RENDERED: November 21, 2001; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002144-MR

CAREY M. ARNOLD, INDIVIDUALLY,
& ON BEHALF OF ALL SIMILARLY
SITUATED; AND THOMAS C. HECTUS,
INDIVIDUAL, & ON BEHALF OF ALL
SIMILARLY SITUATED — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 00-CI-000123

MICROSOFT CORPORATION — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: DYCHE, GUIDUGLI, AND KNOPF, JUDGES.

KNOPF, JUDGE: The appellants, Carey M. Arnold and Thomas C. Hectus sought to bring a class action pursuant to CR 23 against Microsoft Corporation (Microsoft) for violations of the Kentucky Consumer Protection Act. The trial court granted Microsoft's motion to dismiss, concluding that the appellants lacked standing to pursue their anti-trust claims, and that the appellants had failed to otherwise state a claim under the Act. Finding no error, we affirm.

The facts underlying this action are not in dispute. Microsoft is a corporation organized under the laws of the state of Washington. Microsoft primarily focuses on developing and licencing computer software. In particular, Microsoft developed and licences the most commonly used operating system for Intel-based personal computers in the United States: the "Windows" operating system. When this action was filed, "Windows 98" was the most current version of the operating system then in use.

Microsoft distributed Windows 98 through original equipment manufacturers (OEMs), who install the software on personal computers, and through software retailers. However, Microsoft does not "sell" its software to OEMs, retailers or to the public. Rather, the company licences the use of its software to the users. As a condition to the use of Windows 98, purchasers are required to accept Microsoft's "End User License Agreement" (EULA). In summary, the EULA prohibits end-users from copying, modifying or transferring the software, and it sets out the scope of Microsoft's warranty of the product.

The long-running Federal Court proceedings involving Microsoft, while not directly relevant to this appeal, are instructive for their discussion of the relevant issues. In summary, the United States Department of Justice filed suit against Microsoft in 1994, claiming that Microsoft unlawfully maintained a monopoly in the operating system market through anti-competitive means. Although the parties entered into a consent decree, the Justice Department brought a civil contempt action, alleging that Microsoft had violated the decree's

provisions. In 1998, the Justice Department and the Attorneys General for nineteen individual states brought an action against Microsoft for violations of the Sherman Anti-Trust Act,[1] and under analogous state laws. The matter proceeded to a trifurcated trial before the United States District Court for the District of Columbia.

In November, 1999, the District Court entered its findings of fact. The Court found that Microsoft enjoys a monopoly position with its Windows operating system. The Court further found that Microsoft maintained its monopoly power by anti-competitive means, and further had used that position to obtain a monopoly in the internet browser market.[2] Based upon these findings, the Federal District Court thereafter concluded that Microsoft violated §§ 1 and 2 of the Sherman Act.[3] To remedy these violations, the court directed Microsoft to submit a proposed plan of divestiture, with the company to be split into an operating systems business and an applications business.[4]

Recently, on appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed in part, reversed in part and remanded for further proceedings.[5] The Federal Circuit Court agreed that Microsoft possessed monopoly power over

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[1] 15 U.S.C. §§ 1 *et. seq.* (hereafter, "the Sherman Act")

[2] United States v. Microsoft Corp., 84 F. Supp. 2d 9 (D.D.C., 1999) *(Findings of Fact)*.

[3] United States v. Microsoft Corp., 87 F.Supp.2d 30 (D.D.C., 2000) *(Conclusions of Law)*.

[4] United States v. Microsoft Corp., 97 F.Supp.2d 59 (D.D.C.,2000) *(Final Judgment)*.

[5] United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir., 2001).

the relevant market and that it had engaged in certain anti-competitive conduct to preserve that monopoly. However, the Court reversed the District Court's finding that Microsoft had unlawfully attempted to extend its monopoly into the internet browser market. The Circuit Court also reversed the District Court's finding that Microsoft had unlawfully tied its "Internet Explorer" browser to its Windows 98 operating system, and the Court remanded the matter to the District Court for further findings. For substantive and procedural reasons, the Court reversed the portion of the Final Judgment directing that Microsoft be split into separate companies. Finally, the Court found that the trial judge had engaged in impermissible *ex parte* contacts with members of the media and had made public comments about Microsoft which gave rise to an appearance of partiality. Accordingly, the Circuit Court directed that the trial judge be recused from any further proceedings. The United States Supreme Court denied Microsoft's petition for a writ of certiorari.[6]

