

CHIPPING AWAY AT THE *ILLINOIS BRICK WALL*:
THE USE OF *CALDER* JURISDICTION IN STATE INDIRECT
PURCHASER LITIGATION

STEPHEN BLECHA*

Since the unraveling of the lysine price-fixing conspiracy, dramatized in the recent Hollywood film The Informant!, the rate of discovery of other price-fixing cartels has increased dramatically. When direct purchasers of the product “pass on” the overcharges to indirect purchasers—those purchasers more than one step removed in the chain of distribution from the conspirator, and often the end consumer—it is the indirect purchasers who bear the brunt of the harm. Indirect purchasers, however, are often barred from recovering damages. While many states, unlike the federal government, provide indirect purchasers with standing to file an antitrust suit against the violator, such actions are nonetheless often fruitless due to the lack of personal jurisdiction.

This Note analyzes Supreme Court precedent in determining the issue of personal jurisdiction and proposes that the “effects test” set forth in Calder v. Jones should be used to extend personal jurisdiction over antitrust violators in indirect purchaser suits to states where the harm of the violation was felt. This Note argues that a liberal application of the Calder analysis is necessary given antitrust suits’ uniqueness, which distinguishes them from other intentional torts. This Note concludes that the use of Calder’s “effects test” to establish personal jurisdiction in indirect purchaser litigation is desirable from a policy standpoint, prevents circumvention of the purpose of legislation granting indirect purchasers standing to sue, and is consistent with “traditional notions of fair play and substantial justice.”

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“Yond Cassius has a lean and hungry look; He thinks too much: such men are dangerous.”¹

I. INTRODUCTION

Since the unearthing and subsequent unraveling of the lysine price-fixing conspiracy in the 1990s,² the number of international price-fixing cartels discovered annually has increased dramatically.³ Imagine that Cassius Corporation,⁴ a manufacturer of microchips that are typically implanted into cellular phones, is a leading conspirator in one of these recently discovered cartels. Cassius, organized and headquartered in Japan, sells its microchips to a number of manufacturers around the world, including BrutusCell,⁵ a Delaware corporation with its principal place of business in Texas. BrutusCell uses the microchips in its production of cellular phones, then sells these phones throughout the United States.

For several years, Cassius Corporation took part in a worldwide price-fixing conspiracy, artificially raising the price of these microchips with the help of its coconspirators. Due to this artificial price hike, BrutusCell was overcharged for its microchips. As the prices for the microchips rose, BrutusCell, not wanting to simply absorb the financial loss, decided to continuously raise its prices for cellular phones accordingly. BrutusCell is a savvy corporation, however, and its directors learned of the price-fixing scheme years ago. Even though BrutusCell has standing to sue for treble damages under federal law, it refuses to do so for two reasons. First, BrutusCell and Cassius have a long-standing relationship, and BrutusCell understandably fears that a suit would likely disturb that relationship. Second, BrutusCell, in avoiding the overcharge by passing it on to consumers, has suffered no injury and thus feels no dire incentive to file suit.

Now imagine that consumers in Illinois, seeking compensation for purchasing overpriced cellular phones, decide to bring an indirect purchaser suit.⁶ As a result of the Supreme Court's decision in *Illinois Brick*

1. WILLIAM SHAKESPEARE, *JULIUS CAESAR* act 1, sc. 2.

2. The discovery of the lysine conspiracy was recently depicted in the film, *THE INFORMANT!* (Warner Bros. Pictures 2009), starring Matt Damon. For a brief description of the lysine conspiracy, see ANTITRUST DIV., U.S. DEP'T OF JUSTICE, *AN ANTITRUST PRIMER FOR FEDERAL LAW ENFORCEMENT PERSONNEL* 6–7 (2005), <http://www.justice.gov/atr/public/guidelines/209114.pdf> (explaining that the worldwide lysine industry is a \$600-million industry, and that, as a result of the conspiracy, prices for lysine were artificially raised by seventy percent).

3. See Kevin Voigt, *Suicide, Lies and Videotape: The Real 'Informant!'*, CNN.COM (Oct. 2, 2009), <http://edition.cnn.com/2009/BUSINESS/10/01/whitacre.informant/index.html> (explaining that in 1993, only one or two cartels were discovered, whereas in recent years, up to fifty cartels were discovered, and proposing that the discovery of the lysine conspiracy prompted this increase).

4. This is a fictional corporation.

5. This is a fictional corporation.

6. An indirect purchaser is a purchaser more than one step removed in the chain of distribution from the conspirator. Cynthia Urda Kassis, *The Indirect Purchaser's Right to Sue Under Section 4 of the Clayton Act: Another Congressional Response to Illinois Brick*, 32 AM. U. L. REV. 1087, 1087 n.1

Co. v. Illinois,⁷ consumers would not have standing to sue under federal law. While consumers would have a cause of action under Illinois law,⁸ current personal jurisdiction precedent indicates that the Illinois courts may not have personal jurisdiction over Cassius, as it never sold any products directly into the state.⁹ If a court so ruled, Illinois citizens would have no way to recover, as both federal law¹⁰ and Texas state law¹¹ deny standing to indirect purchasers in antitrust suits.¹² Thus, the Illinois statute granting indirect purchasers a cause of action¹³ and the purpose behind that statute, to allow for consumer victims to recover for overcharges,¹⁴ is thwarted, and those actually injured remain uncompensated.

Yet it would seem that under the “effects test,” as set forth by the Supreme Court in *Calder v. Jones*,¹⁵ an Illinois court would comport with due process if it chose to extend jurisdiction over Cassius, as Cassius did not aim its harm at Texas specifically, but rather at the cellular phone microchip market. Cassius certainly acted intentionally in deciding to partake in a global price-fixing conspiracy, and the citizens of Illinois were injured as a result. Furthermore, Cassius, in knowingly overcharging BrutusCell, not only targeted competition in the microchip market, but also in the cellular phone market, as it knowingly sold its product to a manufacturer of cellular phones. The injured indirect purchasers in Illinois were participants in this market, and they deserve compensation.

(1983). Typically, the manufacturer sells to direct purchasers, and the direct purchasers then sell to indirect purchasers. AM. BAR ASS’N SECTION OF ANTITRUST LAW, INDIRECT PURCHASER LITIGATION HANDBOOK, at xv (2007).

7. 431 U.S. 720, 728 (1977).

8. 740 ILL. COMP. STAT. ANN. 10/7(2) (West 2010) (“No provision of this Act shall deny any person who is an indirect purchaser the right to sue for damages.”).

9. See AM. BAR ASS’N SECTION OF ANTITRUST LAW, *supra* note 6, at 74–78.

10. See *Ill. Brick*, 431 U.S. at 735 (denying indirect purchasers standing to sue for damages under federal law).

11. See AM. BAR ASS’N SECTION OF ANTITRUST LAW, *supra* note 6, at 337.

12. Additionally, Delaware law does not provide a private right of action for indirect purchasers, so the indirect purchasers could not bring their suit in Delaware. See AM. BAR ASS’N, INDIRECT PURCHASER LAWSUITS: A STATE-BY-STATE SURVEY 47–48 (Eric J. McCarthy et al. eds., 2010).

13. 740 ILL. COMP. STAT. ANN. 10/7.

14. See, e.g., *Arthur v. Microsoft Corp.*, 676 N.W.2d 29, 35 (Neb. 2004) (“The clear purpose of the Act is to provide consumer protection against the monopolization of trade or commerce.”); see *infra* Part IV.D.

15. 465 U.S. 783 (1984). Courts vary in their interpretation of the “effects test.” For example, the Ninth Circuit interprets the “effects test” as permitting jurisdiction over a defendant who “(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state.” *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme*, 433 F.3d 1199, 1206 (9th Cir. 2006) (quoting *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004)). The Third Circuit, on the other hand, interprets the “effects test” as permitting jurisdiction only in the following situation: “(1) The defendant committed an intentional tort; (2) The plaintiff felt the brunt of the harm in the forum such that the forum can be said to be the focal point of the harm suffered by the plaintiff as a result of that tort; (3) The defendant expressly aimed his tortious conduct at the forum such that the forum can be said to be the focal point of the tortious activity . . .” *IMO Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 265–66 (3d Cir. 1998) (footnote omitted). The differences in interpretation are discussed *infra* Part II.E.a–b.

This Note explains why extending jurisdiction over antitrust violators in indirect purchaser suits brought in states where the harm of the violation is felt, as a result of the violator's attack on competition in the applicable market, comports with due process under *Calder v. Jones*. Due to the variance in state law, the applicability of this Note is limited to those states that provide standing for indirect purchasers (a majority of the states¹⁶) and also to the constitutional due process analysis of personal jurisdiction.¹⁷ Furthermore, this Note applies particularly to cases where the forum state does not have "classic" minimum contacts with the defendant. The discussions and arguments within this Note, however, are highly relevant to a number of related issues, such as the unique nature of antitrust infractions and how that nature alters a personal jurisdiction analysis, the necessity of indirect purchaser litigation, and the effect of unnecessary personal jurisdictional barriers on state statutes.

Part II of this Note provides a brief history of indirect purchaser litigation in both the federal and state systems, and examines the realm of the modern personal jurisdiction analysis, with a strong emphasis on how *Calder v. Jones* has been applied.¹⁸ Part III analyzes case law dealing with the interaction of personal jurisdiction and antitrust law, in both direct and indirect purchaser cases, to illustrate why the unique nature of antitrust violations alters a personal jurisdiction analysis and requires a broad reading of *Calder*. Part III then demonstrates the need for indirect purchaser litigation by examining the policy arguments for and against providing indirect purchasers standing. Finally, Part IV recommends that state courts extend jurisdiction over antitrust violators whose violations harmed the indirect purchasers of that state, because such an extension is both desirable and within the bounds of the Supreme Court's personal jurisdiction precedent.

II. BACKGROUND

Although the United States is not the only country to rely upon both public and private forms of antitrust enforcement,¹⁹ the United States is unique in that the annual number of private antitrust suits vastly outweighs the annual number of governmental antitrust suits.²⁰ While causes of action are available under both federal and state law for private antitrust plaintiffs, a remedy for the ultimate victims of most antitrust vi-

16. See *infra* notes 33–34 and accompanying text.

17. In order for a state court to have personal jurisdiction over a defendant, such jurisdiction must comport with both due process and the state long-arm statute. See *infra* Part II.E.1.

18. 465 U.S. at 783.

19. See Daniel A. Crane, *Optimizing Private Antitrust Enforcement*, 63 VAND. L. REV. 675, 676 (2010).

20. See Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1179 (2008) (“[I]n the last few decades, private enforcement has outstripped public enforcement by a 10:1 ratio.”).

olations, indirect purchasers,²¹ does not exist in the federal system. In *Illinois Brick Co. v. Illinois*, the Supreme Court held that indirect purchasers do not have standing to file an antitrust suit under federal law.²² A majority of states reject the Supreme Court's reasoning in *Illinois Brick* by giving indirect purchasers standing to bring suit against defendants who have harmed the citizens of that state. Despite this attempt by the states to compensate indirect purchasers, exercising personal jurisdiction over defendants who lack traditional contacts with the forum state can be very difficult.²³ The Court in *Calder*, however, held that the proper inquiry for personal jurisdiction in intentional tort cases should focus on where the defendant "aimed" its tort and where the effects of the defendant's tort were felt. This Note argues that, under the *Calder* standard, personal jurisdiction should be proper in indirect purchaser cases, such as the one discussed in the introduction. Section A provides a brief analysis of the Supreme Court's decision in *Illinois Brick* and subsequent state reactions to that decision. Section B then provides an introduction to the modern personal jurisdiction analysis via an explanation of the Supreme Court precedent. Finally, Section C describes the Supreme Court's development of the "effects test" for personal jurisdiction established in *Calder v. Jones* and provides an analysis of subsequent application by lower courts.

A. *The Illinois Brick Decision and State Reactions*

An investigation into the holding of *Illinois Brick Co. v. Illinois* necessarily begins with an analysis of *Hanover Shoe, Inc. v. United Shoe Machinery Corp.* In fact, Justice Blackmun claimed in his dissenting opinion to *Illinois Brick* that, if not for the precedent set in *Hanover Shoe*, the Court would likely have unanimously approved indirect purchaser standing.²⁴ In *Hanover Shoe*, the Supreme Court held that an entity sued by a direct purchaser for a violation of federal antitrust laws could not avoid liability by claiming that the plaintiff had not suffered any injury because the overcharge was "passed on" down the distribution line.²⁵ Because indirect purchaser actions rely on the fact that such purchasers are injured as a result of the direct purchaser "passing on" the overcharge, a relatively obvious question arose out of *Hanover Shoe*: if a defendant may not assert a "pass-on" defense, may indirect purchaser plaintiffs offensively claim that they have been injured by "passed-on" overcharges? In *Illinois Brick*, the Supreme Court resolved this issue by

21. Robert H. Lande, *New Options for State Indirect Purchaser Legislation: Protecting the Real Victims of Antitrust Violations*, 61 ALA. L. REV. 447, 448 (2010) (explaining that the true victims of most antitrust violations are indirect purchasers).

22. 431 U.S. 720, 735 (1977).

23. See AM. BAR ASS'N SECTION OF ANTITRUST LAW, *supra* note 6, at 74–78.

24. *Ill. Brick*, 431 U.S. at 765 (Blackmun, J., dissenting).

25. 392 U.S. 481, 494 (1968).

denying indirect purchasers standing to sue under federal law, handing down an opinion that changed the face of federal antitrust litigation, prompted several states to enact statutes to circumvent the policies created by the opinion, and sparked over thirty years of serious policy and economic debate that continues to this day.²⁶ Although several exceptions to the holding in *Illinois Brick* have arisen over the years, indirect purchasers, for the most part, currently may not recover damages under federal antitrust laws.²⁷

The Supreme Court based its holding on several rationales. First, the Court explained that prohibiting the “pass-on” defense, while allowing indirect purchasers to recover for a “pass-on” injury, “would create a serious risk of multiple liability for defendants.”²⁸ Second, the Court claimed that tracing indirect purchaser injuries as part of a damages analysis would be an incredibly complex and uncertain process.²⁹ Additionally, the Court suggested that direct purchasers were better plaintiffs than indirect purchasers, as direct purchasers most often absorb the brunt of overcharges and also have a stronger incentive to file suit when compared to indirect purchasers.³⁰

26. See *Comes v. Microsoft Corp.*, 646 N.W.2d 440, 447 (Iowa 2002) (“Prior to the [Supreme Court’s] ruling in *Illinois Brick*, most federal courts construed section four of the Clayton Act to allow suits by indirect purchasers.”); Lande, *supra* note 21, at 448 (“Not surprisingly, many states enacted laws, called *Illinois Brick* Repealers . . . to give indirect purchasers the right to sue when firms violate analogous state antitrust laws.”); Barak D. Richman & Christopher R. Murray, *Rebuilding Illinois Brick: A Functionalist Approach to the Indirect Purchaser Rule*, 81 S. CAL. L. REV. 69, 69 (2007) (“The landmark case of *Illinois Brick Co. v. Illinois* . . . has been subjected to steady and widespread criticism since it was decided in 1977.”).

