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McCarthy v. Recordex Svcs. Inc

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Docket 95-1005

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-1005

MARY RUTH MCCARTHY; GUY COLVILLE; EDWARD ORMSBY;
CARMEN TOMASETTI; JOSEPH HOFFMAN,

Appellants

v.

RECORDEX SERVICE, INC.; COPYRIGHT, INC.; SMART CORP., National
Headquarters Medical Records Copying; MEDFAX INCORPORATED;
HOSPITAL CORRESPONDENCE COPIERS; MERCY HEALTH CORPORATION OF
SOUTHEASTERN PENNSYLVANIA, Misericordia Hospital Division;
METHODIST HOSPITAL; THE GRADUATE HOSPITAL; HAHNEMANN
UNIVERSITY HOSPITAL; THE LOWER BUCKS HOSPITAL

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 93-cv-00281)

Argued Monday, January 22, 1996

BEFORE: STAPLETON, COWEN and GARTH, Circuit Judges

(Opinion filed April 4, 1996)

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OPINION OF THE COURT

GARTH, Circuit Judge:

The instant appeal requires us to decide whether the plaintiff-clients, v attorneys purchased photocopies of the clients' hospital records for the purpose of prosecuting their clients' personal injury and medical malpractice claims, have sta to bring an antitrust action against the sellers of the photocopies. We hold that clients lack standing to bring a treble-damages claim because they are not "direct purchasers," as required by Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). Ho

we also hold that these clients are not barred from seeking injunctive relief under section 16 of the Clayton Act.

I.

Plaintiffs Mary Ruth McCarthy,⁰ Guy Colville, Edward Ormsby, Carmen Tomasetti,⁰ Joseph Hoffman filed a three-count complaint, on January 19, 1993, against five hospitals (the "Hospital defendants")⁰ and five copy-service companies (the "Copy Service defendants").⁰ The complaint asserted violations of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2 (count I);⁰ violations of the Racketeering, Influence, and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1433 and 1962 (count II); and violations of the civil rights laws, 42 U.S.C. § 1983 (count III). The complaint and amended complaint sought injunctive relief, money damages, class certification and attorneys' fees. In essence, the plaintiffs allege that the Hospital Defendants and the Copy Service Defendants conspired

⁰McCarthy died subsequent to the institution of this litigation. A personal representative has been named for her but has not been formally substituted on the record as of the date of this appeal.

⁰Tomasetti died after commencing this action. No personal representative has been named for her as of the date of this appeal.

⁰The Hospital Defendants are Mercy Health Corporation of Southeastern Pennsylvania, Misericordia Hospital Division ("Misericordia"); Methodist Hospital ("Methodist"); Graduate Hospital ("Graduate"); Hahnemann University Hospital ("Hahnemann"); and the Lower Bucks Hospital ("Lower Bucks"). They are all hospital corporations that operate hospitals in the Commonwealth of Pennsylvania.

⁰The Copy Service Defendants are Recordex Services, Inc. ("Recordex"), CopyRight, Inc. ("CopyRight"), Smart Corporation ("Smart"), Medfax, Inc. ("MedFax"), and Hospital Correspondence, Copiers ("HCC"). They are all corporations doing business in the Commonwealth of Pennsylvania, who have entered into contracts with one of the Hospital Defendants to perform copying services in response to requests for copies of hospital records.

⁰Count I specifically alleges that the defendants engaged in a "contract combination conspiracy in restraint of trade effecting [sic] interstate commerce"; and that "the defendants possess a monopoly in the relevant market for the performance of copying services of hospital patient records, and have willfully maintained that power in order to illegally extract unlawful prices for the performance of said copy services." Complaint at ¶ 52.

to charge excessive prices for photocopies of medical records requested by patients and former patients.

Each of the named plaintiffs, at some time within four years before filing the instant action, were patients at hospitals owned by the Hospital Defendants. Each plaintiff had retained either Matty & Ferroni ("M&F"), a New Jersey law firm, or Feinberg & Spalding ("F&S"), a Philadelphia firm, to file a personal injury or medical malpractice claim on his or her behalf. In each case, after the particular plaintiff had signed a medical consent form authorizing the appropriate hospital to release his or her medical records, the plaintiff's attorney requested photocopies of the client's hospital records. The copy service company, in each case, billed the attorney directly.⁰

Each of the five plaintiffs had entered into a contingent-fee agreement with either M&F or F&S. With the exception of McCarthy, none of the plaintiffs were obligated under the relevant retainer agreement to reimburse the law firm for costs, including the photocopying expenses at issue, unless a monetary recovery in favor of the particular plaintiff or client was obtained.⁰ McCarthy's agreement with F&S, on the other hand, provided that

⁰Tomasetti retained M&F, which requested copies of patient records from Hahnemann; Recordex provided the photocopying services and charged M&F \$44.40. Hoffman retained F&S, which requested copies of records from Lower Bucks; MedFax performed the photocopying and charged M&F \$19.22. Both Tomasetti and Hoffman settled their cases and reimbursed M&F of their settlement proceeds for the photocopying costs.

Colville retained M&F, which requested copies from Methodist; Smart, which performed the photocopying, charged M&F \$25.49. Ormsby also retained M&F, which requested copies from Graduate; HCC photocopied the records, charging M&F \$38.40. At the time this case was filed, neither Colville nor Ormsby had reached a settlement, and neither had reimbursed M&F for the copying expenses incurred. Ormsby has apparently discontinued her personal injury claim. App. at 536.

McCarthy retained F&S, which requested copies of her medical records from Misericordia. CopyRight, which was responsible for providing copying services related to requests for Misericordia patient records, billed F&S \$540. F&S refused to pay the bill but eventually obtained the copies from opposing counsel. App. at 517-20, 525.

⁰The four plaintiffs other than McCarthy entered into contingent fee agreements with M&F. Under these agreements, the law firm would receive its fee (33-1/3% for Tomasetti and 33% for each of the other three plaintiffs) only if it successfully litigated or settled the case. Under Colville's contract, M&F would be entitled to 40% of the recovery plus reimbursement of any costs. The other three contracts only awarded M&F a percentage

"[t]he absence of a recovery shall not relieve [McCarthy] from the obligation of paying court costs and other proper litigation and investigative costs."⁰ App. 498. However, Stephen R. Bolden, a partner at F&S, admitted in an affidavit that despite the contract language, in actual practice, the firm never sought reimbursement for advanced costs. A representation of the client did not lead to a recovery:

Although under the express language in this Contingent Fee Agreement, Fell & Spalding is contractually entitled to seek reimbursement from a client even where a representation of that client has not led to the recovery of funds; as a matter of actual practice, where Fell & Spalding has been unsuccessful in obtaining a recovery of funds by way of settlement or otherwise . . . Fell & Spalding has not sought reimbursement for the costs incurred in copying a client's hospital records

App. 526.⁰

Each of the Hospital Defendants had entered into a contract with one of the Copy Service Defendants, granting the Copy Service Defendant the exclusive right to photocopy hospital records requested by patients or other members of the public entitled to such records. Under the contract, the copy-service company agreed to photocopy any medical

the recovery (i.e. M&F would have to cover its costs out of its percentage share of the settlement or award).

