No. 18-3735

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MARION HEALTHCARE, LLC, *et al.*,
Plaintiffs-Appellants,

v.

BECTON DICKINSON & COMPANY, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Illinois
(Case No. 3:18-cv-01059)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* SUPPORTING DEFENDANTS-APPELLEES

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July 18, 2019

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-3735

Short Caption: Marion Healthcare, LLC v. Becton Dickenson & Company

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Attorney's Signature: s/ Cory L. Andrews Date: July 18, 2019

Attorney's Printed Name: Cory L. Andrews

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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None

Attorney's Signature: s/ Corbin K. Barthold Date: July 18, 2019

Attorney's Printed Name: Corbin K. Barthold

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes and defends free enterprise, individual rights, limited government, and the rule of law. To that end, WLF often appears as an *amicus curiae* in important antitrust cases. *See, e.g.*, *Apple v. Pepper*, 139 S. Ct. 1514 (2019); *FTC v. Actavis*, 570 U.S. 136 (2013); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

The central aim of antitrust law is to ensure free-market competition, providing consumers with better goods and services at lower prices. The decision below furthers that laudable goal. By insisting that only the direct purchaser of goods may sue an allegedly abusive monopolist for damages—even if that purchaser passed the alleged overcharge to its customers—the Supreme Court's direct-purchaser rule "more effectively enforce[s]" the Clayton Act's treble-damages remedy. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 734 (1977).

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[*] No party's counsel authored any part of this brief. No one, apart from WLF and its counsel, contributed money intended to fund the brief's preparation or submission. All parties have consented to the filing of WLF's brief.

Applying this bright-line rule, the district court correctly dismissed the plaintiffs' antitrust claim. In appealing from that decision, the plaintiffs seek to evade the direct-purchaser rule simply by repeating their allegation that the distributors (and other intermediaries) entered into "exclusionary" contracts with the manufacturer. But if indirect purchasers could avoid *Illinois Brick* merely by alleging that everyone above them in the supply chain is part of a grand "conspiracy to restrain trade," the direct-purchaser rule would become a dead letter. WLF urges the Court to reject the plaintiffs' attempt to upset well-settled and sound antitrust law.

STATEMENT OF THE CASE

The plaintiffs are healthcare providers who purchase medical supplies—at issue here, syringes and catheters. (A3-4, ¶¶ 8-10) Like many healthcare providers, the plaintiffs belong to a group purchasing organization (GPO) that negotiates discount prices with a manufacturer on the providers' behalf. (A2, ¶ 2) The plaintiffs also are free to buy medical supplies "outside of the GPO system." (A14, ¶ 51)

When a GPO and a manufacturer agree on the price of medical supplies, those terms are set forth in a "net dealer contract." (A11, ¶ 42)

Once a healthcare provider decides to purchase medical supplies at the prices negotiated by its GPO, "it selects a distributor." (A12, ¶ 44) That distributor then enters into two agreements: (1) a "dealer notification agreement" with the manufacturer and (2) a "distributor agreement" with the provider. (A12, ¶¶ 44-45)

Under these agreements, the distributor first buys the supplies from the manufacturer at the GPO-negotiated prices of the net dealer contract. (A8-9, ¶ 31) The distributor does not set the contract price the provider pays for supplies. Instead, it merely agrees to honor the terms that the provider, through its GPO, negotiated with the manufacturer. (A2, ¶ 2; A8-9, ¶ 31) The distributor then resells those supplies to the provider, who pays "the contract price plus a percentage markup" to the distributor. (A12, ¶ 45)

Defendant Becton Dickinson & Company makes medical supplies, including syringes and catheters. (A4, ¶ 11) Defendants Premier, Inc. and Vizient, Inc. are GPOs who broker the sale of Becton supplies. (A4-5, ¶¶ 12-13) Defendants Cardinal Health, Inc.; Owens & Minor Distribution, Inc.; McKesson Medical Surgical, Inc.; and Henry Schein, Inc. distribute Becton supplies to providers. (A5, ¶¶ 14-17)

