

THE ILLINOIS BRICK WALL: STANDING TALL

By Christopher T. Casamassima¹ and Tammy A. Tsoumas²

Over thirty years ago, in *Illinois Brick Co. v. Illinois*,³ the Supreme Court made the policy decision that the efficient enforcement of the Sherman Act necessitated a rule that barred claims by indirect purchasers for the payment of alleged “overcharges” passed on through a distribution chain. The Court reasoned that the complexities of apportioning the damage attributable to a passed-on overcharge warranted a bright line rule that only the direct purchaser has standing to recover damages—even if the purchaser was a distributor who passed on the overcharge to a consumer.

This article examines the continued vitality of *Illinois Brick*, and the contours of the potential exceptions to its application in the Ninth Circuit. In sum, the *Illinois Brick* doctrine is standing the test of time. And if anything, in recent years it has been strengthened rather than weakened. Courts are narrowly construing the two exceptions recognized by the Supreme Court, and have hemmed in the third, the “co-conspirator” exception, to a narrow set of facts unique to price-fixing claims. The wall keeping out indirect-purchaser claims erected by *Illinois Brick* has not eroded over time.

I. The Rule: A Brief Review of the Illinois Brick Doctrine

Illinois Brick and its progeny address the central question of who has suffered antitrust injury within the meaning of section 4 of the Clayton Act, which provides:

“any 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”⁴

Put simply, *Illinois Brick* addresses who can sue for damages under the Sherman Act. The *Illinois Brick* plaintiffs were the State of Illinois and 700 local governmental entities who hired contractors, who, in turn used concrete blocks in their construction project for plaintiffs. These contractors, in turn, sub-contracted with masonry subcontractors, who purchased the concrete blocks from defendants.⁵ Despite being direct purchasers of contractors who used concrete block in various projects, the plaintiffs instead sued the manufacturers of concrete block for alleged antitrust violations.⁶ The plaintiffs were therefore not direct purchasers of the defendant manufacturers, and were actually three levels removed from the defendants. To illustrate, the defendant manufacturers sold the

1 Christopher Casamassima is a litigation partner in the Los Angeles office of Kirkland & Ellis LLP. He litigates complex civil cases, often involving price-fixing and other antitrust claims.

2 Tammy Tsoumas is a litigation associate in the Los Angeles of Kirkland & Ellis LLP. She focuses her practice on antitrust and other complex litigation matters.

3 431 U.S. 720 (1977).

4 15 U.S.C. Section 15(a).

5 431 U.S. at 726.

6 *Id.* at 726-7.

concrete block to masonry contractors; the contractors then submitted bids to general contractors; then, the general contractors in turn submitted bids for projects to customers like the State of Illinois.⁷

On these facts, the Supreme Court considered whether a plaintiff has standing “in the context of a suit in which the plaintiff, an indirect purchaser, seeks to show its injury by establishing pass-on by the direct purchaser[.]”⁸ The Supreme Court held that the answer is no. The Supreme Court’s rationale was two-fold.

First, the Court was concerned with the risk of duplicative recovery. The Court reasoned that “[e]ven though an indirect purchaser had already recovered for all or part of an overcharge passed on to it, the direct purchaser would still recover automatically the full amount of the overcharge that the indirect purchaser had shown to be passed on; similarly, following an automatic recovery of the full overcharge by the direct purchaser, the indirect purchaser could sue to recover the same amount.”⁹

Second, the Court was concerned with the complexity—and inefficiency—that would result from trying to apportion the damages between the direct and indirect purchasers.¹⁰ The Court observed that where there are multiple layers in any given distribution chain, “[t]he demonstration of how much of the overcharge was passed on by the first purchaser must be repeated at each point at which the price-fixed goods changed hands before they reached the plaintiff.”¹¹ Consequently, allowing an indirect purchaser to proceed with its antitrust claims “would transform treble-damage actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge from direct purchasers to middlemen to ultimate consumers.”¹² “However appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness.”¹³

Since *Illinois Brick*, the Supreme Court has shown a strong reluctance to create exceptions to the indirect purchaser bar. In *Kansas v. Utilicorp United, Inc.*,¹⁴ the Court addressed the issue of who may sue “when, in violation of the antitrust laws, suppliers overcharge a public utility for natural gas and the utility passes on the overcharge to its customers.”¹⁵ The States of Kansas and Missouri alleged antitrust violations on behalf of all persons residing within Kansas and Missouri and all state agencies, municipalities, and other political subdivisions who had purchased gas from any utility at inflated prices.¹⁶ The

7 *Id.* at 726.