27. There are generally four exceptions to the holding in *Illinois Brick*. First, in cases involving a “cost-plus” contract between the direct purchaser and indirect purchaser, indirect purchasers have standing to sue. *Ill. Brick*, 431 U.S. at 735–36. A second exception exists if “the direct purchaser is owned or controlled by the defendant or indirect purchaser.” AM. BAR ASS’N SECTION OF ANTITRUST LAW, *supra* note 6, at 17. A third exception exists if the direct purchaser is found to be a coconspirator in a vertical conspiracy. *Id.* at 20. Finally, indirect purchasers are not prevented from seeking injunctive relief under federal law. *Id.* at 23.

28. *Ill. Brick*, 431 U.S. at 730 (explaining that if indirect purchasers were allowed standing to file suit, indirect purchasers would be able to recover for the full amount of overcharges in one suit, and direct purchasers would also be able to recover the full amount of overcharges in another suit, as the defendant is precluded from asserting a “pass-on” defense).

29. *Id.* at 732, 741 (explaining that “the evidentiary complexities and uncertainties involved in the defensive use of pass-on against a direct purchaser are multiplied in the offensive use of pass-on by a plaintiff several steps removed from the defendant in the chain of distribution,” and also that establishing “a pass-on defense against a direct purchaser applies *a fortiori* to the attempt to trace the effect of the overcharge through each step in the distribution chain from the direct purchaser to the ultimate consumer”).

30. *Id.* at 746 (“[T]he direct purchaser absorbs at least some and often most of the overcharge.”). Although the Court recognized that “direct purchasers sometimes may refrain from bringing a treble-damages suit for fear of disrupting relations with their suppliers,” the Court implied that the incentive for direct purchasers to bring suit is still greater than that of indirect purchasers, as “[m]any of the indirect purchasers barred from asserting pass-on claims under the *Hanover Shoe* rule have such a small stake in the lawsuit that even if they were to recover as part of a class, only a small fraction would be likely to come forward to collect their damages.” *Id.* at 746–47.

Ultimately, the decision in *Illinois Brick* denies recovery to the true victims of antitrust violations.³¹ Fortunately, *Illinois Brick* only applies to antitrust actions brought under federal law, and individual states are free to allow indirect purchasers standing to sue.³² Although the exact rights of indirect purchasers vary from state to state, a total of thirty-six states and the District of Columbia provide indirect purchasers with a cause of action.³³ Twelve states, however, have chosen to explicitly follow *Illinois Brick* and deny indirect purchasers standing.³⁴ Thus, although the Supreme Court seemingly dealt a lethal blow to indirect purchasers in *Illinois Brick*, a majority of the states have taken it upon themselves to ensure that indirect purchasers may recover for harm suffered.

B. Personal Jurisdiction

Any personal jurisdiction due process analysis must begin with the minimum contacts analysis provided in *International Shoe Co. v. Washington*.³⁵ In *International Shoe*, the Supreme Court held that due process requires that, in order for a court to extend personal jurisdiction over a defendant, the defendant must have minimum contacts with the forum state, and the forum state's exertion of personal jurisdiction must not offend "traditional notions of fair play and substantial justice."³⁶

The Supreme Court set forth the following five factors to consider in determining whether the extension of personal jurisdiction offends "traditional notions of fair play and substantial justice": (1) "the burden on the defendant," (2) "the interests of the forum State," (3) "the plaintiff's interest in obtaining relief," (4) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and

31. See *Comes*, 646 N.W.2d at 447 (claiming that denying indirect purchasers standing to bring suit would mean that the "real victims—those who purchase goods and pay the overcharge—cannot recover"); *Freeman Indus., LLC v. Eastman Chem. Co.*, 172 S.W.3d 512, 520 (Tenn. 2005) (explaining that, by allowing indirect purchasers the right to sue, the court was "affording a remedy to the ultimate victims of the antitrust conduct.").

32. In *California v. ARC America Corp.*, the Supreme Court held that state indirect purchaser statutes are not preempted by federal law. 490 U.S. 93, 105–06 (1989).

33. *Comes*, 646 N.W.2d at 448. In addition to Iowa, "nineteen states, the District of Columbia, and Puerto Rico have statutes explicitly authorizing indirect purchasers to maintain an antitrust suit." *Id.* Those states are Alabama, California, Hawaii, Illinois, Kansas, Maine, Maryland, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Mexico, New York, North Dakota, South Dakota, Vermont, West Virginia, and Wisconsin. *Id.* at 448 n.7; AM. BAR ASS'N SECTION OF ANTITRUST LAW, *supra* note 6, at 26. Furthermore, "[s]eventeen other states permit recovery on behalf of consumers, either in the form of restitution or damages under state consumer protection laws or state unfair trade practices statutes." *Comes*, 646 N.W.2d at 448. "These states are: Alaska, Arizona, Arkansas, Connecticut, Florida, Kentucky, Louisiana, Massachusetts, Missouri, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, Utah, Washington, and West Virginia." *Id.* at 448 n.8. In addition to these thirty-six states, Colorado, Delaware, Maryland, and Virginia also "allow the state attorney general to initiate a lawsuit on behalf of the government or natural persons." *Id.* at 448 & n.9.

34. AM. BAR ASS'N SECTION OF ANTITRUST LAW, *supra* note 6, at 26.

35. 326 U.S. 310, 316 (1945).

36. *Id.* (quoting *Miliken v. Meyer*, 311 U.S. 457, 463 (1940)).

(5) “the shared interest of the several States in furthering fundamental substantive social policies.”³⁷ While the minimum contacts inquiry and the “fair play and substantial justice” inquiry are distinct, they are also interrelated: when more of one is present, less of the other is needed.³⁸ The 1984 decision in *Calder v. Jones*, like the other personal jurisdiction opinions of the 1980s, was meant to supplement the *International Shoe* analysis.³⁹

C. *Specific Versus General Jurisdiction*

This Note deals solely with the realm of what is commonly called “specific” jurisdiction. Typically, personal jurisdiction is divided into two categories: “specific” and “general” jurisdiction.⁴⁰ Specific jurisdiction exists when a “[s]tate exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant’s contacts with the forum.”⁴¹ Thus, an analysis of specific jurisdiction involves an investigation into the “relationship among the defendant, the forum, and the litigation.”⁴² Federal courts and some state courts,⁴³ however, also permit a court to exercise “general jurisdiction” over a defendant where the defendant had “continuous and systematic” contacts with the forum, despite the fact that those contacts are unrelated to the litigation.⁴⁴

Calder jurisdiction falls within the realm of specific jurisdiction.⁴⁵ Although general jurisdiction may certainly be active in indirect purchaser litigation, such contacts alleviate the need for *Calder* jurisdiction. Thus, because this Note deals solely with *Calder* jurisdiction in the realm of indirect purchaser litigation, it examines only specific jurisdiction.

D. *Modern Specific Personal Jurisdiction*

Calder does not stand alone; rather, it is simply a piece in the puzzle that makes up personal jurisdiction. Thus, to understand *Calder* and why extending *Calder* jurisdiction to indirect purchaser cases is in line with

37. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 (1987) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

38. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476–77 (1985) (explaining that the considerations within the “fair play and substantial justice” analysis “sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required,” and also that, likewise, “where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable”).

39. See *Calder v. Jones*, 465 U.S. 783 (1984).

40. See *Helicopteros Nacionales de Colom. S.A. v. Hall*, 466 U.S. 408, 414–16 (1984).

41. *Id.* at 414 n.8.

42. *Id.* at 414 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)).

43. AM. BAR ASS’N SECTION OF ANTITRUST LAW, *supra* note 6, at 74 n.266 (explaining that “not all states recognize general jurisdiction”).

44. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 438 (1952).

45. See *Bancroft & Masters, Inc. v. Augusta Nat’l Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000).

Supreme Court precedent on personal jurisdiction, it is necessary to first analyze the other notches in the web. For the purposes of this Note, brief introductions to several key cases should suffice for foundational purposes.

In *World-Wide Volkswagen Corp. v. Woodson*,⁴⁶ the Supreme Court rejected the argument that “foreseeability” of harm in a state is sufficient for the requisite minimum contacts.⁴⁷ The plaintiffs in *World-Wide Volkswagen* brought products liability claims in Oklahoma state court against an automobile retailer and its wholesale distributor, both of which had no direct contacts with the forum state.⁴⁸ The plaintiffs purchased an automobile from the retailer defendant in New York and were subsequently injured in Oklahoma when the automobile caught fire after being rear-ended.⁴⁹ In rejecting the plaintiffs’ argument that injury was foreseeable in Oklahoma because it is foreseeable that the vehicles might travel there, the Court stated that “the mere ‘unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.’”⁵⁰ The Court, however, also explained that a specific type of “foreseeability” is “critical” to any due process analysis: when “the defendant’s conduct and connection with the forum State are such that he should *reasonably anticipate being haled into court there*.”⁵¹

In *Burger King Corp. v. Rudzewicz*,⁵² the defendants—Michigan residents—owned a Burger King franchise in Michigan.⁵³ Burger King, a Florida corporation, brought suit against the defendants for breach of franchise obligations, claiming that the defendants ceased franchise payments, and for trademark infringement, claiming that the defendants’ continued operation of the franchise after Burger King had terminated the franchise tortiously interfered with Burger King’s trademarks.⁵⁴ The defendants argued that the Florida court lacked personal jurisdiction over the defendants, as they were residents of Michigan and the events did not arise within the state of Florida.⁵⁵

The Supreme Court found that, although neither defendant had any physical ties to Florida, the “franchise dispute grew directly out of ‘a contract which had a *substantial* connection with that State,’” and the defendants agreed to a twenty-year relationship with a Florida corpora-

46. 444 U.S. 286 (1980).

47. *Id.* at 295–96.

48. *Id.* at 288–89.

49. *Id.* at 288.

50. *Id.* at 298 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

51. *Id.* at 297 (citing *Kulko v. Superior Court*, 436 U.S. 84, 97–98 (1978)) (emphasis added).

52. 471 U.S. 462 (1985).

53. *Id.* at 466.

54. *Id.* at 464, 468–69.

55. *Id.* at 469.

tion.⁵⁶ Furthermore, the Court explained that the defendants' refusal to pay the franchise fees and their continued operation of the franchise after the plaintiff terminated the franchise agreement "caused foreseeable injuries to the corporation in Florida."⁵⁷ Thus, the Court denied the defendants' motion and allowed proceedings to continue in the Florida court.⁵⁸

In *Asahi Metal Industry Co. v. Superior Court*, the Supreme Court, while agreeing that California did not have jurisdiction over the defendant, famously split on whether placing an item into the "stream of commerce" ought to subject an entity to personal jurisdiction in whatever forum a product reaches.⁵⁹ The plurality, led by Justice O'Connor, reiterated both the purposeful direction requirement from *Burger King* and the inadequacy of "foreseeability" from *World-Wide Volkswagen*, concluding that placing a product "into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State."⁶⁰ Thus, the O'Connor plurality found that "stream of commerce" jurisdiction violated due process.

Justice Brennan, accompanied by Justices White, Marshall, and Blackmun, concluded that placing a product into the "stream of commerce" is sufficient to subject a defendant to personal jurisdiction in any forum in which that product arrives and that the exertion of such jurisdiction comports with due process.⁶¹ Justice Brennan rested his concurrence on the fact that "[a] defendant who has placed goods in the stream of commerce benefits economically from the retail sale of the final product in the forum State, and indirectly benefits from the State's laws that regulate and facilitate commercial activity."⁶² He also relied upon the Court's reasoning in *World-Wide Volkswagen*, as the Court carefully distinguished between goods that reach a distant forum state via the chain of distribution versus products which reach the state due to consumer travel.⁶³ As no binding precedent came out of the case, the federal circuits⁶⁴

56. *Id.* at 479–80 (quoting *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957)).

57. *Id.* at 480.

58. *Id.* at 487.

59. 480 U.S. 102, 105, 112–16 (1987).

60. *Id.* at 110–13. Subsequently, this has become known as the "stream of commerce plus" theory. Kelly Elizabeth Grieshaber, Ruckstuhl v. Owens Corning Fiberglas Corp.: *The Louisiana Long-Arm Statute Stretches Beyond Its Reach*, 45 LOY. L. REV. 765, 772 (1999).

61. *Asahi*, 480 U.S. at 116–117 (Brennan, J., concurring).

62. *Id.* at 117.

63. *Id.* at 120.

64. Angela M. Laughlin, *This Ain't the Texas Two Step Folks: Disharmony, Confusion, and the Unfair Nature of Personal Jurisdiction Analysis in the Fifth Circuit*, 37 CAP. U. L. REV. 681, 703–04 (2009). The First, Fourth, Sixth, and Eleventh Circuits follow Justice O'Connor's "stream of commerce plus" theory. See *Bridgeport Music, Inc. v. Still N the Water Publ'g*, 327 F.3d 472, 479–80 (6th Cir. 2003); *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 944–46 (4th Cir. 1994); *Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 683 (1st Cir. 1992); *Madara v. Hall*, 916 F.2d 1510, 1519 (11th Cir. 1990). The Fifth, Seventh, and Eighth Circuits follow Justice Brennan's "stream of commerce" theory. See *Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610, 613–15 (8th Cir. 1994); *Ruston*

and state courts have subsequently divided over whose interpretation to follow.⁶⁵

Most recently, the Court took up the issue of specific jurisdiction in *J. McIntyre Machinery, Ltd. v. Nicastro*.⁶⁶ The Court seemingly granted certiorari to resolve the lower court division resulting from *Asahi*,⁶⁷ but once again, five Justices could not agree and no binding precedent came from the case.⁶⁸ Robert Nicastro, the appellee, was seriously injured while using the appellant's product and filed suit in New Jersey state court.⁶⁹ The appellant was incorporated in England, which is also where the subject product was produced.⁷⁰

Justice Kennedy, writing for the plurality, found that, while the defendant targeted the United States, it could not be subject to personal jurisdiction in New Jersey because the appellant never advertised in New Jersey and never shipped anything into New Jersey.⁷¹ Justice Kennedy stated "[t]he defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State."⁷² Explaining that the United States is a sovereign distinct from any of its states, Justice Kennedy found the fact that the appellant targeted the United States at large was irrelevant to the question of whether the appellant targeted New Jersey.⁷³ It is noteworthy that Justice Kennedy distinguished between product liability cases and intentional tort cases, explaining that in cases involving intentional torts "the defendant might well fall within the State's authority by reason of his attempt to obstruct its laws."⁷⁴

Justices Breyer and Alito concurred in the judgment but found that the outcome of the case was determined by precedent and there was no need to go further.⁷⁵ Relying primarily on *Asahi* and *World-Wide Volkswagen*, Justice Breyer stated that there was no evidence that the appellant "delivered its goods in the stream of commerce 'with the expectation that they [would] be purchased' by New Jersey users."⁷⁶ Justice

Gas Turbines, Inc. v. Donaldson Co., 9 F.3d 415, 420 (5th Cir. 1993); Dehmlow v. Austin Fireworks, 963 F.2d 941, 947 (7th Cir. 1992).

