven? What about the item that is put on sale below cost because it is outdated and needs to be cleared from inventory?

Assuming that injury at the retailer level could be quantified somehow, that injury would be attributable only to the increased use of debit cards, a minor part of the market. According to plaintiff, that cost is then spread over every consumer product sold by every retailer. If plaintiff is correct, the recovery per product will be infinitesimal. In addition, the manageability of the litigation and the administration of any settlement present insurmountable barriers. If the Court of Appeals asked today if there is an example of "an impossible complex situation," the *Morris* case would provide such an example. The Court cannot conceive of an economically feasible way to administer a trial which would require inquiry into how every retailer set the price for every consumer good sold in this state. Nor is it conceivable that any judgment would be in any amount which could be economically *allocated* and *paid* to *every* consumer in North Carolina.

5. *Complexity.* It is difficult to imagine a more complex damage case. Plaintiff's case would require an analysis of pricing of virtually every product sold at retail in North Carolina. The litigation could last an interminable period, and it is difficult to conceive of how a claims process would work. It is likely the price increases attributable to the excess cost to the retailer of using debit cards would be such a small measure that there would be no cost effective way to administer a claims process that would compensate consumers directly.

{91} Each *AGC* factor in *Morris* supports dismissal of the claims. Morris asserts remote claims outside the relevant market which involve speculative and complex damages. Eight other jurisdictions have agreed and thus placed limits on indirect purchaser standing. Plaintiff's counsel urged the Court to permit amendment to the pleadings to assert only claims for debit card holders. Such an amendment would make no difference in the outcome on this motion.

***28** {92} Having found that the complaint is subject to dismissal, the Court does not need to address defendants' argument that plaintiff seeks relief that would violate the Commerce Clause of the United States Constitution.

CONCLUSION

{93} If state antitrust laws are to have any impact, they must work. Compromise *cy pres* settlements that provide no payments to consumers have little deterrent effect and no benefit for those actually injured. Where actual injury can be shown with reasonable certainty, defendants should pay those damages to the injured parties and be subject to statutory penalties. That is a real deterrent, and it benefits those injured.

{94} Part of the problem in dealing with indirect purchaser cases is the race to the courthouse which follows a triggering event at the federal level. Despite the fact that the case was two years old, when asked at oral argument, plaintiff's counsel in *Crouch* had no idea what the pass through per tire would be, either in cents or in dollars. His suggestion was for the Court to wait until class certification and address the issues in that context. Where, as here, it is apparent from the pleadings that either (1) sound economic analysis can only produce speculative damages or (2) the complexity of the required sound economic analysis is staggering and virtually impossible to accomplish

given the inability to get at all the required information, deferral to class certification is unnecessary. The Court is not required to nor should it defer standing determinations to class certification. While there may be some overlap in the factors considered in each determination, the tests are different.

{95} As Justice Brennan noted in his dissent in *Illinois Brick,* the complexity of damage proof should not foreclose a claim . [FN45] That policy must be balanced with the need to control the manageability of litigation. Judge Posner has correctly noted that indirect consumer class actions frequently do little to provide redress for injury in indirect purchaser cases, [FN46] and the North Carolina cases support his conclusion. [FN47] The proper focus should be on insuring that those cases in which there is non-speculative proof of direct impact on consumers at something other than a negligible level get tried and those cases which fall outside the limits of rational accepted economic analysis are dismissed. The modified *AGC* factors provide guidelines for making those determinations at the trial level. Applying those factors to these two cases results in their dismissal. Other cases may come out differently or may require some discovery before ruling. Class actions which provide no redress to those actually injured do not fulfill the purpose of the state statute which is to redress injury to those directly impacted by the price fixing.

FN45. 431 U.S. at 758-60.

FN46. *See* Landes and Posner, *supra* note 3, at 607.

FN47. *See* discussion *supra* ¶ ¶ 60-65.

{96} State statutes do not provide as effective a deterrent as the federal scheme. There is an adequate and more effective deterrent to antitrust violations at the federal level. State indirect purchaser cases should be designed to provide relief to those directly injured by antitrust violations. Since they permit double recovery they should be narrowly construed. Similar to the judgments the legal system makes on "foreseeability" in negligence cases, judgments on "standing" are designed to place limits on what would otherwise be limitless claims. The two concepts are similar in that they set a boundary beyond which claims are determined to be too remote. Where a class action will provide no actual benefit or an insignificant benefit to class members, there exists a strong inference that the class claims are too remote or speculative to withstand scrutiny under the modified *AGC* factors. Sometimes, as here, the standing determination can be made early in the process and save significant resources. Other times the determination should await further discovery before decision. In either case, the five factors set out above should be applied and each case determined on its own facts. Applying the factors to the claims in *Crouch* and *Morris* results in dismissal.

***29** It is hereby ORDERED, ADJUDGED and DECREED:

1. Defendants' Motion to Dismiss in *Crouch* is granted, and plaintiff's claims are hereby dismissed.
2. Defendants' Motion to Dismiss in *Morris* is granted, and plaintiff's claims are hereby dismissed.
3. Each party shall bear its own costs.

This the 26th day of October 2004.

2004 WL 2414027 (N.C.Super.), 2004-2 Trade Cases P 74,601, 2004 NCBC 7

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ATTACHMENT B

C

Not Reported in A.2d, 2004 WL 3030037
Only the Westlaw citation is currently available.
UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Vermont, Chittenden County.

Anthony J. FUCILE

v.

VISA U.S.A. INC. and Mastercard International, Inc.

No. S1560-03 CNC.

Dec. 27, 2004.

John T. Sartore of Paul Frank & Collins, P.C. , Burlington, VT; Stephen V. Bomse and David M. Goldstein of Heller Ehrman White & McAuliffe LLP , San Francisco, CA; Robert C. Mason of Arnold & Porter LLP, New York, NY, for Defendant Visa U.S.A. Inc.

Samuel Hoar, Jr. of Dinse, Knapp & McAndrew , Burlington, VT; Kenneth A. Gallo and Patricia C. Crowley of Paul, Weiss, Rifkind, Wharton & Garrison LLP , Washington, DC; Gary R. Carney and Randi D. Adelstein of Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, NY, for Defendant MasterCard International Incorporated.

Robert A. Mello of Mello & Klesch, LLP , South Burlington, VT; David Markun , Edward S. Zusman and Kevin Eng of Markun Zusman Compton & David, LLP, San Francisco, CA, for Plaintiffs.

ENTRY

NORTON, J.

***1** The plaintiff, Anthony J. Fucile, sues Visa and Mastercard on behalf of himself and all similarly situated individuals for damages incurred by purchasing products sold by merchants who used the defendants' debit card services. Mr. Fucile claims that because of the defendants' antitrust violations, merchants were forced to pay higher costs for the use of debit cards. The merchants, in turn, passed these costs along to consumers through the price of the goods they sold. Mr. Fucile brings this action under the Vermont Consumer Fraud Act. The defendants move to dismiss for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6) of the Vermont Rules of Civil Procedure. Because Mr. Fucile lacks standing under the Consumer Fraud Act, the court dismisses his complaint.

This action stems from a class action in the U.S. District Court for the Eastern District of New York. In that action, a class of retailers sued Visa and Mastercard for antitrust violations, claiming that the two defendants illegally required retailers to accept debit card services along with credit card services. The parties settled before trial, resulting in more than $3 billion in damages and injunctive relief worth between $25 billion to $87 billion. See generally *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F.Supp.2d 503 (E.D.N.Y.2003).

Mr. Fucile now seeks damages as a consumer from merchants affected by the antitrust violations at issue in the prior class action litigation, claiming that these violations constituted an unfair method of competition within the meaning of 9 V.S.A. § 2453(a). Mr. Fucile claims standing to bring this claim not as a purchaser, because he did not actually purchase the financial services from the defendants, but as an "indirect purchaser."

The defendants, however, argue that Mr. Fucile is neither a direct purchaser nor an indirect purchaser. Rather, he is a "non-purchaser," because he did not actually receive the financial services that were affected by the defendants' antitrust violation. Mr. Fucile merely complains about prices of goods that may or may not have been affected by the price of the defendants' financial services. Therefore, the defendants argue, he lacks standing.

