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ANOTHER BRICK IN THE WALL: THE *ILLINOIS BRICK* CO-CONSPIRATOR EXCEPTION'S TREATMENT BY UNITED STATES CIRCUIT COURTS

❖ NOTE ❖

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I. INTRODUCTION

The Supreme Court's 1977 ruling in *Illinois Brick Company v. Illinois* profoundly shaped private antitrust enforcement at the federal level in the United States. Yet, the Supreme Court's avoidance of subsequent questions stemming from its *Illinois Brick* ruling has created a circuit split regarding plaintiff standing in cases involving anticompetitive behavior by multiple co-conspirators. This Note examines the origins of this "co-conspirator" exception to *Illinois Brick* and analyzes the differences in the exception's treatment by circuit courts across the United States in order to promote a clearer, more-uniform application of the legal theory going forward.

II. BACKGROUND

The co-conspirator exception, along with all other exceptions to the *Illinois Brick* doctrine, arises under the Clayton Act of 1914.[1] The Clayton Act adds enforcement power to the Sherman Act of 1890 and together the two statutes comprise the United States' federal antitrust framework.[2] Specifically, section 4 of the Clayton Act provides that "any person who shall be injured in [their] business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court . . . ."[3] The provision thus allows a private right of action for businesses who deal with antitrust violators.[4]

1. Illinois Brick Co. v. Illinois, 431 U.S. 720, 723 (1977).
2. *See* 3 Federal Antitrust Law § 18.2 (2018).
3. 15 U.S.C. § 15(a) (2012).
4. Meagan P. VanderWeele, *In re ATM Fee Litigation: Ninth Circuit Uses Illinois Brick to Build a High Wall for Indirect Purchasers*, 12 DEPAUL BUS. & COMM. L.J. 121, 122 (2013).

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On its face, section 4 appears to permit claims by any party who can establish cause-in-fact between their injury and a defendant's antitrust violations. However, like in other legal relief frameworks such as tort law, a requisite degree of proximity is implied when a party claims antitrust damages against a defendant.[5] Given this implication, who has standing to sue for damages under American antitrust law, then?[6] The Supreme Court shed light on this question in the following case trilogy.[7]

Hanover Shoe v. United Shoe Machinery Corp. was a prelude to *Illinois Brick.* The case involved a shoe manufacturer alleging the defendant's "practice of leasing and refusing to sell . . . important shoe machinery" amounted to unlawful monopolization.[8] Plaintiff claimed damages for overcharges it absorbed in leasing the machinery from defendant.[9] Meanwhile, the defendant argued that plaintiff "suffered no legally cognizable injury" since the illegal overcharges were passed onto the plaintiff's customers in the form of higher shoe prices.[10] The Supreme Court held this cost shifting does not prevent damage recovery by plaintiff, who was a direct purchaser of defendant's machinery.[11]

Almost a decade later, *Illinois Brick Company v. Illinois* expanded on *Hanover Shoe*'s analysis. Plaintiffs in *Illinois Brick* included the State of Illinois and various municipalities who, unlike Hanover Shoe Company, did not purchase directly from the defendants.[12] Rather, plaintiffs were three levels removed as the defendant manufacturers sold bricks to masonry contractors, who then submitted bids to general contractors, who furthermore submitted project bids to the plaintiff municipal clients.[13] Thus, the Supreme Court considered whether a plaintiff can collect damages "in the context . . . in which the plaintiff, an indirect purchaser, seeks to show its injury by establishing pass-on by the direct purchaser . . . ."[14] The majority answered "no," citing risks of duplicative recovery and the immense difficulty of trying to apportion damages.[15] Nevertheless, the opinion acknowledged two exceptions to the general rule preventing recovery by indirect purchasers: "where 'an overcharged buyer has a pre-existing cost-plus contract'" with a seller,[16] and "where the direct purchaser is owned or controlled by its customer."[17]

The Supreme Court later reinforced its *Hanover Shoe* and *Illinois Brick* decisions in *Kansas v. Utilicorp United*. The case involved consolidated claims by both petitioner and respondent

5. *See*, *e.g.*, SAS of Puerto Rico v. Puerto Rico Tel. Co., 48 F.3d 39, 43 (1st Cir. 1995).

6. *See* Christopher T. Casamassima & Tammy A. Tsoumas, *The Illinois Brick Wall: Standing Tall*, 20 COMPETITION: J. ANTI. & COMP. L. SEC. ST. B. CAL 67, 67 (2011) ("Put simply, *Illinois Brick* addresses who can sue for damages under the Sherman Act.") [hereinafter Casamassima].