65. Laughlin, *supra* note 64, at 704 n.132.

66. 131 S. Ct. 2780 (2011).

67. *Id.* at 2786 ("This Court's *Asahi* decision may be responsible in part for that court's error regarding the stream of commerce, and this case presents an opportunity to provide greater clarity.").

68. *See id.* at 2785.

69. *Id.* at 2786.

70. *Id.*

71. *Id.* at 2790.

72. *Id.* at 2788.

73. *Id.* at 2790.

74. *Id.* at 2787.

75. *Id.* at 2791 (Breyer, J., concurring).

76. *Id.* at 2792 (quoting *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 298 (1980)). It should be noted that this issue is likely to come before the Court again in the near future. Justice Breyer explained his rationale for refusing to join the plurality as follows:

Ginsburg, along with Justices Sotomayor and Kagan, dissented, stating that when “a local plaintiff [is] injured by the activity of a manufacturer seeking to exploit a multistate or global market . . . jurisdiction is appropriately exercised by courts of the place where the product was sold and caused injury.”⁷⁷

E. *Calder v. Jones*

In the 1980s, the Burger and Rehnquist Courts sought to resolve the massive confusion over personal jurisdiction in the modern era by handing down a number of opinions, including *Calder*, which form the basis for modern personal jurisdiction.⁷⁸ Among the opinions, *Calder* is somewhat unique in its flexible application, and it is likely this flexibility which prevented the opinion from becoming lost in a sea of personal jurisdiction opinions.⁷⁹

The plaintiff in *Calder*, a resident of California, filed a libel suit against two defendants, John South and Iain Calder, and the defendants filed a motion to quash service of process based on a lack of personal jurisdiction.⁸⁰ The plaintiff’s libel claim was based on an article written by the defendants in Florida.⁸¹ In resolving the case, the Supreme Court developed what is known as the “effects test” for personal jurisdiction.⁸²

The defendants, both residents of Florida, had nominal physical contacts with the state of California.⁸³ Calder, the president and editor of the publication in which the article was published, only visited California twice, and neither visit was related to the article in question.⁸⁴ South, the author of the article in question, frequently traveled to California for business matters.⁸⁵ For the article in question, however, South conducted research in Florida and only relied upon phone calls to people in Califor-

At a minimum, I would not work such a change to the law in the way either the plurality or the New Jersey Supreme Court suggests without a better understanding of the relevant contemporary commercial circumstances. Insofar as such considerations are relevant to any change in present law, they might be presented in a case (unlike the present one) in which the Solicitor General participates.

Id. at 2794 (Breyer, J., concurring).

77. *Id.* at 2804 (Ginsburg, J., dissenting).

78. See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); Larry Dougherty, Note, *Does a Cartel Aim Expressly? Trusting Calder Personal Jurisdiction When Antitrust Goes Global*, 60 FLA. L. REV. 915, 919 (2008).

79. Dougherty, *supra* note 78, at 919.

80. *Calder v. Jones*, 465 U.S. 783, 784–86 (1984).

81. *Id.* at 784.

82. C. Douglas Floyd & Shima Baradaran-Robison, *Toward a Unified Test of Personal Jurisdiction in an Era of Widely Diffused Wrongs: The Relevance of Purpose and Effects*, 81 IND. L.J. 601, 611 (2006).

83. *Calder*, 465 U.S. at 785–86.

84. *Id.* at 786.

85. *Id.* at 785.

nia for information.⁸⁶ Despite the lack of physical contacts with the state of California, the Court held that jurisdiction was proper “based on the ‘effects’ of their Florida conduct in California.”⁸⁷ The Court explained the “effects” of their Florida conduct as follows: “The article was drawn from California sources, and the brunt of the harm, in terms both of respondent’s emotional distress and the injury to her professional reputation, was suffered in California.”⁸⁸

In response to the defendants’ objections that “foreseeable” harm in California is insufficient for the extension of personal jurisdiction under *World-Wide Volkswagen*,⁸⁹ the Court stated that, unlike the defendant in *World-Wide Volkswagen*, the defendants in this case were not charged with “untargeted negligence.”⁹⁰ Rather, these defendants “expressly aimed [their intentional actions] at California,” and “knew that the brunt of that injury would be felt by [the plaintiff in California].”⁹¹ Thus, the Court reasoned the defendants must “‘reasonably anticipate being haled into court [in California],’” as they could reasonably anticipate being held accountable for the truthfulness of their article.⁹² Summarizing the essence of its analysis, the Court explained that “[a]n individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California.”⁹³

1. *The Interaction of Calder Jurisdiction and State Long-Arm Statutes*

Before going further it should be noted that some state long-arm statutes restrict the constitutionally granted jurisdiction of their respective state courts.⁹⁴ Although challenges to personal jurisdiction based on the restrictions within state long-arm statutes are certainly worthy of analysis in any particular indirect purchaser case, this Note specifically deals with the *constitutionality* of extending jurisdiction over defendants in indirect purchaser litigation. Thus, parts of this Note may not be particularly applicable for certain states with overly restrictive long-arm statutes, as the question of whether jurisdiction is constitutional, while relevant, may not be decisive in such states. Therefore, this Note applies

86. *Id.* at 785–86.

87. *Id.* at 789.

88. *Id.* at 788–89. The Court went on to summarize its rationale by stating that “California is the focal point both of the story and of the harm suffered.” *Id.* at 789.

89. *Id.* at 789 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980)).

90. *Id.*

91. *Id.* at 789–90.

92. *Id.* at 790 (quoting *World-Wide Volkswagen*, 444 U.S. at 297).

93. *Id.*

94. See Douglas D. McFarland, *Dictum Run Wild: How Long-Arm Statutes Extended to the Limits of Due Process*, 84 B.U. L. REV. 491, 493 (2004) (“Long-arm jurisdiction is not self-executing. Due process permits—but does not require—a state to reach beyond its borders to serve nonresidents. Long-arm jurisdiction exists only when the state authorizes the extraterritorial reach.”).

particularly to states that have either (1) accepted all jurisdiction constitutionally granted to them,⁹⁵ or (2) adopted long-arm statutes with language which permits *Calder* jurisdiction.⁹⁶ It should be noted, however, that many of the principles within this Note, particularly those within Parts III.E and IV.C, are generally applicable to indirect purchaser litigation.

2. *How Calder Has Been Applied*

Although the Court in *Calder* implied that the “effects test” does not apply to negligence,⁹⁷ it did not limit the test to libel claims. Thus, in the years following the decision courts have employed the “effects test” to subject defendants to personal jurisdiction for a multitude of intentional and business torts,⁹⁸ including antitrust.⁹⁹

Judicial interpretation of *Calder* has varied considerably. A complete analysis of all judicial interpretations, however, is not necessary for the purposes of this Note. Rather, this Subsection outlines popular trends in the interpretation of *Calder*. The majority of the confusion lower courts face stems from the Supreme Court’s language in *Calder* of “intent” and “express aiming.” Thus, this Subsection first addresses the basic judicial interpretations of these issues. Next, it analyzes judicial variances in the interpretation of “express aiming” and “injury” when a defendant has aimed its actions at multiple forums. This latter section is particularly relevant to indirect purchaser litigation, as antitrust violations are often targeted at broad geographic regions and sometimes the entire globe.¹⁰⁰

95. Approximately twenty states have a long-arm statute that extends their respective jurisdiction to the maximum amount permitted by due process. *Id.* at 497. Additionally, the courts of another twenty-one states have declared that their respective long-arm statute, while seemingly limited, in fact extends jurisdiction to the maximum permitted by due process. *Id.*

96. Because *Calder* jurisdiction has not been analyzed under a state long-arm statute in an indirect purchaser case, it is difficult to say for certain which state long-arm statutes that do not extend jurisdiction to the limits of due process would fit within *Calder*. The language within some long-arm statutes, however, looks incredibly similar to the three-pronged *Calder* test, and thus, in those states, *Calder* would seemingly be active regardless of the restrictions within the long-arm statute. *See, e.g.*, D.C. CODE § 13-423(a)(4) (2011) (allowing for the extension of jurisdiction over a defendant who causes “tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he . . . derives substantial revenue from goods used or consumed, or services rendered, in the District of Columbia”).

97. *See Calder*, 465 U.S. at 789.

98. *Far W. Capital, Inc. v. Towne*, 46 F.3d 1071, 1077–78 (10th Cir. 1995); *Pavlovich v. Superior Court*, 58 P.3d 2, 7 (Cal. 2002) (citing *IMO Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 259–61 (3d Cir. 1998) (explaining that courts have applied *Calder* to a multitude of intentional torts, and to business torts as well)).

99. *See, e.g., In re Vitamins Antitrust Litig.*, No. 99-197, 2001 U.S. Dist. LEXIS 25073, at *17–19 (D.D.C. Oct. 30, 2001).

100. *See ANTITRUST DIV., U.S. DEP’T OF JUSTICE, supra note 2*, at 6–7 (explaining the worldwide targeting in the infamous lysine conspiracy and citric acid conspiracy).

a. Intent and Express Aiming

The language of “intent” and “express aiming” in *Calder* has divided and confused lower courts in their interpretations of the “effects test.”¹⁰¹ The primary question, which results in a blending of the “intent” and “express aiming” prongs of *Calder*, is whether some sort of subjective intent is necessary to satisfy the “express aiming” prong, or whether awareness of harm in the forum state is sufficient.¹⁰² This Subsection briefly addresses the workings of and rationales behind two prevalent interpretations, and a third interpretation that was long considered to be an outlier, though may no longer be so.

In *Bancroft & Masters Inc. v. Augusta National Inc.*, the Ninth Circuit focused its inquiry on the subjective intent of the defendant.¹⁰³ Relying upon the *Calder* opinion’s language distinguishing “untargeted negligence,” the Ninth Circuit determined, employing a logic similar to the O’Connor plurality in *Asahi*, that “something more” than knowledge of injury in the forum state is necessary to satisfy the “effects test.”¹⁰⁴ That “something more,” the Ninth Circuit concluded, was “[i]ndividualized targeting,” or actions targeted at a particular plaintiff who the defendant knows is a resident of the forum state.¹⁰⁵ In other words, the Ninth Circuit held “that foreseeable effects in the forum not are not enough and that there must be express aiming which is satisfied when the defendant performs acts for the ‘very purpose’ of having effects in the forum.”¹⁰⁶

Other courts, however, have held that such “intentional targeting” is not necessary, holding instead that awareness that the plaintiff would be injured in the forum state is sufficient. For example, the Fifth Circuit stated that “[t]he defendant must be chargeable with knowledge of the forum at which his conduct is directed in order to reasonably anticipate being haled into court in that forum.”¹⁰⁷ Awareness of harm in these jurisdictions, however, is not sufficient, by itself, to support personal jurisdiction under *Calder*. The conduct must still be “expressly aimed” — or in the words of the Fifth Circuit, “directed” — and injury must result.¹⁰⁸

Additionally, there is the often cited Seventh Circuit opinion, *Janmark, Inc. v. Reidy*, in which the Court explained that “there can be no serious doubt after *Calder v. Jones*, that the state in which the victim of a tort suffers the injury may entertain a suit against the accused tort-

101. Floyd & Baradaran-Robison, *supra* note 82, at 618.

102. *See id.* at 618–19.

103. 223 F.3d 1082, 1087–88 (9th Cir. 2000).

104. *Id.* at 1087.

105. *Id.* at 1087–88.

106. Floyd & Baradaran-Robison, *supra* note 82, at 618 n.88 (citing *Bancroft & Masters*, 223 F.3d at 1088).

107. *Revell v. Lidov*, 317 F.3d 467, 475 (5th Cir. 2002).

108. *Id.* at 475–76.

feasor.”¹⁰⁹ By its plain language, this seemingly implies that injury in a forum is sufficient, without “express aiming.” As broad as this interpretation of *Calder* seems, however, the Seventh Circuit has since remarked that *Janmark* may not be as broad as it appears and has reiterated that “express aiming” is a prerequisite to *Calder* jurisdiction.¹¹⁰ Thus, although many courts consider *Janmark* to represent a minority viewpoint, it may simply be another subsection within the majority. Regardless, the Seventh Circuit has explicitly chosen not to overrule *Janmark*, instead reiterating that jurisdiction was proper in that case.¹¹¹

b. Aiming Broadly to Avoid *Calder* Jurisdiction?

Another question regarding the “effects test” has produced division among lower courts regarding the “express aiming” and “injury” elements: can a defendant escape *Calder* jurisdiction in all state courts simply by aiming broadly across many states, so that no state is the focal point of the aiming, and no plaintiff feels the “brunt” of the harm? This question carries particular importance to the potential use of *Calder* jurisdiction in indirect purchaser cases, as antitrust violations are rarely targeted at individual state markets.¹¹² Not surprisingly, lower courts are split on this issue.¹¹³

109. 132 F.3d 1200, 1202 (7th Cir. 1997) (citation omitted).

110. *Tamburo v. Dworkin*, 601 F.3d 693, 705–06 (7th Cir. 2010) (“*Janmark*’s jurisdictional conclusion was premised on the Illinois-based injury and the fact that the defendant acted with the purpose of interfering with sales originating in Illinois.”).

111. *Id.* at 706. While it may seem unnecessary to explain *Janmark*, given the Seventh Circuit’s recent discussion of the case, this Note includes a brief analysis of *Janmark*, in essence, because the D.C. Circuit relied upon the plain language of *Janmark* in *In re Vitamins Antitrust Litigation*, discussed *infra* Part III.B.

112. See *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 778–79 (7th Cir. 1994) (explaining that, while an antitrust violation must affect interstate commerce to fall under federal jurisdiction, the number of cases in which interstate commerce is not affected is “minuscule”).