8 *Id.*

9 *Id.* at 730.

10 *Id.* at 731–32.

11 *Id.* at 732–33.

12 *Id.* at 737.

13 *Id.*

14 497 U.S. 199 (1990).

15 *Id.* at 204.

16 *Id.* at 204–205.

plaintiffs argued that the Court “should allow indirect purchaser suits in cases involving regulated public utilities that pass on 100 percent of their costs to their customers.”¹⁷ The Court disagreed. The Court recognized that the rationales of avoiding duplicative recoveries and complex apportionment issues “will not apply with equal force in all cases.” Nonetheless, the Court reasoned that “ample justification exists . . . not to carve out exceptions to the direct purchaser rule for particular types of markets”¹⁸

II. The Exceptions to the Illinois Brick Doctrine

The Supreme Court and the Ninth Circuit, however, have recognized two narrow exceptions to *Illinois Brick*. An indirect purchaser may be able to pursue an antitrust claim: (1) if the indirect purchaser obtained goods from a direct purchaser pursuant to a preexisting “cost-plus contract;” or, (2) if the direct purchaser is owned or controlled by another party (either the indirect purchaser or the seller).¹⁹ The most contested question within these exceptions, as we will address below, is what constitutes “own or control.”

Beyond these two exceptions, in what has been dubbed the “co-conspirator exception,” the Ninth Circuit has held that an indirect purchaser may bring suit where he establishes a price-fixing conspiracy between the manufacturer and the middleman.²⁰ As discussed below, the status of this exception is hazier than the two more entrenched exceptions; and, indeed, its very existence has been called into question.

A. Cost Plus

The first exception acknowledged by the Supreme Court is where the direct purchaser enters into a “cost plus” pricing contract with an indirect purchaser before the direct purchaser begins paying the artificially-inflated price to the manufacturer.²¹ The “pre-existing” cost-plus contract exception makes sense from the standpoint that apportionment of the overcharge would not be difficult on this narrow set of facts. As put by the Supreme Court in *Utilicorp United*, “the effect of the overcharge is essentially determined in advance, without reference to the interaction of supply and demand that complicates the determination [of the amount of the passed-on overcharge] in the general case.”²² The parameters of this exception, likely because of its specificity, are not frequently contested.

B. Own or Control

The second exception also makes logical sense—when the price-fixer owns or controls the direct purchaser, there is “no realistic possibility” that the direct purchaser will file suit, and *Illinois Brick*’s concerns with apportionment and double recovery are

17 *Id.* at 208.

18 *Id.* at 216 (internal marks omitted).

19 *Illinois Brick*, 431 U.S. at 726 n.2

20 *Del. Valley Surgical Supply Inc. v. Johnson & Johnson*, 523 F.3d 1116, 1123 n. 1 (9th Cir. 2008)

21 See *Utilicorp United*, 497 U.S. 199; see also *Delaware Valley Surgical Supply Inc. v. Johnson & Johnson*, 523 F.3d 1116, 1123 n.1 (9th Cir. 2008) (recognizing the cost-plus contract to the indirect purchaser rule).

22 497 U.S. at 217.

inapplicable.²³ This exception, however, has been subject to more scrutiny than the first exception, specifically over what it means to “own or control” another entity. And in resolving this question, courts have narrowly construed the exception. As recently put by Judge Breyer of the Northern District of California in *In re ATM Fee Antitrust Litigation*, the “quintessential example of such a circumstance is one where the ‘direct purchaser is a subsidiary or division of a co-conspirator.’”²⁴