7. *See* Hanover Shoe v. United Shoe Mach. Corp., 392 U.S. 481, 489 (1968) ("[W]hen a buyer shows that the price paid by him . . . is illegally high . . . . his right to damages is not destroyed."); Illinois Brick Co. v. Illinois, 431 U.S. 720, 726 (1977) ("[T]he issue is presented in the context of a suit in which the plaintiff, an indirect purchaser, seeks to show its injury by establishing pass-on . . . ."); Kansas v. Utilicorp United, Inc., 497 U.S. 199, 204 (1990) ("We must decide who may sue under § 4 . . . .").

8. Hanover Shoe, 392 U.S. at 483.

9. *Id.* at 483.

10. *Id.* at 487-88.

11. *Id.* at 493-94.

12. *See* Casamassima, *supra* note 6, at 67.

13. Illinois Brick Co. v. Illinois, 431 U.S. 720, 726 (1977).

14. *Id.* at 726.

15. *Id.* at 730-32.

16. *Id.* at 724 n.2 (quoting Hanover Shoe v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968)).

17. *Id.* at 736 n.16.

against a common set of defendants, a pipeline company and several gas producers.[18] Respondent had sued its suppliers alleging a conspiracy to inflate gas prices.[19] Petitioners, meanwhile, had filed their own suit against the defendants and claimed respondent's complaint lacked standing because respondent had passed on the inflated costs to Kansas citizens.[20]

Petitioners also asked for an exception "allow[ing] indirect purchaser in suits involving *regulated public utilities* that pass on 100 percent of their costs to their customers" and argued that *Illinois Brick*'s policy concerns were minimal in such a scenario.[21] The Supreme Court disagreed.[22] Recognizing the policy rationales behind *Hanover Shoe* and *Illinois Brick* may not always apply uniformly, *Utilicorp* nonetheless reinforced the Supreme Court's "belief that ample justification exists for our stated decision not to 'carve out exceptions to the direct purchaser rule for particular types of markets.'"[23]

Thus, the Supreme Court made clear that only an antitrust violator's direct purchasers may sue the violator for antitrust damages. Claims by indirect purchaser plaintiffs are blocked by the "*Illinois Brick* wall"[24] unless the direct purchaser had a cost-plus contract with the defendant, or the plaintiff owned or controlled the direct purchaser.[25] This is where the clarity ends, though. Despite having opportunities,[26] the Supreme Court failed to formulate a clear rule addressing situations where multiple parties coordinate uncompetitive behavior across multiple levels of a supply chain. Put differently, the Supreme Court declined to specify who can sue for damages when direct purchasers conspire with their supplier to violate antitrust law and injure others down the supply chain with inflated prices. Circuits have responded by formulating their own approaches to govern the standing of indirect purchasers who claim damages against co-conspirators. These approaches, discussed below, have been dubbed as a third, "co-conspirator" exception to *Illinois Brick*'s general indirect purchaser bar. Proper understanding of this exception is crucial in a modern outsourcing economy where supply chains consisting of independent contractors have largely replaced single, vertically integrated enterprises.[27]

III. ANALYSIS

Circuits' treatment of the co-conspirator exception varies considerably. The Fourth and Ninth circuits construe the exception narrowly, applying it only in cases involving price-fixing by defendants. On the other side of the continuum, the Seventh and Eighth circuits construe the exception more liberally. A third group of circuits have illustrated the exception's procedural

18. Kansas v. Utilicorp United, Inc., 497 U.S. 199, 204-05 (1990).
19. *Id.* at 204.
20. *Id.* at 204-05.
21. *Id.* at 208. (*emphasis added*).
22. *Id.*
23. *Id.* at 216 (quoting Illinois v. Illinois Brick Co., 431 U.S. 720, 744 (1977)).
24. *See* Kendall v. VISA U.S.A., Inc., 518 F.3d 1042, 1049 (exemplifying the "brick wall" metaphor).
25. Illinois Brick, 431 U.S. at 724, 736.
26. *See, e.g.*, Shamrock Foods Co. v. Arizona, 729 F.2d 1208 (9th Cir. 1984), *cert. denied*, 469 U.S. 1197 (1985); Iowa Beef Processors, Inc., v. Meat Price Investigators Ass'n (*In re* Beef Industry Antitrust Litig.), 607 F.2d 167 (5th Cir. 1979), *cert. denied*, 452 U.S. 905 (1981).
27. *See generally* Simon Loertscher & Michael H. Riordan, *Make and Buy: Outsourcing, Vertical Integration, and Cost Reduction*, 11 AM. ECON. J.: MICROECONOMICS 105, 105 (2019) (citing JOSH WHITFORD, THE NEW OLD ECONOMY: NETWORKS, INSTITUTIONS, AND THE ORGANIZATIONAL TRANSFORMATION OF AMERICAN MANUFACTURING (2005)).