113. Compare *Patterson v. Home Depot, USA, Inc.*, 684 F. Supp. 2d 1170, 1183 (D. Ariz. 2010) (citing *Calder* in extending jurisdiction in a products liability action over a foreign manufacturer that only sold its product into Illinois, explaining that, “[b]y licensing its subsidiary to disseminate products manufactured in accordance with an allegedly defective design, [the defendant] should have anticipated being haled into court in the instance that the design had a harmful effect on residents of Arizona”), *Noss v. Avatar Tech., Inc.*, No. CV 2001–1391, 2002 WL 32103156, *9–10 (Idaho Dist. Nov. 2, 2002), *Simon v. Philip Morris, Inc.*, 86 F. Supp. 2d 95, 132 (E.D.N.Y. 2000) (“*Calder*’s reasoning does not hinge on the fact that only one plaintiff living in only one state was involved. The main point of the case is its distinction between intentional and negligent wrongdoing for purposes of assessing minimum contacts.”), and *Cole v. Tobacco Inst.*, 47 F. Supp. 2d 812, 815–16 (E.D. Tex. 1999) (explaining that *Calder* jurisdiction is proper when “intentional wrongdoing was aimed at more than one state,” because to hold otherwise would imply “that a party can avoid liability by multiplying its wrongdoing”), *with Imo Indus., Inc. v. Keikert AG*, 155 F.3d 254, 265–66 (3d Cir. 1998) (holding that *Calder* requires the forum state to be the “focal point” of the “expressly aimed” activity).

i. Express Aiming

The Third Circuit interprets the “expressly aim” element to require that the forum state be the “focal point” of the defendant’s intentional actions.¹¹⁴ In *Imo Industries, Inc. v. Kiekert AG*, the Third Circuit analyzed the precedent of the First, Fourth, Fifth, Eighth, and Tenth Circuits, concluding that these cases indicate “that the mere allegation that the plaintiff feels the effect of the defendant’s tortious conduct in the forum because the plaintiff is located there is insufficient to satisfy *Calder*.”¹¹⁵ Thus, it seems that, under this interpretation, a defendant who aims broadly across many states cannot be held to have “expressly aimed” at any particular state.

Other courts, however, find that when a defendant aims its activity broadly, the forum state, and the particular plaintiff, need not qualify as the “focal point” of the harm to satisfy the “expressly aimed” requirement.¹¹⁶ In *Cole v. Tobacco Institute*, the defendant argued that, because it aimed its alleged wrongful activities at multiple states, it could not be subject to personal jurisdiction in Texas based on *Calder*.¹¹⁷ The District Court for the Eastern District of Texas rejected the defendant’s claim, explaining that such an argument “implies that a party can avoid liability by multiplying its wrongdoing.”¹¹⁸ The court went on to reason that “under *Calder*, the fact that [the defendant] aimed its alleged wrongdoing at the entire United States gives it the requisite ‘minimum contacts’ with each state where that alleged wrongdoing caused injury.”¹¹⁹

ii. Injury

A similar split in the courts revolves around the question of whether the “brunt” of the harm need be suffered in the forum state.¹²⁰ The Third Circuit and others have stated that the “injury” prong of the *Calder* analysis requires that “[t]he plaintiff felt the brunt of the harm in the forum such that the forum can be said to be the focal point of the harm suffered by the plaintiff as a result of that tort.”¹²¹ The Ninth Circuit, on the other hand, has explicitly stated that *Calder*’s injury prong does not require

114. *Imo Indus.*, 155 F.3d at 265–66.

115. *Id.* at 261–63. The specific cases the Third Circuit analyzed were *Noonan v. Winston Co.*, 135 F.3d 85 (1st Cir. 1998); *ESAB Grp., Inc. v. Centricut, Inc.*, 126 F.3d 617 (4th Cir. 1997), *cert. denied*, 523 U.S. 1048 (1998); *Far W. Capital, Inc. v. Towne*, 46 F.3d 1071 (10th Cir. 1995); *Gen. Electric Capital Corp. v. Grossman*, 991 F.2d 1376 (8th Cir. 1993); and *Southmark Corp. v. Life Investors, Inc.*, 851 F.2d 763 (5th Cir. 1988).

116. *See, e.g., Cole*, 47 F. Supp. 2d at 815–16.

117. *Id.* at 815.

118. *Id.*

119. *Id.* at 816 (quoting *Commonwealth v. Philip Morris Inc.*, No. 957378J 1998 WL 1181992, at *26 (Mass. Super. Ct. Mar. 20, 1998)).

120. *Compare Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme*, 433 F.3d 1199, 1207 (9th Cir. 2006), with *Imo Indus., Inc.*, 155 F.3d at 265.

121. *Imo Indus.*, 155 F.3d at 265.

that the “brunt” of the harm be suffered in the forum state, explaining that “[i]f a jurisdictionally sufficient amount of harm is suffered in the forum state, it does not matter that even more harm might have been suffered in another state.”¹²² Meanwhile, some courts, such as the Seventh Circuit, note the division among the courts but have put off resolving the issue.¹²³

III. ANALYSIS

Unfortunately, the only court to apply the “effects test” to an indirect purchaser claim, like the one described in the introduction, did not follow the recommendation of this Note. The precedent of other courts, however, on both the “effects test” generally and on the interaction of antitrust law and personal jurisdiction, indicates that jurisdiction under *Calder* comports with due process in such situations. Section A analyzes non-*Calder* personal jurisdiction precedent dealing with the type of indirect purchaser claims this Note primarily addresses. Section B of this Part analyzes precedent on how *Calder* has been applied to direct purchaser litigation with a particular emphasis on the reasoning employed by the court in *In re Bulk [Extruded] Graphite Products*.¹²⁴ Next, in Section C this Note examines the only indirect purchaser case in which *Calder* was analyzed. This Note then changes direction with Sections D and E to show why policy encourages a broad reading of *Calder* in relation to indirect purchaser litigation. Specifically, Section D discusses the purposes behind state indirect purchaser statutes, and Section E provides an analysis of the arguments for and against indirect purchaser litigation.

A. *Non-Calder Personal Jurisdiction and Indirect Purchaser Cases*

In regards to indirect purchaser actions, lack of personal jurisdiction currently stands as a strong defense to many potential actions.¹²⁵ The majority of courts deny jurisdiction in indirect purchaser cases where none of the conspirators directly sell products into the forum state; subsequent indirect purchasers likely are dissuaded from bringing a suit in fear of it being dismissed for lack of personal jurisdiction. As of now, nearly all courts analyzing personal jurisdiction in the realm of indirect purchaser litigation have not considered the *Calder* “effects test” but rather have relied upon opinions such as *Burger King*, *Asahi*, and/or *World-Wide Volkswagen*.¹²⁶ This Subsection first analyzes two cases in which jurisdic-

122. *Yahoo! Inc.*, 433 F.3d at 1207.

123. *Tamburo v. Dworkin*, 601 F.3d 693, 706 n.9 (7th Cir. 2010).

124. Civ. No. 02-6030 (WHW), 2007 WL 2212713 (D.N.J. July 30, 2007).

125. See AM. BAR ASS'N SECTION OF ANTITRUST LAW, *supra* note 6, at 74.

126. See, e.g., *Frankenfeld v. Crompton Corp.*, 697 N.W.2d 378, 386 (S.D. 2005); *Execu-Tech Bus. Sys., Inc. v. New Oji Paper Co. Ltd.*, 752 So. 2d 582, 586 & n.10–11 (Fla. 2000); *Lorix v. Crompton Corp.*, 680 N.W.2d 574, 583 (Minn. Ct. App. 2004).

tion was denied, and then analyzes a case in which the extension of jurisdiction was held to be proper.

1. *Indirect Purchaser Cases in Which Jurisdiction Was Denied*

In *Lorix v. Crompton Corp.*, the Minnesota Appellate Court, relying on the “purposefully directed” test discussed in *Burger King*, held that personal jurisdiction did not exist over a defendant accused of participating in a massive price-fixing conspiracy.¹²⁷ The defendant, a producer of rubber-processing chemicals headquartered in Belgium with a subsidiary in Ohio, sold its product to various tire manufacturers outside Minnesota.¹²⁸ Tire manufacturers then used the chemicals to make tires sold into Minnesota, and the plaintiff was overcharged as a result of the price-fixing conspiracy.¹²⁹ The court held that jurisdiction did not exist over the defendant and explained that, in Minnesota,

[A] nonresident supplier does not have contacts with Minnesota that would support the exercise of personal jurisdiction by selling raw material to a nonresident manufacturer when (1) the manufacturer incorporated the raw material into a different product that the manufacturer then sold in Minnesota in accordance with its own business plans and (2) there was no showing that the supplier delivered its product into the stream of commerce with the expectation that it would be purchased by customers in Minnesota.¹³⁰

Likewise, in *Frankenfeld v. Crompton Corp.*, the Supreme Court of South Dakota refused to extend jurisdiction over the same defendant as in *Lorix*, as well as one other defendant, neither of whom sold their chemicals directly into South Dakota.¹³¹ Applying Justice O’Connor’s plurality opinion from *Asahi*, the court held that a price-fixing conspiracy in this case could not act as the “plus” in the “stream of commerce plus” theory because the plaintiff did not purchase a product directly from the defendants, but rather “purchased tires that allegedly contained some of those chemicals.”¹³² The court then applied Justice Brennan’s analysis from *Asahi* and found that because the defendants did not sell their product into the “stream of commerce” with the expectation that their product would end up in South Dakota, the extension of jurisdiction would offend due process.¹³³

127. 680 N.W.2d at 583.

128. *Id.* at 577.

129. *Lorix*, 680 N.W.2d at 577.

130. *Id.* at 580 (citing *In re Minn. Asbestos Litig.*, 552 N.W.2d 242, 246–47 (Minn. 1996)).

131. 697 N.W.2d at 386.

132. *Id.*

133. *Id.*

2. *Indirect Purchaser Cases in Which Jurisdiction Was Held to Be Proper*

Although the aforementioned courts refused to extend personal jurisdiction over out-of-state defendants, at least one court in an almost identical situation (in which the defendant does no actual business in the forum state) found the requisite minimal contacts for personal jurisdiction in an indirect purchaser action.¹³⁴ As with the cases above, however, this court did not employ the “effects test” in its personal jurisdiction analysis.

In *Execu-Tech Business Systems, Inc. v. New Oji Paper Co.*, the defendant, a Japanese corporation that did not conduct business outside of Japan, previously pled guilty to federal criminal charges relating to its conspiracy to price-fix thermal facsimile paper.¹³⁵ Subsequently, the plaintiff, a Florida consumer of thermal facsimile paper, filed an indirect purchaser action against the defendant on behalf of all Florida consumers of thermal facsimile paper.¹³⁶ The court distinguished this case from personal jurisdiction precedent involving products liability or breach of contract, as the defendant did not sell defective paper into Florida and did not violate an agreement with Florida consumers, instead defining the action producing injury as introducing “a ‘defective’ price into the Florida market.”¹³⁷ Relying on *World-Wide Volkswagen*, the court reasoned that the defendant possessed the requisite minimal contacts with Florida because Florida’s long-arm statute, which includes a “[c]ommitting a tortious act within this state” prong,¹³⁸ provided the defendant with notice of the applicable Florida law.¹³⁹ Thus, the court found that the defendant, in choosing to partake in a nationwide price-fixing scheme that inherently included Florida, “reasonably should have expected to be haled into court in [Florida] if ‘caught.’”¹⁴⁰ The court went on to suggest that the defendant “purposefully availed” itself of the protection of Florida laws: “[a]s long as [the defendant] and the other conspirators sought to use the benefits afforded by Florida law to participate in (and profit from) the thermal fax paper market in this state, then they should have been prepared to follow Florida law governing their price-setting activities.”¹⁴¹ Thus, while in the minority, at least one court has extended jurisdiction over a defendant that did not sell any products directly into the forum state.

134. *Execu-Tech Bus. Sys., Inc. v. New Oji Paper Co. Ltd.*, 752 So. 2d 582 (Fla. 2000).

135. *Id.* at 583.

136. *Id.*

137. *Id.* at 585.

138. FLA. STAT. ANN. § 48.193(1)(b) (West 2011).

139. *Execu-Tech*, 752 So. 2d at 586.

140. *Id.*

141. *Id.* (citing *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)).

B. *Calder and Direct Purchaser Litigation*

Although only one court has applied the “effects test” to an indirect purchaser claim, federal courts have applied the test to cases arising under the Clayton Act.¹⁴² Although this Note focuses specifically on indirect purchaser claims, the arguments for expanding *Calder* jurisdiction based on the unique nature of antitrust violations apply to direct purchaser litigation as well. This Section examines two direct purchaser cases that reach different conclusions on how the “expressly aimed” prong of *Calder* should be interpreted.

In *In re Vitamins Antitrust Litig.*, the District Court for the District of Columbia analyzed *Calder* jurisdiction in ten separate states and concluded, based upon a strict interpretation of *Calder*’s “express aiming” prong, that jurisdiction was proper in only two of the forum states.¹⁴³ This seemingly bizarre situation arose because the Judicial Panel on Multidistrict Litigation ordered a consolidated pretrial for all cases brought against the defendant.¹⁴⁴ This case involved a single defendant corporation, located in Belgium, that was accused of participating in a worldwide price-fixing conspiracy considered to be “the most pervasive and harmful criminal antitrust conspiracy ever uncovered.”¹⁴⁵ Although the court declined to find *Calder* jurisdiction in eight states, it did find that the “effects test” was satisfied in California and Illinois.¹⁴⁶ The court’s decision rested on a state-by-state analysis of how each state applied *Calder* and primarily focused on the “expressly aimed” element of the “effects test.”¹⁴⁷

The district court found that, because Illinois only requires the injury be felt in Illinois for *Calder* jurisdiction to apply, the “effects test” was satisfied.¹⁴⁸ Additionally, the court explained that California considers antitrust violations a “special regulation of the Cartwright Act,” and interprets the “effects test,” when applied to special regulations, to allow for jurisdiction where the defendant caused harm in the state.¹⁴⁹ The court then explained that, unlike Illinois and California, the remaining forums required that a defendant’s conduct be “specifically and purposefully directed” at the forum state to satisfy the “express aiming” prong of

142. See, e.g., *In re Vitamins Antitrust Litig.*, No. 99-197 (TFH), 2001 U.S. Dist. LEXIS 25073 (D.D.C. Oct. 30, 2001).

143. *Id.* at *64-65.

144. *In re Vitamin Antitrust Litig.*, No. 1285, 1999 U.S. Dist. LEXIS 8599, at *1-4 (J.P.M.L. June 7, 1999).

145. Miranda Berge, *The Multi-State Vitamins Indirect Purchaser Litigation, Settlement, and Implications* 4 (Feb. 10, 2002) (unpublished seminar/major writing paper) (quoting David Barboza, *Tearing Down the Facade of ‘Vitamins, Inc.’*, N.Y. TIMES, Oct. 10, 1999, at C1) (on file with author).

146. *In re Vitamins Antitrust Litig.*, 2001 U.S. Dist. LEXIS 25073, at *64-65.

147. *Id.* at *56-65.

148. *Id.* at *58-59.