The seminal Ninth Circuit case regarding the own-or-control exception is *Royal Printing Co. v. Kimberly Clark Corp.*, decided in 1980.²⁵ In *Royal Printing*, plaintiffs were small retail businesses “which buy paper products and resell them.”²⁶ Defendants were “ten of the nation’s largest manufacturers of paper products.”²⁷ “The manufacturers s[old] their paper products at the wholesale level through their wholesaling divisions or wholly-owned subsidiaries, as well as through independent wholesalers.”²⁸ The Ninth Circuit assessed whether plaintiffs (who were indirect purchasers of the defendants) had standing to sue where their purchases were directly from wholly-owned subsidiaries or divisions of the defendant manufacturers.²⁹ The Court found that even though the plaintiffs were indirect purchasers, they nevertheless had standing to sue based on their purchases from the wholesalers that were owned by the manufacturer-defendants because “[t]here is little reason for the price-fixer to fear a direct purchaser’s suit when the direct purchaser is a subsidiary or division of a co-conspirator.”³⁰ The *Royal Printing* Court affirmed summary judgment as to the remainder of plaintiffs’ purchases made through independent wholesalers because plaintiffs were “truly indirect purchasers” as to those sales.³¹

Another Ninth Circuit application of the own-or-control exception is *Freeman v. San Diego Ass’n of Realtors*.³² In *Freeman*, eleven real estate associations in San Diego decided to combine their databases of real estate listings into one database maintained by a new entity called Sandicor. The associations owned Sandicor and controlled it by appointing its Board of Directors.³³ Sandicor and the associations agreed that Sandicor would assess subscribers a \$44/month database access fee and out of this fee, Sandicor would pay the associations \$25 per subscriber per month.³⁴ The costs associated with providing support services,

23 This exception was recognized by the Supreme Court in *Illinois Brick*. See *Illinois Brick Co.*, 431 U.S. at 736 n.16 (“Another situation in which market forces have been superseded and the pass-on defense might be permitted is where the direct purchaser is owned or controlled by its customer.” (citations omitted)).

24 *In re ATM Fee Antitrust Litig.*, Docket No. 733 in Case No. 04-02676 (N.D. Cal. filed Sept. 16, 2010) (citing *Royal Printing Co. v. Kimberly Clark Corp.*, 621 F.2d 323, 326 (9th Cir. 1980)).

25 621 F.2d 323 (9th Cir. 1980)

26 *Id.* at 324.

27 *Id.*

28 *Id.*

29 *Id.* at 325-7.

30 *Id.*

31 *Id.* at 328.

32 322 F.3d 1133, 1140 (9th Cir. 2003).

33 *Id.* at 1140-1141.

34 *Id.* at 1146.

however, were not the same for each of the eleven associations.³⁵ For example, the largest associations paid \$10 per subscriber per month, while the smallest associations paid around \$50 per subscriber per month.³⁶ Because the \$25 support fee from Sandicor resulted in a profit for the larger associations and a loss for the smaller associations, the larger “associations agreed to pay [the smaller associations] fixed monthly cash subsidiaries.”³⁷ Two real estate agents filed a complaint alleging that the “price of Sandicor’s MLS is inflated because the support fees Sandicor pays the associations are fixed at a supracompetitive level.”³⁸ The Ninth Circuit held that the plaintiffs had standing even though they suffered “higher prices from passed-on costs” because “[t]he associations own Sandicor.”³⁹ “[The associations] appoint [Sandicor’s] board of directors, and they are accused of conspiring with it. There’s no realistic possibility that Sandicor will sue them.”⁴⁰

Notwithstanding *Freeman*’s “no realistic possibility to sue” phrasing, *Freeman* relied explicitly on the narrow holding in *Royal Printing*, and was premised on the associations’ ownership of Sandicor and the associations’ control of its board of directors. *Freeman* did not expand the exception to encompass situations where one party merely has commercial leverage over another. Accordingly, recent District Court decisions have continued to narrowly construe the exception. Perhaps the most prominent of these decisions is Judge Hamilton’s 2009 opinion in *Sun Microsystems, Inc. v. Hynix Semiconductor Inc.*⁴¹ There, Sun Microsystems argued that it had standing to bring suit against various manufacturers of dynamic random access memory (“DRAM”) even though Sun bought DRAM from external manufacturers, who purchased the DRAM from the defendant manufacturers.⁴² Although recognizing that it did not own or operate the external manufacturers, Sun argued that it qualified under the own-or-control exception to *Illinois Brick* by asserting “that it is only control over the external manufacturers’ DRAM procurement activities that counts for purposes of the control exception (rather than the presence of structural control).”⁴³ In fact, Sun “determined from whom, at what price, and at which percentage of business the external manufacturers would order DRAM; . . . provided forecasts to determine the quantities of DRAM ordered by the external manufacturers; and . . . bore the cost of the DRAM that was ordered by the external manufacturers on its behalf.”⁴⁴ Despite Sun’s apparent *de facto* control over DRAM purchases, Judge Hamilton concluded that the own-or-control exception did not apply because Sun failed to show that it met the test to show actual ownership or formal control.⁴⁵ In particular, the court found an absence of facts indicating “interlocking directorates, minority stock ownership, loan agreements

35 *Id.* at 1141.