A motion to dismiss for failure to state a claim upon which relief can be granted will issue only if it is beyond doubt that there exists no facts or circumstances that entitle a plaintiff to relief. *Powers v. Office of Child Support*, 173 Vt. 390, 395 (2002). In a motion to dismiss, the court assumes all facts that a plaintiff pleads are true and disregards all of a defendant's contrary assertions. *Id.* Here, the dispositive issue is whether a person in Mr. Fucile's position, having not actually acquired the product or service that is alleged to be tainted by unlawful trade, can seek damages under the Consumer Fraud Act. Because this standing issue is one of law, it is appropriate for disposition on a motion to dismiss for failure to state a claim upon which relief can be granted. See, e.g., *Parker v. Town of Milton*, 169 Vt. 74, 76-79 (1998).

***2** The Consumer Fraud Act, literally read, provides limitless standing to any consumer. See 9 V.S.A. § 2451a(a) (defining consumer as "any person who purchases, leases, contracts for, or otherwise agrees to pay consideration for goods or services"). Courts will not, however, interpret statutes in a manner that

leads to "absurd results manifestly unintended by the Legislature." *In re G.T.*, 170 Vt. 507, 517 (2000). Although courts should interpret the Consumer Fraud Act liberally in order to serve its remedial purpose, courts should not "so freely stretch its meaning as to evade the Legislature's intent." *Wilder v. Aetna Life & Cas. Ins. Co.*, 140 Vt. 16, 19 (1981). Thus, the court must define some limits to who may have standing to sue under the Consumer Fraud Act.

Although federal courts have limited antitrust actions to "direct purchasers" of goods or services, see *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977), Vermont has expressly disagreed with this limitation and allowed indirect purchaser suits under state law. See 9 V.S.A. § 2465(b) ; *Elkins v. Microsoft Corp.*, 174 Vt. 328, 337-38. (2002). But the standing issue in the instant case is a separate matter from the indirect purchaser issue. Indeed, the *Illinois Brick* Court did not address standing, stating that the indirect purchaser issue "is analytically distinct from the question of which persons have sustained injuries too remote to give them standing to sue for damages." *Illinois Brick*, 431 U.S. at 728 n. 7. Despite his claim that he qualifies as an "indirect purchaser," Mr. Fucile is far more remote than the plaintiff in *Elkins*. In *Elkins*, the plaintiff had actually acquired the product that was allegedly tainted by unfair methods of competition. See *Elkins*, 174 Vt. at 333. Here, Mr. Fucile never actually purchased the tainted financial services, but merely claims damages through the purchase of other products, the price of which may or may not have been affected by the financial services. Therefore, despite Vermont's indirect purchaser rule, the court must still determine if Mr. Fucile has standing given his remote relationship to the alleged wrongdoing.051 Extra cent-Y found within cent-Y markup.

Federal courts have generally split into two camps with respect to antitrust standing. Some courts have opted for the "direct injury" test, which focuses on the relationship between the parties. Under this test, if the plaintiff is separated by intermediate victims, courts usually deny standing. See Annotation, *"Target Area" Doctrine as Basis For Determining Standing to Sue Under § 4 of Clayton Act (15 U.S.C.A. § 15) Allowing Treble Damages For Violation of Antitrust Laws*, 70 A.L.R. Fed. 637, § 2[a]. Other courts have used the "target area" test, which focuses on the general area of the economy injured by the antitrust violator. See *id.*

The Supreme Court has not endorsed either test, but it has provided factors that lower courts should consider in determining standing. *Associated Gen. Contractors v. Calif. State Council of Carpenters*, 459 U.S. 519, 537 n. 33 (1983). These factors include (1) whether there is a causal connection between the antitrust violation and the alleged harm, *id.* at 537; (2) the directness of the injury, considering the "chain of causation," *id.* at 540; (3) whether the violator had an improper motive, *id.* at 537 and n. 35; (4) whether the plaintiff's injury was of a type that Congress sought to redress by providing a private remedy, *id.* at 538; (5) whether the alleged damages are speculative, *id.* at 542; and (6) whether the nature of the action will keep "the scope of complex antitrust trials within judicially manageable limits," *id.* at 543. ***3** Simply by glancing at these factors, one can see that the Court did not pull them from thin air. Rather, they reflect the Court's standing factors to determine whether a case or controversy exists, pursuant to Article III of the Constitution. FN1 The three primary factors in this context are (1) injury, (2) causation, and (3) redressibility. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The Vermont Supreme Court has expressly adopted these factors in other contexts. See, e.g., *Agency of Natural Resources v. U.S. Fire Ins. Co.*, 173 Vt. 302, 306 (2001). Although the Vermont Consumer Fraud Act has broader remedial purposes than federal statutes, the court nevertheless believes that the Vermont Supreme Court would also draw upon the standing factors in *Associated General Contractors* for guidance, at least to the extent that these factors are consistent with allowing "indirect purchaser" standing.

> FN1. The Court has noted that antitrust standing is somewhat different from constitutional standing because it requires additional considerations, but both share the same basic requirements. See *Associated Gen. Contractors*, 459 U.S. at 535 n .31.

Therefore, in applying the general factors of *Associated General Contractors*, the court holds that Mr. Fucile does not have standing in this case. First, the causal chain here is simply too long. Mr. Fucile's damages are through an alleged inflated cost of goods sold by merchants who were injured by the defendants' inflated cost of financial services. He would have to demonstrate that the merchants actually passed their costs along to consumers through the price of their goods, rather than absorbing them by other means. The court would need to consider all other potential causes of inflated costs, such as any number of supply problems that affected the price of each different product the plaintiff class bought in Vermont during the relevant time period. This exercise in speculation extends far

beyond a court's abilities. Although causation may be indirect, given the indirect purchaser rule in Vermont, it cannot extend beyond a reasonable length, as it does here. Thus, factors (1) and (2) weigh against standing.

Second, the defendants' intent in this case weighs in favor of standing. Although the complaint is unclear as to the defendants' intent to violate antitrust law, the extent of money that the defendants allegedly made because of their tying arrangement demonstrates that their actions were intentional. Moreover, the defendants are associations providing financial services to thousands of banks. One cannot imagine that they lack familiarity with antitrust laws in conducting their business, so inferring intent here is appropriate. Therefore, factor (3) weighs in favor of standing for Mr. Fucile.

Third, the injury here does not appear to be a type that the Legislature intended to redress through the Consumer Fraud Act. Although, as the Vermont Supreme Court has stated many times, courts should construe the Act liberally to effectuate its remedial purpose, the court cannot imagine that the Legislature intended the Act to redress injuries to all consumers, even those whose contact to the goods or services tainted by unfair competition is remote and tangential. One could divine any number of hypothetical scenarios analogous to this case that highlight the absurdity of allowing standing under these circumstances.

***4** For instance, assume the plaintiff in *Elkins* was not a computer purchaser, but a client whose attorney provided legal services using Microsoft software. The client could claim that her bill was slightly higher because the attorney was forced to pay a higher price for the software because of Microsoft's antitrust violations. Whether or not the client's alleged injury is accurate, the court cannot reasonably assume that the Legislature intended the Consumer Fraud Act to extend limitlessly. As Justice Brennan acknowledged in his *Illinois Brick* dissent, "[t]here is, of course, a point beyond which antitrust defendants should not be held responsible for the remote consequences of their actions." 431 U.S. at 749 n. 2. The plaintiff here extends far beyond this point. Thus, factor (4) weighs against standing.

Finally, the alleged damages are highly speculative. Assuming that the merchants actually passed along added expenses in the price of goods sold, the court would need to determine the degree to which these expenses were passed along. This degree may vary from one good to another. For instance, merchants may pass on greater costs in product markets that are relatively inelastic and fewer costs in product markets that are relatively elastic. See *Illinois Brick*, 431 U.S. at 750 n. 3 (Brennan, J., dissenting). The court would then have to determine actual sales of goods to the plaintiff class during the relevant time period. Consumer fraud cases typically venture into the field of approximation, see *id.* at 758-59 (Brennan, J., dissenting), but these alleged damages venture into uncharted territories of sheer guesswork. Factors (5) and (6) therefore weigh against standing.