In 2018 the plaintiffs sued the defendants under § 1 of the Sherman Act, 15 U.S.C. § 1. (A1-28) The alleged § 1 violation consists of a single conspiracy claim. (A28) The plaintiffs seek treble damages under § 4 of the Clayton Act, 15 U.S.C. § 15(a). (*Id.*) They allege that the distributor-defendants "purchase products from Becton" then "resell the relevant Becton products directly to healthcare providers" under "terms negotiated by the GPOs." (A8, ¶ 31) According to the plaintiffs, Becton includes "sole or dual sourcing" and "disloyalty penalty" provisions in its net dealer contracts with the GPOs. (A11, ¶ 41)

The plaintiffs allege that these "exclusionary" agreements, along with the distributors' separate contracts with Becton and with the plaintiffs, "compel healthcare providers to buy Becton products" and "inflate the prices of certain Becton products to above-competitive levels." (A2-3, ¶¶ 4-5) Based on this "web of contracts," the plaintiffs allege a wide-ranging "conspiracy in restraint of trade." (A11-13, ¶¶ 40-47)

Applying *Illinois Brick*'s direct-purchaser rule, the district court granted the defendants' Rule 12(b)(6) motions and dismissed the

plaintiffs' § 1 claim, with prejudice. (A30-38) Because "the direct purchasers, the distributors, are passing on alleged overcharges"—overcharges arising from contracts "they had no hand in negotiating"—the district court found that the plaintiffs' damages action "implicates the same concerns expressed in *Illinois Brick*." (A37) That is, it "would be infeasible to calculate with any certainty which portion of overcharges the distributors absorb or ascertain which portion of the distributors' upcharges are due to market force, rather than overcharges." (A37)

The district court acknowledged that this court, in *Paper Systems Inc. v. Nippon Paper Industries*, 281 F.3d 629 (7th Cir. 2002), recognized an exception to *Illinois Brick* when the distributor allegedly conspires with the manufacturer *to fix* prices. (A36) But the plaintiffs here do not allege a price-fixing conspiracy. (A37) And unlike *Paper Systems*, there is no "single transaction" between Becton, the distributors, and the plaintiffs. (*Id.*)

At bottom, the district court held that the plaintiffs' quest for antitrust damages presents "a classic 'pass-on' theory prohibited by

Illinois Brick." (A38) The plaintiffs' § 1 claim thus "fall[s] within the direct purchaser rule, and no exception applies." (*Id*.)

The plaintiffs appealed. They contend that *Illinois Brick*'s direct-purchaser rule does not apply to their conspiracy claim or, in the alternative, that *Illinois Brick* should be "overruled." (Pls.' Br. at 36)

SUMMARY OF ARGUMENT

For more than 40 years, the Supreme Court has maintained a "bright-line rule" limiting the private enforcement of federal antitrust law, "grounded on the belief that simplified administration improves antitrust enforcement." *Apple*, 139 S. Ct. at 1522. Under *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), an antitrust defendant may not assert a pass-on defense—that is, a reduction in damages based on the plaintiffs' passing on some or all of the alleged overcharge to those further down the sales chain.

So too, under *Illinois Brick*, 431 U.S. at 736-47, an indirect-purchaser plaintiff who claims injury from an alleged antitrust overcharge is not harmed "by reason of" an antitrust violation under § 4 of the Clayton Act. The Supreme Court reasoned that, because antitrust defendants "could not use a pass-on defense in an action by direct

purchasers, it would risk multiple liability to allow suits by indirect purchasers." *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 207 (1990).

As the district court aptly recognized, the plaintiffs' claim triggers a straightforward application of the direct-purchaser rule; the plaintiffs' theory of recovery is an indirect one that would require this Court to grapple with the very "evidentiary complexities and uncertainties" against which *Illinois Brick* warns. 431 U.S. at 732. Such pass-through damages are prohibited in whatever form they take.

Indeed, allowing the plaintiffs' antitrust damages claim to proceed here would undercut *Illinois Brick*'s core policy justifications for barring indirect-purchaser suits. As the Supreme Court has recently reaffirmed, these include "(1) facilitating more effective enforcement of antitrust laws; (2) avoiding complicated damages calculations; and (3) eliminating duplicative damages against antitrust defendants." *Apple*, 139 S. Ct. at 1524. As we detail below, each of these policy concerns is at stake here.