36 *Id.*

37 *Id.*

38 *Id.* at 1142.

39 *Id.* at 1145–6.

40 *Id.* at 1146 (footnote reference omitted).

41 608 F.Supp. 2d 1166, 1177 (N.D. Cal. 2009).

42 *Id.*

43 *Id.* at 1180–1181.

44 *Id.* at 1181.

45 *Id.* at 1182.

that subject the wholesalers to the manufacturers' operating control, [etc.]"⁴⁶ Without these formal requirements, Sun did not control the manufacturers who purchase DRAM within the meaning of the exception.

Likewise, last year, in *In re ATM Fee Antitrust Litig.*, the plaintiffs were customers of automated teller machines ("ATMs"). When customers use an ATM that does not belong to his or her bank, their bank will be charged an "interchange fee" by the bank that owns the ATM.⁴⁷ In turn, the customer's bank will charge the customer a "foreign ATM fee" for using a non-card-issuing bank ATM.⁴⁸ "Plaintiffs allege that several large banks have conspired . . . to fix the interchange fee that a card-issuing bank pays to an ATM owner when a foreign ATM transaction involving the card-issuing bank's customer" occurs.⁴⁹ Accordingly, plaintiffs allege that "interchange fees are . . . higher than they would otherwise be."⁵⁰ Importantly, the plaintiffs did "not pay this allegedly unlawful fee directly (their banks [did]) Rather, Plaintiffs assert[ed] that their respective banks pass[ed] on this inflated fee to them in [the] form of higher foreign ATM fees."⁵¹ Recognizing that they were indirect purchasers, Plaintiffs tried to fit into the own-or-control exception to *Illinois Brick* by arguing that "there is 'no realistic possibility' that the direct purchasers of interchange fees—*i.e.*, the card-issuing banks—would file a lawsuit challenging the unlawful fixing of those fees[.]"⁵² In rejecting each of the reasons that Plaintiffs put forth as to why the direct purchasers would not file lawsuits, Judge Breyer held that the exception did not apply. In so doing, he noted the absence of actual ownership: "[T]hese 4,100 entities are not owned by, nor do they own, the 650 entities to which they pay interchange fees. As a result, there is a realistic possibility that they would sue to end the illegal fixing of inflated interchange fees."⁵³ Judge Breyer also rejected the argument that a purchaser's fear of disrupting its relationship with its supplier could be a basis for invoking the own-or-control exception, holding that "the Supreme Court rejected this very argument in *Illinois Brick*."⁵⁴ In the end, Judge Breyer found that the case "involve[d] a fairly straightforward application of the rule set forth in *Illinois Brick* [because] Plaintiffs' theory of recovery is an indirect one that would require this Court to grapple with the very evidentiary complexities and uncertainties that the Court in *Illinois Brick* warned against."⁵⁵

46 *Id.*

47 Case No. 04-02676 CRB, Docket No. 733 in Case No. 3:04-cv-02676-CRB, at 2 (N.D. Cal. Sept. 16, 2010).

48 *Id.*

49 *Id.* at 3.

50 *Id.*

51 *Id.*

52 *Id.* at 11.

53 *Id.* at 14. See also *id.* at 17 (reasoning that the own or control exception does not apply because "there is no structural or underlying fundamental reason, such as the ownership of the direct purchaser by the supplier, why all of these entities would refrain from filing suit").

54 *Id.* at 15.

55 *Id.* at 16.

C. “Co-Conspirator”

A third—at least arguable—“exception” to the *Illinois Brick* direct purchaser rule is sometimes referred to as the “co-conspirator” exception. A fundamental disagreement, however, exists regarding the scope (and even existence) of a co-conspirator exception in the Ninth Circuit.