Although the present case arose separately from the Federal litigation, it is based on many of the same facts and allegations developed in those cases. In January of 2000, Arnold and Hectus brought an action against Microsoft based upon

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[6] Microsoft Corp. v. United States, 2001 U.S. LEXIS 9509, 70 U.S.L.W. 3267 (U.S., Oct. 9, 2001). At this writing, the Justice Department and Microsoft have reached a settlement of the Federal action, and they have submitted the settlement to the trial court for approval. *See* United States v. Microsoft Corp., No. 98-1232, Stipulation filed November 2, 2001. <http://news.findlaw.com/cnn/docs/microsoft/msstipprpfnljd110201.pdf> Nine states (including Kentucky) have agreed to join with the Justice Department in a revised settlement. <http://news.findlaw.com/cnn/docs/microsoft/prpsrvsfnljdg110601.pdf> To date, the remaining nine states and the District of Columbia have not agreed to join in the settlement and will be pursuing further remedies before the Federal District Court.

Kentucky's Consumer Protection Act, KRS 367.170, and KRS 367.175, Kentucky's version of the Sherman Act.[7] In the complaint, Arnold alleged that, in June 1998, she purchased a Windows 98 CD ROM disk from a retail outlet for $89.00. Likewise, Hectus alleged that he had purchased a new Intel-based personal computer from an OEM. Windows 98 had been installed as the operating system on that computer. They alleged that they had been damaged by Microsoft's monopolistic practices and predatory pricing schemes.

In lieu of an answer, Microsoft filed a motion to dismiss the complaint for failure to state a claim.[8] After a full briefing and argument, the trial court granted Microsoft's motion to dismiss. Based upon Illinois Brick Co. v. Illinois,[9] the court concluded that KRS 367.175, like the Sherman Act, does not permit indirect purchasers such as Arnold and Hectus to bring a claim for anti-trust violations. The trial court further found that the allegations in the complaint did not state a claim under the KRS 367.170. Arnold and Hectus now appeal from the trial court's order dismissing their complaint.

On a motion to dismiss, the trial court must take every well-pleaded allegation of the complaint as true and construe each allegation in the light most favorable to the party against

[7] 15 U.S.C. §§ 1 & 2.

[8] CR 12.02.

[9] 431 U.S. 720, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977).

whom the motion is made.[10] In this case however, the issue of standing can be decided as a matter of law based upon the applicable statutes. On review, this Court will confine itself to a determination of whether the matters alleged in the complaint establish appellant's standing to bring the action or whether it is without a "substantial interest" in the subject matter of the controversy.[11]

Furthermore, because they involve questions of law, the issues of standing and the interpretation of statutes are subject to *de novo* review. This Court is not required to give deference to the trial court's decision on these issues.[12] The role of the Court in construing a legislative act is to carry out the intent of the legislature.[13] A statute should be interpreted according to the plain meaning of the language, and a court is not free to add or subtract words.[14] At the same time, a statute must be read in light of the mischief to be corrected, the evil intended to be remedied, and the policy and purpose of the statute.[15]

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[10] City of Louisville v. Stock Yards Bank & Trust Co., Ky., 843 S.W.2d 327, 328 (1992)

[11] Id.

[12] Commonwealth v. Montaque, Ky., 23 S.W.3d 629, 631 (2000)(*quoting* Floyd County Board of Education v. Ratliff, Ky., 955 S.W.2d 921, 925 (1997)); Bob Hook Chevrolet Isuzu, Inc. v. Commonwealth, Ky., 983 S.W.2d 488 (1998).

[13] Magic Coal Co. v. Fox, Ky., 19 S.W.3d 88, 94 (2000).

[14] Commonwealth v. Frodge, Ky., 962 S.W.2d 864, 866 (1998); Commonwealth v. Allen, Ky., 980 S.W.2d 278, 280 (1998).

[15] Springer v. Commonwealth, Ky., 998 S.W.2d 439, 448 (1999); Sisters of Charity Health Systems, Inc., v. Raikes, Ky., 984 S.W.2d 464, 469 (1998).

Arnold and Hectus first argue that the trial court erred in finding that indirect purchasers lack standing to bring an action under KRS 367.175(2). In particular, they contend that the trial court should not have applied the reasoning of Illinois Brick Co. v. Illinois to interpret Kentucky's version of the Sherman Act. In Illinois Brick, the State of Illinois brought suit on its own behalf and on behalf of a number of local governmental entities seeking treble damages under § 4 of the Clayton Act[16] for an alleged conspiracy to fix the price of concrete block in violation of § 1 of the Sherman Act.[17] The State and the local governments were all indirect purchasers of concrete block--that is, they did not purchase concrete block directly from the price-fixing defendants but rather purchased products or contracted for construction into which the concrete block was incorporated by a prior purchaser.