Nor has the passage of time rendered *Illinois Brick* irrelevant. All the core policy concerns underlying the direct-purchaser rule have been vindicated in the laboratory of experience. By concentrating the ability

to recover in the hands of the purchaser with the most skin in the game, the rule continues to ensure robust antitrust enforcement. Despite the rise of computer-aided economic models predicting economic behavior, there remains no reliable way to trace overcharges through a distribution chain free from spurious assumptions or guesswork. And the direct-purchaser rule still eliminates the possibility that both direct and indirect purchasers will recover a treble damages windfall for the same alleged antitrust violation.

In *Illinois Brick*, the Supreme Court explicitly invited Congress, "[s]hould [it] disagree with this result," to "amend the [Clayton Act] to change it." 431 U.S. at 735 n.14. Yet for more than 40 years, Congress has never done so. Instead, Congress has steadfastly rejected a host of legislative proposals to repeal the direct-purchaser rule. In all that time, Congress has never concluded that any proposed change would yield, on balance, better antitrust enforcement.

All the same, because it is presumed to know of the Supreme Court's construction of statutory language, Congress "adopt[s] that interpretation when it re-enacts a statute without chang[ing it]." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). Here, not only has Congress

repeatedly amended the Clayton Act, but it has twice amended § 4, retaining the very language at issue in *Illinois Brick*. Those amendments give *Illinois Brick* special precedential force.

As the Supreme Court has cautioned, it would be an "unwarranted and counterproductive exercise to litigate a series of exceptions" to *Illinois Brick*. *UtiliCorp*, 497 U.S. at 217. But that is precisely what the plaintiffs ask this Court to do. By allowing indirect purchasers to evade the direct-purchaser rule simply by pleading around it, the plaintiffs' urged exception would render the rule a nullity.

* * *

"The general tendency of the law, in regard to damages at least, is not to go beyond the first step." *Hanover Shoe*, 392 U.S. at 491 (quoting *S. Pac. Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533 (1918) (Holmes, J.)). Yet the plaintiffs ask the Court to walk the Clayton Act's antitrust treble-damages remedy, indiscriminately, across innumerable layers of purchasers. In such a world—one in which every purchaser can wield its own antitrust treble-damages remedy—competitive firms would face perverse incentives not to compete and courts would be deluged with antitrust suits.

The Court should decline the plaintiffs' invitation to take that journey and, instead, stop at step one. Were it to wander any further, great inefficiency and uncertainty would surely follow.

ARGUMENT

I. THIS COURT SHOULD VINDICATE, NOT DILUTE, THE DIRECT-PURCHASER RULE.

A. The Policies Underlying the Direct-Purchaser Rule Remain as Vital as Ever.

In its *amicus* brief, the United States cites commentators who suggest "that developments in economics and class action litigation since 1968 and 1977 have mitigated many of the concerns of the Court in *Hanover Shoe* and *Illinois Brick*." (U.S. Br. at 13 n.4) According to the government, the multi-state experiment with indirect-purchaser suits has shown that "the evidentiary complexities are not as great as the *Illinois Brick* court believed them to be." (*Id.* at 20) Not so.

If anything, for those states whose own antitrust laws allow them, indirect-purchaser suits "have been problematic and disruptive in both federal and state courts." Edward D. Cavanaugh, Illinois Brick: *A Look Back and a Look Ahead*, 17 Loy. Consumer L. Rev. 1, 49 (2004). Above all, "the case has not been made for overruling or even modifying the *Illinois Brick* rule." *Id.*

1. Ensuring effective antitrust enforcement.

Illinois Brick posits that the direct purchaser is best situated to sue an abusive monopolist. By "concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it," the direct-purchaser rule enforces the antitrust laws "more effectively." 431 U.S. at 735.

Since they transact with the violator, direct purchasers are better positioned than indirect purchasers to detect the violator's anticompetitive practices. *See* Richard A. Posner & William M. Landes, *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, 609 (1979). What's more, direct purchasers (normally suppliers or distributors) are usually less numerous and more concentrated than indirect purchasers (often retail consumers). So a direct purchaser's antitrust lawsuit is less likely to be a diffuse class action with high administrative costs and little recovery for the class itself. *Id.* at 607.