Tallying the above analysis, the court grants the defendants' motion to dismiss. The court also notes that even should the Vermont Supreme Court ultimately adopt a different standard than that in *Associated General Contractors,* such as the "target area" test as it existed prior to *Associated General Contractors,* this court would still dismiss. In its most liberal manifestation, the target area test considered not only whether an antitrust violator's actions were aimed at a particular sector of the market, but whether the violator could have foreseen that its actions would affect the sector. See, e.g., *Mulvey v. Samuel Goldwyn Prod.*, 433 F.2d 1073, 1076 (9th Cir.1970); see also *Illinois Brick*, 431 U.S. at 760 and n. 18 (Brennan, J., dissenting) (discussing "more liberal" target area test). Even under this test, Mr. Fucile lacks standing. The defendants could not be expected to foresee an antitrust violation affecting merchants to result in increased cost of goods throughout the entire consumer base and to so injure that consumer base as to result in liability to every consumer in the country. General consumers were not the target area of the defendants' actions; merchants were. Therefore, the court would grant the defendants' motion using this test, as well.

***5** Finally, the court briefly addresses Mr. Fucile's request that the court permit an amended answer to allow a narrower class, defined as those consumers who used debit cards in their transactions. The court denies this request, as it would not result in a different ruling. Mr. Fucile lacks standing because his injury-as a general consumer of products that are not directly related to the defendants' financial services-is too remote. Whether he used a debit card, a credit card, a check, or cash is irrelevant. His injury would still be that of a general consumer, and he would lack standing.

ORDER

For the foregoing reasons, the defendant's motion to dismiss is GRANTED.

JUDGMENT FOR DEFENDANTS

The court having
granted the defense motion for

dismissal
judgment is entered for defendants, this action is dismissed.
Vt.Super.,2004.
Fucile v. Visa U.S.A., Inc.
Not Reported in A.2d, 2004 WL 3030037

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ATTACHMENT C

Only the Westlaw citation is currently available.

Iowa District Court.
Jeff SOUTHARD, Trish Southard, Jeffrey Stickel and Heather Stickel, Mel Lint, Keith Goodyk, and Greg Dana, on behalf of themselves and all others similarly situated in the State of Iowa, Plaintiffs,
v.
VISA U.S.A. INC. and Mastercard International, Inc., Defendants.
Betty Jo WINTER, on behalf of herself and all others similarly situated,
Plaintiff,
v.
VISA U.S.A. INC. and Mastercard International, Inc., Defendants.
No. LACV 031729, 94491.

Nov. 17, 2004.

Edward Remsburg of Ahlers & Cooney, Des Moines, IA; Stepher V. Bomse and David M. Goldstein of Heller Ehrman White & McAuliffe LLP, San Francisco, CA, Robert C. Mason of Arnold & Porter LLP, New York, NY, for Defendant Visa U.S.A. Inc.

Kim J. Walker of Faegre & Benson LLP, Des Moines, IA; Kenneth A. Gallo of Clifford Chance U.S. LLP, Washington, DC; Keila D. Ravelo, Gary R. Carney and Wesley R. Powell of Clifford Chance U.S. LLP, New York, NY, for Defendant MasterCard International Incorporated.

Michael P. Mallaney and J. Barton Goplerud of Hudson, Mallaney & Shindler, PC, Des Moines, IA; Gordon Ball of Ball & Scott, Knoxville, TN; Jonathan W. Cuneo and Daniel M. Cohen of Cuneo Waldman & Gilbert, LLP, Washington, DC; Michael D. Hausfeld of Cohen, Milstein, Hausfeld & Toll, Washington, DC; Steve W. Berman and George W. Sampson of Hagens Berman, LLP, Seattle, WA; Maxwell M. Blecher and Don Pepperman of Blecher & Collins, Los Angeles, CA, for Plaintiffs.

RULING

GOODHUE, J.

***1** The defendants have filed a motion to dismiss as to each of the entitled cases which have been consolidated by prior court order. A motion to dismiss admits the allegation of the petition and must stand or fall on the contents of the petition and matters of which the Court can take judicial notice. (See *Leuchtemmacher v. Farm Bureau Mutual, Inc.*, 460 N.W.2d 858 and *Curtis v. Board of Supervisors*, 220 NW 2d 44.) The petition itself becomes the statement of facts and need not be reiterated at length. A brief statement of the salient facts will suffice.

(1) The defendants, for purpose of this proceeding, are considered a single entity and any theory of recovery or amendment offered by either plaintiff will be afforded to both.

(2) Together, the two defendants dominate the credit card industry.

(3) During the relevant period the defendants issued both credit cards and debit cards.

(4) The defendants forced merchants to use their debit card services if in fact they were to have the right to use their credit card services and then charged the same for both services. Requiring merchants to use both services is called "tying."

(5) Debit cards involve an immediate or almost immediate withdrawal of funds from the purchaser's account instead of an advancement of credit as when a credit card is used. Accordingly, the risk of loss is significantly less when a debit card is used.

(6) Frequently merchants were unable to tell whether a credit card or debit card was being used.

(7) A merchant who honors the defendants' cards pays an interchange fee in the form of a discount on each sale made using one of the defendants' cards. A portion of the interchange fee goes to the defendants, a portion to the bank issuing the card, and a portion to the acquiring institution or bank who services the merchants.

(8) The tying together of the credit cards and debit cards and the identical charge for both uses for purposes of this motion result in the assessment of excessive and unjustified fees in violation of the Iowa Competition Law (Iowa Code Chapter 553.)

(9) The merchants who paid the excessive fees have passed those costs on to the citizens of Iowa who have done business with the merchants using the defendants' services. The plaintiffs are representative of that class of Iowa citizens.

(10) The Court believes it can and, accordingly, does take judicial notice of *In re Visa Check/MasterMoney Antitrust Litigation*, 297 F.Supp.2d 503 and the facts it chronicles regarding the successful litigation by merchants against these same defendants predicated on these same tying acts alleged in the plaintiffs' petition as being violations of federal competition statutes.

Based on the facts alleged in the petition and as briefly summarized above, the plaintiffs have brought this class action on the behalf of Iowa consumers, alleging they are entitled to relief under Chapter 553 of the Code of Iowa or, alternatively, by way of an action for unjust enrichment.

***2** Motions to dismiss are not favored and have been said to be virtually emasculated. (See *Unertl v. Benzanson*, 414 N.W.2d 321.) Nevertheless, such motions continue to be used and recognized where the issue is standing or capacity to sue. (See *Comes v. Microsoft*, 646 N.W.2d 440 and *Troester v. Sisters of Mercy Health Corp.*, 328 N.W.2d 308.) Although motions for summary judgment are preferred, the motion to dismiss seems particularly appropriate when, as in this case, the petition contains an exhaustive statement of the pertinent facts. The thrust of the defendants' motion is a challenge to the plaintiffs' standing to bring action as to the violation of the Iowa Competition Law. That there has been such a violation as alleged in the petition may be assumed.

It is not disputed that under federal law "indirect purchasers" cannot recover damages for violations of competition statutes. (See *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707.) The *Comes* decision rendered by the Iowa Supreme Court and cited above specifically held that "indirect purchasers" can sue for damages under the Iowa Competition Law. The inclusion of "indirect purchasers" by the *Comes* court was primarily made to turn on Iowa Code Sect. 553.12 which provides in part that "(a) person who is injured ... by conduct prohibited under this chapter may bring suit." Plaintiffs' claim to be "indirect purchasers" within the meaning of *Comes* and therefore afforded standing and the ability to bring this action. Nevertheless, even the plaintiffs in oral argument admit that some line must necessarily be drawn beyond which an injured party may not recover because of remoteness or lack of standing. The defendants, relying in part on Iowa Code Sect. 557.2 which mandates "uniform application of state and federal laws prohibiting restraints of economic activity and monopolistic practices," contend that the issue of remoteness or standing should be determined by the guidelines set out by the federal court in *General Contractors of Calif., Inc. v. Calif. State Council of Carpenters*, 459 U.S. 519, 103 S.Ct. 897, 74 L.Ed.2d 723. Plaintiffs contend that remoteness and standing should be determined by tests used in other areas of Iowa law such as "foreseeability" or "proximate cause."