The United States Supreme Court held that, with limited exceptions, only overcharged direct purchasers, and not subsequent indirect purchasers, were persons "injured in business or property" within the meaning of § 4, and that therefore the State of Illinois was not entitled to recover under federal law for the portion of the overcharge passed on to it.[18] However, the Supreme Court has since held that nothing in the Sherman Act or in Illinois Brick precludes the states from allowing indirect

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[16] 15 U. S. C. § 15(a).

[17] 15 U. S. C. § 1.

[18] 431 U.S. at 729, 52 L. Ed. 2d at 729, 97 S. Ct. at 2066.

purchasers to bring an anti-trust action.[19] Thus, as the trial court noted, the United States Supreme Court's interpretation of the Sherman Act is not controlling over our interpretation of KRS 367.175.

Nevertheless, we, like the trial court, find the reasoning of Illinois Brick to be highly persuasive. KRS 367.175 is identical to the Sherman Act except that the phrase "among the several states" was replaced by "in this Commonwealth."[20] Because there are no Kentucky cases interpreting KRS 367.175 and because that statute is based upon the Sherman Act, the interpretation of the Sherman Act given by the United States Supreme Court is highly instructive.[21]

Arnold and Hectus first note that KRS 367.175 was enacted in 1976, one year prior to the holding of the United States Supreme Court in Illinois Brick. Prior to Illinois Brick, they claim that indirect purchasers were entitled to recover under the Sherman Act. As a result, they argue that the General Assembly never intended to adopt the United States Supreme Court's interpretation of the Sherman Act. We disagree.

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[19] California v. ARC America Corp., 490 U.S. 93, 101-02, 104 L. Ed. 2d 86, 95, 109 S. Ct. 1661, 1665 (1989).

[20] The relevant portion of the statute, KRS 367.175(2), provides as follows: "It shall be unlawful for any person or persons to monopolize, or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce in this Commonwealth".

[21] *See e.g.* Palmer v. International Association of Machinists and Aerospace Workers, AFL-CIO, Ky., 882 S.W.2d 117 (1994); Kreate v. Disabled American Veterans, Ky. App. 33 S.W.3d 176 (2000).

As noted by the trial court, Hanover Shoe, Inc. v. United Shoe Machinery Corp.,[22] was the precedent that the Court in Illinois Brick relied upon and affirmed. Hanover Shoe pre-dated KRS 367.175. In Hanover Shoe, the Supreme Court rejected the defense that indirect purchasers rather than direct purchasers were the parties injured by anti-trust violations. The Court held that the proof necessary to trace the effects of the overcharge on the purchaser's prices, sales, costs, and profits, and of showing that these variables would have behaved differently without the overcharge, would unduly complicate such actions.[23] A second reason for barring the pass-on defense was the Court's concern that only direct purchasers would have a sufficient incentive to bring an action.[24] The Court in Illinois Brick applied this reasoning to the opposite situation: to bar indirect purchasers from bringing a claim under the Sherman Act.[25] The General Assembly was undoubtedly aware of this long-standing interpretation of the Sherman Act when it adopted KRS 367.175.

Arnold and Hectus next contend that KRS 367.175, unlike the Sherman Act, permits indirect purchasers to bring an action for anti-trust violations. The Consumer Protection Act defines the words "trade" and "commerce" to mean

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[22] 392 U.S. 481, 20 L. Ed. 2d 1231, 88 S. Ct. 2224 (1968).

[23] Id., at 492-493. 20 L. Ed. 2d at 1241.

[24] Id., at 494. 20 L. Ed. 2d at 1241-42.

[25] *See also* Kansas v. Utilicorp United, Inc., 497 U.S. 199, 11 L. Ed. 2d 169, 110 S. Ct. 2807 (1990).

> the advertising, offering for sale, or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value, and shall include any trade or commerce *directly or indirectly* affecting the people of this Commonwealth.(*Emphasis Added*)

In addition, KRS 466.070 permits a person injured by the violation of any statute to recover from the offender such damages as he or she sustained by reason of the violation. Based upon these two statutes, Arnold and Hectus claim that they are entitled to bring an action for damages under KRS 367.175.