requirements in a price-fixing context without expressly precluding its applicability to other uncompetitive behavior. Several other circuit courts of appeals have not considered the exception, thus allowing for wide commentary by district courts. Despite their contrasting rules, jurors on both ends of the continuum have also questioned the propriety of referring to uncompetitive conspiracies as an *Illinois Brick* "exception."[28]

A. The Fourth and Ninth Circuits – Strict Construction

The early 2000s' antitrust lawsuits involving Microsoft are widely remembered for their transformative effects on the internet browser and software industry.[29] In the Fourth Circuit, these proceedings also allowed the jurisdiction to formulate its narrow construction of the co-conspirator exception in *Dickson v. Microsoft*.[30] *Dickson* involved plaintiffs alleging a "hub-and-spoke" conspiracy between Microsoft and original equipment manufacturers.[31] The *Dickson* court acknowledged other circuits' treatment of the co-conspirator exception but elected to follow "the more narrow proposition that *Illinois Brick* is inapplicable to a more particular type of conspiracy – price fixing . . . ."[32] Since plaintiff alleged the co-conspirators' licensing agreements had restrained trade rather than set the resale price of software, plaintiff's claims were barred by *Illinois Brick*.[33]

The Ninth Circuit, meanwhile, first recognized the co-conspirator exception in *Arizona v. Shamrock Foods*.[34] In *Shamrock Foods*, plaintiffs alleged two types of "wholesale price-fixing conspiracy."[35] They "contend[ed] that the dairy producers conspired [1] among themselves *and* [2] with the grocery stores to raise and stabilize the *retail* price of dairy products to maintain more profits for all [co-conspirators]."[36] Thus, the defendants in *Shamrock Foods* were "both suppliers to and direct horizontal competitors with the [co-conspirator] grocery stores."[37] The Ninth Circuit favored plaintiffs based on their first theory and held *Illinois Brick* does not prevent claims against horizontal competitors engaged in price-fixing.[38] Furthermore, in dicta,[39] the court opined that "[e]ven if the plaintiffs were claiming a [vertical] conspiracy, we

28. *See* Crayton v. Concord EFS, Inc. (*In re* ATM Fee Antitrust Litig.), 686 F.3d 741, 750 (9th Cir. 2012) ("As the district court aptly noted, this co-conspirator exception is not really an exception at all."); *see also* Paper Sys., Inc. v. Nippon Paper Indus. Co., 281 F.3d 629, 631-32 (7th Cir. 2002) ("The right to sue middlemen that joined the conspiracy is sometimes referred to as a co-conspirator 'exception' to *Illinois Brick* but it would be better to recognize that *Hanover Shoe* and *Illinois Brick* allocate the first non-conspirator in the distribution chain the right to collect 100% of the damages.").

29. *See, e.g.*, Richard Blumenthal & Tim Wu, *What the Microsoft Antitrust Case Taught Us*, N.Y. TIMES (May 18, 2018), https://www.nytimes.com/2018/05/18/opinion/microsoft-antitrust-case.html.

30. 309 F.3d 193, 215 (4th Cir. 2002).

31. *Id.* at 198.

32. *Id.* at 215.

33. *Id.* at 199-200, 216.

34. *See* Arizona v. Shamrock Foods Co., 729 F.2d 1208 (9th Cir. 1984); *see also* Casamassima, *supra* note 6, at 73 ("The exception traces its roots to a 1984 Ninth Circuit case, *Arizona v. Shamrock Foods Company*.").

35. Shamrock Foods, 729 F.2d at 1211.

36. *Id.* at 1210-11. (*emphasis added*).

37. *Id.* at 1210.

38. *Id.* at 1211.

