

## Paper Trail: Working Papers and Recent Scholarship

**Editors' Note:** In this edition we note a recent paper by one of the editors that considers why courts have certified the Microsoft indirect purchaser cases as class actions far more frequently than have courts in other indirect purchaser cases. The paper touches on, but does not explore, the possible effect of the Class Action Fairness Act on indirect purchaser litigation, a topic that we would like to address in future issues. Send suggestions for papers to review on this topic—or any others—to: [page@law.ufl.edu](mailto:page@law.ufl.edu) or [jwoodbury@crai.com](mailto:jwoodbury@crai.com).

—WILLIAM H. PAGE AND JOHN R. WOODBURY

### Recent Papers

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**William H. Page, Class Certification in the *Microsoft* Indirect Purchaser Litigation,**  
[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=671048](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=671048)

In a 1999 article,<sup>1</sup> I surveyed class certification decisions in cases that indirect purchasers had filed under state “*Illinois Brick*<sup>2</sup> repealer” statutes and similar state laws. I found that most of the courts up to that time had denied certification on the ground that the individual issues of “impact” and damages predominated over the common issues of liability. Even though the states’ laws authorized indirect purchaser suits, these courts were skeptical of claims that plaintiffs, relying on the tax incidence model of passing on, could prove an overcharge to indirect purchasers by common proof. Their skepticism was based on many of the same factors the Supreme Court had cited in *Illinois Brick* as reasons for denying indirect purchasers the right to sue at all. A minority of courts, however, routinely granted certification, applying what I called a “sanguine” approach to the problems of proving passing on.

I concluded that the most important determinant of whether an indirect purchaser class would be certified was whether it had been filed in a skeptical jurisdiction or a sanguine jurisdiction. In addition, however, I observed that some putative indirect purchaser classes were less likely to be certified even under a more lenient standard: those that consisted of large numbers of consumers who made frequent, undocumented purchases from many sellers; those in which the overcharge to direct purchasers varied significantly; those in which the direct purchasers had market power on the buying or selling side; those in which the monopolized product was heterogeneous; and those in which intermediate purchasers added value to the monopolized product or incorporated it into other products. I argued that these findings suggested that indirect purchaser suits were not effective in providing real compensation to the vast majority of indirect purchasers of price-fixed products. The costs and practical limitations of class action litigation—factors largely independent of the merits of the claims—make it impossible to calculate and distribute damages to millions of indirect purchasers who suffer small individual harms.

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<sup>1</sup> William H. Page, *The Limits of State Indirect Purchaser Suits: Class Certification in the Shadow of Illinois Brick*, 67 ANTITRUST L.J. 1 (1999).

<sup>2</sup> *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

In the recent *Microsoft* follow-on litigation, however, state courts have certified indirect purchaser classes much more frequently than have the courts in the pre-1999 cases. Of the fourteen opinions on certification in the *Microsoft* cases, three (two in Michigan and one in Maine) denied certification, while eleven granted it. In the present paper, I explore possible explanations for this disparity in the rate of certification and consider whether the experience in these cases helps us decide whether indirect purchaser class actions are in the consumer interest. I once again survey the results in all of the class certification decisions in indirect purchaser cases to date.<sup>3</sup> I discovered that, while the numbers are still relatively small, indirect purchaser classes are being certified significantly more frequently since my 1999 study, and that much of that change is attributable to the *Microsoft* cases. Slightly more than a third of indirect purchaser cases (in which written opinions were issued) were certified through 1998; since then, about two thirds have been certified—half of the non-*Microsoft* cases and almost 80 percent of the *Microsoft* cases.

Like the earlier cases, a *Microsoft* indirect purchaser case's chances of certification depended in large part—but not exclusively—on whether it was filed in a sanguine or skeptical jurisdiction. The rate of certification in the *Microsoft* cases has been higher primarily because they were filed in sanguine jurisdictions more frequently than were earlier cases. Courts in previously sanguine states all continued to follow the sanguine approach in their *Microsoft* cases; courts in states with no track record in indirect purchaser litigation all adopted the sanguine view in their *Microsoft* cases. In addition, however, courts in two previously skeptical states, Florida and Minnesota, adopted versions of the sanguine view in their *Microsoft* cases. Only two of the previously skeptical states, Michigan and Maine, continued to follow that approach.

The paper places these cases in context by discussing their relationship to the government *Microsoft* case. I note that the government case offered little support for an overcharge claim: it held that Microsoft had illegally maintained its monopoly by exclusionary practices it adopted during and after 1995; it did not hold that Microsoft acquired its monopoly unlawfully. Nor did it hold that Microsoft was charging a monopoly price, even though it had the power to do so; indeed, many of the holdings suggest that Microsoft was at least temporarily charging low prices. Recognizing the limited support that the government case provided, the indirect purchaser plaintiffs alleged that Microsoft acquired its monopoly by illegal conduct that began in the 1980s, long before the browser wars that were a focus of the government case. Some of the classes alleged that this illegality extended to the Microsoft Office application software, which was not at issue in the government litigation.