None of the fee agreements entitled M&F to reimbursement of costs if the client failed to recover. Colville's contract provided: "If there is no recovery there will be no charge for services rendered." App. 414. Likewise, Hoffman's agreement stated: "If no monies are recovered there will be no fee for services rendered." App. 433. Orloff's agreement similarly read: "If there is no recovery, there are no charges for any fees." App. 455. Finally, Tomasetti's contingent fee agreement provided: "If no monies are recovered attorney to have no claim for services rendered. -- Attorney to advance all costs necessary, & to be reimbursed at settlement." App. 470.

⁰If McCarthy prevailed, F&S would receive a 1/3 contingent fee (calculated based on the amount of the award or settlement before deducting expenses) plus litigation expenses.

⁰Richard C. Ferroni, a partner at M&F, similarly stated in an affidavit that

[h]e had not, nor has his firm, ever sought reimbursement for costs (including the costs of obtaining copies of a client's hospital records) from a client where there has not been a recovery in the action in which he or his firm has represented the client and the Contingent Fee Agreement does not address costs. Although clients are advised they are responsible for costs regardless of the outcome.

App. 536.

records requested by patients or other requestors. The sole remuneration received by Copy Service Defendants derived from the copying charges paid by the requestors. A 685, 692, 694, 698, 701.

Patients or their attorneys were charged \$1 per page for copies of medical records. In addition, they also typically paid a retrieval fee, which was remitted to the hospital, an "administrative" or "basic" fee (i.e. a flat fee unrelated to the number of copies) which was retained by the copy-service company; and postage and handling fees.

Certain "favored" requestors were charged a reduced rate⁰ or no fee at all.⁰ The Hospital Defendants set the schedule of charges, designating the requestors who would not be charged. Typically, sixty percent or more of the requests for hospital records were nonbillable.

Plaintiffs claim that the practice of subsidizing certain requestors while charging patients or their agents an inflated fee violated a Pennsylvania regulation, which provides in relevant part:

Patients or patient designees shall be given access to or a copy of their medical records, or both Upon the death of a patient, the hospital shall provide, upon request, to the executor of the decedent's estate or, in the absence of an executor, the next of kin responsible for the disposition of the remains, access to all medical records of the deceased patient. The patient or the patient's next of kin may be charged for the cost of reproducing the copies; however, the charges shall be reasonably related to the cost of making the copies.

28 Pa. Code § 115.29 (emphasis added).

After plaintiffs filed an amended complaint, the defendants moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). The district court, by order dated August 1993, denied defendants' motion to dismiss counts I (antitrust) and II (RICO) but granted the motion to dismiss count III (civil rights).

⁰For example, Medicare copy requests were billed at seven cents per page; and the Workmen's Compensation Appeal Board paid a ten dollar flat fee per request regardless of the number of pages actually copied.

⁰For example, other hospitals, physician's offices, Blue Cross and Blue Shield, the Veteran's Administration and social service agencies received copies for free. The military and certain HMOs also received free copies.

Subsequently, on April 4, 1994, plaintiffs moved to certify the case as a class action. On November 18, 1994, in a Memorandum and Order, the district court denied plaintiffs' motion for class certification.

On April 1, 1994, defendant Hahnemann filed a motion for partial summary judgment on count I (the antitrust claim), which was eventually joined by all of the defendants Smart. The district court denied the motion for partial summary judgment in an order dated May 5, 1994.

Subsequently, Hahnemann moved for reconsideration. On July 8, 1994, the district court granted Hahnemann's motion for reconsideration and granted summary judgment on count I in favor of all defendants, holding that the plaintiffs lacked standing because they were not "direct purchasers" of the hospital records, within the meaning of Illinois Co. v. Illinois, 431 U.S. 720 (1977).

On December 12, 1994, all of the defendants joined in a motion for summary judgment on the remaining RICO claim, on the theory that antitrust standing principles applied equally in the RICO context. On December 29, 1994, the district court granted summary judgment to all defendants on count II, thus disposing of all three counts of the complaint. Plaintiffs timely filed the instant appeal.

II.

The district court had jurisdiction over plaintiffs' antitrust and RICO claims under 15 U.S.C. § 15; 18 U.S.C. § 1964; and 28 U.S.C. § 1331. We have appellate jurisdiction over the district court's grant of summary judgment in favor of defendants under 28 U.S.C. § 1291.

The issue of antitrust standing is a legal issue, over which we exercise plenary review. In re Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1164 (3d Cir. 1993), cert. dismissed, 114 S. Ct. 625, 652, and cert. denied, 114 S. Ct. 921 (1994). We also exercise plenary review of a district court's grant of summary judgment, apply

same standards applied by the district court. Rosen v. Bezner, 996 F.2d 1527, 1530 (3d Cir. 1993); Koshatka v. Philadelphia Newspapers, Inc., 762 F.2d 329, 333 (3d Cir. 1985).

Summary judgment is proper only where "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of proving that no genuine dispute exists as to any material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Moreover, any inferences to be drawn must be viewed in the light most favorable to the party opposing summary judgment. Id. at 247; Matsushita Elec. Indus. Co. v. Zenith Corp., 475 U.S. 574, 587 (1986).

III.

A.

Almost twenty years ago, the Supreme Court articulated the so-called "direct purchaser" rule, an antitrust standing doctrine that barred downstream indirect purchasers from bringing an antitrust claim. See Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). Recognizing that allowing an indirect purchaser to assert an antitrust claim for the portion of an overcharge "passed on" to the indirect purchaser would create an intractable problem of tracing and apportioning damages between different purchasers in the chain of distribution, the Court chose to avoid this morass by enunciating a bright-line rule that only the purchaser immediately downstream from the alleged monopolist may bring an antitrust action. Id.

Almost a decade before Illinois Brick, the Supreme Court laid the foundation for the "direct purchaser" standing requirement in Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968), which rejected a "pass-on" defense proffered by an antitrust defendant who claimed that the plaintiff was not entitled to treble damages for costs "passed on" to its customers. Id. at 487-89. In Hanover Shoe, the plaintiff shoe manufacturer, Hanover Shoe, Inc., brought suit under section 4 of the Clayton Act a

United Shoe Machinery Corp. (USMC), a manufacturer and distributor of shoe machinery, alleging that USMC had monopolized the shoe machinery industry by refusing to sell equipment and requiring users to lease the equipment instead. Id. at 486-87. USMC argued that Hanover Shoe had been able to recoup its losses by charging its customers more for the shoes and thus did not suffer any cognizable injury because it had passed on the allegedly illegal overcharge to its customers. Id. at 487-88.

The Court rejected USMC's pass-on theory, explaining that entertaining such a defense would raise difficult proof issues as to the amount of the overcharge passed on and whether, absent the overcharge, Hanover Shoe could have raised its prices. Id. at 487-88. The Court also expressed concern that downstream buyers would have only "a tiny stake in the lawsuit" and thus little incentive to prosecute a private antitrust claim. Id. at 487-88. The Court reasoned that allowing a pass-on defense would diminish private antitrust law enforcement and thereby increase the likelihood that violators of antitrust laws would escape liability. Id.