39. Casamassima, *supra* note 6, at 73.

[still] would hold that *Illinois Brick* is no bar . . . ."[40] This dicta created ambiguity in the ruling and hindered lower courts' subsequent application of the exception.[41]

In 2012, however, the Ninth Circuit decided *In re ATM Fee Antitrust Litigation*, which provided a more-robust discussion of the exception. *In re ATM Fee* reinforced how *Shamrock Foods* limited the co-conspirator exception's applicability to cases involving price-fixing.[42] In its ruling, the Ninth Circuit also clarified that regarding alleged vertical price-fixing conspiracies, plaintiffs' claims could only get past the *Illinois Brick* wall if "[d]efendants have conspired to fix the [final] price that [p]laintiffs paid directly."[43] Since the plaintiffs in *In re ATM Fee* alleged that defendants had conspired to set interchange fees (paid by banks) rather than the foreign ATM fees included in their final statements, their claims failed to overcome *Illinois Brick*'s indirect purchaser bar.[44]

Thus, in the Fourth and Ninth Circuits, the *Illinois Brick* wall stands formidably vis-à-vis plaintiffs wielding the co-conspirator exception. Here, the wall's narrow, selective openings only allow the passage of co-conspirator claims involving a fixed, final price.

B. The Seventh and Eighth Circuits – Simple Permissiveness

The Seventh Circuit's co-conspirator rule is articulated in *Paper Systems v. Nippon Paper Industries*.[45] Widely discussed by other jurisdictions,[46] *Nippon* involved defendants accused of conspiring to reduce fax paper output in order to raise the product's market price.[47] The Seventh Circuit favored the plaintiffs with a simple catch-phrase: "The first buyer from a conspirator is the right party to sue."[48] Thus, plaintiffs can collect damages from manufacturers and intermediaries simply if "conspiracy and overcharges can be established."[49] This approach does not require the fixing of a final price unlike the Fourth and Ninth Circuit rule. The Seventh Circuit instead "restrict[s] *Illinois Brick*'s influence by allowing an exception when the direct purchaser conspires with the seller, even though the price illegally set is an upstream cost that is passed-on to plaintiffs."[50]

The Eighth Circuit, meanwhile, articulated an approach similar to *Nippon* in its recent decision of *Insulate SB v. Advanced Finishing Systems*.[51] While discussing plaintiffs' antitrust standing, the Eighth Circuit reinforced an earlier ruling "that indirect purchasers may bring an antitrust claim if they allege the direct purchasers are 'party to the antitrust violation' and join

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40. Shamrock Foods, 729 F.2d at 1211.

41. *See* Casamassima, *supra* note 6, at 74 ("More than twenty-five years later, the impact of the dicta in *Shamrock Foods* remains a subject of debate [in the Ninth Circuit].").

42. Crayton v. Concord EFS, Inc. (*In re* ATM Fee Antitrust Litig.), 686 F.3d 741, 749 (9th Cir. 2012).

43. *Id.* at 751.

44. *Id.*

45. 281 F.3d 629 (7th Cir. 2002). *See also* Fontana Aviation, Inc. v. Cessna Aircraft Co., 617 F.2d 478, 481 (7th Cir. 1980) (previewing the *Nippon* rule through dicta).

46. *See* Dickson v. Microsoft Corp., 309 F.3d 193, 214-15 (rejecting *Nippon*); *In re* ATM Fee, 686 F.3d at 755 n.7 (arguing *Nippon* "contradicts [*Utilicorp*]'s admonition" against creating further exceptions to *Illinois Brick*). *But see, e.g.*, Laumann v. NHL, 907 F. Supp. 2d 465, 481-82 (S.D.N.Y. 2012) (favoring *Nippon*).

47. Nippon, 281 F.3d at 631. Note how this behavior differs from price-fixing.

48. *Id.*

49. *Id.* at 632.

50. Crayton v. Concord EFS, Inc. (*In re* ATM Fee Antitrust Litig.), 686 F.3d 741, 755 n.7 (9th Cir. 2012).

51. 797 F.3d 538 (8th Cir. 2015).

the direct purchasers as defendants."[52] Although the insufficiency of plaintiffs' factual pleadings ultimately doomed their claim,[53] *Insulate SB* reveals the Eight Circuit, like the Seventh Circuit, prefers a broad application of the co-conspirator exception that extends beyond price-fixing. Plaintiff's initial complaint alleged that anticompetitive dealing arrangements between an equipment manufacturer and its distributors "forced [plaintiff] to pay an artificially high price."[54]

Overall, in the Seventh and Eighth circuits, the *Illinois Brick* wall remains fairly open to plaintiffs wielding the co-conspirator exception. It permits claims against a wide variety of uncompetitive behaviors, not just price-fixing. Accordingly, the resulting price inflation need not directly set the final price payed by the plaintiff.