Several other state trial courts have been confronted with nearly identical issue which this Court faces. These are primarily states where the bright line rule excluding "indirect purchasers" from competition cases as set out in *Illinois Brick* has been abrogated by statute or prior court decision. Counsel has made several of these state court cases available to this Court. Almost universally, motions to dismiss have been sustained and the factors set out in *Associated Contractors*, supra, have been considered applicable in determining standing. The General Court of Justice Superior Court Division in the County of Harnett, North Carolina in *Morris v. Visa USA, Inc. and Mastercard International, Inc.*, 03 CVS 2514 filed a particularly instructive ruling which is nearly as exhaustive as a law review article. That ruling enumerates eight other states which recognize indirect purchaser claims but their trial courts have held that consumers such as these plaintiffs with derivative claims have no standing. Apparently no state appellate court has addressed the issue at this time.

***3** Plaintiffs contend that *Comes* places Iowa in a unique position which differentiates it from other states. *Comes* does in fact include some rather broad language, but the instant factual situation is distinctly different than what existed in *Comes*. In *Comes* the plaintiffs were in fact "indirect purchasers" of a product that the defendant Microsoft produced. In *Comes* the plaintiffs ended up with the software the defendant produced, in their computers. The cost of the Microsoft product was directly reflected in the price of the hardware the plaintiffs purchased from the third party who was the "direct purchaser" from Microsoft. The plaintiffs in the instant case are not really "indirect purchasers." Their claims against these defendants could more accurately be termed "derivative." These plaintiffs have not ended up with

a product the defendant supplied. Instead, they dealt with a merchant who was charged a fee by a bank who in turn paid a fee to the defendant. Their contention is that the cost of the service that the defendants supplied to the banks and was paid for by the banks was transferred to and paid by the merchants and ultimately shifted to the plaintiffs as the final consumer.

Since the plaintiffs are not "indirect purchasers" in the sense that the plaintiffs in *Comes* were, *Comes* is helpful only by analogy or by use of some of the broad language the *Comes* court employed in interpreting the Iowa Competition Law. That the bright line excluding indirect purchasers as announced in *Illinois Brick* has been abrogated does not answer the remoteness or standing issue.

The remoteness doctrine is not a simple application of a "but for" test or "foreseeability" or "proximate cause" but is instead dependent on public policy considerations applicable to the many facets of the law where damage awards are sought. (See *State ex rel. Miller v. Phillip Morris, Inc.*, 577 N.W.2d 401, *Beyond the Garden Gate, Inc. v. Northstar Freezer Dry Mfg., Inc.*, 526 N.W.2d 305 and *Virden v. Betts and Beer Const. Co., Inc.*, 656 N.W.2d 805.) The issue then that emerges is what is the test of standing or remoteness that is to be applied under the Iowa Competition Law.

It is noteworthy that the *Comes* court, although relying on the broad sweep of the statutory language as to those protected, devoted appreciable consideration to the announced policies and reasoning employed in *Illinois Brick.* The *Comes* case specifically points out the factual differences between the *Comes* case and *Illinois Brick.* This discussion leads this Court to the conclusion that the Iowa Supreme Court is quite sensitive to the legislative direction for uniform application of the state and federal statutes. Furthermore, a fair reading of *Comes* suggests that the trial court is being directed to weigh the policy considerations as set out in *Illinois Brick* as refined by *Associated General Contractors* in determining whether or not a plaintiff has standing or his damage is too remote to bring an action under the Iowa Competition Law.

***4** The five factors set out in *Associated General Contractors* which the Court believes it must consider are:

(1) The nature of the plaintiffs' claim.

(2) The directness of the injury.

(3) The specific intent of the defendants.

(4) The character of the alleged damages, including the risk of duplicative recovery, the complexity of the apportionment, and their speculative nature.

(5) The existence of other more appropriate plaintiffs.

To begin with, the nature of the plaintiffs' action is derivative and not simply indirect, as previously noted. As opposed to the factual situation in *Comes,* there are more appropriate plaintiffs to bring action and they have successfully done so. Any recovery made would be duplicative. The damages incurred are substantially more indirect than in *Comes* and, as noted, are more accurately termed "derivative." Apportionment would be complex, speculative, and arbitrary. The willingness of the *Winters* plaintiffs to redefine the plaintiff class is illustrative of the complexity and arbitrary nature of the apportionment that would be required. Even defining the class is arbitrary. The North Carolina trial court in Morris as previously cited sets out in detail the complexity and speculative and arbitrary nature of the decisions that would be involved in any apportionment. The criteria set out in *Associated General Contractors* are simply not met.

In summary, the Court concludes that the thrust of the *Comes* case is that although the bright line exclusion of indirect purchasers as set out in *Illinois Brick* has been abrogated under the Iowa Competition Law, an analysis of standing and remoteness is still appropriate and must be made. That the guidelines announced in *Associated General Contractors* are appropriate to consider in resolving the issues of standing and remoteness. Applying those standards as per the prior discussion, the plaintiffs do not have standing under the Iowa Competition Law and to the extent the plaintiffs have pled a cause of action pursuant to Chapter 553 of the Code of Iowa, the defendants' motion to dismiss is sustained and the plaintiffs' action dismissed.

The Southard plaintiffs have also made a claim based on unjust enrichment and for money had and received. In reality, the two concepts pled constitute the same cause of action. (See *State Dept. of Human Services, ex rel. Palmer v. Unisys Corp.*, 637 N.W.2d 142.)

Plaintiffs rely on the asserted breadth of unjust

enrichment as it exists as a cause of action in Iowa. In the *Palmer* case cited above it is stated that "We recognize unjust enrichment is a broad principle with few limitations. We have never limited the principle to require benefits to be conferred directly by the plaintiff." *Palmer v. Unisys*, supra p. 155.) In referring to Iowa law, the federal court in *Iconco v. Jensen Const. Co.*, 622 F.2d 1291 at page 1302 stated "We are impressed with the simplicity of the rule echoed by the Iowa unjust enrichment cases. It is essential merely to prove that a defendant has received money which in equity and good conscience belongs to plaintiff," quoting *In Re Estate of Shatman*, 231 Iowa 480, 1 N.W.2d 636, 642.

***5** However, *Iconco* proceeds to state that "Unjust enrichment does not occur in the abstract. One is unjustly enriched only by reference to some standard of justice and fairness. Iowa would, of course, be free to look to the provisions of state statute defining legal rights and responsibilities to discern whether one's enrichment at the expense of another has been unjust." *Iconco* at p. 1296, 1 N.W.2d 636. There is nothing "unjust" in Iowa law about the charges the defendants made to the banks and the banks in turn to the merchants, absent the Iowa Competition Law. To allow the plaintiffs to proceed based on a theory of unjust enrichment would require the reinfusion of the Iowa Competition Law which is unavailable to them because of a lack of standing.

The plaintiffs cite *Palmer* and, in particular, the language set out above for their contention that privity has no application in unjust enrichment cases. The *Palmer* case did not turn on the language cited above, and in that sense it is dicta. In *Palmer*, Heritage, the party receiving the ultimate benefit, was potentially primarily liable to the plaintiff. There is no primary liability between these plaintiffs and defendants. Furthermore, *Palmer* at page 155 states that "We also agree a plaintiff who has an independent obligation to a third person cannot maintain an action for unjust enrichment against a defendant who is incidentally benefited by the performance of that obligation to the third person." The prohibition cited is exactly the type of derivative lawsuit which the plaintiffs in this case are bringing. These plaintiffs had an independent obligation to the merchants and any benefit conferred on the defendants by reason of that obligation is incidental. The defendants approached the deficiency in a different way by contending that no direct benefit was conferred upon them by the act in question. In other factual situations involving a claim of unjust enrichment, recovery has been denied because of a lack of "privity." See *Commercial Federal Bank v. Quest Corp.*, 2004 WL 22 96370 (Iowa App.). In essence, the plaintiffs' problem is the same under the unjust enrichment claim as it was under the Iowa Competition Law. In addition to an inability to utilize the unfairness standard set out by the Iowa Competition Law, the plaintiffs' damages are too remote and derivative to allow the plaintiffs to make recovery. The plaintiffs have no cause of action under the theory of unjust enrichment.

It would be illogical and a strange application of the law to rule that the plaintiffs' cause of action is too remote to confer standing under the Iowa Competition Law but to use the same acts and the Iowa Competition Law as a predicate for recovery under a theory of unjust enrichment.