In Illinois Brick, the Supreme Court addressed the corollary to the problem that was faced in Hanover Shoe: offensive use of the pass-on theory by indirect purchasers who cannot recover treble damages for injuries "passed on" to them by intermediaries in the distribution chain. Illinois Brick involved a suit brought by the State of Illinois and 700 local governmental entities against a group of concrete block manufacturers, who allegedly engaged in a price-fixing conspiracy. 431 U.S. at 726-27. The State and local municipalities had hired general contractors for several large construction projects in the Chicago area. Id. at 726. The general contractors, in turn, had subcontracted masonry work to certain masonry contractors who had purchased the allegedly overpriced blocks from the conspirators. Id. The State of Illinois and the local governmental entities were thus indirect purchasers of concrete block, two levels down the distribution chain from the manufacturers. Id.

Illinois and the other governmental entities claimed that part or all of the overcharge had been passed on by the subcontractors and general contractors. Id. As a result, according to the plaintiffs, they had overpaid for the concrete block than three million dollars. Id. The Court dismissed the claim, holding that indirect purchasers may not sue for antitrust damages. Id. at 736.

The Court in Illinois Brick explained that the outcome was dictated by Hanover and that principles of judicial consistency compelled the Court to prohibit the off use of a pass-on theory where it had disallowed the defensive use of the pass-on doctrine in a similar factual situation. Id. at 730. The Court further explicated that permitting the latter while disallowing the former would create a risk of multiple liability: "one-sided application of Hanover Shoe substantially increases the possibility of inconsistent adjudications--and therefore of unwarranted multiple liability for the defendant--by presuming that one plaintiff (the direct purchaser) is entitled to full recovery while preventing the defendant from using that presumption against the other plaintiff" Id.

The State posited that the danger of duplicative recovery could be avoided by apportioning the damages attributable to the concrete-block manufacturers' wrongful conduct. The Court, however, rejected the State's argument that indirect purchasers should be allowed to recover the fraction of the overcharge "passed on" to them, explaining:

Permitting the use of pass-on theories . . . essentially would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that would have absorbed part of the overcharge--from direct purchasers to middlemen to ultimate consumers. However appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness.

Id. at 737.

Subsequently, in Kansas v. Utilicorp United, Inc., 497 U.S. 199 (1990), the Court reaffirmed its commitment to the "direct purchaser" rule, refusing to carve out an exception to Illinois Brick for situations where the full cost of the product (and one hundred percent of any overcharge) had been passed on to the indirect purchaser at 216. In Utilicorp, the States of Kansas and Missouri, acting as parens patriae, brought an antitrust action on behalf of their residents, claiming that a pipeline and five gas producers had conspired to inflate the price of the natural gas that was supplied to public utilities. Id. at 204. These utilities, according to the States, passed on the full amount of the overcharge to their residential and commercial customers. Id.

Kansas and Missouri argued that the concerns voiced in Illinois Brick, namely the difficulties of apportionment, the risk of multiple recovery and the diminution of incentives for private antitrust enforcement, were absent because regulated public utilities pass on one hundred percent of their costs to consumers, who are the ones who actually suffer antitrust injury. The Court forcefully rejected that argument, opining that "[a]lthough the rationales of Hanover Shoe and Illinois Brick may not apply with equal force in all instances, we find it inconsistent with precedent and imprudent even to create an exception for regulated public utilities." Id. at 208.

We have applied Illinois Brick's antitrust standing principle on several occasions. For example, in Mid-West Paper Products Co. v. Continental Group, Inc., 596 F.2d 573 (7th Cir. 1979), we relied on Illinois Brick in holding that indirect purchasers of consumer bags could not maintain a treble-damages suit against the manufacturers of such bags at 575. In Mid-West Paper, the defendants manufactured so-called consumer bags--single-layered multilayered paper bags used for packaging pet foods, coffee, cookies, chemicals and the like. Id. The plaintiff--grocery stores purchased either empty consumer bags (which they used to package their own products) from middlemen and wholesalers or products that were pre-packaged in consumer bags for resale to their customers. Id. at 575-76. After

reviewing the teachings of Illinois Brick, we determined that the "direct purchaser" rule barred the treble-damages claims of all of the plaintiffs (except Mid-West Paper Products Company, which had purchased consumer bags directly from a subsidiary of one of the defendants). Id. at 575.

Similarly, in Merican, Inc. v. Caterpillar Tractor Co., 713 F.2d 958 (3d Cir. 1983), cert. denied, 465 U.S. 1024 (1984), non-factory-authorized dealers, who had purchased electrical generators from authorized dealers for resale in foreign markets, alleged that Caterpillar, the manufacturer of these electrical generators, had illegally imposed a penalty on its dealers to prevent or discourage the dealers from selling Caterpillar products to independent marketers. Id. at 960. The district court held that the plaintiffs had standing under Illinois Brick because the nonfactory-authorized dealers were the "direct target[s] of an unlawful conspiracy." Id. at 962. We reversed, holding that an indirect purchaser, even if a "direct target" of an antitrust conspiracy, lacks standing under Illinois Brick. Id. at 966.

Likewise, in Link v. Mercedes-Benz, Inc., 788 F.2d 918 (3d Cir. 1986), Mercedes-Benz repair customers claimed that Mercedes dealers, who were required to purchase parts exclusively from Mercedes at artificially inflated prices, had passed on those costs to retail customers. Id. at 928-30. Citing Illinois Brick, we held that retail customers were indirect purchasers and therefore lacked antitrust standing. Id. at 930.

Most recently, in Gulfstream III Associates, Inc. v. Gulfstream Aerospace Corp., 888 F.2d 425 (3d Cir. 1993), we held that only the direct purchaser of an aircraft, and not a downstream buyer or assignee, had standing to pursue an antitrust claim. Id. at 431. We emphasized that "any exception to the direct purchaser rule would be inappropriate in this case for the same reasons that the Supreme Court held an exception would be inappropriate in Utilicorp." Id.

B.

Plaintiffs argue that the Supreme Court has receded from Illinois Brick's "direct purchaser" rule. Specifically, plaintiffs contend that the "direct purchaser" rule has been displaced by the multi-factor approach to antitrust standing outlined in Associated General Contractors v. California State Council of Carpenters, 459 U.S. (1983) [hereinafter "AGC"].

In AGC, the plaintiff-unions, representing California construction workers, sued an association of employers with whom the unions had entered into collective bargaining agreements. Id. at 522-24. The complaint alleged that the association and its members coerced certain landowners and other contractors to hire non-union labor. Id.