The exception traces its roots to a 1984 Ninth Circuit case, *Arizona v. Shamrock Foods Company*.⁵⁶ When the case first began, *Shamrock Foods* involved allegations of a *wholesale* price-fixing conspiracy.⁵⁷ However, after several claims were settled, the consumers altered their allegations to assert a price-fixing conspiracy between the dairy producers and the grocery stores to fix the retail price of dairy products.⁵⁸ Notably, “Shamrock and the other defendant dairies made retail home delivery sales in addition to wholesale sales to grocery stores and thus were both suppliers to and *direct horizontal competitors* with the grocery stores.”⁵⁹

The Ninth Circuit reasoned that “*Illinois Brick* is no bar since there would be no wholesale overcharge to be passed on to the consumers.”⁶⁰ “Instead, [the Court] would be presented with a conspiracy among horizontal competitors at the retail level to fix retail prices.”⁶¹ The Court held that “*Illinois Brick* does not prevent this garden variety price-fixing claim.”⁶² Put differently, the Court held that when there are allegations of a horizontal price-fixing conspiracy, a plaintiff’s claims are not barred by *Illinois Brick*. To reach its holding, nothing further was required.

Nevertheless, the Court then went on in dicta to remark that “[e]ven if the plaintiffs were claiming a two-tier conspiracy, we would hold that *Illinois Brick* is no bar to the suit.”⁶³ The Court reasoned that “in *Illinois Brick*[,] [the concern] was tracing a wholesale overcharge through an intermediary and allocating the retail price between an unlawful wholesale overcharge and market forces.”⁶⁴ The Ninth Circuit noted that “[t]hese are not the concerns in the present case.”⁶⁵

56 729 F.2d 1208 (9th Cir. 1984).

57 *Id.* at 1210.

58 *Id.*

59 *Id.* (emphasis added).

60 *Id.* at 1211.

61 *Id.*

62 *Id.*

63 *Id.*

64 *Id.* at 1214.

65 *Id.*

D. After Shamrock Foods: the State of the “Co-Conspirator Exception” in the Ninth Circuit

More than twenty-five years later, the impact of the dicta in *Shamrock Foods* remains a subject of debate. Some decisions underscore its narrow scope, and others have even suggested that the exception does not exist. In fact, no published case in the Ninth Circuit has applied the co-conspirator exception to a purely vertical conspiracy. And no case in the Ninth Circuit has attempted to reconcile *Shamrock Foods* with the Supreme Court’s reaffirmation of *Illinois Brick* in *Utilicorp United*, which was decided after *Shamrock Foods*.

For example, in 1992—after *Shamrock Foods*, but before *Utilicorp United*—in *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*,⁶⁶ plaintiff States alleged antitrust violations against the defendant oil companies. In an apparent effort to fit squarely within *Shamrock Foods*, plaintiffs alleged that defendants sought to fix retail prices.⁶⁷ The court did not read *Shamrock Foods* so broadly. The court reasoned that “[t]he *Shamrock Foods* consumer class was allowed to circumvent the *Illinois Brick* rule because it alleged a different type of conspiracy theory—one which did not require an analysis of ‘pass on’ evidence.”⁶⁸ The court found the facts of *Petroleum Products* to be distinguishable. In particular, the court noted that “[u]nlike the plaintiffs in *Shamrock Foods*, the States do not here allege that the conspiracy operated to *directly* fix retail prices.”⁶⁹ Instead, the plaintiffs’ theory was that defendants sought to fix retail prices *indirectly* “through the coordinated manipulation of wholesale prices which, in turn, caused a coordinated increase in retailers’ prices.”⁷⁰ At bottom, plaintiffs were indirect purchasers, the co-conspirator exception was inapplicable, and the plaintiffs’ claims were barred by *Illinois Brick*.