Direct purchasers have the most incentive to sue only for conduct that is in fact anticompetitive. That is because a supplier or distributor is the manufacturer's bulk purchaser. If the manufacturer's conduct is efficient, the supplier or distributor stands to lose a great deal by trying to kill that efficiency through an antitrust lawsuit. In contrast, a consumer or end-user stands to lose little or—if the product is something she will buy only once—nothing by filing a baseless suit.

None of this has changed. Despite the claims of critics of *Illinois Brick*, "direct purchasers do sue price-fixers." Cavanaugh, *supra*, at 48. Indeed, "[i]t is a common mistake to assume that the direct purchasers have less incentive to sue because they are not really harmed by the overcharge." John E. Lopatka & William H. Page, *Indirect Purchaser Suits & the Consumer Interest*, 48 Antitrust Bull. 531, 560-62 & n.114 (2003) (citing ten lawsuits within the previous four years in which both direct and indirect purchasers had sued).

Experience with state antitrust law has shown that "in virtually every instance in which indirect purchasers have sued, direct purchasers, who have the right to sue for the full overcharge under current law, have sued as well." William H. Page, *Class Interpleader:*

The Antitrust Modernization Commission's Recommendation to Overrule Illinois Brick, 53 Antitrust Bull. 725, 735-36 (2008).

These "[r]obust enforcement activities by direct purchasers … belie any contention that *Illinois Brick* has had a negative impact on deterrence." Cavanaugh, *supra*, 48-49. According to the most recent Antitrust Modernization Commission, the "evidence suggests that direct purchaser litigation is more likely to provide effective deterrence." Antitrust Modernization Commission, *Report and Recommendations* 273 (Apr. 2007). "Even in the *Microsoft* litigation, where most direct purchasers, mainly computer manufacturers, were exclusively dependent on Microsoft for the supply of an essential input," those direct purchasers with plausible claims of antitrust injury against Microsoft pursued them. Page, *supra*, at 736.

On the other hand, if—as the plaintiffs here insist—*Illinois Brick* does not apply, then neither does *Hanover Shoe*. And while "the evidence shows that direct purchasers will sue for the full overcharge, it is less clear they will have adequate incentive to sue for an indeterminate share of the overcharge." Page, *supra*, at 737. If the pass-

on defense were revived, "fragmenting the right to sue could undermine the incentive of any class of purchasers to sue." *Id.*

The plaintiffs' conspiracy allegations change nothing. Medical-supply distributors are "motivated plaintiffs" who "have incentives to bring suit against the manufacturer." *Del. Valley Surgical Supply v. Johnson & Johnson*, 523 F.3d 1116, 1124 (9th Cir. 2008). And contrary to the plaintiffs' claim, the anticompetitive prices they allege would harm the distributors most. A monopoly rent is by definition a supracompetitive charge that lowers demand for a product, so Becton's allegedly inflated prices would reduce the distributors' medical-supply sales. But if this were true, the developers would suffer a decline in revenue, *so they would sue*. That has not happened, and for good reason.

Nor are the plaintiffs' allegations of a sales-chain-wide "conspiracy" enough to prevent such suits. Even if proven, a plaintiff's own anticompetitive conduct generally is no defense to liability in an antitrust suit. *Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n*, 830 F.2d 716, 720 (7th Cir. 1987) ("[T]he [*in pari delicto*] defense is not available to defendants in antitrust suits." (citing *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134 (1968))). As this Court has

explained, allowing such a defense "would undermine the public interest in assuring the continual threat of private action as a deterrent to antitrust violations." *Gen. Leaseways*, 830 F.2d at 720.

Simply put, permitting recovery for pass-on damages would "substantially reduce" the deterrent effect of treble-damages suits. *Illinois Brick*, 431 U.S. at 729. That remains just as true today as it was in 1977.

2. Avoiding complex and speculative damages evidence.

In its decisions articulating the direct-purchaser rule, the Supreme Court has construed § 4 of the Clayton Act to bar both plaintiffs and defendants from invoking pass-on theories of damages liability. The "principal basis" for the rule is to avoid pass-on inquiries that would "greatly complicate and reduce the effectiveness of already protracted treble damages proceedings." *Illinois Brick*, 431 U.S. at 731-32.