Finally, it appears that because of the merchants' previous recovery in the *In re Visa Check/MasterMoney Antitrust Litigation*, supra, that the defendants have been stripped of their ill-gotten gains and that no "unjust enrichment" remains.

***6** Defendants' motion to dismiss as to the plaintiffs' claim of unjust enrichment is granted and the plaintiffs' cause of action is dismissed.

Costs are assessed to the plaintiffs.

2004 WL 3030028 (Iowa Dist.)

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ATTACHMENT D

C
Not Reported in A.2d, 2004 WL 2475284, 2004-2 Trade Cases P 74642

Superior Court of Maine.
Catherine J. KNOWLES, et al, Plaintiffs
v.
VISA U.S.A. INC., et al, Defendants
No. Civ.A. CV-03-707.
Oct. 20, 2004.

ORDER

WARREN, J.
***1** This action is brought by plaintiffs Catherine J. Knowles and Diane Roberts, suing on behalf of themselves and a proposed class of all similarly situated Maine consumers, against defendants Visa U.S.A. Inc. and MasterCard International Inc. alleging violations of Maine's antitrust statutes, 10 M.R.S.A. § § 1101 , 1104 (1996). Before the court is defendants' motion to dismiss on the ground that plaintiffs lack standing for purposes of the antitrust laws.

1. *The Wal-Mart Class Actions*

This action follows on the heels of the settlement of a group of antitrust class actions brought in the U.S. District Court for the Eastern District of New York styled *In re Visa Check/MasterMoney Antitrust Litigation,* No. 96-CV-5238 (JG) (E.D.N.Y.) also known as *Wal-Mart Stores, Inc., et al v. Visa U.S.A. Inc., et al.* (the *"Wal-Mart* class actions")
The *Wal-Mart* class actions were brought by merchants who asserted that they had been harmed by defendants' requirement that merchants had to accept Visa and MasterCard debit cards in order to be allowed to accept Visa and MasterCard credit cards. The merchants alleged that this constituted an illegal tying arrangement in violation of the antitrust laws.
In February 2000 the federal district court granted class certification to a national class consisting of all merchants who accepted Visa or MasterCard credit cards and consequently had been required to accept Visa or MasterCard debit cards. *In re Visa Check/MasterMoney Antitrust Litigation,* 192 F.R.D. 68, 90 (E.D.N.Y.2000). In October 2001 the district court's class certification order was affirmed by the U.S. Court of Appeals for the Second Circuit. 280 F.3d 124 (2d Cir.2001), *cert. denied,* 536 U.S. 917 (2002).
On April 11, 2003 the federal district court denied a motion for summary judgment by Visa and MasterCard and granted partial summary judgment to the class plaintiffs on a number of specific issues. *In re Visa Check/MasterMoney Antitrust Litigation,* 2003 U.S. Dist. LEXIS 4965, 7-12 (E.D.N.Y.2003). The court concluded, however, that issues of disputed fact remained, *inter alia,* on issues "that lie at the heart of the merchants' [Sherman Act] claims: whether Visa and MasterCard's Honor All Cards rules harmed competition in the debit card services market, and whether the defendants acted together to produce that result." *Id.* at 19.
On April 30, 2003, on the eve of trial, the parties reached a settlement of the *Wal-Mart* class actions. This settlement was ultimately approved by the district court in December 2003. *In re Visa Check/MasterMoney Antitrust Litigation,* 297 F.Supp.2d 503 (E.D.N.Y.2003). The settlement involved a payment to the class of more than $3 billion plus injunctive relief preventing Visa and MasterCard from tying debit and credit cards in the future. In approving the settlement and awarding $220 million in attorneys fees, the district court noted that this constituted "the largest antitrust settlement in history," 297 F.Supp.2d at 508, and further noted that in addition to the $3 billion to be paid in settlement, the injunctive relief that had been agreed to was estimated to result in future savings of $25 billion to $87 billion. *Id.* at 511. FN1

> FN1. With respect to the merits, the district court noted that the *Wal-Mart* plaintiffs did not have an open and shut case as to liability. *See* 297 F.Supp.2d at 511 (plaintiffs' ability to prove that the "honor all cards" rule was anticompetitive was "no sure thing"). This was particularly true in light of the difficult questions of law involved. *See* 297 F.Supp.2d at 510, *quoting* Hovencamp, *Tying Arrangements and Class Actions,* 36 Vand.L.Rev. 213, 213 (1983) to the effect that "[f]ew areas of federal antitrust law are more confusing than the law that governs tying arrangements."

2. *The Consumer Class Actions*

***2** Once the merchants' class had been settled,

consumer class actions began to be filed. It is the court's understanding that the case at bar is one of approximately 20 consumer class actions filed against Visa and MasterCard in state courts around the country.

Like their counterparts in other states, Knowles and Roberts allege that the unlawful tying of Visa and MasterCard credit and debit cards harmed consumers because the merchants subjected to the allegedly illegal tying arrangement passed the increased costs on to consumers. Neither the class nor plaintiffs' theory of the case is limited to Maine consumers who actually used Visa or MasterCard debit or credit cards. Instead, plaintiffs' theory is that because merchants had to pay artificially inflated amounts as a result of defendants' unlawful tying agreement, the merchants passed those amounts on to all their customers by increasing the price of *all* retail goods they sold-regardless of whether payment was made by cash, check, credit card, debit card or otherwise. Thus the proposed class in this case consists of all consumers who purchased any item from any Maine merchant who accepted Visa or MasterCard during the period from December 1999 to December 2003.

Specifically, the class plaintiffs allege that because Visa and MasterCard credit cards are dominant and ubiquitous, acceptance of these cards is critical to the business success of all or most retail merchants. As a result, plaintiffs contend, Visa and MasterCard were able to require that retail merchants accept Visa or MasterCard debit cards if they wanted to accept Visa or MasterCard credit cards, and were able to impose artificially inflated costs and fees upon the merchants, who then passed on those costs to consumers. Complaint ¶ ¶ 32, 38-40, 54, 56-58. Plaintiffs allege that Visa and MasterCard were able to set the same fees for their debit cards as for their credit cards even though, in an unrestrained market, debit cards would have commanded lower fees. Complaint ¶ ¶ 40, 44. Moreover, according to plaintiffs, the particular kind of debit cards which Visa and MasterCard required merchants to accept involved a higher level of credit risk for merchants than other kinds of debit cards offered by entities other than Visa and MasterCard. FN2 *Id.* ¶ 43.

> FN2. The Visa and MasterCard debit cards complained of by the class plaintiffs are off-line debit cards, as opposed to on-line debit cards offered by other entities.

Plaintiffs further allege that Visa and MasterCard were able to impose a "no discount, no surcharge" policy on retailers. This prevented retailers from either adding a surcharge for the riskier off-line debit cards offered by Visa and MasterCard or giving consumers a discount for paying through a less expensive means, such as cash or an on-line debit card. Complaint ¶ 7.

One of the named plaintiffs in the case at bar, Diane Roberts, is also a plaintiff in a class action brought in the District of Columbia. *Peterson, et al v. Visa U.S.A. Inc., et al.*, Civil Action No. 03-008080 (D.C. Superior Court, filed Dec. 1, 2003). That action includes claims under the laws of the District of Columbia and seventeen states (including Maine) and seeks to have the District of Columbia court certify a multi-state class action on behalf of consumers from Maine and the 16 other states. In the District of Columbia action, plaintiffs are seeking monetary damages and injunctive relief against Visa and MasterCard's "no discount, no surcharge" policy. D.C. Complaint ¶ ¶ 187-92. Only monetary damages are sought in the case before this court. FN3

> FN3. Because of the pendency of the District of Columbia action, plaintiffs originally sought to have this action stayed to await developments in the District of Columbia. Plaintiffs thereafter withdrew their request for a stay. The court agrees that this case should proceed. There is an undoubted benefit in having Maine courts construe Maine's antitrust laws and determine what relief, if any, should be available to Maine consumers.