In the past few years, there have been a number of decisions that have grappled with the vitality of *Shamrock Foods* and the co-conspirator exception. In *In re Ditropan XL Antitrust Litigation*,⁷¹ for example, plaintiff American Sales Company (“ASC”) alleged antitrust violations against defendant pharmaceutical companies. ASC alleged that through anti-competitive conduct, the defendant pharmaceutical companies were able to maintain a monopoly and charge supra-competitive prices for a drug called Ditropan XL.⁷² Although ASC purported to be a direct purchaser, ASC did not buy directly from either of the defendant companies.⁷³ Because ASC was an indirect purchaser, the court addressed whether the purported “co-conspirator exception” saved ASC’s antitrust claims. The court highlighted that the *UtiliCorp United* Court “cautioned lower federal courts against creating

66 1992 U.S. Dist. LEXIS 14434 (C.D. Cal. July 16, 1992).

67 *Id.* at *5.

68 *Id.* at *6.

69 *Id.* at *8.

70 *Id.* at *9.

71 No. M:06-CV-01761-JSW, MDL No. 1761, 2007 WL 2978329 (N.D. Cal. Oct. 11, 2007).

72 *Id.* at *1.

73 *Id.*

new exceptions to the *Illinois Brick* rule.”⁷⁴ In light of the Supreme Court’s teachings, the court reasoned that “it is not clear that there is a valid co-conspirator exception to the prohibition on indirect purchaser suits.”⁷⁵ The court further reasoned:

The Ninth Circuit has not addressed the purported co-conspirator exception to *Illinois Brick* since the Supreme Court’s admonition in *UtiliCorp United*. Thus, it is not clear whether such an exception is valid.⁷⁶

The court determined, however, that it did not need to decide the issue.

In 2008, the Ninth Circuit published two decisions touching on the scope of *Shamrock Foods’* co-conspirator exception. In the first, in *Kendall v. VISA U.S.A., Inc.*,⁷⁷ the plaintiff merchants sued the defendant credit card companies and the banks, alleging violations of the antitrust laws. The plaintiff merchants did not have a contractual relationship with the credit card companies. Rather, the banks were the middlemen between the merchants and the credit card companies.⁷⁸ In other words, the plaintiff merchants were indirect purchasers of the credit card companies. “In an attempt to circumvent *Illinois Brick*, [the plaintiffs] . . . allege[d] the [credit card companies] directly conspired with the [b]anks to set the merchant discount fee” charged to the plaintiff merchants.⁷⁹ Accordingly, the merchants “contend[ed] they [we]re entitled to sue the [credit card companies] as co-conspirators under the exception to *Illinois Brick* found in” *Shamrock Foods*.⁸⁰ The Court, however, disagreed. The Court reasoned that the plaintiff merchants dealt directly with the banks (the middlemen) and thus the plaintiffs “r[an] squarely into the *Illinois Brick* wall.”⁸¹

The second 2008 Ninth Circuit opinion, *Delaware Valley Surgical Supply Inc. v. Johnson & Johnson*,⁸² involved antitrust claims brought by plaintiff Bamberg County Memorial Hospital & Nursing Center (“Bamberg”) against defendant Johnson & Johnson (“J &

74 *Id.* at ★4.

75 *Id.* (emphasis added). The court cited a case from the Seventh Circuit, *In re Bank Name Prescription Drugs Antitrust Litigation*, to underscore the uncertainty of the existence of the co-conspirator exception. In *Brand Name Prescription Drugs*, the Seventh Circuit reasoned that “*Utilicorp* implies that the only exceptions to the *Illinois Brick* doctrine are those stated in *Illinois Brick* itself.” *In re Bank Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 605 (7th Cir. 1997).

76 *Id.* at ★4.

77 518 F.3d 1042 (9th Cir. 2008).

78 *Id.* at 1049.

79 *Id.* at 1050.

80 *Id.*

81 *Id.* at 1049. The Ninth Circuit further reasoned that “the district court was not required to accept [the plaintiff merchants’] conclusion that the [credit card companies] were co-conspirators of the Banks without any evidentiary facts alleged to support such a conclusion.” *Id.* at 1050. And notably, in an apparent attempt to demonstrate the narrow scope of any exception to the *Illinois Brick* rule, the Court cited to the Supreme Court’s decision in *UtiliCorp United* for the proposition that “the exception to *Illinois Brick* did not apply even where the direct purchaser almost certainly passed on the entire cost of an alleged overcharge to the indirect purchaser because no facts were alleged to support the allegation of conspiracy.” *Id.*

82 523 F.3d 1116 (9th Cir. 2008).