In determining whether the plaintiff-unions had standing to sue under section 4 of the Clayton Act, the AGC Court employed a five-part analytical framework, which encompassed the following considerations: (1) the causal connection between the antitrust violation and the harm to the plaintiff (including whether the defendant intended to cause that harm), id. at 537; (2) whether the "nature" of the plaintiff's alleged injury was the type that the antitrust laws were intended to forestall," id. at 538; (3) the directness or indirectness of the asserted injury, id. at 541; (4) the existence of direct victims of the alleged injury (i.e. whether the plaintiff is the party most likely to seek redress of the antitrust violation), id. at 542; and (5) the potential for duplicative recovery or complex apportionment of damages, id. at 543-44. The AGC five-factor framework was an attempt by the Court to synthesize and clarify the confusing collection of the then-extant antitrust-standing rules.⁰

⁰Prior to AGC, the courts of appeals applied a variety of different tests to determine standing under section 4 of the Clayton Act: (1) the "direct injury" test, see Chrysler Corp. v. Fedders Corp., 643 F.2d 1229, 1233 (6th Cir.), cert. denied, 454 U.S. 893 (1981); Loeb v. Eastman Kodak, 183 F. 704, 709 (3d Cir. 1910); (2) the "zone of interests" test, see Malamud v. Sinclair Oil Corp., 521 F.2d 1142, 1151-1152 (6th Cir. 1975); and (3) the "target area" test, see Pan-Islamic Trade Corp. v. Exxon Corp., 632 F.2d 539, 546-47 (3d Cir. 1980), cert. denied, 454 U.S. 927 (1981); Calderone Enters. Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292, 1295 (2d Cir. 1971), cert. denied, 406 U.S. 970 (1972). Recognizing that these alternative formulations for assessing antitrust standing often led to contradictory and inconsistent results, the Supreme Court in AGC attempted

Contrary to plaintiffs' intimation, however, the AGC Court neither overruled Brick nor limited its application. Indeed, the AGC Court cited Illinois Brick with approval. See id. at 544-45. Moreover, factors four and five in the AGC framework address Illinois Brick's concerns. In our view, AGC incorporates, rather than repudiates, the principles of Illinois Brick.⁰

Plaintiffs assert, however, that the absolute bar of the "direct purchaser" rule has been supplanted by AGC's balancing approach. In support of this contention, plaintiffs cite to certain passages from our opinion in In re Lower Lake Erie Iron Ore Antitrust Litigation, 998 F.2d 1144 (3d Cir. 1993), cert. dismissed, 114 S. Ct. 625, 652, and denied, 114 S. Ct. 921 (1994), wherein we adumbrated that "indirect purchaser status [not necessarily] the death knell of [an antitrust] claim" Id. at 1168. In Lower Lake Erie, several steel companies, dock companies and trucking companies filed civil actions in federal district court, alleging that the defendant railroad companies in the lower Lake Erie industrial region had conspired to monopolize the transportation and handling of iron ore in the region. Id. at 1151, 1152.

articulate a unified set of factors that could be applied generally in determining antitrust standing.

⁰Of course, AGC and Illinois Brick address two analytically distinct aspects of antitrust standing. See Merican, 713 F.2d at 963-65 (noting that "the Supreme Court has recognized two types of limitations on the availability of the section 4 remedy which the courts consider when examining whether a treble damage action may be maintained"). The AGC was concerned primarily with the issue of whether a particular plaintiff's injury was remote from an antitrust injury to warrant providing that plaintiff a section 4 remedy. Id. at 964. This inquiry, akin to the determination of "proximate cause" in the negligence context, is subtle and resists the use of hard-and-fast "black letter" rules. See id.

In contrast, Illinois Brick dealt with the issue of whether a plaintiff who is unable to trace an injury to an antitrust violation falls "within the group of 'private antitrust plaintiffs' that Congress created to enforce the antitrust laws under section 4." Id. at 963. Illinois Brick focuses exclusively on the risk of duplicative recovery and the potential for overly-complex damages and apportionment calculations. Id. at 963-64. Because there would always be a risk of duplicative recovery, as well as the potential for complex apportionment computations, if indirect purchasers were allowed to bring antitrust claims, the "direct purchaser" rule, unlike the AGC standard, is a bright-line rule.

In a bifurcated trial, the liability jury found against Bessemer and Lake Erie Railroad Company (BL&E), the sole remaining defendant,⁰ and in favor of all plaintiffs one; and the damages jury awarded all but one claim for damages. Id. at 1151. On we applied AGC and affirmed the district court's denial of BL&E's motion to dismiss lack of standing and the district court's denial of BL&E's motion for judgment n.o.

Plaintiffs here contend that Lower Lake Erie requires that we set aside the district court's grant of summary judgment and remand for a determination of standing pursuant to the AGC factors. We disagree.

Lower Lake Erie is fully distinguishable. In Lower Lake Erie, we found that the plaintiffs' claims did not involve "the particular kind of double recovery Illinois sought to prevent." Id. at 1169.

By contrast, all of the policy concerns expressed in Illinois Brick are implicated in the present case. First, there is considerable risk that the Hospital defendants and Copy Service defendants would be exposed to multiple liability. Although plaintiffs' attorneys here have chosen not to sue the defendants directly, it is probable that lawyers who themselves purchase photocopies of their clients' hospital records would bring treble damage claims against the Hospital defendants and the Copy Service defendants in the future. Indeed, both the district court and this court inquired as to why the instant complaint had not been amended to substitute the attorneys as plaintiffs. No satisfactory answer was given. Hence, if we were to deny the defendants the protection of the "purchaser" rule, they could potentially be held liable to both the clients and the attorneys representing the clients.

Furthermore, this lawsuit involves apportionment problems perhaps more complex than those implicated in Illinois Brick. Because the costs of the photocopies are only passed on to the client, if the costs are passed on at all, on a contingent basis, the dis

⁰The other defendants all settled before trial.

court would be faced with complex statistical calculations as to the percentage of photocopying costs borne by the attorneys as compared to the costs borne by their clients. In addition, the district court would have to ascertain the degree to which contingent fees charged to successful plaintiffs includes a recoupment of photocopying costs not charged to losing plaintiffs.

Under these circumstances, plaintiffs cannot escape the absolute bar of the "direct purchaser" rule. In order to survive summary judgment, plaintiffs must establish that their clients, and not their attorneys, are the direct purchasers of the hospital-record photocopies. On this record, no such proof exists.

C.

Plaintiffs argue that they, and not their lawyers, are the direct purchasers of hospital record photocopies.⁰ Plaintiffs contend that their attorneys merely acted as their agents in purchasing the photocopies. Citing In re Toilet Seat Antitrust Litigation, 1977-2 Trade Cases ¶ 61,601 (E.D. Mich. 1977), plaintiffs posit that purchases made by an agent on behalf of the agent's principal do not come within the scope of the "direct purchaser" rule.

⁰Plaintiffs first contend that their attorneys cannot be considered part of the chain of distribution because they do not make a profit from, or charge separately for, the photocopies. We are not persuaded for at least two reasons. First, in order for a consumer to be considered an indirect purchaser of an item, it is not necessary that the consumer incur a separate charge for that item; it is only necessary that the consumer have purchased the item through a middleman. For example, a homeowner who hires a housepainter who charges by the hour and does not invoice the homeowner separately for the cost of materials cannot be considered the "direct purchaser" of the paint used by the housepainter.

Second, attorneys do profit, albeit indirectly, from their purchase of their clients' hospital record photocopies. That is, they earn a contingent fee at the end of a successful action. Moreover, even if the attorneys failed to profit (or even if they suffered a loss) on the transaction, this fact does not transform their clients into direct purchasers. For example, in the previous hypothetical, the homeowner would be considered an indirect purchaser even if the housepainter had charged a fee insufficient to recoup the costs of the paint job or if the housepainter had charged no fee at all.