3. *The Contentions of the Parties with respect to Standing*

***3** Visa and MasterCard contend that plaintiffs lack standing to pursue their antitrust claims under the rationale of the U.S. Supreme Court's decision in *Associated General Contractors v. California State Counsel of Carpenters*, 459 U.S. 519 (1983). That decision sets forth various factors to be considered, including the directness of the injury, when determining whether a plaintiff has standing for antitrust purposes. Visa and MasterCard argue that the direct victims of their allegedly unlawful tying scheme (the merchants) have already settled their claims and that an allegation of indirect injury to consumers is insufficient to provide consumers with standing for antitrust purposes.

Plaintiffs have a simple response. They point out that while the U.S. Supreme Court has ruled that under federal antitrust law only direct victims of anti-competitive practices may sue for treble damages, *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 729 (1977) , Maine and a number of other states have

passed legislation rejecting the *Illinois Brick* rule for purposes of their state antitrust laws. Specifically, the Maine legislature amended 10 M.R.S . A. § 1104(1) in 1989 to provide a private antitrust treble damage remedy for any person injured "directly *or indirectly* in its business or property." *See* Laws 1989, ch. 367 (emphasis added). The legislative history of this provision demonstrates that the legislature intended to allow "indirect purchasers" to sue manufacturers who had engaged in price-fixing. L.D. 1653, 114th Legis., 1st Sess. (1989). Given this so-called *Illinois Brick* repealer, plaintiffs argue, federal precedent limiting standing for antitrust purposes is inapplicable in Maine.

The threshold issue on this motion, therefore, involves the legal effect of Maine's *Illinois Brick* repealer on the issue of antitrust standing.

4. *The Effect of the Illinois Brick Repealer*

In considering a motion to dismiss, the court must accept the allegations in the complaint as true. Given their allegations in this case, plaintiffs' argument on standing is straightforward. They argue that the language of 10 M.R.S.A. § 1104(1) as amended by Laws 1989, ch. 367, is unambiguous and expressly permits suits by indirect victims. Under these circumstances, they contend, the court should not go beyond the statutory wording and should conclude that the issue of standing has been legislatively resolved.

In most other contexts, the court would be inclined to agree that the plain wording of the statute would control. However, the court does not agree that it should limit its analysis to the statutory wording in this case for several reasons. First, the U.S. Supreme Court expressly stated that it did not base its ruling in *Illinois Brick* on standing and observed that the issue of standing and the indirect purchaser rule were "analytically distinct." 431 U.S. at 728 n. 7. As a result, the fact that the Maine legislature decided to overrule *Illinois Brick* on the issue of whether indirect purchasers may assert a remedy does not necessarily resolve the issue of standing.

*4 Second, it is well established that the antitrust laws set forth broad general principles and leave the application and elaboration of those principles to the courts. As the U.S. Supreme Court noted in *National Society of Professional Engineers v. United States*, 435 U.S. 679, 687-88 (1978):

> One problem presented by the language of § 1 of the Sherman Act is that is cannot mean what it says....
>
> Congress ... did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common law tradition. FN4
>
> > FN4. The specific statutory language referred to in the above-quoted citation, section 1 of the Sherman Act, is mirrored by 10 M.R.S.A. § 1101, the provision of Maine antitrust law which plaintiffs allege Visa and MasterCard violated in this case.

This same language was quoted by the U.S. Supreme Court when it was faced with the task of defining standing for antitrust purposes in *Associated General Contractors*, 459 U.S. at 531.

Thus, the antitrust laws constitute a broad grant of authority to the courts to fashion a common law of antitrust in furtherance of a general principle to prevent anticompetitive restraints of trade. *See, e.g., SAS of Puerto Rico v. Puerto Rico Telephone Co.*, 48 F.3d 39, 43 (1st Cir.1995) ("Despite its statutory framework, antitrust law is largely the handiwork of federal judges and antitrust enforcers...."). In this context, the rule that a court should not look beyond the wording of a statute does not have its usual force. Although the court must heed the legislature's intent in enacting the *Illinois Brick* repealer, it must recognize that in the particular context of antitrust, statutory wording is only the beginning and not the end of any inquiry.

Notably, when asked at the hearing what standing principles plaintiffs would apply in this case, counsel for plaintiffs directed the court's attention to Justice Brennan's dissent in *Illinois Brick*. *See* Tr. of June 17, 2004 hearing at 36. In that dissent Justice Brennan conceded that "despite the broad wording of [the statute] there is a point beyond which the wrongdoer should not be held liable." 431 U.S. at 760 (Brennan, J., dissenting). *See id.* at 748 n. 2. Although Justice Brennan went on to argue for a liberal rule of standing defined in terms of the "target area" of the violation, *id.* at 760-61, what is important for present purposes is that he did not dispute that some limits have to be placed on the standing of indirect victims. The wording of the statute, therefore, does not resolve the issue of standing.

5. *Standing under Associated General Contractors*

The court is accordingly faced with a choice between the "target area" test for standing espoused by Justice Brennan in *Illinois Brick* and the *Associated General Contractors* test adopted by the U.S. Supreme Court

in 1983. As the Supreme Court noted in *Associated General Contractors,* the target area test poses the prospect of "contradictory and inconsistent results." 459 U.S. at 536 n. 33. Moreover, the target area test does not take account of prudential concerns that may significantly affect whether specific plaintiffs are proper parties to enforce the antitrust laws. "Although the law is written broadly, the Superior Court's doctrine of antitrust standing has significantly narrowed the number of persons entitled to bring suit." *RSA Media, Inc. v. AK Media Group, Inc.*, 260 F.3d 10, 13 (1st Cir.2001) (footnote and citations omitted).

***5** *Associated General Contractors* has remained the template for determining standing under the federal antitrust laws for the past 20 years. *See, e.g., Verizon Communications Inc. v. Law Offices of Curtis V. Trinko LLP,* 124 S.Ct. 872, 884-85 (2004) (Stevens, J., concurring); *RSA Media Inc. v. AK Media Group Inc.*, 260 F.3d at 13-14. It is probable that the Maine Law Court, if presented with this issue, would look to the *Associated General Contractors* factors in determining standing under Maine's antitrust laws and would apply those factors except to the extent that those factors cannot be reconciled with the legislature's adoption of the *Illinois Brick* repealer.

In *Associated General Contractors,* the U.S. Supreme Court began by observing that standing in an antitrust case is not limited to the requirement of injury in fact but requires a further inquiry to determine whether the plaintiff is a proper party to bring a private antitrust action. 459 U.S. at 535 n. 31. The Court then set forth the following specific factors that must be considered as part of that inquiry:

(1) the causal connection between the plaintiffs' alleged injury and defendants' claimed violation of the antitrust laws. 459 U.S. at 537.

(2) the alleged improper motive of the defendant. 459 U.S. at 537 and n. 35.

(3) the nature of plaintiffs' alleged injury, including whether it is the type Congress sought to redress in the antitrust laws and whether the plaintiff was a consumer or competitor in the market in which trade was restrained. 459 U.S. at 538-39.

(4) the directness or indirectness of the alleged injury. 459 U.S. at 540.

(5) whether there exists a more immediate class of potential plaintiffs whose self-interest could be expected to motivate them to enforce the antitrust laws. 459 U.S. at 541-42.

(6) whether the damages or injuries claimed are speculative. 459 U.S. at 542-43.

(7) whether the complexity of the case can be kept "within judicially manageable limits", avoiding the risk of duplicative recoveries and the danger of complex apportionment of damages. 459 U .S. at 543-44. FN5

> FN5. There are some minor variations in the manner in which courts have summarized the factors set forth in *Associated General Contractors.* The above represents this court's own distillation of those factors.

Looking at these factors in the instant case, it is evident that plaintiffs have adequately pleaded a causal connection and an improper motive. As *Associated General Contractors* demonstrates, however, those factors alone do not confirm standing if they are outweighed by other factors. *See* 459 U.S. at 537.

Inquiry with respect to the nature of the alleged injury presents a somewhat closer case. As noted above, *Associated General Contractors* suggests that one of the subsidiary issues in this inquiry is whether plaintiffs are consumers or competitors in the relevant market. 459 U.S. at 539. The plaintiffs before the court are neither consumers nor competitors in the specific market in which trade was allegedly restrained, which is the market among retail merchants' debit and credit card services. *See In re Visa Check/MasterMoney Antitrust Litigation,* 2003 U.S. Dist. LEXIS 4965, 8-10 (E.D.N.Y.2003) (relevant market is among merchants, not consumers). Nevertheless, plaintiffs have adequately alleged an injury of the type that Congress sought to redress. *See Blue Shield of Virginia v. McCready,* 457 U.S. 465, 483 (1982). Moreover, Maine's adoption of an *Illinois Brick* repealer further suggests that the court should not deny standing just because plaintiffs are not participants in the actual market where trade was allegedly restrained. This factor weighs in favor of standing.