J”).⁸³ Bamberg alleged that there were “artificially inflated prices” because of “coercive” contractual arrangements that forced buyers to make unwanted purchases from J & J.⁸⁴ The challenged contract provisions were in a contract between Bamberg and J & J.⁸⁵ However, Bamberg exercised its option to purchase J & J’s products through a J & J distributor.⁸⁶ Accordingly, Bamberg (even though it had entered into an agreement with J & J) was an indirect purchaser.

In analyzing the direct purchaser rule, the Court noted that “the Supreme Court has given considerable attention to the question of who may assert a claim when a middleman, for example a distributor or a wholesaler, sits between an end user and a manufacturer.”⁸⁷ The Court further highlighted that the Supreme Court has “refused to create an exception to the *Illinois Brick* rule, even where its previous concerns about the difficulties of apportionment, the risk of multiple recovery, and the diminution of incentives for private antitrust enforcement would not apply with equal force.”⁸⁸ In fact, the Ninth Circuit noted that even though the Supreme Court recognizes that the “*Illinois Brick* rule often denies relief to consumers who have paid inflated prices because of their status as indirect purchasers,” the Supreme Court’s jurisprudence nevertheless demonstrates a “desire for a brightline rule” and for “stability in the law.”⁸⁹ The Ninth Circuit concluded that it was “bound by the sensible and straightforward rule set forth by *Illinois Brick*.”⁹⁰

Supreme Court jurisprudence has been neither vague nor ambiguous in establishing the direct purchaser rule. The Supreme Court intended to make a bright line rule for identifying the proper plaintiff when an antitrust violation occurs in a multi-tiered distribution system. The Court has explicitly rejected attempts to create exceptions to that rule, even when the considerations in a particular market may undermine some of the reasoning used by the *Illinois Brick* Court.⁹¹

The Ninth Circuit then held that because “[t]he undisputed truth is that Bamberg only indirectly purchased goods from J & J, . . . Bamberg lack[ed] standing under section 4 of the Clayton Act to assert an antitrust violation against J & J.”⁹²

In reaching its decision, the Ninth Circuit highlighted that there are two established exceptions to the *Illinois Brick*: where “(1) there was a pre-existing cost-plus contract . . . or (2) the direct purchaser is owned or controlled by the indirect purchaser.”⁹³ After listing these two exceptions, the Court, citing *Shamrock Foods*, wrote that “this [C]ourt

83 *Id.* at 1118.

84 *Id.*

85 *Id.*

86 *Id.* at 1118–1119.

87 *Id.* at 1120.

88 *Id.* at 1121 (internal quotation marks omitted).

89 *Id.*

90 *Id.* at 1122.

91 *Id.* (citation omitted).

92 *Id.*

93 *Id.* at 1123 n.1.

has held that an indirect purchaser may bring suit where he establishes a price-fixing conspiracy between the manufacturer and the middlemen.”⁹⁴ Thus the Court notably did not enumerate the co-conspirator exception alongside the two recognized exceptions, instead acknowledging it only in the specific context of *Shamrock Foods* and price-fixing conspiracies.

Since *Delaware Valley*, two district courts have analyzed the issue in writing—both issuing opinions in September 2010. In *Stanislaus Food Products Co. v. USS-POSCO Industries*,⁹⁵ the Eastern District of California reiterated the narrow scope of the exception. In *Stanislaus*, the plaintiff Stanislaus was a tomato canner.⁹⁶ Stanislaus purchased tin-plated cans from Silgan, who purchased the products to manufacture the tin-plated cans from Defendant USS-POSCO Industries (“UPI”).⁹⁷ Stanislaus alleged that “UPI and Silgan agreed to fix the prices of . . . [p]roducts sold to Silgan at supracompetitive prices.”⁹⁸ The plaintiff sought to fit within the “co-conspirator exception” to *Illinois Brick*. The court disagreed and found that unlike in *Shamrock Foods*, “plaintiff does not allege that Silgan was a co-conspirator in a *horizontal* conspiracy[.]”⁹⁹ The court recognized that *Shamrock Foods* also contains dicta that seemed to support the notion that where there is a conspiracy to fix retail prices, the co-conspirator exception would apply.¹⁰⁰ But, the court reasoned that “plaintiff does not allege that Silgan and UPI entered into a conspiracy to fix prices at the retail level[.]”¹⁰¹ Thus, to the extent a co-conspirator exception exists, it was inapplicable.