We are unpersuaded by plaintiffs' argument and find In re Toilet Seat Antitrust Litigation, the single case relied upon by the plaintiffs in support of their agency theory, to be inapposite. That case involved an alleged conspiracy by toilet seat manufacturers to fix the price of wood-flour toilet seats. See In re Toilet Seat Antitrust Litig., 387 F. Supp. 1342, 1343 (J.P.M.L. 1975). One of the plaintiffs, Harvey Lum Company, purchased toilet seats through a purchasing agent, Biddle Purchasing Company, which actually placed the order for the toilet seats at a price approved by Harvey. Biddle received a flat monthly fee, unrelated to the quantity of toilets ordered, and no inventory. In re Toilet Seat Antitrust Litigation, 1977-2 Trade Cases ¶ 61,601, 72,496. The district court concluded that under these limited circumstances, Harvey was the direct purchaser of the toilet seats and had standing to bring an antitrust claim.⁰ at 72,496-97.

In the present case, in contrast, none of the plaintiffs retained their lawyers to act as mere purchasing agents whose sole objective and function was to buy photocopies for the clients. Rather, each client hired his or her attorney to file a lawsuit on his or her behalf and to protect the client's legal interests. Moreover, a fair reading of the record reveals that the lawyers purchased the photocopies for their own use in representing their clients. The attorneys, and not the clients, were undeniably the direct purchasers of the photocopies.

Furthermore, the fact that the costs of the photocopies were passed on to the clients on a dollar for dollar basis (at least where the attorney obtained a recovery on behalf of the client)

⁰The district court relied on the dictum in footnote 16 of Illinois Brick, which states: "Another situation in which market forces have been superseded and the pass-on defense might be permitted is where the direct purchaser is owned or controlled by its customer." Illinois Brick, 431 U.S. at 736 n.16 (citing Perkins v. Standard Oil Co., 395 U.S. 648 (1969) and In re Western Liquid Asphalt Cases, 487 F.2d 191, 197, 199 (9th Cir. 1973), cert. denied, 415 U.S. 919 (1974)). Because Harvey "controlled" Biddle's actions regarding purchases made on Harvey's behalf, the district court "view[ed] the relationship between Harvey and Biddle as falling within the above exception." In re Toilet Seat Antitrust Litigation, 1977-2 Trade Cases ¶ 61,601, at 72,497.

the client) is not dispositive.⁰ Indeed, the subcontractors in Illinois Brick and utility companies in Utilicorp passed on their costs to the plaintiffs in those cases; yet the Supreme Court deemed this fact insufficient to confer standing to the indirect-purchaser plaintiffs in those cases.

Plaintiffs attempt to distinguish these precedents by characterizing the middlemen in those cases as "independent contractors." Plaintiffs take the position that the attorneys in the present case, in contrast, are agents and not independent contractors.

It is, of course, beyond cavil that the attorney-client relationship is an agent-principal relationship. However, attorneys are also independent contractors as well as agents. See Restatement (2d) Agency § 14N (1958) ("One who contracts to act on behalf of another and subject to the other's control except with respect to his physical conduct is an agent and also an independent contractor."); id. § 14N comment a ("[M]ost of the persons known as agents, that is, brokers, factors, attorneys, collection agencies, selling agencies are independent contractors") (emphasis added); 41 Am. Jur. 2d Independent Contractors § 4 (1995) ("[F]or example, attorneys at law . . . and other similar persons . . . are agents, although as to their physical activities they are independent contractors") (emphasis added); see also Commonwealth v. Minds Mining Corp., 60 A.2d 14, 20 (Pa. 1948) (adopting Restatement definitions of independent contractor).

An agent may be either an independent contractor or a servant (or employee in day parlance). See Restatement (2d) Agency § 2 comment b (1958) ("An agent who is a servant is, therefore, an independent contractor when he contracts to act on account of the principal."). Therefore, the relevant inquiry here is not whether a principal-

⁰Plaintiffs are no more direct purchasers of the hospital record photocopies at issue than a passenger in a taxicab would be considered a direct purchaser of the gasoline sold by the taxicab to carry the passenger to his destination. Moreover, even if a separate charge for gasoline were assessed, the taxi passenger still could not be considered a direct purchaser in any sense.

relationship exists between clients and their attorneys, but whether attorneys are independent contractors or mere employees. Although there are a number of factors relevant to this inquiry, see Restatement (2d) of Agency § 220 (1958), the most important factor is the degree of control exercised by the principal:

The legal distinction between an employee and an independent contractor is so well established as to require little, if any, discussion. The characteristic of the former relationship is that the master not only controls the result of the work but has the right to direct the way in which it shall be done, whereas the characteristic of the latter is that the person engaged in the work has the exclusive control of the manner of performing it, being responsible only for the result.

Feller v. New Amsterdam Cas. Co., 70 A.2d 299, 300 (1950). See also Moon Area Sch. v. Garzony, 560 A.2d 1361, 1367 (Pa. 1989); Hammermill Paper Co. v. Rust Eng'g Co., A.2d 389, 392 (Pa. 1968).

It is clear that attorneys exercise "exclusive control of the manner of performing [their legal work], being responsible [to the client] only for the result." Feller A.2d at 300.

Furthermore, plaintiffs here are not even directly liable for the cost of the photocopies. Except for McCarthy, plaintiffs are liable only if their attorneys succeed in achieving a recovery on their behalf. Indeed, three of the contingent-fee agreements do not impose a separate charge for litigation costs; rather, the attorneys are reimbursed out of their percentage share of the settlement or award.

In McCarthy's case, although the retainer agreement does indicate that she is responsible for costs irrespective of the outcome, her attorney acknowledged that in actual practice, his law firm never charged clients unless the firm obtained a recovery. Furthermore, McCarthy faces another insurmountable obstacle: her attorney never paid photocopying charges but rather obtained the needed copies from opposing counsel. Therefore, McCarthy (and indeed, even her attorney) cannot show any injury -- much less antitrust injury.

Based on these undisputed facts, we must conclude that the clients are not direct purchasers.⁰ And unless an exception to the "direct purchaser" principle applies here, the plaintiffs have no standing to assert their antitrust claim under count I.

D.

Plaintiffs argue, in the alternative, that Illinois Brick does not apply here if they fall within the "co-conspirator" exception to the direct purchaser rule. Citing Link, 788 F.2d at 918, and In re Brand Name Prescription Drugs Litigation, 867 F. Supp. 1338 (N.D. Ill. 1994), plaintiffs advance the proposition that indirect buyers have standing to bring an antitrust claim against defendants who are co-conspirators in a vertical antitrust conspiracy. To the extent that these cases recognize a co-conspirator exception, however, we hold that plaintiffs have failed to establish the applicability of such an exception to the facts at hand.

Preliminarily, we reject plaintiffs' reading of Link as establishing an exception to Illinois Brick where the middlemen, from whom the plaintiffs made purchases, particu-

⁰The attorneys are the real parties in interest. Indeed, as noted previously, the district court offered the plaintiffs' attorneys an opportunity to substitute themselves as the plaintiffs of record. Although the defendants did not object to the district court's proposal, the attorneys for the plaintiffs declined the court's offer, choosing instead to appeal the district court's adverse ruling as to standing.