The provisions cited by Arnold and Hectus do not afford the standing which they claim. First, the definition of the terms "trade" and "commerce" uses the phrase "directly or indirectly" to define the scope of the Consumer Protection Act's jurisdiction. Thus, the Act applies to any "trade or commerce" which directly or indirectly affects the people of this Commonwealth. The definition does not purport to define the class who are entitled to bring an action under the Act.[26]

Furthermore, the Consumer Protection Act does not expressly afford civil remedies to private plaintiffs for violations of KRS 367.175.[27] Where the statute both declares the

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[26]KRS 367.175 prohibits monopolization of "trade or commerce in this Commonwealth." The trial court took the position that statute creates a cause of action only for conduct which occurs wholly within this state. We decline to reach the merits of this issue because it is not necessary to the holding of this case.

[27]In contrast, a number of states expressly allow indirect purchasers to bring an action for anti-trust violations. *See e.g* Ala. Code § 6-5-60(a); Cal. Bus. & Prof. Code § 16750(a); D.C. Code § 28-4509(a); Haw. Rev. Stat. § 480-14(c); 740 Ill. Comp. Stat. 10/7; Kan. Stat. Ann. § 50-161(b); Md. Com. Law Code § 11-209(b)(2)(ii); Mich Comp. Laws § 445.778(8); Minn. Stat § (continued...)

unlawful act and specifies the civil remedy available to the aggrieved party, the aggrieved party is limited to the remedy provided by the statute.[28] Civil money penalties for violations of KRS 367.175 are available, but only on petition of the Attorney General.[29]

KRS 446.070 provides a private right of action for anyone injured by the violation of any statute. However, this statute merely codifies the common law concept of negligence *per se*. It applies only if the alleged offender has violated a statute and the plaintiff was in the class of persons which that statute was intended to protect.[30] KRS 367.175 is part of the Consumer Protection Act. As consumers, Arnold and Hectus are within the general class which the Act was designed to protect.[31]

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[27](...continued)
325D.57; Miss. Code § 75-21-9; S.D. Codified Laws § 37-1-33 ; Wis. Stat. § 133.18(1)(a). A number of other states have adopted statutes which allow "any person" who has been injured or damaged by an anti-trust violation to bring an action for damages. *See e.g.* Colo. Rev. Stat. § 6-4-108; Mo. Rev. Stat. § 416.121; N.C. Gen. Stat § 75-16; Tenn. Code Ann.§ 47-25-106; Wash. Rev. Code § 19.86.090. While these statutes do not expressly allow indirect purchasers to bring an action for damages, appellate courts in North Carolina and Tennessee have held that Illinois Brick does not apply to actions by indirect purchasers under their anti-trust laws. Hyde v. Abbott Laboratories, Inc., 123 N.C. App. 572, 473 S.E.2d 680 (1996) and Blake v. Abbott Laboratories, Inc., 1996 Tenn. App. LEXIS 184 (1996). But conversely, other state appellate courts have interpreted very similar statutes as prohibiting actions by indirect purchasers. *See* Duvall v. Silvers, Asher, Sher & McLaren, 998 S.W.2d 821 (Mo. App., 1999); Blewett v. Abbott Laboratories, 86 Wash. App. 782, 938 P.2d 842 (1997); and Stifflear v. Bristol-Myers Squibb Co., 931 P.2d 471 (Colo. App., 1996).

[28] Grzyb v. Evans, Ky., 700 S.W.2d 399, 401 (1985).

[29] KRS 367.990(8).

[30] Davidson v. American Freightways, Inc., Ky. 25 S.W.3d 94, 99-100 (2000).

[31] In KRS 367.120(1), the legislative intent of the Consumer Protection Act is set out as (continued...)

But it is not clear that they are within the class of persons which KRS 367.175 was designed to protect.

Yet even if they are, they remain indirect purchasers. Arnold and Hectus agree that they have not been directly injured by Microsoft's conduct. KRS 446.070 does not give a right of action to every person against any one violating a statute, but only to persons suffering injury as the direct and proximate result thereof, and then only for such damage as they may sustain.[32]

Arnold and Hectus contend that KRS 446.070 allows a person who has been indirectly injured to bring an action for damages based upon the violation of a statute. In State Farm Mutual Automobile Insurance Co. v. Reeder,[33] the Kentucky Supreme Court recognized that KRS 446.070 allows a third party to bring a cause of action based upon a violation of the Unfair

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[31](...continued)
follows:

> The General Assembly finds that the public health, welfare and interest require a strong and effective consumer protection program to protect the public interest and the well-being of both the consumer public and the ethical sellers of goods and services; toward this end, a Consumers' Advisory Council and a Division of Consumer Protection of the Department of Law are hereby created for the purpose of aiding in the development of preventive and remedial consumer protection programs and enforcing consumer protection statutes.