Deciding how much of the defendant's overcharge a plaintiff passed on would introduce "massive [amounts of] evidence," "complicated theories," and "insurmountable" problems of proof into private antitrust actions. *Hanover Shoe*, 392 U.S. at 493. Because a

"wide range of factors influence a company's pricing policies," it would be nearly impossible to know whether a plaintiff had raised its prices (a) because of the defendant's overcharges or, rather (b) for some other reason. *Id.* at 492. It would be "[e]qually difficult" to compute how much a reduction in the plaintiff's sales offset any price increase. *Id.* at 493.

These concerns "appl[y] with no less force" to "pass-on theories by plaintiffs." *Illinois Brick*, 431 U.S. at 732. "Permitting the use of pass-on theories under § 4 essentially would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge," ranging "from direct purchasers to middlemen to ultimate consumers." *Id.* at 737. That "would add whole new dimensions of complexity to treble-damages lawsuits." *Id.*

This case proves the point. The plaintiffs concede that the distributors merely agree to honor the contract terms the plaintiffs, through their GPO agents, negotiate with Becton. (A2, ¶ 2; A8-9, ¶ 31) Under these agreements, a distributor first buys the supplies from Becton at the GPO-negotiated prices in the net dealer contract. (A8-9, ¶ 31) The distributor then resells those supplies to the plaintiffs, who pay

"the contract price plus a percentage markup" to the distributor. (A12, ¶ 45)

The plaintiffs' admission that distributors add their own "percentage markup" to Becton's pre-negotiated "contract price" confirms that the plaintiffs are asking the Court to apportion an alleged overcharge. Permitting them to sue would require the Court to "trace the effect of the overcharge through each step in the distribution chain." *Illinois Brick*, 431 U.S. at 741.

Yet there is no way to do that without answering whether, and by how much, the alleged overcharge affected each distributor's pricing decisions for catheters and syringes. Such a "computation requires knowledge of the prevailing elasticities of supply and demand"—an inquiry "beyond the technical competence" of juries and judges. Herbert Hovencamp, *Federal Antitrust Policy: The Law of Competition and Its Practice*, § 16.6a (5th ed. 2016).

"Even if most of the overcharge were passed on in most cases, it would still be necessary in each individual case to determine [by] how much"—that is, "to adjudicate the antitrust violator's passing-on defense in the direct purchaser's suit and to measure the indirect

purchasers' damages in their suits." William M. Landes & Richard A. Posner, *The Economics of Passing On: A Reply to Harris and Sullivan*, 128 U. Pa. L. Rev. 1274, 1276 (1980).

Such an undertaking would also defeat the purpose of a bright-line rule. Even if "it might be possible for economists to factor out each of these considerations for all prior sales," "the Supreme Court has decreed a simpler solution: simply restrict the right to recover to those who are more directly affected by the defendants' actions." *Loeb Indus. v. Sumitomo Corp.*, 306 F.3d 469, 486 (7th Cir. 2002).

Despite claims to the contrary, in the more than 40 years since *Illinois Brick* was decided, nothing has changed the fact that "allowing indirect purchasers to sue would complicate and delay antitrust proceedings." Cavanaugh, *supra*, at 48. Indeed, despite "technological developments that have given birth to sophisticated economic models predicting economic behavior, there is still no satisfactory way to trace overcharges through the distribution chain without resorting to assumptions or outright speculation." *Id.*

Put differently, "fancy-pants theories" do not always "lead to a brighter tomorrow." Frank H. Easterbrook, *When Is It Worthwhile to*

Use Courts to Search for Exclusionary Conduct?, 2003 Colum. Bus. L. Rev. 345, 351 (2003).

Illinois Brick predicted that allowing indirect purchasers to recover would prompt "massive multiparty litigations involving many levels of distribution and including large classes of ultimate consumers remote from the defendant"—that is, burdensome litigation. 431 U.S. at 740. This was no idle speculation. "As predicted, enactment of *Illinois Brick* repealers has triggered numerous costly indirect purchaser class actions in state courts." Page, *supra*, at 728. Reversing the decision below would only exacerbate that problem, by injecting it into *federal* courts.