C. The Middle Ground (Beef) Circuits

The following circuits "have not expressly required the alleged conspiracy to be one for price-fixing . . . ."[55] At the same time, this group has lacked opportunities to apply the exception outside of the price-fixing context.[56] Furthermore, several circuits in the group have reprimanded plaintiffs for failing to undertake procedural due diligence.[57]

The Fifth Circuit issued the earliest opinion in the group through its *In re Beef Industry Antitrust Litigation* ruling.[58] *In re Beef* involved consolidated claims by cattle ranchers alleging price-fixing at the retail level created a price depression that was "passed up the chain of distribution."[59] Plaintiffs argued two theories on appeal: First, that retailers had engaged in a horizontal conspiracy to fix the price of beef; Second, that retailers conspired with meatpackers in a vertical price-fixing conspiracy.[60] Plaintiffs prevailed on the first theory as the court found a functional equivalent of "cost-plus contracts" existing between the middlemen and price-fixing retailers.[61] However, the Fifth Circuit dismissed plaintiffs' "allegations . . . alleging vertical conspiracy."[62] Plaintiffs had failed to name the alleged co-conspirator middlemen as defendants in the original complaints despite having many opportunities to amend during trial.[63] Thus, the Fifth Circuit refused to apply the co-conspirator exception "absent joinder of the packers and slaughterhouses" because doing so could expose defendant retailers to an unfair risk of "overlapping liability."[64]

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52. *Id.* at 542 (quoting Campos v. Ticketmaster Corp., 140 F.3d 1166, 1170-71 nn.3-4 (8th Cir. 1998)).
53. *Id.* at 546.
54. *Id.* at 541.
55. Marrero-Rolón v. Autoridad De Energía Eléctrica De P.R., 2016 U.S. Dist. LEXIS 193917, at *11 (D.P.R. 2016).
56. *Id.* at *11.
57. *See* Jewish Hospital Ass'n v. Stewart Mechanical Enterprises, 628 F.2d 971, 977 (6th Cir. 1980); *see also In re* Beef Indus. Antitrust Litig., 600 F.2d 1148, 1163 (5th Cir. 1979).
58. *In re* Beef, 600 F.2d at 1148.
59. *Id.* at 1153. *See also* Lowell v. Am. Cyanamid Co., 177 F.3d 1228, 1231-32 (11th Cir. 1999) (clarifying *In re Beef*'s factual background).
60. *Id.* at 1153, 1160.
61. *Id.* at 1163-66.
62. *Id.* at 1163.
63. *Id.* at 1161, 1163.
64. *Id.* at 1163.

Similar reasoning guided the Sixth Circuit's decision in *Jewish Hospital Ass'n v. Stewart Mechanical Enterprises, Inc*.[65] The case involved an alleged conspiracy among contractors "to fix the price of mechanical (plumbing, heating, air-conditioning and sheet metal) work" on a hospital addition.[66] On appeal, the Sixth Circuit rejected plaintiffs' attempt to argue a vertical conspiracy.[67] "The problem with [plaintiff's] argument [wa]s that the Hospital ha[d] never pleaded the existence of a vertical conspiracy nor alleged facts sufficient to sustain such an allegation."[68] Thus, both the Fifth and Sixth circuits "reject[] . . . belated attempt[s] to argue the existence of a vertical conspiracy."[69] In doing so, they articulate a requirement which appears to be implicit in at least one of the circuits discussed earlier.[70]

The Eleventh Circuit, meanwhile, was carved out of the Fifth Circuit in 1981.[71] *In re Beef* still carries weight in the Eleventh Circuit as do other Fifth Circuit pre-split decisions.[72] But, the Eleventh Circuit refined *In re Beef*'s co-conspirator rule in *Lowell v. American Cyanamid*.[73]

Lowell involved plaintiff farmers who "appealed a district court order dismissing [their] antitrust complaint for failure to join middlemen dealers as defendants pursuant to [*Illinois Brick*]."[74] The Eleventh Circuit reversed the district court by distinguishing plaintiffs' claims from those in *In re Beef*.[75] Unlike the *In re Beef* ranchers, *Lowell*'s plaintiffs alleged only "a vertical conspiracy with no allegations of 'pass-on.'"[76] The scheme between American Cyanamid and its dealers set the product price directly billed to farmers.[77] Thus, farmers did not have to join the middlemen but could sue American Cyanamid directly.[78] The Eleventh Circuit emphasized that "*In re Beef* is consistent with the rul[ing]."[79] The two decisions' consistency is rooted in the earlier distinction: *In re Beef* involved an alleged horizontal conspiracy which passed-on price depression to the farmers, while *Lowell* involved a vertical scheme which directly set the farmers' final price.[80] The Eleventh Circuit reasoned *Illinois Brick*'s policy concerns simply do not apply to the latter type of conspiracy.[81] What distinguishes *Lowell* from *Nippon*, however, is its silence on whether the farmers would still win if American Cyanamid conspired with distributors to reduce product output, for example.