149. *Id.* at *59 & n.22 (citing *St. Joe Paper Co. v. Super. Ct.*, 120 Cal. App. 3d 991, 997 (Cal. Ct. App. 1981)).

the “effects test.”¹⁵⁰ While the court sympathized with the plaintiffs’ argument that broad aiming should not defeat jurisdiction under *Calder*,¹⁵¹ it refused to take into account the unique nature of antitrust violations in analyzing the “express aiming” requirement and held that jurisdiction did not exist in the remaining forums.¹⁵²

In *In re Bulk [Extruded] Graphite Products*, however, the New Jersey District Court took a different approach in interpreting *Calder* in a global price-fixing case.¹⁵³ Because the plaintiffs filed their complaint under Section 12 of the Clayton Act, which allows for nationwide service of process,¹⁵⁴ the court only needed to determine if the defendant had sufficient minimum contacts with the United States as a whole.¹⁵⁵ The defendants in that case were accused of conspiring to fix the price charged for bulk graphite products across the globe.¹⁵⁶ The former president of one of the defendant corporations testified that, in order to successfully fix the prices of bulk graphite products, such a conspiracy would “have to be directed toward the worldwide market in that product, including the United States bulk graphite market.”¹⁵⁷ He went on to explain that:

[T]he issue of graphite electrodes is if you sold them one place for one price and another place for another price, somebody would go to the other place that was a cheaper price, uhm, so we employed a phrase that was common currency price parity, so no matter what currency you sold it in, no matter what part of the world you sold it in, it had to equivocate to a common price So global in that sense is applicable to wherever the customer was.¹⁵⁸

In other words, the defendant did not particularly aim its conduct at any individual country but rather at the market for bulk graphite.¹⁵⁹ The court chose to extend jurisdiction over the defendant under *Calder*, despite the fact that the defendant aimed its conduct worldwide and there was no evidence that the defendant particularly targeted the United States.¹⁶⁰ More specifically, because the United States was included in

150. *Id.* at *64.

151. *See id.*

152. *Id.* at *65.

153. Civ. No. 02-6030 (WHW), 2007 WL 2212713 (D.N.J. July 30, 2007).

154. 15 U.S.C. § 12 (2006).

155. *In re Bulk Extruded Graphite Prods.*, 2007 WL 2212713, at *6 (citing *In re Auto. Refinishing Paint Antitrust Litig.*, 358 F.3d 288, 298 (3d Cir. 2004)).

156. *Id.* at *1.

157. *Id.* at *8.

158. *Id.* at *8–9.

159. *See id.* For a general discussion of how antitrust injury occurs primarily at the market level, and how “the primary economic aim of competition law is to prevent the acquisition or exercise of ‘market power,’” *see* ANDREW I. GAVIL ET AL., *ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY* 16–29 (2d ed. 2008).

160. *In re Bulk Extruded Graphite Prods.*, 2007 WL 2212713, at *9. *But see In re Chocolate Confectionary Antitrust Litig.*, 602 F. Supp. 2d 538, 565 n.24 (M.D. Pa. 2009) (refusing to extend jurisdic-

this global scheme, *Calder*'s "express aiming" was satisfied despite the fact that the Third Circuit interprets "express aiming" to require that the forum be the focal point of the defendant's harm.¹⁶¹

In reaching this conclusion, the court reasoned that "the nature of price fixing in a conspiracy to fix prices in a global commodity like bulk graphite makes it difficult to identify a precise [focal point] for tortious acts."¹⁶² Unlike the court in *In re Vitamins*, this court recognized that "[t]he special character of an antitrust claim [requires a more liberal interpretation of] the phrase 'expressly aim,'" and did not deny jurisdiction simply because the defendant aimed broadly.¹⁶³ Although the aforementioned cases do not involve indirect purchaser suits, their interpretation of *Calder* in the context of global price-fixing is highly relevant to the overall issue of how *Calder* should be applied to antitrust violations.

C. *Calder and Indirect Purchaser Cases*

As of yet, only one court has analyzed *Calder* in an indirect purchaser action.¹⁶⁴ In *In re Dynamic Random Access Memory (DRAM)*, the plaintiffs—indirect purchasers from North Carolina, Tennessee, and Vermont—filed suit alleging a price-fixing conspiracy against multiple defendants who did not sell their products into any of the aforementioned states.¹⁶⁵ The California district court denied jurisdiction on the grounds that the plaintiffs failed "to allege that defendants' conspiratorial acts were individually targeted towards any plaintiff *whom defendants knew to be residents of* North Carolina, Tennessee, or Vermont."¹⁶⁶ Essentially, the court found that the plaintiffs had not established that the defendants "expressly aimed" at their forum states.¹⁶⁷ The court went on to explain that, because the defendants had not sold products directly into the states and did not receive substantial revenue from sales of their products in those states, the defendants could not have "expressly aimed" at the forum states.¹⁶⁸

tion in a case in which "plaintiffs' evidentiary proffer [was] more diaphanous than that provided in *Bulk [Extruded] Graphite*.").

161. See *In re Bulk Extruded Graphite Prods.*, 2007 WL 2212713, at *5, *9.

162. *Id.* at *9.

163. See *id.*

164. It should be noted that the issue of *Calder* jurisdiction in an indirect purchaser case was raised in *Holder v. Haarmann & Reimer Corp.*, but because the plaintiff's attorney explicitly disavowed reliance on the prong of the state long-arm statute that could support a *Calder* claim, the court refused to conduct a *Calder* analysis. 779 A.2d 264, 272 n.8 (D.C. 2001). Additionally, while indirect purchasers were involved in *In re Vitamins Antitrust Litigation* and *In re Bulk (Extruded) Graphite Products*, the courts' analysis in those cases focused on Sherman Act violations and not state law violations. See *In re Bulk [Extruded] Graphite Prods.*, 2007 WL 2212713, at *4; *In re Vitamins Antitrust Litig.*, No. 99-197, 2001 U.S. Dist. LEXIS 25073, at *23 (D.D.C. Oct. 30, 2001).

165. No. C 02-1486 PJH, 2005 WL 2988715, at *1, *6 (D. Cal. Nov. 7, 2005).

166. *Id.* at *6.

167. See *id.*

168. *Id.*

D. The Purposes Behind State Indirect Purchaser Statutes

In order to understand why a broad reading of *Calder* is necessary in indirect purchaser litigation, it is important to understand the purposes behind state indirect purchaser statutes. In the aftermath of *Illinois Brick* many state legislatures enacted legislation to circumvent the *Illinois Brick* decision and to permit indirect purchasers standing in their respective state courts.¹⁶⁹ Since the enactment of such legislation, courts in those states have had the opportunity to interpret the legislation and to explain the legislative purposes behind those statutes.

Many legislatures that enacted legislation providing indirect purchasers standing to sue felt the true victims of antitrust violations were consumers who purchased the product and paid the overcharge.¹⁷⁰ Other state legislatures, in agreement with Justice Brennan's dissenting opinion in *Illinois Brick*, determined that indirect purchaser suits were necessary for sufficient enforcement of antitrust laws.¹⁷¹ Astonishingly, the Supreme Court seemingly conceded the validity of the purposes behind circumventing *Illinois Brick* in *California v. ARC America Corp.*, explaining that such laws "are consistent with the broad purposes of the federal antitrust laws: deterring anticompetitive conduct and ensuring the compensation of victims of that conduct."¹⁷²

Similarly, in states that declined to amend their legislation in the aftermath of *Illinois Brick*, many state courts interpret the pre-*Illinois Brick* legislation, and the legislative intent behind such legislation, to permit indirect purchaser standing.¹⁷³ Several courts, in determining that the pre-*Illinois Brick* legislation permits indirect purchaser standing, concluded that neglecting to do so leaves the true victims of antitrust violations, the consumers, without a legal remedy.¹⁷⁴ Other courts interpret

169. See AM. BAR. ASS'N SECTION OF ANTITRUST LAW, *supra* note 6, at 26.

170. See, e.g., *Arthur v. Microsoft Corp.*, 676 N.W.2d 29, 35 (Neb. 2004) ("The clear purpose of the Act is to provide consumer protection against the monopolization of trade or commerce.").

171. See *Union Carbide Corp. v. Super. Ct.*, 679 P.2d 14, 17–18 (Cal. 1984) (explaining that the legislature enacted a post-*Illinois Brick* amendment permitting indirect purchasers standing in order "to retain the availability of indirect-purchaser suits as a viable and effective means of enforcing California's antitrust laws").

172. 490 U.S. 93, 102 (1989).

173. See *Comes v. Microsoft Corp.*, 646 N.W. 2d 440, 447 (Iowa 2002); *Hyde v. Abbott Labs., Inc.*, 473 S.E.2d 680, 688 (N.C. Ct. App. 1996) ("We believe that allowing indirect purchasers to sue for [antitrust] violations will best advance the legislative intent that such violations be deterred, and that aggrieved consumers have a private cause of action to redress [antitrust] violations.").

174. *Freeman Indus., LLC v. Eastman Chem. Co.*, 172 S.W.3d 512, 520 (Tenn. 2005) ("By construing Tennessee Code Annotated section 47–25–106 (2001) as permitting indirect purchaser suits, we are affording a remedy to the ultimate victims of the antitrust conduct. Accepting the defendants' position would leave such victims of illegal activity with no redress, a result that hardly comports with notions of fair play."); *Comes*, 646 N.W.2d at 447 ("[T]o prohibit suits by indirect consumers, we must accept the fact that real victims—those who purchase goods and pay the overcharge—cannot recover. This result would overwhelmingly defeat the purpose of the Iowa Competition Law. Consumers in this state are best protected by permitting all injured purchasers to bring suit against those who violate our antitrust laws.").

pre-*Illinois Brick* legislation to permit indirect purchaser standing based upon the idea that the legislature allowed for such standing because it believed it was necessary to properly enforce the antitrust laws.¹⁷⁵

E. The Policy Debate: Arguments for and Against Indirect Purchaser Litigation

To make the case for a broad reading of *Calder* jurisdiction in indirect purchaser litigation, it is necessary to consider the arguments for and against indirect purchaser litigation. The policy discussions that follow are meant to provide context to the overall problem this Note addresses: currently, the law denies compensation to many antitrust victims. The statutes enacted by states in the aftermath of *Illinois Brick*¹⁷⁶ that provide causes of action for indirect purchasers, and the purposes behind those statutes, are being circumvented by personal jurisdiction barriers.¹⁷⁷ To understand the importance of this circumvention, it is necessary to understand the policy behind indirect purchaser litigation.

1. Arguments Against Indirect Purchaser Litigation

Although much scholarship is dedicated to analyzing the policy behind indirect purchaser litigation, this Note, for the sake of brevity, addresses the arguments of two primary and highly respected opponents of indirect purchaser litigation—Professor William Landes and Judge Richard Posner. Professor Landes and Judge Posner not only suggest that indirect purchasers should be denied standing but also suggest that the decision in *Illinois Brick* increases the deterrent effect of private antitrust actions.¹⁷⁸ This Subsection details several of the primary arguments Professor Landes and Judge Posner make in support of *Illinois Brick*.¹⁷⁹

175. *Bunker's Glass Co. v. Pilkington, PLC*, 75 P.3d 99, 109 (Ariz. 2003) (explaining that the legislation was enacted in order to protect Arizona citizens from anticompetitive practices, and that proper enforcement of Arizona antitrust laws “can only be fully enjoyed, however, if Arizona citizens, whether direct or indirect purchasers of goods, may sue to enforce that right”).

176. Or, as noted *supra* Part III.D., statutes enacted before *Illinois Brick* and subsequently interpreted to allow for indirect purchaser standing.

177. See *infra* Part IV.D.

178. AM. BAR ASS'N SECTION OF ANTITRUST LAW, *supra* note 6, at 359.

179. For a more comprehensive look at Professor Landes and Judge Posner's arguments, see William M. Landes & Richard A. Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick*, 46 U. CHI. L. REV. 602 (1979) [hereinafter Landes & Posner, *Should Indirect Purchasers Have Standing?*]; William M. Landes & Richard A. Posner, *The Economics of Passing On: A Reply to Harris and Sullivan*, 128 U. PA. L. REV. 1274, 1274 (1980) [hereinafter Landes & Posner, *Economics*]. For a more comprehensive look at arguments against indirect purchaser litigation generally, see Gregory J. Werden & Marius Schwartz, *Illinois Brick and the Deterrence of Antitrust Violations—An Economic Analysis*, 35 HASTINGS L.J. 629, 663 (1984); Andrew S. Gehring, Note, *The Power of the Purchaser: The Effect of Indirect Purchaser Damages Suits on Deterring Antitrust Violations*, 5 N.Y.U. J.L. & LIBERTY 208, 209, 243–44 (2010) (using data regarding the number of direct and indirect purchaser lawsuits filed in New York over a

First, they suggest that indirect purchasers are, in fact, benefited by the decision in *Illinois Brick*.¹⁸⁰ Professor Landes and Judge Posner argue that a direct purchaser who suspects an antitrust violation by one of its suppliers will actually charge the indirect purchasers less, as the direct purchaser knows that it will be able to bring a suit against the supplier for treble damages.¹⁸¹ Thus, they argue that indirect purchasers are compensated via a lower purchase price.¹⁸² *Illinois Brick*, they argue, promotes this compensation by eliminating a direct purchaser's worry about not succeeding in a suit by reason of a "passing-on" defense.¹⁸³ Although they concede that this argument depends upon direct purchasers considering possible recoveries via an antitrust suit when determining purchaser price, they propose that, if this is the case, indirect purchasers still should not be given standing by reason of their other arguments.¹⁸⁴

Second, Professor Landes and Judge Posner suggest that direct purchasers better enforce the antitrust laws—i.e., direct purchasers are the better plaintiff.¹⁸⁵ The close proximity of direct purchasers to the suppliers in the chain of distribution, they argue, increases the likelihood that direct purchasers would detect an antitrust violation, such as a conspiracy.¹⁸⁶ Further, Professor Landes and Judge Posner respond to the anti-*Illinois Brick* proposition that direct purchasers may be deterred from bringing suit for fear of retaliation, or because they benefit from the conspiracy, by suggesting that such concerns ignore the idea that direct purchasers need to be "bought off" at a price greater than what could be gained via the treble damages award of a successful antitrust suit.¹⁸⁷ They propose that overruling *Illinois Brick* would not solve this problem, but would instead merely lower the price of buying off the direct purchaser.¹⁸⁸

Additionally, they argue that granting indirect purchasers standing would mean the implementation of the "pass-on" defense rejected in *Hanover Shoe*, and the results of permitting this defense would cripple private antitrust enforcement.¹⁸⁹ Using economic calculations, Professor Landes and Judge Posner propose that, even when indirect purchasers receive the brunt of the harm from the antitrust violation, the increase in

nine-year period and suggesting that the data indicates that indirect purchasers do not have a significant impact on deterring antitrust violations).

180. Landes & Posner, *Should Indirect Purchasers Have Standing?*, *supra* note 179, at 605.

181. *Id.*

182. *Id.* at 605–06.