We acknowledge that generally an attorney is to be considered the agent of the client, and as such, would not be held personally liable for expenditures made for the disclosed principal. See Messenger Publishing Co. v. Walkinshaw, 157 A. 18 (Pa. Super. Ct. 1931). However, the Pennsylvania Supreme Court has yet to address this subject and there is a wealth of authority that an attorney ordering goods or services in connection with litigation, as is the case here, ordinarily be treated as a principal and hence be liable for such expenses.

Even the lower courts in Pennsylvania, whose decisions are not binding on us, had difficulty with this issue. See Pessano v. Eyre, 13 Pa. Super. 157 (1900). But neither the cases revealed by the parties' research nor those revealed by our own research have discussed this issue in the context of a federal antitrust action, such as we have here. In none of those cases was the Illinois Brick direct purchaser rule at issue and we are satisfied that in the instant antitrust context, the attorney-appellants do not have standing to prosecute this action.

in a vertical antitrust conspiracy. To the contrary, in Link, we expressly refused to adopt such an exception where the alleged co-conspirators immediately upstream were also joined as codefendants:

Alternatively, appellants argue that this court should carve out a narrow exception to Illinois Brick in vertical conspiracies where the intervening parties in the distribution process are named as co-conspirators (a so-called "co-conspirator exception"). We decline to recognize this exception where, as here, the alleged co-conspirators are not also joined as co-defendants.

Link, 788 F.2d at 931 (citations omitted) (emphasis added).

Similarly, in Brand Name, although the district court did allow the plaintiff retailers of pharmaceutical drugs to sue both the manufacturers and the wholesalers, it did so on the basis that the plaintiffs had alleged that the parties immediately upstream (i.e. the wholesalers) had colluded with the manufacturers to fix prices. The plaintiffs had not alleged that overcharges were passed on but rather that the wholesalers, as a result of a price-fixing conspiracy, had directly imposed an overcharge on the plaintiff retailers. See Brand Name, 867 F. Supp. at 1344.

Most significantly, the district court in Brand Name emphasized that the reason it had not granted summary judgment in favor of the manufacturer-defendants was because the plaintiffs ha[d] named [as defendants] a large percentage of all possible [wholesalers who had allegedly participated in the conspiracy]." Id. at 1346. The district court declined to "penalize[] [the plaintiffs] for the failure to join every single [w]holesaler [involved in the alleged conspiracy]" Id.

Plaintiffs here posit that they have joined all of the co-conspirators in the conspiracy (i.e. the Hospital defendants and the Copy Service defendants). Reasoning that they have thereby satisfied the requirements of the co-conspirator exception, plaintiffs argue that they should therefore be accorded standing to bring an antitrust claim even though they are not direct purchasers. We cannot agree.

Plaintiffs misconstrue Brand Name and Link, and misconceive the nature of the conspirator exception. In order to fall within the exception, plaintiffs here would have to allege that the intermediaries immediately upstream, that is, the attorneys, colluded with the defendants to overcharge plaintiffs for the photocopies. Moreover, plaintiffs would be obliged to join the lawyers as defendants, which they have not done. In such a case, the co-conspirator exception does not apply here.

E.

Plaintiffs also suggest that the present case falls within the "pre-existing cost-plus contract" exception to the direct purchaser rule. This exception arises from the holding in Hanover Shoe:

We recognize that there might be situations--for instance, when an overcharged buyer has a pre-existing "cost-plus" contract, thus making it easy to prove that he has not been damaged--where the considerations requiring that the passing-on defense not be permitted in this case would not be present.

Hanover Shoe, 392 U.S. at 494.

The vitality of the "pre-existing cost-plus contract" exception is doubtful, however, in light of Utilicorp. The Supreme Court, in that case, expressly refused to recognize the exception to Illinois Brick even where one hundred percent of the cost increases have been passed through to indirect purchasers. Utilicorp, 497 U.S. at 216.

Moreover, even if this exception survived Utilicorp, plaintiffs have failed to show that they meet the prerequisites of this exception. Specifically, plaintiffs have failed to show the existence of a pre-existing agreement to purchase a fixed quantity of photocopies from the attorneys. See Mid-West Paper, 596 F.2d at 580. In addition, as discussed earlier, plaintiffs have failed to demonstrate that they must pay the full cost of the copies since their liability for litigation costs is only contingent in nature.

In sum, plaintiffs have failed to establish that any exception to the direct purchaser rule obtains. Thus, we hold that plaintiffs lack standing to pursue their antitrust claim (count I).

IV.

Significantly, antitrust standing principles apply equally to allegations of RICO violations. See Holmes v. Sec. Investor Protection Corp., 503 U.S. 258, 270 (1992). The precepts taught by Illinois Brick and Utilicorp apply to RICO claims, thereby denying standing to indirect victims. Wooten v. Loshbough, 951 F.2d 768, 770 (7th Cir. 1992); County of Oakland v. City of Detroit, 866 F.2d 839, 851 (6th Cir. 1989), cert. denied, 491 U.S. 1003 (1990); Carter v. Berger, 777 F.2d 1173, 1176 (7th Cir. 1985); Terre Du Lac Ass'n v. Terre Du Lac, Inc., 772 F.2d 467, 473 (8th Cir. 1985), cert. denied, 475 U.S. 1082 (1986); Daley's Dump Truck Serv., Inc. v. Kiewit Pac. Co., 759 F. Supp. 1498, 1502 (W.D. Wash. 1991), aff'd sub. nom., Imagineering, Inc. v. Kiewit Pac. Co., 976 F.2d 1082 (9th Cir. 1992), cert. denied, 113 S. Ct. 1644 (1993). Indeed, plaintiffs have conceded that, if they lacked antitrust standing, they also lacked RICO standing. See Plaintiffs' Motion to Secure Certification (Nov. 29, 1994), at 3-4 (App. at 1168-69).

Hence, the central and dispositive issue is whether plaintiffs are "direct purchasers." If so, they are entitled to pursue both their antitrust and RICO claims. If not, and insofar as damages are concerned, the district court properly granted summary judgment in favor of the defendants.

V.

Finally, plaintiffs argue that even if they lack standing to recover damages under section 4 of the Clayton Act,⁰ they may still seek injunctive relief under section 16 of the Act.⁰

Standing analysis under section 16 is not identical to that for section 4. See Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 111 n.6 (1986). "Section 16 has been applied more expansively, both because its language is less restrictive than that of § 4 . . . and because the injunctive remedy is a more flexible and adaptable tool for enforcing the antitrust laws than the damage remedy" Schoenkopf v. Brown & Williamson Tobacco Corp., 637 F.2d 205, 210 (3d Cir. 1980). Most importantly, "because standing under § 16 raises no threat of multiple lawsuits or duplicative recoveries [unlike the concerns voiced in Illinois Brick], some of the factors other than antitrust injury that are appropriate to a determination of standing under § 4 are not relevant under § 16." Cargill, 479 U.S. at 111 n.6.