***6** In light of Maine's *Illinois Brick* repealer, the next factor-directness or remoteness of the asserted injury-should be disregarded entirely in any inquiry as to standing under Maine's antitrust laws.

The remaining factors are whether there exist more immediate plaintiffs, whether the damages or the injuries are speculative, whether there is a danger of duplicative recoveries, and whether there is a need for complex apportionment. *See* 459 U.S. at 541-44. These factors are the prudential concerns that have caused federal courts to limit the right of private parties to sue even when a violation exists and the plaintiff has been damaged. *See SAS of Puerto Rico v. Puerto Rico Telephone Co.,* 48 F.3d at 43. In the court's view, all these factors weigh against standing in this case.

First, there is indisputably a more immediate class of

potential plaintiffs motivated to enforce the antitrust laws in this case-namely, the merchants who have already sued and obtained a settlement of more than $3 billion as well as injunctive relief putting an end to the allegedly illegal tying arrangement. *See* 297 F.Supp.2d 503. This injunctive relief benefits consumers as well as merchants and puts to rest any concern that unless remote plaintiffs are allowed to sue, the antitrust laws will remain unenforced in this case. *See Associated General Contractors,* 459 U.S. at 542; *SAS of Puerto Rico,* 147 F.3d at 45. In contrast, if this case presented a situation where potential antitrust violations would remain unredressed unless the parties bringing suit were found to have standing, the case for standing would be immeasurably improved.

Second, both the asserted damages and the chain of causation in this case are speculative. Plaintiffs' contention is that merchants subjected to overcharges as a result of defendants' illegal tying arrangement passed those overcharges on to consumers. To determine what portion of any overcharge was passed on by any given merchant, with respect to which products, and to which consumers is a task of monumental uncertainty and complexity. Depending on their other costs, their competitive position in the market, their profit margins, and the specific products they sold, some merchants could have absorbed a substantial portion of any overcharge instead of passing it on. To a significant extent, whether an overcharge was passed on would depend on the elasticity of demand in the various product markets in which the merchant sells. FN6

> FN6. *See, e.g., Illinois Brick Co. v. Illinois,* 431 U.S. at 750 n. 3 (Brennan, J, dissenting) ("If the market is relatively inelastic, he may pass on a relatively large portion [of any overcharge]. If demand is relatively elastic, he may not be able to raise his price and will have to absorb the increase, making it up by decreasing other costs or increasing sales volume. It is extremely unlikely that a middleman could pass on the entire cost increase. But rarely would he have to absorb the entire increase.").

In this case, where plaintiffs are alleging that retailers raised prices generally and that plaintiffs therefore paid overcharges on every single purchase, *see* Complaint ¶ ¶ 7, 46-47, 58, 66, the extent to which damages were incurred by the class would depend on the specific elasticity of demand for any given product sold at retail in the State of Maine by any retailer who accepted Visa or MasterCard credit cards-essentially every product of any kind sold to anyone in the State. While this might be a manageable inquiry if only one product were involved, the complexity of inquiry is geometrically increased when all of the different pricing variables applicable to each and every retail product sold in the state must be considered. For any given consumer, the issue is even more complicated and speculative because the inquiry would involve what items that particular consumer purchased, what that consumer paid for each item, and what percentage of overcharge, if any, was contained in that price.

***7** For example, if plaintiff Diane Roberts purchased a number of items at a Shaw's Supermarket on a specific date during the relevant time period and paid $2.49 for a carton of orange juice, her right to damages would depend on what portion of that $2.49 was attributable to defendants' alleged restraint of trade with respect in providing debit card services to Shaws-as opposed to such factors as competitive pricing by other supermarkets, the wholesale cost of orange juice, labor costs and other overhead, the elasticity of demand for orange juice, and strategic pricing decisions made by Shaw's. FN7 Moreover, the same issues would arise for every other item in Ms. Roberts' grocery cart and for every other item that she purchased from any other retailer that day. This process would then need to be repeated for every single day of the alleged four-year damages period.

> FN7. This is a modified version of an example offered by defendants in their memorandum of law.

It might be argued that such an inquiry is not necessary for each consumer because relief can be afforded on a generalized basis once the damage to the class has been determined. But even if no inquiry were required as to the specific damages incurred by each consumer, determination of the damage incurred by the class as a whole would require determining what portion of any overcharge had been passed on to consumers with respect to every item sold in Maine over a four year period by every supermarket, every large retailer, every gas station, every restaurant, and every other merchant that accepted Visa or MasterCard. To say that such an inquiry would be highly speculative and problematic is an understatement.

The remaining *Associated General Contractors* factors are the danger of duplicative recovery and the problem of complex apportionment. Duplicative recovery is a major issue in this case in light of the more than $3 billion already recovered by the

merchants in settlement of the *Wal-Mart* class actions. If double recovery is to be avoided, a complex apportionment between the damages already recovered by merchants and the damage recoverable by the class will be necessary. As noted above, there would also be a complex apportionment necessary to determine the relief that should be afforded to individual class members. Both those issues have a significant effect on the ability of this case to be kept within "judicially manageable limits." *Associated General Contractors,* 459 U.S. at 741.

Plaintiffs argue that in light of the *Illinois Brick* repealer, the court should conclude that the Maine legislature has expressly authorized duplicative recoveries and this factor should therefore not be weighed against them on the issue of standing. The court does not agree. The 1989 amendment to 10 M.R.S.A. § 1104 expressly authorizes indirect purchasers to sue but it does not expressly authorize duplicative recoveries. One of the major arguments for allowing indirect purchasers to sue is that in many cases the direct victims of a restraint of trade are reluctant to bring suit and antitrust violations would therefore otherwise go unremedied. Although this rationale justifies eliminating the *Illinois Brick* bar against suits by indirect purchasers, it does not answer the question of what should happen when the direct victims have in fact already brought suit.

***8** The most forceful opponent of the *Illinois Brick* ruling-Justice Brennan-believed that double recovery was only a theoretical possibility. Thus in his *Illinois Brick* dissent, he expressed the view that while arguments based on the potential dangers of double recovery had "some abstract merit", those concerns were unrealistic "as a practical matter." 431 U.S. at 761. *See id.* at 762-64. To the extent those concerns actually materialized, however, Justice Brennan's dissent makes it clear that he contemplated that duplicative recoveries should be prevented and that apportionment between the direct and indirect victims could and should be made. *See* 431 U.S. at 761-63. He specifically approved the Ninth Circuit's discussion of the procedural mechanisms available to prevent duplicative recovery in *In re Western Liquid Asphalt Cases,* 487 F.2d 191, 201 (9th Cir.1973), *cert. denied,* 415 U.S. 919 (1974), and he noted that those mechanisms could be used to require antitrust plaintiffs to litigate among themselves "their appropriate shares of the total recovery" in the event that a problem of double recovery was actually presented. 431 U.S. at 763. Thus, if the dissenters had prevailed in *Illinois Brick,* indirect victims would be able to sue but would not necessarily be entitled to subject defendants to duplicative recoveries.

Other states that have enacted *Illinois Brick* repealers have provided statutory mechanisms to deal with the problem of duplicative recoveries, in some cases expressly authorizing their courts to take appropriate steps to avoid such recoveries. *See Bunkers Glass Co. v. Pilkington PLC,* 75 P.3d 99, 108 (Ariz.2003) ; *Ciardi v. F. Hoffman-LaRoche Ltd.,* 762 N.E.2d 303, 321 (Mass.2002) (Sosman, J., dissenting). While the treatment of potential duplicative recovery when direct and indirect antitrust victims have both brought suit is an unresolved issue under Maine law, the guidance from Justice Brennan's *Illinois Brick* dissent is that duplicative recovery should at least be prevented to the extent possible. In the court's view, the danger of duplicative recovery and the complex apportionment that may be necessary to avoid such recovery are legitimate factors that must be considered for purposes of antitrust standing. These factors, like the other prudential considerations discussed above, weigh against the standing of the plaintiffs in this case.