183. *See id.* at 605–08; *see also* Landes & Posner, *Economics*, *supra* note 179, at 1274.

184. Landes & Posner, *Should Indirect Purchasers Have Standing?*, *supra* note 179, at 607.

185. *See id.* at 609.

186. *Id.* The Article goes on to propose that indirect purchasers not only "lack direct knowledge of the business of the supplier who has raised prices, [but] must also undertake efforts (unnecessary for a direct purchaser) to determine which remote supplier is responsible for the price increase." *Id.*

187. *Id.* at 613–14.

188. *Id.* at 614.

189. *Id.* at 615–17.

price paid is negligible, which makes detection of the violation difficult.¹⁹⁰ Additionally, they argue the direct purchaser in such a situation is in the best position to detect an antitrust violation in such a situation, but is deterred from bringing suit, as the direct purchaser would receive minimal damages from a successful suit.¹⁹¹ Such distortion of incentives, they propose, could lead to a situation in which neither party expends the resources necessary to unearth the price-fixing scheme.¹⁹²

Furthermore, Professor Landes and Judge Posner argue that permitting the “pass-on” defense causes efficiency problems in the appropriation of damages among plaintiffs.¹⁹³ First, they note that apportionment of damages requires knowledge of the elasticities of supply and demand, and while estimations of such factors are theoretically possible, measuring both with precision is very difficult.¹⁹⁴ In turn, they argue that these difficulties lead to a serious risk of inconsistent calculations that could lead to multiple recoveries in some cases and inadequate recoveries in others.¹⁹⁵

2. *Arguments for Direct Purchaser Litigation*

Proponents of providing indirect purchasers with standing argue that *Illinois Brick* hinders the two primary goals of private antitrust enforcement—deterrence and compensation.¹⁹⁶ In regard to the first goal, scholars suggest that denying indirect purchasers standing results in a suboptimal level of deterrence, as it leaves private enforcement of antitrust laws in the hands of those who are sometimes discouraged from filing suit because (1) they can avoid injury (2) they do not want to disrupt relations with their suppliers or (3) they possibly benefit from the antitrust violation via collusion.¹⁹⁷ On the first point, scholars argue that direct purchasers are often in the position to pass on the overcharges and thus may avoid injury completely.¹⁹⁸ Although the amount of overcharge

190. *Id.*

191. *Id.* at 618 (“The party with the largest stake in the recovery (the indirect purchaser) experiences a negligible increase in price, making it difficult for him to detect the antitrust violation. The party in the best position to detect the violation (the direct purchaser) has little incentive to do so because of his relatively small stake in any damage recovery.”).

192. *Id.* at 617.

193. *Id.* at 615 (“Efforts to solve these problems would make antitrust litigation even more cumbersome than it is already and thereby directly reduce the efficiency of the enforcement process.”).

194. *Id.* at 619.

195. *Id.* at 620.

196. *California v. ARC Am. Corp.*, 490 U.S. 93, 102 (1989) (explaining that the broad purposes of federal antitrust law are “detering anticompetitive conduct and ensuring the compensation of victims of that conduct”); *see also supra* Part III.D (explaining that state statutes have the same goals).

197. Richman & Murray, *supra* note 26, at 92–96.

198. Robert G. Harris & Lawrence A. Sullivan, *Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis*, 128 U. PA. L. REV. 269, 347 (1979) (“Theoretical economics and practical information about pricing practices suggest that even in the short run massive passing on is the rule and that in the long run it is well nigh inevitable.”); Herbert Hovenkamp, *The Indirect-Purchaser Rule*

a direct purchaser may pass on depends on the elasticity of the market,¹⁹⁹ these proponents argue that in most U.S. markets the overcharge will be passed on.²⁰⁰ “Pass-on,” however, may be most prevalent in inelastic markets. There is also evidence that suggests that direct purchasers in elastic markets may also pass on a significant part of the overcharge.²⁰¹ Thus, proponents of permitting standing to indirect purchasers assert that if direct purchasers may pass on some or all of the overcharge, their incentive to file suit decreases drastically, as their injury is either slight or nonexistent.²⁰²

Additionally, these proponents suggest that even if direct purchasers feel some injury as a result of the overcharge, their incentive to file suit is diminished through fear of disturbing relations with their manufacturer.²⁰³ Professor Herbert Hovenkamp uses the relationship between Microsoft and its primary direct purchasers as an example.²⁰⁴ Microsoft’s primary direct purchasers, he explains, are computer manufacturers who install the Windows operating system on a computer before it is sold.²⁰⁵ These computer manufacturers have a deeply embedded, complex relationship with Microsoft, and their profits are significantly affected by Microsoft’s actions.²⁰⁶ Such direct purchasers are dependent on Microsoft, but Microsoft is not dependent upon them. Thus, Professor Hovenkamp suggests that computer manufacturers are unlikely to bring an antitrust

and *Cost-Plus Sales*, 103 HARV. L. REV. 1717, 1726–27 (1990); Lande, *supra* note 21, at 453 (citing Robert L. Steiner, *The Third Relevant Market*, 45 ANTITRUST BULL. 719, 745–58 (2000)).

199. *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 749 n.3 (1977) (Brennan, J., dissenting) (“The portion of an illegal overcharge that a direct purchaser can pass on depends upon the elasticity of demand in the relevant product market.”).

200. Harris & Sullivan, *supra* note 198, at 337–38 (conducting a study of sixty-five price-fixing cases, and concluding that, of the forty-eight cases in which pass-on was possible and the final purchaser was known, the probability of short-term pass-on (meaning that the conspiracy lasted less than one year) was “high in twenty-eight cases, medium in ten cases, and low in ten other cases”); Hovenkamp, *supra* note 198, at 1726–27 (“[I]n competitive [elastic] markets in which the direct purchasers are dealers or retailers—in short, in most American distribution markets—a significant part of the monopoly overcharge is passed on . . .”).

201. Hovenkamp, *supra* note 198, at 1726–27 (explaining that, in elastic markets, “the longer a cartel or monopoly survives, the more successful direct purchasers will be in passing the overcharge on to consumers”). *But see Ill. Brick Co.*, 431 U.S. at 749 n.3 (Brennan, J., dissenting) (“If demand is relatively elastic, [the direct purchaser] may not be able to raise his price and will have to absorb the increase, making it up by decreasing other costs or increasing sales volume.”); Landes & Posner, *Should Indirect Purchasers Have Standing?*, *supra* note 179, at 607. For a full analysis of Professor Hovenkamp’s theory behind overcharges in elastic markets, see Hovenkamp, *supra* note 198, at 1726, 1727 n.45.

202. *See, e.g.*, Lande, *supra* note 21, at 452–53.

203. Even the majority in *Illinois Brick* recognized this as a problem. *Ill. Brick Co.*, 431 U.S. at 746 (“We recognize that direct purchasers sometimes may refrain from bringing a treble-damages suit for fear of disrupting relations with their suppliers.”); *see also* Herbert Hovenkamp, *The Rationalization of Antitrust*, 116 HARV. L. REV. 917, 941–42 (2003); Richman & Murray, *supra* note 26, at 94.

204. Hovenkamp, *supra* note 203, at 941–42.

205. *Id.*

206. *Id.* (explaining that, because Microsoft releases a new version of Windows every couple of years, consumers are prompted to purchase new computers that possess the technology to run the new operating system, and this results in profits for the computer manufacturers).

suit against Microsoft, especially if they can pass on part of the overcharge to consumers.²⁰⁷

Furthermore, some scholars suggest that direct purchasers may actually profit from their suppliers' antitrust schemes and thus most certainly lack an incentive to file suit.²⁰⁸ Although such tacit collusion is difficult to prove, recent scholarship suggests that such collusion is not only possible but is also facilitated by the ruling in *Illinois Brick*.²⁰⁹ Common sense and logic indicate that it is in the best interest of a supplier violating antitrust laws to dissuade its purchasers from filing suit (should they become aware of the violations) by ensuring that the direct purchaser also benefits from the antitrust scheme. One example of such collusion is an upstream cartel choosing to ration its sales to direct purchasers to create artificial scarcity in the marketplace, which thus leads to higher sales prices for consumers and more profits for direct purchasers.²¹⁰ In such a situation, the "agreement" to collude need not be express to be effective—in fact, it is in the best interest of both parties to leave as little evidence of an agreement as possible.²¹¹ In sum, proponents of indirect purchaser litigation suggest that these three propositions—that direct purchasers are deterred from bringing suit because of (1) lack of injury (2) fear of retaliation or (3) possible collusion—result in a suboptimal level of deterrence.²¹²

Proponents of indirect purchaser litigation also argue that permitting indirect purchasers standing better fulfills the second goal of antitrust: compensation to those actually injured.²¹³ While direct purchasers suffer the ultimate injury in the scenario in which the direct purchaser is also the consumer, this situation is becoming increasingly uncommon.²¹⁴ Instead, as previously discussed, the direct purchaser is often able to pass on the overcharge, avoiding injury to itself and passing on the harm to

207. *See id.*

208. Lande, *supra* note 21, at 453.

209. Maarten Pieter Schinkel et al., *Illinois Walls: How Barring Indirect Purchaser Suits Facilitates Collusion*, 39 RAND J. ECON. 683, 695 (2008) ("The influential Supreme Court ruling in *Illinois Brick* facilitates collusive arrangements between an upstream cartel and its direct purchasers.").

210. *Id.* at 685. Professor Schinkel's paper, in addition to providing the example in the text of this Note, provides a thorough and stimulating analysis of the economic nature of tacit collusion between suppliers and direct purchasers. *See id.* at 686–94.

211. *Id.* at 685 ("The arrangement is tacit, simple, and covert. No money changes hands. The deal requires little or no communication and will in all likelihood leave few traces and no hard evidence, so that it can escape private litigation under the antitrust laws by indirect purchasers or consumers.").

212. Richman & Murray, *supra* note 26, at 92–96.

213. Kassis, *supra* note 6, at 1087 ("Price fixing and other antitrust violations most frequently injure indirect purchasers—those who purchase goods through retailers and other middlemen rather than directly from the antitrust violator.").

214. Richman & Murray, *supra* note 26, at 91; *see also* Lande, *supra* note 21, at 447–48 ("Since most products travel through one or more intermediaries before reaching consumers, [the decision in *Illinois Brick*] left most true victims of illegal cartels and other antitrust violations without a remedy to compensate them." (footnote omitted)).

the indirect purchasers.²¹⁵ Thus, these scholars argue that permitting indirect purchasers standing allows for the compensation of those actually injured by antitrust violations.²¹⁶

3. *Why the Supreme Court's Fears in Illinois Brick Are Misplaced*

As previously discussed, the Court in *Illinois Brick* based its holding on several principals, including the following: (1) the complexity of determining damages in indirect purchaser suits (2) the threat of multiple liability for defendants and (3) the idea that direct purchasers are the better plaintiffs for such suits. This Subsection analyzes scholarly arguments that demonstrate the Supreme Court's fears in *Illinois Brick* are mistaken.

In terms of complexity, there simply is no doubt that determining passed-on overcharges is a complex task. Scholars, however, note that calculating antitrust damages in any case is a complex process.²¹⁷ The complexities that are added in indirect purchaser suits are not of a caliber that call for the denial of indirect purchaser standing.²¹⁸ Furthermore, since *Illinois Brick*, many proven methods of calculating such overcharges have arisen.²¹⁹

Additionally, in terms of multiple liability, some scholars conclude that the risk is both narrow and limited in nature.²²⁰ Furthermore, if each court properly calculates pass-through charges, duplicative liability is unlikely as each plaintiff in each case, whether direct purchaser or indirect purchaser, will receive payment for the individual overcharge suffered.²²¹ Regardless, even if multiple liability on the part of the defendant is pos-

215. See *supra* notes 184–88 and accompanying text.

216. Kassis, *supra* note 6, at 1087.

217. Richman & Murray, *supra* note 26, at 98 (“[A]ntitrust litigation is . . . rife with complex determinations. Even the most fundamental tasks of antitrust adjudication, such as determining the relevant market, routinely require costly data collection, rigorous empirical estimations of prices and cross-elasticities, and expensive expert testimony.” (footnote omitted)).

218. *Id.*

219. *Id.* (“For example, pass-on damages can be measured by the ‘yardstick’ method, which looks to the prevailing price in a geographic market that is similar (but not cartelized), or by the ‘before-and-after’ method, that looks to pre- or post-cartel prices in the same market.”); see also Harris & Sullivan, *supra* note 198, at 321–38 (analyzing sixty-five price-fixing cases in order to show how pass-on charges can be calculated); George Kosicki & Miles B. Cahill, *Economics of Cost Pass Through and Damages in Indirect Purchaser Antitrust Cases*, 51 ANTITRUST BULL. 599 (2006) (discussing prior methods of calculating pass-through damages, and developing a workable method of their own).

220. Harris & Sullivan, *supra* note 198, at 344 (suggesting that permitting indirect purchaser litigation creates no risk of excessive liability: “An overcharge is first paid by a plurality of direct purchasers—that is, by all of the initial customers of the monopolized or cartelized industry. Each of these firms then sells to its own customers, multiplying the aggregate size of the buyer group, and so on at each succeeding distribution stage. An aggregate recovery equal even to the full amount of the overcharge trebled could result only if suits were successfully brought on behalf of *all* direct purchasers or, if any one direct purchaser did not recover, by all subsequent purchasers in the chain beginning with any nonrecovering direct purchaser. Has any cartel or monopolist ever been forced to account so comprehensively for its overcharge? The question itself underscores the triviality of the risk.”).

221. See *supra* note 220 and accompanying text.

sible, the question arises: would we rather have multiple liability on the part of defendants, or would we rather permit more antitrust conspiracies to remain undiscovered?²²²

Finally, scholars note significant problems with the assertion that direct purchasers are the better plaintiff. First, these scholars argue that the incentives for direct purchasers to bring suit are lower because they are often able to pass on some, if not all, of the overcharges they face.²²³ The incentives for direct purchasers to bring suit, as previously discussed, are already lower due to fear of retaliation from their suppliers.²²⁴ The disincentivized state of many direct purchasers logically indicates that they are not necessarily the best plaintiff. Although it may be true that direct purchasers are likely in a better position to discover conspiracies, it simply does not need to be (and currently is not) a forced decision between direct and indirect purchasers.

IV. RECOMMENDATION

Antitrust, unlike libel or even battery, is an intentional tort that does not rely on injuring a specific individual or entity. Rather, antitrust violations are attacks on competition and are aimed at markets, not individuals.²²⁵ This Part proposes that the “effects test” is satisfied against antitrust defendants in any forum state that falls within the defendant’s targeted market. Section A explains how each prong of the *Calder* analysis is satisfied and why the language of “focal points” that some courts employ in their *Calder* analysis is inappropriate in the realm of indirect purchaser litigation. Section B demonstrates that this Note’s recommendation comports with Supreme Court personal jurisdiction precedent outside *Calder*. Section C briefly explains that, in terms of policy, indirect purchaser litigation is necessary. Finally, Section D suggests that to deny jurisdiction in such cases subverts the purposes and intentions of state statutes that grant indirect purchasers standing to sue.