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65. Jewish Hospital Ass'n v. Stewart Mechanical Enterprises, 628 F.2d 971, 977 (6th Cir. 1980).
66. *Id.* at 972.
67. *Id.* at 977.
68. *Id.*
69. *Id.*
70. *See* Insulate SB, Inc. v. Advanced Finishing Sys., 797 F.3d 538, 542 (8th Cir. 2015) ("[I]ndirect purchasers may bring an antitrust claim if they allege the direct purchasers are 'party to the antitrust violation' *and* join the direct purchasers defendants.") (*emphasis added*).
71. *See* Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452 (1980).
72. Bonner v. Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981).
73. Lowell v. Am. Cyanamid Co., 177 F.3d 1228, 1228 (11th Cir. 1998).
74. *Id.*
75. *Id.* at 1231-33.
76. *Id.* at 1230.
77. *Id.* at 1228-29.
78. *Id.* at 1233.
79. *Id.* at 1232.
80. *Id.*
81. *Id.* at 1232-33.

Lastly, the Third Circuit provides the most-liberal construction of the co-conspirator exception outside of the Seventh and Eighth circuits through its rulings in *Howard Hess Dental Labs v. Dentsply International* and *In re Linerboard Antitrust Litigation*.[82]

Hess involved consolidated appeals arising from both price-fixing and exclusive dealing conspiracy allegations against an artificial tooth manufacturer and its distributors.[83] The Third Circuit dismissed one set of plaintiffs because they failed to join the dealers who were "immediately upstream,"[84] in what the court viewed as "effectively a horizontal price fixing conspiracy at the dealer level . . . ."[85] Taken at face value, this holding shows the Eleventh Circuit's procedural stringency is in line with *In re Beef* and *Jewish Hospital*. The second set of plaintiffs, meanwhile, had antitrust standing according to the Third Circuit but only with respect to their retail price-fixing claims.[86] But, their exclusive dealing claims could only proceed if the co-conspirator middlemen were barred from suing the manufacturer due to their "totally complete" involvement in the conspiracy.[87] The Third Circuit reached this result by electing to adopted a "'limited' general" co-conspirator exception, which it juxtaposed to the Seventh Circuit's "general" exception in *Nippon*.[88] The Third Circuit was unsatisfied with *Nippon*'s lack of explanation and delineation of the "general" co-conspirator exception's limits.[89]

Through *In re Linerboard*, however, the "'limited' general" exception still maintains substantial breadth. Here, the Third Circuit ruled that output agreements by co-conspirators constitute price-fixing under the co-conspirator exception.[90] Furthermore, the court reiterated there is no bar against plaintiffs who directly purchase from an offender a product incorporating an ingredient whose price had been fixed.[91]

Thus, the Third Circuit illustrates procedural stringency similar to the Fifth, Sixth, Eight, and Eleventh Circuits. The Third Circuit rule also resembles the Seventh and Eighth Circuit more than other circuits in this group given how it broadly construes the co-conspirator exception by inconspicuously applying the exception to behavior beyond price-fixing.

In sum, the middle ground circuits have lacked opportunities to evaluate claims under the co-conspirator exception outside of a price-fixing context. Only one circuit, the Third, has accommodated anticompetitive behavior beyond price fixing into the exception albeit under the guise of equating such behavior to price fixing. Together, these circuits underscore the importance of plaintiffs joining co-conspirators as defendants during pleading in order to maximize the durability of their antitrust claim, especially when alleging vertical conspiracies involving pass-on. Plaintiffs should be diligent if they attempt to pass the *Illinois Brick* wall with a co-conspirator exception in the Third, Fifth, Sixth, and Eleventh circuits. While the Third Circuit provides some openings, other parts of the wall remain obscured.

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82. 424 F.3d 363 (3d Cir. 2005); 305 F.3d 145 (3d Cir. 2002).
83. Howard Hess Dental Labs, Inc. v. Dentsply Int'l, Inc., 424 F.3d 363, 366 (3d Cir. 2005).
84. *Id.* at 371.
85. *Id.* at 378 n.12.
86. *Id.* at 378.
87. *Id.* at 383-84.
88. *Id.* at 379 n.13.
89. *Id.*
90. Winoff Indus. v. Stone Container Corp. (*In re* Linerboard Antitrust Litig.), 305 F.3d 145, 159-160 (3d Cir. 2002).
91. *Id.* at 159.

