IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

DIVISION 2	NORBERT G. WEDEPOHL, CLERK
HON. ROBERT M. BRUTINEL	BY: D. PRICE
CASE NUMBER CV95-0526	DATE: July 9, 1996

TITLE:	COUNSEL:
ELMER and ELLEN McLAUGHLIN, *et al.* Plaintiff, vs ABBOTT LABORATORIES, *et al.* Defendant.	John M. McKeegan SHOCKMAN & McKEEGAN 7373 Scottsdale Road, Stw. 130C Scottsdale, AZ 85253 (See Attachment A)

HEARING ON:	COURT REPORTER:

The issue before the court is whether the court should follow the rationale of *Illinois Brick v. Illinois*, 431 U.S. 720 (1977) and determine that indirect purchasers are not persons "injured in their business or property" within the meaning of A.R.S. §44-1408. For the reasons set forth herein the court declines to do so.

Defendants assert in their motion to dismiss that: 1. The *Illinois Brick* rationale is persuasive and should be followed by this court; 2. That the Arizona Court of Appeals adopted the rationale of *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968) in *Northern Arizona Gas Service, Inc., v. Petrolane Transport, Inc.*, 145 Ariz. 467, 702 P.2d 696, (App. 1984), and thus by implication *Illinois Brick* is or should be the law in Arizona; 3. That A.R.S. §44-1412 provides that the court may use as a guide interpretations given by the federal courts to comparable federal antitrust statutes in interpreting the Arizona Antitrust Act, and *Illinois Brick* should be so used, and; 4. Uniform laws such as the Arizona Antitrust Act should be interpreted consistently among the various states. *Canon School Dist. No. 50 v. W.E.S. Construction Co.*, 180 Ariz. 148, 882 P.2d 1274, (1994).

The Plaintiffs respond that: 1. This court should decline to follow *Illinois Brick* for the reason that it was the intention of the Arizona Legislature at the time of enactment of the Arizona antitrust statutes that indirect purchaser suits be allowed. 2. That the Arizona Attorney General has taken the position that Arizona law allows indirect purchaser suits, and; 3. That the reasoning in *Illinois Brick* is not persuasive in interpreting Arizona law.

The parties agree that Arizona law is not preempted by federal law and that this court is not bound by the holding in *Illinois Brick*. *California v. ARC America Corp.*, 490 U.S. 93, (1987)

As is set forth above, the Defendants argue and Arizona law supports the proposition that Uniform laws should be interpreted consistently among the various states. This is reflected in A.R.S. §44-1412 which provides as follows:

> This article shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this article among those states that enact it. It is the intent of the legislature that in construing this article, the courts may use as a guide interpretations given by the federal courts to comparable federal antitrust statutes.

However, several states allow indirect purchaser suits by statute. *California v. ARC America Corp.*, 490 U.S. 93, 98 fn. 3. Only four states have adopted the Uniform State Antitrust Act, of those four, two states have by legislation expressly allowed suits by indirect purchasers, rejecting the holding of *Illinois Brick*. The goal of uniformity is therefore of minimal weight in determining this issue.

Illinois Brick was an interpretation of the intent of Congress in passing Section 4 of the Clayton Act. *ARC America Corp.*, 490 U.S. 105. *Illinois Brick* had not been decided when A.R.S. §44-1408 was passed. For purposes of statutory interpretation *Illinois Brick* is not helpful in determining the intent of the Arizona Legislature in deciding whether indirect purchasers can sue under A.R.S. §44-1408.

Used as a guide to judicial interpretation of A.R.S. §44-1408, the Supreme Court cases on this issue, *Illinois Brick* and *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968) cite three bases for denying indirect purchasers the right to sue. These are: 1. Avoiding unnecessarily complicated litigation; 2. Providing direct purchasers with incentives to bring private antitrust actions, and; 3. Avoiding multiple liability of defendants. These are persuasive reasons for granting the Motion to Dismiss.

The problems of proof suggested in *Hanover Shoe*, *i.e.* that there are too many factors in

determining the amount, if any, of the overcharge passed on, will clearly be a problem in this case. *Northern Arizona Gas Service v. Petrolane Transport, Inc.*, 145 Ariz. 467, 702 P.2d 696, (App.1984). Likewise the problem of multiple overlapping judgments as a result of this case is a real and legitimate concern.

However in balancing the policy concerns raised in the above-referenced cases, the Court must consider the provisions of the Arizona Constitution Art. 14 § 15, entitled "Monopolies and trusts," which provides as follows:

> Section 15. Monopolies and trusts shall never be allowed in this State and no incorporated company, co-partnership or association of persons in this State shall *directly or indirectly combine* or make any contract, with any incorporated company, foreign or domestic, through their stockholders or the trustees or assigns of such stockholders or with any co-partnership or association of persons, or, in any manner whatever, *to fix the prices*, limit the production, or regulate the transportation of any product or commodity. The Legislature shall enact laws for the enforcement of this Section by adequate penalties, and in the case of incorporated companies, if necessary for that purpose, may, as a penalty declare a forfeiture of their franchises. (Emphasis added)

The clear statement of policy contained in the Arizona Constitution is to protect the citizens of Arizona from the precise conduct alleged by the Plaintiffs to have occurred here. In trying to determine if the Legislature intended to include indirect purchasers within the meaning of " a person injured in his business or property" when it passed A.R.S. §44-1408, prior to the decision in *Illinois Brick*, the court is left with the plain meaning of the words "a person injured" and the language of the Arizona Constitution. The policy considerations in favor of excluding indirect purchasers do not outweigh the "plain pathway of public policy in this state" regarding restraints on competition. *Group Health Cooperative v. King County Medical Soc.*, 237 P.2d 737, 763, (Wash., 1952) (Constitutional provision identical to Arizona, cited in the court's order dismissing the plaintiff's complaint in *Blewett v. Abbott*, Washington Superior Court Cause #95-2-01775-4)

The Motion to Dismiss is denied.

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