Finally, in Judge Breyer’s recent decision in *In re ATM Fee Antitrust Litigation*,¹⁰² he considered each of the exceptions to the *Illinois Brick* direct purchaser rule. With respect to the co-conspirator exception, Judge Breyer approached it with skepticism, referring to the holding in *Shamrock Foods* as the “so-called ‘co-conspirator’ exception” and recognizing its applicability only to price-fixing conspiracies.¹⁰³ Judge Breyer recognized that “[s]trictly speaking, the co-conspirator ‘exception’ identified in *Shamrock Foods* is not an exception to the direct purchaser rule,”¹⁰⁴ and that “*Shamrock Foods* stands for the proposition that a plaintiff may sue for damages when the price that they have paid directly is the one that was unlawfully fixed.”¹⁰⁵ Judge Breyer reasoned that where parties conspire to fix a retail

94 *Id.* at 1123 n.1. In 2009, the Northern District of California also recognized that the rule articulated in *Shamrock Foods* only applies “where there is a price-fixing conspiracy between the manufacturer and the middleman[.]” *In re ATM Fee Antitrust Litig.*, No. C 04-02676 CRB, 2009 U.S. Dist. LEXIS 83199, at *20 (N.D. Cal. Sept. 4, 2009) (internal citation omitted).

95 No. CV F 09-0560, 2010 WL 3521979 (E.D. Cal. Sept. 3, 2010).

96 *Stanislaus Food Prods. Co.*, 2010 WL 3521979, at *1.

97 *Id.*

98 *Id.* at *3 (internal quotation marks omitted).

99 *Id.* at *7 (emphasis in the original).

100 *Id.* at *7-8.

101 *Id.* at *8 (emphasis in the original).

102 *In re ATM Fee Antitrust Litig.*, Docket No. 73 in Case No. 04-02676 (N.D. Cal. Sept. 16, 2010) (citing *Royal Printing Co. v. Kimberly Clark Corp.*, 621 F.2d 323, 326 (9th Cir. 1980)).

103 *Id.* at 8.

104 *Id.* at 9.

105 *Id.*

price paid by a consumer, the consumer purchases the price-fixed good directly from a conspirator, and thus there is no need to invoke the “so-called co-conspirator exception.” Because the plaintiffs in *In re ATM Fee Antitrust Litigation* alleged that the defendants “passed along the artificially inflated fee to Plaintiffs,” however, their claims were barred by *Illinois Brick*.

The crux of Judge Breyer’s analysis is that the “co-conspirator exception” is not really an exception at all, but a paradigm to analyze whether or not there is a pass-on overcharge in a price-fixing case. In a horizontal context, even where one of the conspirators is both a retailer and a producer as in *Shamrock Foods*, there is no debate. As *Shamrock Foods* observed, that is a “garden variety” price-fixing claim. That one of the conspirators also happens to produce the product is beside the point.

After this recent line of authority assessing the vitality of a co-conspirator exception, the question remains as to what set of facts it would actually apply? In a resale price maintenance agreement, for example, is it always the case that the middleman is not passing on an overcharge even if it agrees with the manufacturer on the retail price? And after the Supreme Court’s ruling in *Leegin*¹⁰⁶ that resale price maintenance is no longer *per se* illegal, what is the practical significance of a vertical co-conspirator exception anyway, assuming it exists? For that matter, would the *Shamrock Foods* Court have offered its vertical price-fixing *dicta* in a post-*Leegin* world?

★ ★ ★

Despite these questions, what is clear is that *Illinois Brick* is standing the test of time in the Ninth Circuit. Its two entrenched exceptions recognized by the Supreme Court are narrowly construed; and the “so-called” co-conspirator exception has been expressly limited in numerous cases to price-fixing conspiracies—including the most recent Ninth Circuit case on the subject, *Delaware Valley*—and called into question in others. There is, moreover, an absence of recent authority applying the co-conspirator exception in a vertical context, and *Leegin* has likely reduced its practical significance in any event. In sum, Courts continue to rely on the wall erected by *Illinois Brick* to dismiss indirect purchaser claims, and over the last twenty-five years plus, plaintiffs have had limited success in chipping away at its foundation.

106 *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).