"Allowing recovery for indirect purchasers is an exercise not in fact finding but rather in rough justice." Edward D. Cavanaugh, *Antitrust Law and Economic Theory: Finding a Balance*, 45 Loy. U. Chi. L.J. 123, 156-57 (2013). Yet that rough justice relies on "a dizzying array of economic assumptions spun by experts," especially "the dubious assumption that middlemen routinely pass on to their customer all, or substantially all, of any overcharge incurred." *Id.* at 157. Experience belies that assumption.

"Courtrooms should not be transformed into intermediate microeconomics classrooms." *Id.* at 125. Instead, the "better economic view of indirect purchaser cases is that the cost of proving recovery outweighs any benefits that accrue to indirect purchasers-plaintiffs." *Id.* at 157. That is why, under the "bright-line rule of *Illinois Brick*," "indirect purchasers who are two or more steps removed … may not sue." *Apple*, 139 S. Ct. at 1520. So too, here.

3. Eliminating duplicative recoveries.

The direct-purchaser rule also eliminates the risk of duplicative recovery. "Unless they are willing to countenance multiple liability, courts cannot allow suits by indirect purchasers." Posner & Landes, *supra*, at 603. Even before *Illinois Brick*, the Supreme Court refused to "open the door to duplicative recoveries" under § 4 of the Clayton Act. *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 264 (1972).

This concern over duplicative recovery is based on the valid assumption that different groups of plaintiffs will "assert conflicting claims to a common fund—the amount of the alleged overcharge—by contending that the entire overcharge was absorbed at that particular level in the chain." *Illinois Brick*, 431 U.S. at 737. Without the direct-

purchaser rule, an antitrust defendant could be held liable for treble damages to a direct purchaser, then (in a second suit) be forced to pay treble damages for the same antitrust injury the direct purchaser passed on (in the form of an overcharge) to indirect purchasers further down the sales chain. *Id.* at 731 n.11.

Likewise, even if "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." *Illinois Brick*, 431 U.S. at 730. This case is no different.

The plaintiffs, as they must, blithely dismiss the prospect that the distributors, as direct purchasers, may also seek treble damages from Becton for the same alleged overcharge. (Pls.' Br. at 31: "But no conspirator has defected and sued Becton.") Yet with so many potential plaintiffs throughout the sales chain, a serious risk exists of overlapping recovery. And as we have shown, the plaintiffs' scattershot allegations of a conspiracy do not insulate Becton from suit by other alleged co-conspirators. *Gen. Leaseways*, 830 F.2d at 720. Such duplicative

recovery here would not only be inefficient, it would likely result in over-deterrence.

Unlike *Apple*, this *is* a case "where multiple parties at different levels of a distribution chain" *could* try to "recover the same passed-through overcharges initially levied by the manufacturer at the top of the chain." *Apple*, 138 S. Ct. at 1524-25. Simply put, there is no known mechanism for forcing disparate groups of plaintiffs—nevermind plaintiffs' *lawyers*—to agree on anything, let alone on abandoning claims to avoid duplicative recoveries. Because this action involves "an indirect injury causing [the plaintiffs] at best speculative damages that would lead to a strong possibility of duplicative recovery," the plaintiffs' antitrust claim is barred. *Loeb*, 306 F.3d at 486.

B. Congress Has Ratified the Direct-Purchaser Rule.

The Supreme Court recently reaffirmed *Illinois Brick*'s "bright-line rule," which "authorizes suits by *direct* purchasers but bars suits by *indirect* purchasers." *Apple*, 139 S. Ct. at 1520. Even so, the plaintiffs invite this Court to sidestep—or else "overturn"!—*Illinois Brick*. But *stare decisis* demands more, especially here. As *Illinois Brick* emphasized, Congress is always free to legislate away the Supreme

Court's interpretation of § 4 if it disagrees with it. 431 U.S. at 735 n.14. But as further evidence of the rule's continued vitality, Congress has never done so.