In Mid-West Paper, we expressly rejected the contention that the direct purchaser rule bars injunctive relief under section 16 as well as a treble damages suit under section 4. We explained that in contrast to the treble damage action, a claim for injunctive relief does not present the countervailing considerations--such as the risk of duplicative or ruinous recoveries and the spectre of a trial burdened with complex and

⁰Section 4 of the Clayton Act allows for recovery of treble damages in a private antitrust action:

[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15(a).

⁰Section 16 provides in relevant part:

Any person . . . shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws.

15 U.S.C. § 26.

conjectural economic analyses--that the Supreme Court emphasized when limiting the availability of treble damages.

Mid-West Paper, 596 F.2d at 590. See also Merican, 713 F.2d at 962 n.6; In re Beef Antitrust Litig., 600 F.2d 1148, 1167 (5th Cir. 1979), cert. denied, 449 U.S. 905 (1981).

We cautioned that

the rule of standing urged by the defendants, which would completely bar indirect purchasers from seeking injunctive relief, would leave a serious gap in the antitrust enforcement scheme, as the fate of these injured parties, and of the competitive economy in an entire industry, would be made dependent upon the willingness of the government and the direct purchasers to assume the burdens of a lengthy lawsuit.

Mid-West Paper, 596 F.2d at 593-94.

Although plaintiffs need not satisfy Illinois Brick's "direct purchaser" requirement in order to seek injunctive relief, they must still make a threshold showing of entitlement to injunctive relief. That is, plaintiffs must show: (1) threatened loss or injury cognizable in equity; (2) proximately resulting from the alleged antitrust violation. City of Rohnert Park v. Harris, 601 F.2d 1040, 1044 (9th Cir. 1979), cert. denied, 445 U.S. 961 (1980); Central Nat'l Bank v. Rainbolt, 720 F.2d 1183, 1186 (11th Cir. 1983). Because the district court never considered whether plaintiffs would be entitled to injunctive relief under section 16, separate and apart from the Illinois Brick standing rule, we will remand to allow the district court to undertake such an analysis.

VI.

For the foregoing reasons, we will affirm the district court's grant of summary judgment in favor of the defendants on plaintiffs' treble-damages claim (count I) and claim (count II),⁰ but we will reverse as to plaintiffs' claim for

⁰Count III, the civil rights claim, was dismissed by the district court and is not on appeal before us.

injunctive relief and remand for further proceedings consistent with this opinion.⁰

MARY RUTH MCCARTHY, ET AL. V. RECORDEX SERVICE, INC., ET AL.

NO. 95-1005

STAPLETON, J., Concurring in part and dissenting in part:

As the court acknowledges, it is "beyond cavil that the attorney-client relationship is an agent-principal relationship." (Majority Op. at 25.) Nevertheless, the court declares that the "attorneys [in this case], and not the clients, were undeniably the direct purchasers of the photocopies." (Majority Op. at 24.) The first of these inconsistent propositions is clearly correct; it necessarily follows that the second is not. Because the photocopies were purchased from the defendant copy services by the attorneys, as agents for their disclosed client-principals, it is the clients, and not the attorneys, who purchased them. For this reason, I would reverse the judgment of the district court and remand for further proceedings on all of the plaintiffs' claims.

I.

In part III-B, the court concludes that: (1) the Supreme Court in Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 513 (1983) [hereinafter AGC], neither overruled Illinois Brick Co. v. Illinois, 431 U.S. 726 (1977), nor limited its application; (2) "AGC incorporates, rather than repudiates,

⁰Although the injunctive relief issue was only perfunctorily briefed and discussed, I seriously question whether the issue can be successfully pursued. We note, for instance, that plaintiffs apparently have obtained all of the medical records relevant to the particular personal injury claims, and there is little, if any, likelihood that plaintiffs will request additional copies of those records from the defendants. Moreover, it is highly doubtful that additional hospital records pertaining to plaintiffs' personal injury claims will be generated. Nevertheless, because our precedents require that a claim for an injunction under section 16 be treated differently than a claim for treble damages under section 4, it is appropriate that the district court, rather than this Court, consider the merits of the claim for injunctive relief in the first instance.

principles of Illinois Brick," (Majority Op. at 19;); (3) AGC and Illinois Brick address two distinct aspects of antitrust standing; and (4) in order to escape summary judgment, the plaintiffs must establish that they and not their attorneys are the direct purchasers of the photocopies. I agree.

Whether the plaintiffs are direct purchasers of the copies, however, depends on whether the attorneys are agents for the plaintiffs with respect to the purchase of the copies. If the attorneys bought the copies as agents for the plaintiffs, then the plaintiffs are the direct purchasers of the copies. If, on the other hand, the attorneys purchased the copies on their own behalfs, then the plaintiffs are indirect purchasers of the copies. When the applicable law is applied to the facts reflected in the summary judgment record, the conclusion is inescapable that the attorneys purchased the copies for their clients and that the clients are the direct purchasers.

A.

In Pennsylvania, the elements of agency are "the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the understanding of the parties that the principal is to be in control of the undertaking." Scott v. Purcell, 415 A.2d 56, 60 (Pa. 1980) (quoting Restatement (Second) of Agency Comment b (1958)). When a lawyer undertakes to represent a client, he consents to the client's having control of the representation even though he may be expected to exercise professional judgment with respect to the means of pursuing the objectives of the representation. Pennsylvania Rules of Professional Conduct 1.2(a). For this reason, the attorney-client relationship, as the court acknowledges, is generally regarded as an agency relationship. As a principal, the client is bound by the actions of the attorney in the course of the representation. As an agent, the attorney, like other agents, is a fiduciary and owes to his client-principal a duty of care, obedience, and loyalty. Restatement (Second) of Agency §§ 377-398; e.g., Pennsylvania Rules of Professional Conduct 1.1, 1.2, 1.3, 1.15. In particular, an attorney who obtains tangible property

the course of carrying out the agency owes to his client-principal a duty to exercise reasonable care in its protection, to use it only in accordance with the directions of the principal and for his benefit, and to surrender it upon demand on the termination of the agency. Id. § 422; Pennsylvania Rules of Professional Conduct 1.15, 1.16(d). While an attorney may have a lien to secure any unpaid compensation, it is only a lien and a tangible property obtained or created in the course of the representation belongs to the client-principal. Pennsylvania Rules of Professional Conduct 1.16(d).

The record here reflects typical attorney-client relationships between the plaintiffs and their attorneys. The attorneys agreed to represent the plaintiffs in their personal injury suits and thus to obtain on their behalf the goods and services necessary to prosecute those suits.⁰ Although the attorneys, as permitted by Pennsylvania's Rules of Professional Conduct,⁰ are advancing to their clients the expenses associated with litigating their cases, this does not, in my view, alter the relationship between the attorneys and their clients or between the clients and third parties with whom the attorneys deal on the clients' behalf. By contrast, nothing in the record suggests that the attorneys are purchasing the records on their own behalves in the hope of making profit on resales to their clients.