D. The First, Second, and Tenth Circuits – A Clean Slate

The circuits in this last group have yet to issue binding precedent governing *Illinois Brick*'s co-conspirator exception. Until that occurs, our analysis is limited to developments at the district court level and appellate courts' treatment of other *Illinois Brick* exceptions.

The Second Circuit Court of Appeals has not addressed the co-conspirator exception.[92] In *Laumann v. NHL*, however, the Southern District of New York discussed the exception in a recent class action suit against two professional sports leagues for allegedly conspiring with regional sports networks and multichannel video distributors to inflate the price of "out-of-market" game broadcasts.[93] The district court unequivocally favored the Seventh and Third Circuit precedent after juxtaposing it to the Fourth and Ninth circuits' approach.[94] Thus, in *Laumann*, the Southern District of New York held that since the middlemen – regional sports networks and multichannel video distributors – were "alleged to be participants in the conspiracy, the first purchasers who are not part of the conspiracy 'are entitled to collect damages . . . .'"[95] The parties in *Laumann* ultimately settled before any issues involving plaintiffs' antitrust standing were appealed to the Second Circuit.[96] Accordingly, the Second Circuit Court of Appeals will have to wait before ruling on whether to affirm *Laumann*'s affinity towards the Seventh and Third Circuit constructions of the co-conspirator exception.

The First Circuit Court of Appeals has not addressed the co-conspirator exception, either.[97] This void, however, has allowed for extensive commentary on the exception's merits by the District Court of Puerto Rico.[98] In *Marrero-Rolón v. Autoridad De Energía Eléctrica De Puerto Rico*, the District Court of Puerto Rico examined a complaint alleging the island's power agency corruptly conspired with petroleum dealers to burn substandard fuel at inflated prices for electric ratepayers.[99] Magistrate Judge Silvia Carreño-Coll criticized *Dickson* and *In re ATM Fee*, characterizing the rulings as "mis- or over-interpretation[s] of *Utilicorp*'s and *Illinois Brick*'s caution against creating exceptions for specific markets . . . ."[100] Judge Carreño preferred to follow the Seventh Circuit's *Nippon* approach instead like the Southern District of New York did in *Laumann*.[101] The District of Puerto Rico affirmed Carreño's approach in an interlocutory appeal one year later.[102]

Lastly, the Tenth Circuit's construction of other *Illinois Brick* exceptions may provide clues about its potential treatment of co-conspirator claims. In *Zinser v. Continental Grain Co.*, the

92. Laumann v. NHL, 907 F. Supp. 2d 465, 481 (S.D.N.Y. 2012).

93. *Id.* at 471.

94. *Id.* at 483.

95. *Id.* at 482 (citing Paper Sys., Inc. v. Nippon Paper Indus. Co., 281 F.3d 629, 632 (7th Cir. 2002).

96. *See* Garber v. Office of the Comm'r of Baseball, 2016 U.S. Dist. LEXIS 18011 (S.D.N.Y. 2016) (approving parties' proposed settlement).

97. *See* Marrero-Rolón v. Autoridad De Energía Eléctrica De P.R., 2015 U.S. Dist. LEXIS 134211, at *35 (citing Sullivan v. NFL, 34 F.3d 1091 (1st Cir. 1994)). [hereinafter Marrero I]. The cited precedent only addresses damage recoveries by party within a conspiracy.

98. *See* Marrero I, *supra* note 97 at *33-40; *see also* Marrero-Rolón v. Autoridad De Energía Eléctrica De P.R., 2016 U.S. Dist. LEXIS 193917, at *11 (D.P.R. 2016) [hereinafter Marrero II].

99. Marrero I, *supra* note 97, at *6-10.

100. *Id.* at *35 n.23.

101. *Id.*

102. Marrero II, *supra* note 98, at *10 ("The court's holding as to this issue is consistent with the approach used by the Seventh Circuit . . . .").

Tenth Circuit compared plaintiffs' "cost-plus" exception claims to those *In re Beef*.[103] While doing so, the *Zinser* court noted "exceptions to Illinois Brick are exceedingly narrow in scope, and . . . should be few in number. . . . [A]ny exception should not be given an expansive application, lest it swallow the rule and become the rule itself."[104] The Tenth Circuit reiterated this prescription eight years later in *In re Wyoming Tight Sands Antitrust Cases*.[105] Thus, the Tenth Circuit's treatment of *Illinois Brick*'s cost-plus exception suggests the court will likely favor a limited construction of the co-conspirator exception like the Fourth and Ninth Circuits.