In the final analysis, the court has weighed the *Associated General Contractors* factors and has concluded that notwithstanding Maine's enactment of an *Illinois Brick* repealer, the factors that militate against standing outweigh those in favor of standing. Accordingly, defendants' motion to dismiss for lack of standing is granted.

In light of its decision that plaintiffs lack standing under *Associated General Contractors* the court does not have to reach defendants' alternative argument that even if plaintiffs have standing, 10 M.R.S.A. § 1104 is only intended to create a remedy for "indirect purchasers" and that the class members here are not indirect purchasers of debit card services. Nor does it have to consider plaintiffs' response that if defendants are correct as to their indirect purchaser argument, plaintiffs should be allowed to redefine their proposed class to consumers who made purchases with a Visa or MasterCard debit card. FN8

> FN8. As of the writing of this decision, the court is aware that seven other state trial courts have dismissed consumer antitrust claims brought against Visa and MasterCard based on allegations similar to those asserted in this case. *Tackitt v. Visa U.S.A. Inc .*, No. C103-740, Nebraska District Court, Lincoln County, order filed October 19, 2004; *In re Credit/Debit Card Tying Cases,* J.C .C.P. No. 4355, California Superior Court, San Francisco County; order filed October 14, 2004; *Cornelison v. Visa U.S.A. Inc.,* Civil No. 03-1350, South Dakota Circuit Court, Pennington County, order filed September 29, 2004; *Gutzwiller v. Visa U.S.A. Inc.,* No

C4-04-58, Minnesota District Court, Clay County, order filed September 15, 2004; *Beckler v. Visa U.S.A. Inc.,* Civil No. 09-04-C-00030, North Dakota District Court, Cass County, opinion filed August 23, 2004; *Stark v. Visa U.S.A. Inc.,* No. 03-055030-CZ, Michigan Circuit Court, Oakland County, opinion and order filed July 23, 2004; *Ho v. Visa U.S.A. Inc.,* No. 1123166/00, New York Supreme Court, New York County, order filed April 26, 2004. All of the states in question, like Maine, have enacted *Illinois Brick* repealers. Some of these decisions have been based on standing, others have been based on the view that the consumers bringing suit did not qualify as indirect purchasers, and some have been based on both grounds.

Plaintiffs have also directed the court's attention to a preliminary ruling by a trial court in New Mexico expressing the view that the *Associated General Contractors* test per se is not applicable in New Mexico but that some of the *Associated General Contractors* factors may nevertheless be relevant to standing under the New Mexico antitrust statute. *Nass-Romero v. Visa U.S.A. Inc.,* No. D0101-CV-200400413, New Mexico District Court, Santa Fe County, transcript of proceedings on September 17, 2004. The New Mexico court invited further briefing on the issue.

***9** The entry shall be:
Defendants' motion to dismiss the complaint for lack of standing is granted. The clerk is directed to incorporate this order in the docket by reference pursuant to Rule 79(a).
Since the court heard oral argument on defendants' motion to dismiss and took that motion under advisement, counsel for defendants have sent a number of letters to the court submitting various decisions from other state trial courts. Plaintiffs' counsel have not objected to any of these submissions. On October 15, 2004 plaintiffs' counsel filed a motion for leave to submit supplemental authorities, enclosing materials from pending cases in New Mexico and Minnesota. Defendants do not object to this motion but have submitted a response commenting on plaintiffs' submissions.
Plaintiffs' motion for leave to submit supplemental authorities is granted. For the record, the court's view is that parties should be permitted to submit copies of decisions from other courts that they contend are relevant to the issues pending before this court. However, to avoid any perceived need for responsive filings, all parties submitting decisions from other courts should limit themselves to directing the court's attention to the portions of the decisions that they contend are relevant and should refrain from any argument or commentary on the import of those decisions.
Me.Super.,2004.
Knowles v. Visa U.S.A., Inc.
Not Reported in A.2d, 2004 WL 2475284, 2004-2 Trade Cases P 74642

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ATTACHMENT E

STATE OF NORTH CAROLINA, IN THE GENERAL COURT OF JUSTICE

COUNTY OF BUNCOMBE. 04 MAR 26 PM 3:25 SUPERIOR COURT DIVISION
03 CvS 04760

BUNCOMBE CO., C.S.C.

MICHAEL WEAVER,
on behalf of himself and all others similarly situated,

BY: _____

Plaintiff,

v.

Memorandum and Judgment

CABOT CORPORATION;
PHELPS DODGE CORPORATION;
COLUMBIA CHEMICALS CO.;
DEGUSSA ENGINEERED
CARBONS, LP; DEGUSSA AG;
and DEGUSSA CORPORATION,

Defendants.

THIS CAUSE coming on to be heard before the undersigned Judge upon a motion to dismiss the complaint for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, and the Court having read the memoranda and cases furnished by counsel and heard the arguments of counsel, rules as follows:

CONTENTIONS OF THE PARTIES

The Plaintiff contends that under the ruling of the North Carolina Court of Appeals in Hyde v. Abbott Lab, Inc., 123 N.C. App. 572; 473 S.E.2d 680 (1996), the Court of Appeals has held that under the antitrust provisions of Chapter 75 of the General Statutes, it is not necessary that the Plaintiff be a direct purchaser from the Defendant. The Plaintiff further contends that that decision is the controlling authority with regards to this case.

The Defendants contend that the Hyde decision is distinguishable in two ways. First, they contend that the Hyde case was filed before the effective date of the amendment to the antitrust provisions in Chapter 75, which were amended effective October 1, 1996, and applied only to civil actions filed on or after that date. They also contend that the title of the ratified bill exhibits a legislative intent that the North Carolina Antitrust Law be internally consistent with the Federal Antitrust Laws. Since the Federal Antitrust Laws do not allow a suit except by a direct purchaser from the Defendant, they contend that the Legislature has exhibited by amendment after the Hyde decision that North Carolina conform to the Federal interpretation. Secondly, the Defendants contend

that the Hyde case dealt with a finished product, while this case attempts to deal with alleged price fixing of an ingredient for a product, thus, they contend the Plaintiff is one step farther away from the alleged antitrust violators than the Plaintiff was in the Hyde decision.

OPINION OF THE COURT

It is the opinion of the undersigned that notwithstanding the enactment of the amendment in 1996, the Hyde decision is still the law of this State with respect to the issue of suit by an indirect purchaser. Nevertheless, this Court believes that the General Assembly never intended that the antitrust laws of this State be used in the manner in which the Plaintiff has attempted in this case, and that this case is therefore distinguishable from the Hyde case. To rule otherwise would put this Court in an impossible position of attempting to determine whether the alleged price-fixing by an oligopoly of an ingredient used to make tires had anything to do with the price paid by the Plaintiff when he bought the tires. This Court believes that without some allegation and proof that the tire manufacturers themselves were an oligopoly and were fixing prices, that it would be impossible to show the price the Plaintiff paid was not set by the normal laws of supply and demand in our open economic system, and that even if it were possible to show that, there would be no way for the Court to, in any fair or just way, determine an amount the Plaintiff was damaged.

Therefore, it is the opinion of this Court that the General Assembly could not have intended that our Antitrust Statute be used by an indirect purchaser of tires against the manufacturers of an ingredient placed in those tires.

ORDER

It is, therefore, **ORDERED AND ADJUDGED** that the Defendant's motion pursuant to Rule 12(b)(6) is granted, and the case is hereby ***DISMISSED.***

This the 24 day of March, 2004.

DENNIS J. WINNER
Superior Court Judge Presiding

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing Memorandum of Law in Support of Defendants' Motion to Dismiss, on all parties to this cause by:

_____ Hand delivering a copy hereof to the attorney for each said party addressed as follows:

__✓__ Depositing a copy hereof, postage prepaid, in the United States Mail, addressed to the attorney for each said party as follows:

_____ Depositing a copy hereof with a nationally recognized overnight courier service, for overnight delivery, addressed to the attorney for each said party as follows:

_____ Telecopying a copy hereof to the attorney for each said party as follows:

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This the 27th day of May, 2005

Bradley R. Kutrow

Bradley R. Kutrow