222. *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 762 (1977) (Brennan, J., dissenting) (quoting *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968)) (“Where the choice is between a windfall to intermediaries or letting guilty defendants go free, liability is imposed.”).

223. *See supra* notes 199–202 and accompanying text.

224. *See supra* notes 203–08.

225. *See infra* notes 234–35 and accompanying text.

A. *How the “Effects Test” Is Satisfied*

As previously shown, the application of the “effects test” varies from jurisdiction to jurisdiction.²²⁶ Be that as it may, it is hard to imagine *Calder* jurisdiction failing in any jurisdiction where there was evidence that the antitrust violator directly targeted the forum state.²²⁷ Thus, the only real difficulty lies in the situation where such evidence does not exist, and the antitrust violator, instead of specifically focusing on the consumers of particular states, introduces its overpriced product into a particular state with the intent to harm the competition in the market broadly. In such a situation, the “effects test” should be satisfied in any forum that falls within the defendant’s targeted market, as the consumers within that market are those who suffer harm from the defendant’s conduct. This interpretation would not be too broad, as only those who suffered actual injury would be permitted standing to sue.²²⁸

1. *Intent*

The “intentional act” prong of *Calder* should be met both in jurisdictions that require “awareness” of harm, and in jurisdictions that require “subjective intent.”²²⁹ In jurisdictions that require mere “awareness,” an antitrust violator certainly knows that harm, in the form of an overpriced product, is likely to reach any consumer who purchases the good. In jurisdictions that require “subjective intent,” this prong should also be met, as an antitrust violator specifically intends to harm every purchaser in a relevant market. As mentioned above, the “intent” and “express aiming” prongs are somewhat intertwined,²³⁰ and thus this interpretation of “intent” depends upon the “express aiming” analysis provided in the next Subsection.

2. *Express Aiming*

The analysis of *Calder*’s “express aiming” requirement “depends, to a significant degree, on the specific type of tort . . . at issue.”²³¹ *Calder* itself involved a libel claim.²³² Antitrust, however, is a fundamentally different tort than libel. Typically, libel claims target individual persons or entities, and thus when a defendant commits libel the tort is “expressly

226. See *supra* Part II.E.2.

227. For example, if there was a written agreement with the direct purchaser to target Illinois particularly, it would seem that none of the jurisdictional variances listed in Part II.E.2 would deny jurisdiction under *Calder v. Jones*.

228. For example, citizens participating in the market, but who had not purchased an overpriced product, would not have standing to sue, as they would then not be indirect purchasers.

229. See *supra* Part II.E.2.a.

230. See *supra* Part II.E.2.a.

231. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 807 (9th Cir. 2004).

232. *Calder v. Jones*, 465 U.S. 783, 784 (1984).

aimed” at the individual person or entity wherever they may dwell. Those who commit antitrust violations, however, are typically not intending to harm individual persons or entities. Rather, antitrust violations attack competition²³³ and the relevant market in which competition operates.²³⁴ Oftentimes, this extends beyond a single state’s borders. This is not, in the words of *Calder*, “untargeted negligence” but is instead express aiming at a large target group—a market. No single forum state is the “focal point” of the defendant’s aim, because the act was not aimed at an individual person or entity, but at the many persons or entities that purchased the product at an artificially inflated price.²³⁵ This inherent distinction between libel and antitrust indicates that the “express aiming” standard for antitrust claims must be interpreted more broadly than for libel claims.²³⁶

In assessing the “express aiming” requirement of *Calder* in the realm of indirect purchaser litigation, courts should look at the market definition of the defendant’s product—“the cluster of products or services with which the defendant’s product or service effectively competes”²³⁷—and then determine the scope of that market. The scope of that market should be broad enough to include any related markets in which the defendant knew, or should have known, that its product would be sold.²³⁸ In doing so, the court is effectively identifying the target at which the defendant was “expressly aiming.”

For example, in the *Crompton* cases,²³⁹ the defendant attacked the rubber manufacturing market, and should have reasonably anticipated

233. *White Motor Co. v. United States*, 372 U.S. 253, 261 (1963) (quoting *Chi. Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918)) (“Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.”).

234. *L.A. Draper & Son v. Wheelabrator-Frye, Inc.*, 735 F.2d 414, 420–21 (11th Cir. 1984) (citations omitted) (quoting *Chi. Bd. of Trade*, 246 U.S. at 238) (“Certain activities, such as price fixing, have such a pernicious effect on competition and are so lacking in any redeeming virtue that they are deemed per se violations without inquiry into the nature of their impact on a particular market. Other restraints on trade, such as territorial restrictions that a manufacturer imposes on a distributor, have possible procompetitive influences on a given market and the legality of the restraint is judged under the rule of reason. Under the rule of reason, ‘[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition.’ . . . The rule of reason inquiry must be tied to a particular market in which the challenged activity is alleged to impose an impermissible restraint.”).

235. See *In re Bulk [Extruded] Graphite Prods.*, Civ. No. 02-6030 (WHW), 2007 WL 2212713, at *9 (D.N.J. July 30, 2007).

236. See *id.* (“The special character of an antitrust claim leads the Court to interpret more liberally the phrase ‘expressly aim’”); see also *supra* notes 146–49 and accompanying text.

237. WILLIAM C. HOLMES, *ANTITRUST LAW HANDBOOK* § 3:4 (2010).

238. This scope, as applied to the hypothetical described in the introduction, would include the market for cellular phones. Cassius, in knowingly selling its product to a cellular phone manufacturer, knew that its overpriced product would harm purchasers of cellular phones, and thus this market should be included.

239. See *supra* Part III.A.1; see also *Frankenfeld v. Crompton Corp.*, 697 N.W.2d 378, 386 (S.D. 2005); *Lorix v. Crompton Corp.*, 680 N.W.2d 574, 583 (Minn. Ct. App. 2004).

being haled into court in any state that participated in that market. Thus, the defendant “expressly aimed” its anticompetitive conduct not only at North Carolina and Tennessee,²⁴⁰ but also at the rubber manufacturing market at large. By knowingly selling its product to a tire manufacturer, the defendant inherently included the market for automobile tires within its broad attack on rubber manufacturing. Thus, the plaintiffs in those cases were consumers in the targeted market, and it should not matter that the direct purchaser transformed the defendant’s product into a tire before selling it to the plaintiffs. The plaintiffs were harmed by the defendant’s price-fixing scheme.

Within the “express aiming” prong of the “effects test” is the lower court division regarding “focal points,” and this issue must also be analyzed in light of the unique nature of antitrust violations. In courts that do not require the forum state to be the focal point of the defendant’s aim when the defendant aims broadly, the “expressly aimed” element should be met.²⁴¹ The defendant, by aiming at a nationwide market, should not escape jurisdiction simply because it did not expressly target individual states.²⁴² The defendant, in essence, aimed its harm at the entire region. Thus, in states that do not require the forum state to be the focal point when the defendant aims broadly, the courts ought to view the defendant as aiming broadly across the region, and the “express aiming” requirement should be met.

Additionally, courts that rigidly require that the forum state be the “focal point” of the defendant’s conduct should recognize that the “expressly aimed” requirement varies depending on the tort at issue and apply the “effects test” in a manner that is compatible with antitrust. Because antitrust violations target competition, and increasingly competition on a multistate or global scale,²⁴³ the requirement that the forum state be the “focal point” of the harm seems incompatible with antitrust violations. No single forum state is the “focal point” of the defendant’s aim, because the act was not aimed at an individual person or entity, but rather at the many persons or entities that purchased the product at an artificially inflated price in the target market.²⁴⁴ Courts must understand that denying jurisdiction on such grounds not only encourages violators to expand the target area of their actions but may also leave indirect purchasers without a remedy.

240. *Frankenfeld*, 697 N.W.2d at 380.

241. *See supra* Part II.E.2.b.i.

242. In *Cole v. Tobacco Institute*, the defendant argued that “if its intentional wrongdoing was aimed at more than one state, then the *Calder* test is not met.” 47 F. Supp. 2d 812, 815–16 (E.D. Tex. 1999). The court rejected this argument and stated that this type of argument “goes against common sense . . . [and] implies that a party can avoid liability by multiplying its wrongdoing.” *Id.*

243. *See Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 778–79 (7th Cir. 1994) (explaining that the number of purely intrastate antitrust violations is “minuscule”).

244. *See In re Bulk [Extruded] Graphite Prods.*, Civ. No. 02-6030 (WHW), 2007 WL 2212713, at *9 (D.N.J. July, 30 2007).

3. *Injury*

Indirect purchasers who pay an artificially inflated price for a product suffer an injury in the forum in which they reside,²⁴⁵ and thus, in courts that do not require the plaintiff be the “focal point of the harm,”²⁴⁶ this element of the test should be satisfied. In courts that require that the plaintiff be the “focal point of the harm,”²⁴⁷ an analysis similar to the “express aiming” analysis provided is appropriate. There simply is no such indirect purchaser plaintiff that can be labeled as the “focal point” of the harm. The indirect purchasers in the state in which the defendant sold are no more harmed than the indirect purchasers in other states—they all pay the overcharge. Antitrust is not a typical tort, and the “effects test” ought be applied in a manner that is logically consistent with it. “Focal points,” for the most part, seem incompatible with antitrust violations.²⁴⁸ As such, courts that require “focal points” under *Calder* should recognize this incompatibility and apply the “effects test” in a manner that takes into account the unique nature of antitrust violations.

B. Why Extending Jurisdiction Fits Within Supreme Court Precedent on Personal Jurisdiction

The above interpretation of *Calder* comports with other Supreme Court precedent on personal jurisdiction. Particularly, this interpretation logically falls within the products liability cases discussed earlier.²⁴⁹ While antitrust violations are certainly different in nature from products liability, the indirect purchaser cases this Note targets involve products traveling through the “stream of commerce,” and thus, while *Calder* jurisdiction fits particularly well with indirect purchaser cases, it is informative to consider the Supreme Court personal jurisdiction opinions dealing with products liability.

245. *Hitt v. Nissan Motor Co.*, 399 F. Supp. 838, 847 (S.D. Fla. 1975) (“[I]njury as a result of a price fixing conspiracy is incident to the transaction of sale itself. The buyer who pays higher prices due to such a conspiracy is injured at the time such sale is consummated.”); *Execu-Tech Bus. Sys., Inc. v. New Oji Paper Co. Ltd.*, 752 So. 2d 582, 586 (Fla. 2000) (“The same ‘minimum contacts’ that allowed the conspirators to exploit Floridians in the marketplace may now be used by Floridians to establish a jurisdictional basis for recouping their losses in a court of law.”).

246. *See supra* Part II.E.2.b.ii.

247. *See supra* Part II.E.2.b.ii.

248. *See In re Bulk [Extruded] Graphite Prods.*, 2007 WL 2212713, at *9.

249. *See supra* Part II.D.

1. *Minimum Contacts*

Unlike the harm stemming from the products liability claim in *World-Wide Volkswagen*,²⁵⁰ the harm from antitrust violations is not simply “foreseeable” to indirect purchasers in the states where a defendant can reasonably anticipate its product will reach; harm to indirect purchasers in states participating in that market is practically guaranteed. The harm in such a case occurs as soon as indirect purchasers purchase the defendant’s product at an inflated price,²⁵¹ and the defendant’s intent and knowledge of such harm to indirect purchasers separates this from the foreseeability issues discussed in *World-Wide Volkswagen*. Rather, the type of foreseeability at play in indirect purchaser cases is exactly the type that was deemed “critical” by the Court in *World-Wide Volkswagen*: the defendant “should reasonably anticipate being haled into court” in the forum state.²⁵²

By limiting the scope of the market to areas in which the defendant knew or should have known its product would cause harm, the approach taken by this Note ensures that the defendant will be subject to jurisdiction only in the forums that are actually injured by its intentional attack on competition. In other words, this approach ensures that jurisdiction will be limited to forums in which the defendant could “reasonably anticipate being haled into court.” By attacking competition in the market, the defendant should “reasonably anticipate being haled into court” in any state (1) which participated in that market and (2) whose citizens were harmed as a result of the defendant’s conduct.²⁵³

In terms of the “stream-of-commerce” theory developed in *Asahi*,²⁵⁴ the extension of personal jurisdiction over defendants in states that are a defendant’s target market seems to comport both with Justice O’Connor’s plurality and Justice Brennan’s concurrence.²⁵⁵ The theory comports with Justice Brennan’s view, as the defendant placed a product with an artificially inflated price into the “stream of commerce” and thus should be subject to jurisdiction wherever that product is distributed.²⁵⁶

250. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 288 (1980); *see also* Part II.D.

251. *Hitt*, 399 F. Supp. at 847 (“[I]njury as a result of a price fixing conspiracy is incident to the transaction of sale itself. The buyer who pays higher prices due to such a conspiracy is injured at the time such sale is consummated.”).

252. *World-Wide Volkswagen*, 444 U.S. at 297.

253. *Execu-Tech Bus. Sys., Inc. v. New Oji Paper Co. Ltd.*, 752 So. 2d 582, 586 (Fla. 2000) (explaining that Florida Statutes gave the defendant “fair notice of the applicable Florida law in this area at the time [it] embarked upon its criminal scheme to bilk consumers throughout the United States,” and that “[b]ecause the Florida market was embraced within this nationwide scheme, [the defendant] reasonably should have expected to be haled into court in this state if ‘caught’”).

254. *Asahi Metal Ind. Co. v. Superior Court*, 480 U.S. 102 (1987); *see also supra* Part II.D.

255. *Asahi*, 480 U.S. at 116–22 (Brennan, J., concurring).

256. *Id.* at 117 (“The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as the participant in this process is aware that the final product is being marketed in the forum state, the possibility of a lawsuit there cannot come as a surprise.”).