Sanguine courts differed from skeptical courts primarily in their treatment of the expert testimony offered to support plaintiffs' proposals for common or classwide proof that direct purchasers passed on an overcharge to end users. Most of the plaintiffs offered similar presentations by the same expert, who outlined the statistical methods that he planned to use to prove the overcharge and the rate of pass-through. First, assuming that there would be evidence that Microsoft engaged in illegal actions in operating-system markets prior to the damage period, the expert suggested that an overcharge would be "embedded" in prices at every level of distribution. To prove the overcharge, the expert identified three yardstick methods. To prove how much of this overcharge the intermediate purchasers passed on to end users, he proposed estimating the relationship between Microsoft's prices to its customers and the prices paid by end users using basic economic principles (including the tax incidence model of passing on), standard statistical methods,

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<sup>3</sup> My focus is on cases involving single states. I separately discuss three federal cases in 2004 that certified multiple classes under state law.

and data that “should be readily available.” He did not, however, actually implement the methods using data from the states in which the classes were located.

Microsoft challenged these assertions through its own experts, claiming that the plaintiffs’ proposed methodologies did not take account of numerous demand, cost, and competitive factors in different locations and at different times that would affect whether and to what extent any overcharge was passed on. In general, however, the sanguine courts accepted the plaintiffs’ proposed methodologies, refusing to resolve what they viewed as a “battle of experts.” In contrast, the skeptical courts rejected the proposed methodologies because they failed to “bridge the gap between theory and reality.” The Michigan court noted that because the class was large, the products were complex, and the intermediate level was not perfectly competitive, there would likely be widely varying rates of passing on.

The Minnesota case, *Gordon v. Microsoft*,<sup>4</sup> was unique in granting certification while distinguishing prior cases in that jurisdiction that had denied certification on skeptical grounds. In one of the prior cases, the court noted, there were many defendants and a multitude of different transactions; in another, there were many defendants and many different drugs at issue; in a third, the products at issue gained value through repackaging at intermediate levels; in a fourth, buyers had no records of the amount of the product they bought or the price they paid; and in a fifth, the expert could not show that anyone had ever used his methods. In *Gordon*, in contrast, there was a single seller of two primary products; there were relatively infrequent transactions for each class member, and there were likely to be records of those transactions; and the expert had proposed using widely adopted methods of proving damages. The court reviewed the plaintiffs’ expert’s proposed methods, and Microsoft’s objections, and found the methods sufficient, declining to resolve the battle of experts at the certification stage.

Although I conclude in the paper that the main reason for the overwhelming certification of the *Microsoft* cases was that they were filed in sanguine jurisdictions, I do suggest that some of the cases, in choosing a sanguine approach, may have overestimated the relevance of the judgment in favor of the government in *United States v. Microsoft*. Several courts, for example, had referred to the findings in the government case that Microsoft had injured consumers. Yet none of the passages mentioned by the courts found that consumer injury consisted of an illegal overcharge. I also note that the government case rested on a theory that operating-system markets were characterized by network effects; consequently, even if there had been no illegal conduct in the market, it is entirely possible that the tendency of users and developers to choose the most popular operating system would have caused the market to tip toward a single dominant standard.

In the final section of the paper, I consider whether the experience in the *Microsoft* indirect purchaser cases helps to resolve whether indirect purchaser litigation is in the consumer interest. All of the cases settled, so we cannot tell if the sanguine courts’ deferential approach to certification was warranted. In the abstract, a lenient standard makes erroneous grants of certification more likely, while a strict standard makes erroneous denials more likely. Sanguine courts estimate that the costs of an erroneous denial are greater for two main reasons: first, a denial essentially ends the action where the putative class members’ stakes are small, while a grant is only provisional; and second, an erroneous denial thwarts the substantive law’s policy, while an erroneous grant only defers to a later time the proper disposition of the action. Consequently, these courts suggest that a lenient certification standard is appropriate.

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<sup>4</sup> *Gordon v. Microsoft Corp.*, No. 00-5994, 2001 WL 366432 (D. Minn. Mar. 30, 2001).

Scholars have recently argued, however, that this reasoning ignores the fact that certification places enormous pressures on the defendant to settle even an unmeritorious suit.<sup>5</sup> They also note that class actions involving small individual claims fail to provide significant compensation to the plaintiffs, and that deterrence can be provided by other means, such as public enforcement. These objections are consistent with the experience in the Microsoft indirect purchaser litigation—all of the cases settled without an adjudication on the merits, and the settlement funds have not provided much compensation to individual class members, who have not filed many claims. The cases might, however, be justified on a deterrence rationale, particularly because the direct purchasers—Compaq, Gateway, Dell, for instance—have not sued Microsoft for an overcharge. This is an important consideration, because, in general, direct purchasers sue in addition to indirect purchasers, raising serious concerns about duplicative recoveries. But *Microsoft* is also different from other overcharge cases in another respect: it was essentially about exclusionary practices that harmed rivals more directly than purchasers. All of these rivals—Netscape (AOL) and Sun Microsystems, for example—have sued and settled for substantial amounts. Thus, one may well question whether the indirect purchaser suits were necessary to provide adequate deterrence. ●

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<sup>5</sup> See, e.g., Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1268 (2002).