The attorneys' role as agent is controlling here because, unless otherwise agreed, an agent for a disclosed principal is not a party to a contract that the agent enters

⁰ Of course, it is understood that an attorney obtains goods used generally in his practice, such as office supplies, on his own behalf. Office supplies are analogous to the paint purchased by a housepainter or the gasoline purchased by a taxicab driver in the court's hypotheticals. (See Majority Op. at 22 n.15; 24 n.17.)

⁰ Pennsylvania's Rules of Professional Conduct 1.8(e) provides:

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

behalf of the principal. Restatement (Second) of Agency § 320 (followed in Revere
Inc. v. Blumberg, 246 A.2d 407, 409 (Pa. 1968)). Thus, unless it is agreed that such
agent is to be a party to a contract, the contract is, in effect, a contract between
principal and the third party. Restatement (Second) of Agency §292 (followed in Hill
Apartments, Inc. v. NYCE Crete Co., 352 A.2d 148, 154 (Pa. Super. Ct. 1975)).
Accordingly, where, as here, an attorney purchases photocopies of records and it is
understood by the seller that they are being purchased on behalf of his client, the
and not the attorney is the purchaser. My review of Pennsylvania case law convinces
that Pennsylvania subscribes to these basic principles of agency in the context of
attorney-client relationship.

In Moore v. Porter, 13 Serg. & R. 100 (Pa. 1825), the Supreme Court of Pennsyl
addressed the remedies available to a prothonotary to collect fees incurred by liti
The court held that "[t]he party for whom the services are done, is responsible for
fees, and to him is the [prothonotary] to look. . . . The fees are not chargeable
attorney of the party for whom the services are done, unless he has become security
the costs." Id. at 101.

Pessano v. Eyre, 13 Pa. Super. 157 (1900), involved a suit by an expert witness
against the attorney that hired him in pursuit of his client's claim. The superior
held that "[i]f . . . there was no express direct undertaking on the part of the
[attorney] to pay what was due to the [expert witness], that is the end of the matt
because the expert witness could not collect from the attorney. Id. at 163. The a
would be liable to the expert witness only if the attorney "ma[de] himself liable b
special promise." Id.⁰

⁰ The court concludes that in Pessano v. Eyre, 13 Pa. Super. 157 (1900), the super
court "had difficulty with this issue." (Majority Op. at 27 n.18.) I am not sure o
difficulty the court speaks. On the contrary, the superior court in Pessano plainl
articulates the principle that while an agent is not generally liable on a contract
on behalf of a disclosed principal, "even where the agency is known, an agent . . .
render himself liable by an express undertaking." Pennsylvania R. Co. v. Gallagher

In Messenger Publishing Co. v. Walkinshaw, 157 A. 18 (Pa. Super. Ct. 1931), the superior court held that where an attorney orders copies of "a paper book used on a from a publishing company, the attorney does so in his capacity as an agent for his client. As the court explained:

When an attorney has been acting for the defendant up to judgment and the client with him in the taking of an appeal and the attorney orders the printing of the paper-books required by the rules of the appellate court, it is to be presumed he is acting under authority from his client. At least, the ordering of the paper books is within the scope of the attorney's authority.

Id. at 19 (quoting Huntzinger v. Devlin, 80 Pa. Super. Ct. 187 (1922)). Thus, the publishing company, the court held, could not collect from the attorney.

Based on Moore, Pessano, Walkinshaw, and Huntzinger, I conclude that in Pennsylvania "when an attorney contracts with a third party for the benefit of a client for goods or services to be used in connection with the attorney's representation of a particular client and the third party is aware of these facts, the attorney is not liable on the contract unless he either expressly or impliedly assumes some type of special liability." Eppler, Guerin & Turner, Inc. v. Kasmir, 685 S.W.2d 737, 738 (Tex. Ct. App. 1985).⁰

Numerous jurisdictions agree. See Christensen, O'Connor, Garrison & Havelka v. State of Washington, Department of Revenue, 649 P.2d 839, 843 (Wash. 1982); Hasbrouck v. Krs P.2d 1197, 1198 (Mont. 1975); In re May, 261 N.E.2d 109, 110 (N.Y. 1970); Kates v. Millheiser, 569 So.2d 1357, 1357 (Fla. Dist. Ct. App. 1990); Free v. Wilmar J. Hel 688 P.2d 117, 119-20 (Or. Ct. App. 1984); Weeden Engineering Corp. v. Hale, 435 So.

A.2d 401, 402 (Pa. Super. Ct. 1953). In the record in this case, there is no evidence of an express undertaking of liability by the attorneys. Moreover, the fact that the attorney may commit himself to be responsible to the seller for the purchase price does not mean that the client is not also responsible or that any property purchased in the sale on behalf of the client does not belong to the client.

⁰ The court intimates that Pennsylvania case law may be inapposite because no Pennsylvania case discusses the agency issue in a federal antitrust context and none address the direct purchaser rule. (See Majority Op. at 27 n.18.) In my view, this distinction is not significant because the agency status of the attorneys is purely a question of state law. The court does not suggest a reason why the agency question would turn out differently in the federal antitrust context, and I perceive none.

1158, 1160 (La. Ct. App. 1983); Petrando v. Barry, 124 N.E.2d 85, 87 (Ill. Ct. App. 7A C.J.S. Attorney and Client § 140 (1980) ("In the absence of assumption of personal liability, an attorney is generally not liable for work done by third persons in connection with his representation of a client.").

Under this case law, the plaintiff-clients, and not their attorneys, are responsible for the purchase price of the photocopies. Moreover, the record reflects that they had to pay in the past⁰ and will continue to have to pay in the future⁰ the prices that copy services choose to charge. Assuming that an antitrust violation has affected the prices that the copy services charge, I fail to understand how there could be a more direct causal relationship between that violation and the plaintiffs' alleged injury.

B.

The court concludes that because the attorneys are independent contractors with respect to the purchase of the copies, the attorneys, rather than the plaintiffs, are the direct purchasers of the copies. The issue of whether the attorneys are independent contractors is simply not relevant here, however. Independent contractor status is relevant only to determine the extent of a principal's tort liability to third parties. According to the law of respondeat superior, where B acts for the benefit of A and commits a tort and injures C, if B is an independent contractor, then C cannot recover from A regardless of whether B is A's agent. If, on the other hand, B is a servant of A, C can recover from A regardless of whether B is A's agent. Thus, even if it be true that the plaintiffs' attorneys are independent contractors, all this tells us is that the plaintiffs are not responsible to third parties for torts committed by the attorney.

⁰ As the court acknowledges in footnote 6, plaintiffs Thomasetti and Hoffman have not paid their attorneys' advances.

⁰ Even if one credits the testimony that F&S chooses not to press its contract right to reimbursement in unsuccessful cases, it is clear that the clients will wind up paying the purchase price of the photocopies in all successful cases.

tells us nothing about whether the attorneys, as their agents, purchased the copies
their behalves. See Restatement (Second) of Agency §§ 2, 219-220.

II.

Because antitrust standing principles apply equally to allegations of RICO
violations, I would conclude, for the foregoing reasons, that the plaintiffs may go
forward on their RICO damage claims. Because I agree with the court that the plain
have standing to prosecute their claim for injunctive relief under Section 16 of th
Clayton Act, I would remand for further proceedings on all of plaintiffs' claims.