Additionally, the fact that a defendant intended for its product to cause harm in the target market through the “stream of commerce” seemingly satisfies the O’Connor plurality’s requirement of “something more” than merely placing a product into the stream of commerce.²⁵⁷ Unlike product liability actions, actions for antitrust violations are not based upon theories of “untargeted negligence.” Rather, these infractions are “purposefully directed” at competition in a relevant market.²⁵⁸ The distinction is important because in an indirect purchaser case, the defendant’s (1) intent to injure those who purchase its product and (2) anticipation of its products traveling through the stream of commerce in the target market, should be sufficient to satisfy the “something more” spoken of by the O’Connor plurality in *Asahi*.²⁵⁹

Finally, the extension of jurisdiction over defendants in states that fall within their targeted market fits within both the dissenting opinion and the plurality opinion from *Nicastro*.²⁶⁰ While *Nicastro* did not resolve the divisions from *Asahi*, the language regarding “targeting” may serve as ideological support for this Note. This Note’s proposition certainly falls within Justice Ginsburg’s dissent. In reaffirming the “stream of commerce” theory, she stated that when a product liability defendant targets a global or multistate market, it should be subject to jurisdiction wherever its product is sold and causes injury.²⁶¹

The plurality opinion also supports this Note’s proposition. Justice Kennedy’s concerns about sovereignty are inapplicable in the types of cases this Note addresses.²⁶² When an antitrust defendant intentionally targets a market, it is targeting each sovereign and violating the laws of each sovereign within that market.²⁶³ In such a situation, the defendant is not “predict[ing] that its goods will reach the forum State”²⁶⁴ but is instead intending that its product reaches and causes harm in each sovereign within a target market. There will certainly be cases where the United States is a sovereign within a target market, but in such cases the states that wish to extend jurisdiction over an antitrust defendant are not basing that jurisdiction on the fact that they are a part of the United States. Rather, those states are basing jurisdiction on the fact that they were part of a target market.

257. *Id.* at 111.

258. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473–74 (1985) (“[A] forum legitimately may exercise personal jurisdiction over a nonresident who ‘purposefully directs’ his activities toward forum residents . . . [because a] State generally has a ‘manifest interest’ in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors.”).

259. *Asahi*, 480 U.S. at 112 (“The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State . . .”).

260. *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011).

261. *Id.* at 2804.

262. *See id.* at 2786–88.

263. *See Execu-Tech Bus. Sys., Inc. v. New Oji Paper Co. Ltd.*, 752 So. 2d 582, 586 (Fla. 2000).

264. *See Nicastro*, 131 S. Ct. at 2788.

2. *Fair Play and Substantial Justice*

Extending jurisdiction over defendants under the above interpretation of *Calder* does not offend “traditional notions of fair play and substantial justice.”²⁶⁵ While this analysis depends significantly upon the facts of each individual case, it is possible to make a few hypotheses about how such factors may play out by applying them to the hypothetical described in the introduction. In that hypothetical, two out of the five factors for the minimum contacts “fair play and substantial justice” analysis are strongly in favor of exerting personal jurisdiction, one is slightly in favor of extending jurisdiction, and two weigh against exerting jurisdiction.²⁶⁶ The “fair play and substantial justice” analysis works somewhat like a sliding scale.²⁶⁷ Thus, given that *Calder* jurisdiction satisfies the minimum contacts analysis under the above theory, the fact that “fair play and substantial justice” factors also weigh in favor of exerting jurisdiction only adds strength to this analysis.

The two prongs that strongly favor the extension of jurisdiction are the interests of the forum state and the interests of the plaintiff in obtaining effective relief.²⁶⁸ In the opening hypothetical, the interests of the forum state would be severely thwarted, as the injury took place in Illinois, which has a strong interest in protecting the economic welfare of its citizens.²⁶⁹ Additionally, the purposes behind Illinois’s enactment of an “*Illinois Brick* repealer” statute is thwarted if its citizens are not permitted to recover.²⁷⁰ As for the third factor, a plaintiff’s interest in obtaining effective relief would be disrupted if jurisdiction were denied.²⁷¹ Because neither Texas nor Delaware provides a cause of action for indirect purchasers,²⁷² the injured consumers in Illinois would have no venue in which to seek effective relief. Although such a situation only arises when the defendant sells its products (or itself operates) in a state that follows *Illinois Brick*,²⁷³ the law, as it stands, encourages those committing antitrust violations to sell within and/or move to such a state to avoid personal jurisdiction in indirect purchaser actions.

The “shared interest of the several states in furthering fundamental substantive social policies” factor weighs slightly in favor of extending

265. *Asahi Metal Ind. Co. v. Superior Court*, 480 U.S. 102, 113 (1987) (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

266. *See id.*

267. *See supra* Part II.B.

268. *See Asahi*, 480 U.S. at 113.

269. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985) (“A state generally has a ‘manifest interest’ in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors.”).

270. *See infra* Part IV.D.

271. *Asahi*, 480 U.S. at 113.

272. *See* AM. BAR ASS’N, *supra* note 12, at 47, 295.

273. For an overview of every state’s legislation and judicial opinions regarding indirect purchaser litigation, see *id.*

jurisdiction in these cases.²⁷⁴ In the case of a foreign defendant, the extension of jurisdiction under this element is proper by default if a foreign nation expresses no sovereign interest in the case, and if the defendant claims no policy or political considerations that would favor jurisdiction abroad.²⁷⁵ If such considerations exist, then jurisdiction may still be proper if the “shared interests” of the states outweigh those considerations.²⁷⁶ In our hypothetical, while Japan may have an interest in punishing its native corporation for an antitrust violation, the interests of the “several states” in not only deterring such conduct in the United States, but also in compensating their citizens, seemingly outweighs or at least equals Japan’s interest.

The two factors that weigh against exercising jurisdiction are the burden on the defendant and efficiency. First, the burden on the defendant obviously weighs against extending jurisdiction.²⁷⁷ In cases of a foreign defendant this burden is particularly high. Courts have seemingly given less priority to this prong in recent years, however, based on the fact that modern advances in communication and transportation, as well as globalization of the economy, have made international travel commonplace and, thus, ease the burden on a foreign defendant.²⁷⁸ Additionally, not all defendants in indirect purchaser litigation are foreign.²⁷⁹ Finally, even if the burden is relatively high, the Supreme Court states that if minimum contacts exist, the interests of the forum and the plaintiff justify the exercise of jurisdiction.²⁸⁰

In terms of efficiency, allowing personal jurisdiction in these cases might not be as efficient as having all indirect purchaser suits filed in one state court. In cases such as the hypothetical case discussed in the introduction, however, no remedy is available for plaintiffs at all as the state the defendant sold into does not give standing to indirect purchasers. Thus, while efficiency may weigh against extending jurisdiction, at least in some cases it seemingly weighs efficiency against no possibility of recovery.

274. *Asahi*, 480 U.S. at 113 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

275. Leslie W. Abramson, *Clarifying “Fair Play and Substantial Justice”: How the Courts Apply the Supreme Court Standard for Personal Jurisdiction*, 18 HASTINGS CONST. L.Q. 441, 465–66 (1991).

276. *Id.*

277. *Asahi*, 480 U.S. at 113.

278. See, e.g., *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 294 (1980) (quoting *Hanson v. Denckla*, 357 U.S. 235, 251 (1958)) (“[P]rogress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome.”); *Kemin Foods, L.C. v. Omniactive Health Tech., Inc.*, 654 F. Supp. 2d 1328, 1337 (M.D. Fla. 2009) (“The Court certainly recognizes that many miles separate Florida and India; nevertheless, in this global economy, such travel is becoming more common place every day.”); *Etchieson v. Cent. Purchasing LLC*, 232 P.3d 301, 309 (Colo. App. 2010) (“[T]he limits on personal jurisdiction have been relaxed as trade has nationalized (and, more recently, globalized) and as modern transportation and communication have eased the burden of defending oneself in a distant state where one engages in economic activity.”).

279. See, e.g., *Comes v. Microsoft Corp.*, 646 N.W. 2d 440, 442 (Iowa 2002).

280. *Asahi*, 480 U.S. at 114.

Considering that three of the five factors support an extension of jurisdiction, and given that minimal contacts would be present under the interpretation of *Calder* proposed above, extending jurisdiction over defendants in these cases would likely “not offend traditional notions of fair play and substantial justice.”²⁸¹

*C. Why, in Terms of Both Policy and Practicality,
a Broad Application of Calder Is Needed*

Indirect purchaser lawsuits are vital to the main goals of antitrust²⁸² and allowing unnecessary jurisdictional barriers to prevent these suits impairs those goals. This Section briefly addresses some of the arguments against providing indirect purchasers standing and concludes that indirect purchaser suits are not only necessary to the primary goals of antitrust enforcement but also that their importance supports this Note’s application of *Calder v. Jones*.

The argument that indirect purchasers are actually compensated by the decision in *Illinois Brick* relies on a narrow set of circumstances and does not seem to apply to antitrust violations generally. This argument supposes: (1) that the direct purchaser detects the antitrust violation prior to setting the price (2) that the direct purchaser considers the recoveries of a *victorious* antitrust suit in setting its price²⁸³ and (3) that the direct purchaser chooses to absorb the overcharge instead of passing it on.²⁸⁴ First, there is no guarantee that a direct purchaser will detect the violation. Second, even if it detects such a violation, or suspects such a violation, it may choose not to bring a suit, as it may not want to disrupt relations with its supplier. Even if the first two suppositions are met, there are several problems with the proposition that a direct purchaser would simply absorb the overcharge. As previously shown, the direct purchaser may often pass on the overcharge and avoid injury.²⁸⁵ No good would come to the direct purchaser from unnecessarily absorbing the over-

281. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

282. *California v. ARC Am. Corp.*, 490 U.S. 93, 102 (1989) (explaining that deterrence of anti-competitive conduct and compensation to the injured are the broad goals of antitrust law).

283. Professor Landes and Judge Posner address this concern by arguing that, because consumers would normally need to form class actions to recover, “the administrative costs of [a] consumer class action [typically] eat up any damage award or settlement; [thus,] little compensation may actually trickle down to the individual members of the class.” Landes & Posner, *Should Indirect Purchasers Have Standing?*, *supra* note 179, at 607. As evidenced by citations throughout this Note, however, indirect purchaser class actions continue to be brought in state courts, and thus incentives must logically remain for indirect purchasers to bring such actions.

284. If the direct purchaser passed on the overcharge, then the consumers would not obtain a benefit “in the form of lower prices.” *See id.* at 605. While the price charged by direct purchasers may be lower if no antitrust recovery were possible, the passed-on overcharge still results in the indirect purchaser being overcharged.

285. *See supra* notes 198–202.

charge.²⁸⁶ Passing on the damages, particularly if indirect purchaser suits are not permitted, would only increase the direct purchaser's profits, as the profits from the pass-on would simply be added to the potential award from a victorious suit. There is no reason to think that a logical business would simply absorb a financial loss when it can pass it on with no detriment to itself.

The argument claiming that direct purchasers are the better plaintiff—and that permitting indirect purchasers standing curtails direct purchaser incentive—seems to be narrow in scope.²⁸⁷ The direct purchaser only has less incentive to sue if it indeed already has “passed on” the overcharge. If it absorbed the overcharge, then the indirect purchasers would not be harmed and would not have grounds for suit. Thus, this argument relies on a situation in which some of the overcharge is passed on—a situation in which, if both direct and indirect purchasers filed suit, each would be given damages reflecting their actual harm, and, at least for the direct purchaser, those damages would be treble under federal law. In a situation in which indirect purchaser litigation is prohibited, the direct purchaser is compensated for harm it did not suffer while those injured remain uncompensated.²⁸⁸ While direct purchasers may be more incentivized in a situation in which they obtain compensation for harm suffered by indirect purchasers, such a compensation scheme seems fundamentally unfair.²⁸⁹

Finally, the argument that the difficulties in appropriating damages among direct and indirect purchasers cause both accuracy and efficiency problems is, to a degree, valid.²⁹⁰ Courts, however, have handled, and continue to handle, appropriating damages in indirect purchaser cases. Further, as previously discussed, several viable methods exist for appropriating damages, and while that appropriation may be complex, antitrust cases are complex in general, and the added complexity does not seem so great as to justify the prohibition of indirect purchaser suits.²⁹¹

Those who suffer injury as the result of an intentional tort deserve compensation. As previously discussed, indirect purchasers are the ultimate victims of antitrust violations, and a majority of the states have decided that permitting indirect purchasers standing is in the interests of

286. This proposition relies on the types of cases in which a direct purchaser may pass on the overcharge. Recall from Part III.E.2 that demand does not permit all direct purchasers to pass on.

287. Landes & Posner, *Should Indirect Purchasers Have Standing?*, *supra* note 179, at 618.

288. See Richman & Murray, *supra* note 26, at 91 (“[P]recluding recourse to indirect purchasers means that justice is not delivered ‘to every man,’ and as the dissent in *Illinois Brick* observed, direct purchasers’ ability to pass on illegal overcharges means that the ultimate harm falls *only* on the parties who have no recourse, whereas compensation goes to parties who experience little or no harm.”).

289. See *id.* (“[T]he doctrine causes antitrust to provide social insurance to the wrong party, such that even when antitrust violators are appropriately punished, damages are allocated contrary to what the social optimum would dictate.”)

290. Landes & Posner, *Should Indirect Purchasers Have Standing?*, *supra* note 179, 615, 619–20.

291. See *supra* notes 218–20 and accompanying text.

justice.²⁹² This principle, that the injured be compensated, is thwarted when personal jurisdiction unnecessarily stands as a barrier to indirect purchaser compensation in states whose indirect purchasers are injured by the defendant's attack on competition in the targeted market.

Additionally, the goal of deterrence is only maximized when indirect purchasers have standing to sue. If direct purchasers feel no injury and fear retaliation from their suppliers, their incentive to bring suit dwindles. If the indirect purchasers are prevented from suing because of personal jurisdiction barriers, yet another potential plaintiff is taken out of the picture, and deterrence is therefore further reduced.

D. Subversion of Legislative Intent and Judicial Interpretation

Finally, the legislative and judicial purposes behind state indirect purchaser statutes are circumvented when an indirect purchaser case is dismissed on the grounds of personal jurisdiction, despite the fact that the overpriced product reached the state and injured a state citizen. In the particularly nasty cases, such as the one described in the introduction, an indirect purchaser living in a state that adopts an *Illinois Brick* repealer could be left without any remedy for his or her injury if the direct purchaser resides in a state that follows *Illinois Brick*. In cases where the direct purchasers are located in a state that permits indirect purchaser litigation, the other states whose citizens are harmed by the violation still have an interest in rectifying the harm and yet are prevented by a jurisdictional barrier that is both unnecessary and frivolous. Subversion of the purposes behind state indirect purchaser statutes calls for a remedy, and *Calder* jurisdiction can provide that remedy when properly applied in the antitrust context.

V. CONCLUSION

States enacted statutes that give standing to indirect purchasers in an attempt to compensate their citizens who have been injured by antitrust violations and to deter future violations. In situations such as the one described in the introduction, personal jurisdiction currently serves as an effective barrier against indirect purchaser suits and consequently subverts the purposes of these statutes. *Calder* jurisdiction, however, when understood in light of the unique nature of antitrust, should be suf-

292. See Lande, *supra* note 21, at 447–49.

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ficient to subject defendants to jurisdiction in states where indirect purchasers suffered harm because of the defendant's antitrust violation. Such a reading of the "effects test" not only fits within Supreme Court personal jurisdiction precedent, but also promotes the social policies behind statutes which states deliberately enacted to protect the financial interests of their citizens.