[32] Shields v. Booles, 238 Ky. 673, 38 S.W.2d 677, 681 (1931).

[33] Ky. 763 S.W.2d 116 (1989).

Claims Settlement Practices Act (UCSPA).[34] Even though the injured third party was not in direct privity with the insured or the insurer, the Court held that the third party had standing under KRS 446.070 to bring an action based upon the UCSPA,

However, in Reeder, the Court held that the Insurance Code was designed to protect not only the insured party, but also persons who are entitled to recover from the insured. Under the UCSPA, an insurance company is required to deal in good faith with a claimant, whether an insured or a third-party, with respect to a claim which the insurance company is contractually obligated to pay.[35] The breach of that duty results in a direct injury to the third party. Consequently, Reeder does not hold that a party who has only been indirectly injured by the violation of a statute may bring an action under KRS 446.070.

Arnold and Hectus also argue that they have privity with Microsoft by virtue of the EULA, and therefore are direct buyers. Thus, they assert that they have standing to bring an action against Microsoft under Illinois Brick. The trial court's reasoning rejecting this argument is sound, and we adopt the following portion of the trial court's opinion:

> Before analysis of this issue, a review of the purpose and effect of Microsoft's licensing scheme as postulated by Plaintiffs is warranted.
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> 'Under the federal copyright law, the owner of a particular copy . . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy. This is known as

[34] KRS 304.12-230.

[35] Davidson v. American Freightways, Inc., 25 S.W.3d at 100.

> the "first sale doctrine." Under that doctrine, if Microsoft were to sell copies of Windows 98 to any person or entity, those sales would terminate Microsoft's authority to restrict sale or rental of those copies.'[36] . . . The consequence would be that after one copy of software were sold (as opposed to licensed) the buyer could now sell copies to anyone, (or just post it on the internet for free and legal downloading by the rest of the world).
>
> 'If Microsoft relinquished its copyright control of Windows 98 by selling copies, then Microsoft could not maintain its own monopoly pricing of Windows 98. . . . As to Windows 98, Microsoft's chain of distribution culminates with its EULA that directly binds consumers who use that software. The EULA is thus the culmination and an essential aspect of Microsoft's use of federal copyright law to prevent erosion of its monopoly pricing of Windows 98.'[37] . . .
>
> Plaintiff's concede that Microsoft is entitled to copyright protection but, because they are unlawful monopolists, and because they used copyright law to protect that monopoly, their licensing scheme is subject to scrutiny. 'If Microsoft were not an unlawful monopolist, its licensing scheme would not be open to question.'
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> The Court is not distracted by the word 'scheme.' A scheme was once a plan or an idea. But the word has taken on a sinister overtone since its adoption in political circles. It is usually preceded by the word 'risky.'
>
> Microsoft's licensing scheme is just a licensing agreement. It is similar to the licensing agreement all software manufacturers require and is a product of the wording of federal copyright laws as opposed to a special contractual relationship that provides some unique benefit to Microsoft. The licencing agreement is merely a reiteration that in return for using Microsoft's copyrighted intellectual property, the user is not going to infringe on Microsoft's copyright. It is a license to

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[36] *Quoting* Plaintiffs' Memorandum In Opposition to Defendant's Motion to Dismiss, Record on Appeal (ROA) at 738-777, p. 27.

[37] *Quoting* Id. at 28.

> use the product in perpetuity, in return for a single fixed payment. It is the functional equivalent of a sale. The license does not create a legal relationship where the parties are now in privity encompassing all of Microsoft's activities, nefarious or otherwise. Indeed, it would be hard to assess the scope of such a policy on other forms of licenses.[38]

Arnold and Hectus also argue that there is no basis for applying Illinois Brick based upon the unique circumstances of this case. The Court in Illinois Brick reasoned that allowing an indirect purchaser to recover under the Sherman Act would create a risk of double liability for anti-trust defendants because the direct purchaser would still be able to recover the full amount of the overcharge.[39] Arnold and Hectus contend that there is no risk of double recovery in this case because the direct purchasers (retailers and OEMs) have not brought an action against Microsoft.