Overall, the First, Second, and Tenth Circuits have a clear foundation for constructing their *Illinois Brick* wall vis-à-vis the co-conspirator exception. District courts have sketched some blueprints which could be influenced by appellate constructions of other *Illinois Brick* exceptions. Time will tell if the appellate courts will adopt, disregard, or modify these blueprints.

IV. CONCLUSION

Regardless of whether it is viewed as an exception to *Illinois Brick* or a "fundamentally different factual scenario,"[106] circuits across the United States have widely debated exactly when *Illinois Brick* bars suits by parties who allege injury from anticompetitive behavior coordinated by multiple conspirators.

Courts are conflicted on whether to consider plaintiffs dealing with a participant in an anticompetitive conspiracy as "direct purchasers" from the entire conspiracy (and therefore not subject to *Illinois Brick*'s indirect purchaser bar at all) or "indirect purchasers" from an antitrust violator who hides behind co-conspiring middlemen (but still exempt from *Illinois Brick*'s indirect purchaser bar via the co-conspirator exception). Besides nomenclature disagreements, courts are also divided on how to apply the co-conspirator exception's substance. Some circuits only allow plaintiffs standing if their alleged conspiracy fixed the price they directly paid or received. Other circuits allow plaintiffs standing even if the conspirators engaged in other anticompetitive behavior which harmed plaintiffs financially (e.g., reducing output). Thus, both the theory's nomenclature and substantive applicabilition lack uniformity.

This issue can be cured in two ways. First, the Supreme Court could provide uniformity by issuing a writ of certiorari for a case disputing plaintiff's standing under the co-conspirator exception. Ideally, the Court would not only resolve the question presented, but also discuss the exception's applicability to other types of anticompetitive conspiracies and provide reasoning for its decision to favor or reject the lower Circuit. Such a broad ruling is not guaranteed, though. For instance, the Supreme Court could issue a writ of certiorari on a Third Circuit case and simply uphold the Third Circuit's equation of output agreements to price fixing without discussing the exception's substantive merits against defendants who abuse exclusive

103. Zinser v. Continental Grain Co., 660 F.2d 754, 760-61 (10th Cir. 1981).

104. *Id.* at 761.

105. *See In re* Wyoming Tight Sands Antitrust Cases, 866 F.2d 1286, 1293 (10th Cir. 1989) (construing the "cost-plus" exception narrowly).

106. Marrero I, *supra* note 97, at *35 n.23.

licensing agreements as in the Eighth Circuit.[107] This reactive solution also requires parties willing to absorb the extensive costs of litigating up to the Supreme Court.

Alternatively, a more-proactive solution would be for Congress to amend the section 4 of the Clayton Act and specify plaintiffs' standing in various contexts by codifying one of the circuit rules discussed earlier. Section 4 appears ripe for this kind of reform given it already restricts the amount of interest and damages certain plaintiffs may claim.[108] Amending the Clayton Act would be presumably revenue-neutral, possibly sparing the solution from recent congressional impasses.[109] Nevertheless, reforms affecting the rights of sophisticated private actors tend to be prime candidates for politicization.[110] Thus, it remains unclear whether Congress can deliver uniformity more quickly than the Supreme Court. For now, though, the litigation continues.[111]

107. *See* Insulate SB, Inc. v. Advanced Finishing Sys.,797 F.3d 538, 541 (8th Cir. 2015).

108. *See* 15 U.S.C. §§ 15(a)(1-3) (2019) (limiting interest amounts); 15 U.S.C. § 15(b) (2019) (limiting foreign parties' damage amount entitlements).

109. *See generally* PEW RESEARCH CENTER, *Three Decades of Congressional Productivity, 1987-2017*, https://www.pewresearch.org/fact-tank/2019/01/25/a-productivity-scorecard-for-115th-congress/ft_18-01-09_congressproductivity/ (last visited May 15, 2019) (indicating a lower amount of substantive public laws passed by Congress in recent years).

110. *See generally* LEE DRUTMAN, THE BUSINESS OF AMERICA IS LOBBYING: HOW CORPORATIONS BECAME POLITICIZED AND POLITICS BECAME MORE CORPORATE 73 (2015) (suggesting "Need to protect against changes in government policy . . . that could be harmful" is companies' most-important reason for lobbying).

111. *See, e.g.*, Marion Diagnostic Ctr., LLC, v. Becton, Dickinson & Co., 2018 U.S. Dist. LEXIS 203407 (S.D.I.L. 2018), *appeal docketed*, No. 18-03735 (7th Cir. Dec. 28, 2018).