From almost the day *Illinois Brick* was decided, critics have urged Congress to amend § 4 to permit indirect purchasers to sue for treble damages. More than four decades later, no fewer than 17 bills have sought to repeal the direct-purchaser rule. *See* H.R. 4321, 106th Cong. (2000); S. 1962, 100th Cong. (1987); S. 2481, 99th Cong. (1986); S. 2022, 99th Cong. (1986); S. 915, 98th Cong. (1983); H.R. 2244, 98th Cong. (1983); S. 2772, 97th Cong. (1982); S. 300, 96th Cong. (1979); H.R. 2204 96th Cong. (1979); H.R. 2060, 96th Cong. (1979); H.R. 11942, 95th Cong. (1978); H.R. 10783, 95th Cong. (1978); S. 1874, 95th Cong. (1977); H.R. 9132, 95th Cong. (1977); H.R. 8517, 95th Cong. (1977); H.R. 8516, 95th Cong. (1977); H.R. 8359, 95th Cong. (1977).

Yet none of those bills has garnered so much as a floor vote in either chamber of Congress. This steadfast refusal to repeal the direct-purchaser rule, in the face of dogged and persistent efforts to do so, is unusually strong evidence of congressional intent. "The matter has been fully brought to the attention of the public and the Congress," and "the

latter has not seen fit to change the statute." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 488-89 (1940). Such "congressional silence, after years of judicial interpretation, supports adherence to the traditional view." *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 594 (2004).

Nor is that all. While Congress has amended the Clayton Act many times during the same interval, it has never altered or repealed the "any person … injured in his business or property" language from which the direct-purchaser rule derives. *See* 15 U.S.C. § 15(a). What's more, Congress has twice amended § 4 itself, in 1980 and 1982, at the height of a "repeal-*Illinois-Brick*" frenzy. *See* Pub. L. 97-393, 96 Stat. 1964 (1982); Pub. L. 96-349, 94 Stat. 1156 (1980).

And the last of those amendments—the Foreign Sovereign Antitrust Recoveries Act of 1982—expressly overturned a 1978 Supreme Court decision construing the very statutory language at issue in *Illinois Brick*. *See Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978) ("Congress did not intend to make the treble-damages remedy available only to consumers in our own country.").

Yet with both amendments, Congress fully retained the statutory basis for the direct-purchaser rule. Of course, when it twice amended

§ 4 following *Illinois Brick*, Congress was well aware of the rule. Indeed, a debate was still raging over whether Congress intended § 4 to limit recovery to only direct purchasers. That multi-year debate "brought forth sharply conflicting views, both on the Court and in Congress." *Apex Hosiery*, 310 U.S. at 488. Yet amid that debate, Congress "made a considered judgment to retain the relevant statutory text." *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Proj., Inc.*, 135 S. Ct. 2507, 2519 (2015).

While legislative inaction by Congress does not always equal acquiescence, Congress's long history of inaction here, combined with its deliberate amendments to § 4 of the Clayton Act, is decisive: Congress has ratified the rule of *Hanover Shoe* and *Illinois Brick*. In more than four decades, Congress has never concluded that any proposed change would yield, on balance, a better result for antitrust enforcement.

II. THE PLAINTIFFS' URGED EXCEPTION WOULD SWALLOW THE RULE.

On appeal, the plaintiffs insist that the direct-purchaser rule is no bar to recovery because their complaint alleges that the distributors are part of a conspiracy to pass on inflated prices. The district court correctly refused the plaintiffs' invitation to create a broad new

exception to the direct-purchaser rule. As the Supreme Court has cautioned, it would be an "unwarranted and counterproductive exercise to litigate a series of exceptions" to *Illinois Brick*. *UtiliCorp*, 497 U.S. at 217.

The plaintiffs contend their "exception" to *Illinois Brick* applies even though the distributors admittedly had no part in setting the allegedly inflated price, and even though the distributors may have absorbed some portion of any alleged overcharge. (Pls.' Br. at 27) Such an exception would surely swallow the rule. Unfortunately for the plaintiffs, *Illinois Brick* operates as a rule of general application: "The indirect purchaser recovers nothing, even if it bore the entire overcharge and even if the direct purchaser did not sue." *Carter v. Berger*, 777 F.2d 1173, 1175 (7th Cir. 1985).