In addition, the Court in Illinois Brick noted the difficulty of tracing the amount of the overcharge to the end user.[40] However, the Court suggested that an indirect purchaser may still recover under the Sherman Act in circumstances where the effect of the overcharge can be determined "without reference to the interaction of supply and demand that complicates the determination in the general case."[41] Arnold and Hectus assert

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[38] Opinion and Order, July 21, 2000, ROA at 1402-20, pp. 7-8.

[39] 431 U.S. 730-31, 52 L. Ed. 2d at 715-16, 97 S. Ct. at 2067

[40] Id. at 731, 52 L. Ed. 2d at 716, 97 S. Ct. at 2067.

[41] Id. at 736, 52 L. Ed. 2d at 719, 97 S. Ct. at 2070.

that their claims do not present difficult problems of tracing and apportionment.

We find these arguments unconvincing. A recovery by indirect purchasers such as Arnold and Hectus would still leave the direct purchasers free to bring an action against Microsoft for the same anti-trust violations. Thus, Microsoft remains subject to the risk of double recovery. Likewise, we find no support for Arnold and Hectus's assertion that it will not be difficult to trace the effect of Microsoft's overcharge to the price which they paid for Windows 98. To the contrary, as noted by the trial court, Microsoft's monopolistic behavior was directed at business rivals, not at consumers. Any calculation of the damages suffered by the ultimate users of the product would entail the very sort of complex assumptions which the Court in Illinois Brick sought to avoid. As the trial court concluded:

> Plaintiffs may feel that Microsoft's behavior has inhibited others from entering the market. Maybe so. The essence of that behavior has been predatory pricing to keep potential rivals out. Plaintiffs are the beneficiaries, not the victims.
>
> To postulate that such predatory action creates future injury is speculation, and not suitable for judicial remedy in this action.
>
> In summary, Microsoft may have done wrong, but not to these Plaintiffs.[42]

The trial court also dismissed the claims brought by Arnold and Hectus under KRS 367.170. That statute provides that "[u]nfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." The trial court concluded that KRS 367.170 does not

[42] Opinion and Order, July 21, 2000, pp. 17-18.

apply to the monopolistic practices alleged in the complaint. Arnold and Hectus argue that they are entitled to bring their claims against Microsoft under this section based upon the warranty provisions in the EULA. Furthermore, they contend that Microsoft's monopolistic pricing behavior constitutes the sort of conduct which KRS 367.170 was designed to prevent.

We disagree with both contentions. First, the legislature specifically provided a remedy in KRS 367.175 for monopolistic practices. As the more specific section, KRS 367.175 controls over the more general provisions of KRS 367.170.[43]

Furthermore, KRS 367.170 does not allow a person who is not in privity with the seller or lessor to bring an action for violations of the statute.[44] The Consumer Protection Act is remedial legislation enacted to give consumers broad protection from illegal actions.[45] However, to maintain an action alleging a violation of the Act, an individual must fit within the protected class of persons defined in KRS 367.220. That section allows any person who "purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by KRS 367.170,"

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[43] Withers v. University of Kentucky, Ky., 939 S.W.2d 340, 345 (1997).

[44] Skilcraft Sheetmetal, Inc. v. Kentucky Machinery, Inc., Ky. App., 836 S.W.2d 907, 909 (1992).

[45] Stevens v. Motorists Mutual Insurance Co., Ky., 759 S.W.2d 819, 821 (1988).

to bring an action against the seller or lessor. A person who is not in privity with the seller is not within the class of persons which the Consumer Protection Act was designed to protect.

The EULA sets out the scope of Microsoft's warranty of Windows 98 to the end user. Arnold and Hectus have not brought any claims based upon that warranty, nor do their claims arise out of the warranty. We agree with the trial court that the warranty does not create privity with Microsoft for all purposes.

In conclusion, we agree with the trial court that indirect purchasers such as Arnold and Hectus are not entitled to bring an action for anti-trust violations under KRS 367.175. Rather, the holding of Illinois Brick interpreting the Sherman Act is equally applicable to KRS 367.175. Similarly, Arnold and Hectus cannot bring an action under that section based upon KRS 446.070 or through the warranty provisions of the EULA. Finally, we agree with the trial court that Arnold and Hectus have failed to state a claim under KRS 367.170. Therefore, the trial court properly dismissed the complaint.

Accordingly, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

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