The Supreme Court has refused to endorse a case-by-case approach to determining whether some pass-on claims should be allowed. *UtiliCorp*, 497 U.S. at 210, 216-17. Besides, no "conspiracy exception" applies when a plaintiff complains that a distributor "passed on to them" an alleged overcharge imposed by the manufacturer. *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 606 (7th

Cir. 1997). In other words, this Court distinguishes between a claim alleging a conspiracy to pass on inflated prices to the plaintiffs (which, as here, is barred by *Illinois Brick*) from a claim alleging *a conspiracy to fix prices* the plaintiffs directly paid (which is not barred). *Id.*

Brand Name Prescription Drugs addressed a claim by retail pharmacies that drug manufacturers and wholesalers conspired to inflate the prices at which prescription drugs were sold directly to pharmacies. Judge Posner observed that, had the pharmacies alleged the manufacturers conspired with the wholesalers to *fix the prices* the pharmacies paid directly to the wholesalers, they would be "direct purchasers" not barred by *Illinois Brick*. 123 F.3d at 604-05. On the other hand, Judge Posner explained that a claim that the wholesalers merely agreed to pass on inflated prices to the pharmacies "is just the kind of complaint that *Illinois Brick* bars." *Id*. at 606.

That is this case. Again, the plaintiffs admit that the distributors add their own "percentage markup" to Becton's pre-negotiated "contract price." (A12, ¶ 45) And the plaintiffs concede *no* role by the distributors in fixing the pre-markup price the plaintiffs paid. (A2, ¶ 2; A8-9, ¶ 31) Any co-conspirator exception applies only when the direct purchaser

"conspired with a manufacturer with respect to the price paid by a consumer." *Dickson v. Microsoft Corp.*, 309 F.3d 193, 215 (4th Cir. 2002). Under that scenario, "the consumer is the only party who has paid any overcharge." *Id.* (citing 2 Phillip E. Areeda & Herbert Hovencamp, *Antitrust Law* ¶ 371h, at 264 (1995)). The plaintiffs allege no such price-fixing conspiracy here, so their "inclusion of a conspiracy allegation is insufficient to circumvent the *Illinois Brick* rule." *Dickson*, 309 F.3d at 215.

Put differently, *Illinois Brick* bars *any* suit if the theory of recovery hinges on pass-on damages. Here, the only way to know whether the distributors would have charged lower prices for medical supplies in a hypothetical market free from Becton's allegedly supracompetitive price would be to undertake the very kind of pass-on calculus that *Illinois Brick* strictly prohibits.

Leaving aside the fact that—as ably shown by the defendants—the plaintiffs have failed even to adequately plead a plausible § 1 conspiracy under *Twombly*, their proposed exception invites great mischief. That is because "[a] bare allegation of a conspiracy is almost impossible to defend against, particularly where the defendants are

large institutions with hundreds of employees entering into contracts and agreements daily." *Kendall v. Visa USA, Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008).

"Obviously, there is great potential for abuse in a rule which says that an indirect purchaser may sue if it names its seller and its seller's seller as defendant co-conspirators but may not sue if no conspiracy is alleged." Edward D. Cavanaugh, Illinois Brick *Revisited: An Analysis of a Developing Antitrust Jurisprudence*, 17 Val. U. L. Rev. 63, 96 (1983). Such a rule "would encourage the indirect purchaser-plaintiff to allege vertical conspiracies even where none existed." *Id.*

A decision allowing the plaintiffs to evade *Illinois Brick* based on the allegations here would increase, exponentially, the likelihood that a plaintiff in this Circuit "with a largely groundless claim" will "simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value." *Dura Pharm, Inc. v. Broudo*, 544 U.S. 336, 347 (2005) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975)). Yet the *Illinois Brick* rule exists to conserve judicial resources, not to deplete them.

* * *

In short, the plaintiffs seek a new and far-reaching exception to the direct-purchaser rule that no court has ever adopted. If indirect purchasers may avoid *Illinois Brick* merely by alleging that everyone above them in the supply chain is part of a "conspiracy to restrain trade," nothing will remain of the direct-purchaser rule. Rather than gut the rule, this Court should vindicate it. *Illinois Brick*'s public-policy concerns are much too vital to leave to the scruples of an enterprising plaintiffs' bar.

CONCLUSION

The judgment should be affirmed.

July 18, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

This brief complies with the type-volume limits of Fed. R. App. P. 29(a)(5) because it contains 5,634 words, excluding the parts exempted by Fed. R. App. P. 32(f).

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Dated: July 18, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of July, 2019, a true and correct copy of the foregoing was filed with the Clerk of the United States Court of Appeals for the Seventh Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

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