Microsoft file PL + Order 3/26

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STATE OF MAINE
CUMBERLAND, ss

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CUMBERLAND, SS.
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SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-99-709
& CV-99-752

IN RE: MICROSOFT ANTITRUST LITIGATION

ORDER ON DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

The defendant moves for judgment on the pleadings. See M.R. Civ. P. 12(c); Cunningham v. Haza, 538 A.2d 265, 267 (Me. 1988). The defendant argues that because its allegedly wrongful conduct took place outside of Maine, the plaintiffs have failed to state a claim for which relief can be granted under Maine's antitrust statute. 10 M.R.S.A. §§ 1101 et seq (1997). For the following reasons, the defendant's motion is denied.

STATUTORY LANGUAGE

Maine's Mini-Sherman Act provides

> Every contract, combination in the form of trusts or otherwise, or conspiracy, in restraint of trade or commerce in this State, is declared to be illegal . . . .

10 M.R.S.A. § 1101 (emphasis added). Similarly, § 1102 provides

> Whoever shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce of this State shall be guilty of a Class C crime.

10 M.R.S.A. § 1102 (emphasis added).

Statutory construction is a matter of law. Home Builders Ass'n of Maine, Inc. v. Town of Eliot, 2000 ME 82, ¶ 4, 750 A.2d 566, 569. The plain meaning of the statutory language is the primary means of determining legislative intent. Id. In

these two statutory sections, the phrases "in this State" and "of this State" modify "trade or commerce" and not the illegal conduct. See OCE Printing Sys. USA, Inc. v. Mailers Data Servs., Inc., 760 So.2d 1037, 1041 (Fla. Dist. Ct. App. 2000) (interpreting Florida antitrust statute[1] to regulate trade or commerce that occurs in Florida regardless where the contract, conspiracy or monopoly occurs); Health Consultants, Inc. v. Precision Instruments, Inc., 527 N.W.2d 596, 606 (Neb. 1995) (holding that Nebraska antitrust statute[2] applies to extraterritorial conduct when the monopolistic conduct affects consumers within the state); see also In re Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 613 (7th Cir. 1997) (holding that Alabama antitrust statute[3] is not limited to purely intrastate commerce).[4] In considering the

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[1]The Florida statute provides: "Every contract, combination, or conspiracy in restraint of trade or commerce in this state is unlawful." FLA. STAT. ch. 542.18 (1997).

[2]The Nebraska statute provides: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, within this state, is hereby declared to be illegal." NEB. REV. STAT. § 59-801 (West, WESTLAW through 2000 Regular Sess.).

[3]The Alabama statute provides: "Any person, firm, or corporation injured or damaged by an unlawful trust, combine or monopoly, or its effect, direct or indirect, may, in each instance of such injury or damage, recover the sum of $500 ...." ALA. CODE § 6-5-60 (West, WESTLAW through 2000 Regular Sess.).

[4]Cases relied on by the defendant can be distinguished. The 1903 Illinois case cited involved discussion of an Illinois statute passed in 1891 and since repealed. The court confined the statute to "its legitimate constitutional scope" and determined that it would exclude acts connected to any pool, trust, or combination formed outside the state "and which would violate the anti-trust statute of the United States." See, e.g., Akin v. Butler St. Foundry & Iron Co., 66 N.E. 349, 353 (Ill. 1903); 1891 Ill. Laws 121 1/2, 301 repealed by 740 ILL. COMP. STAT. 10/7.9 (1993).

In Arnold v. Microsoft, the court noted that the Kentucky legislature had not enacted legislation covering indirect purchasers. The court was unwilling to infringe on the legislative prerogative: "[a]nticompetitive acts performed largely or totally out of state, against third parties, causing injury to Kentucky residents ... do not warrant such judicial intervention." Arnold v. Microsoft, No. 00-CI-00123, slip op. at 5-6 (Jefferson Circuit Court, Division Eleven July 21, 2000). The court also noted that the

Alabama antitrust statute, the Seventh Circuit observed that

> [i]f the statute is limited today as it once was to commerce that is not within the regulatory power of Congress under the commerce clause, it is a dead letter because there are virtually no sales, in Alabama or anywhere else in the United States, that are intrastate in that sense. Other states read their antitrust statutes to reach what is now understood to be interstate commerce. The reading is constitutionally permissible and we are given no reason to suppose that Alabama would buck this trend and by doing so kill its statute.

Id. at 613 (citations omitted).

LEGISLATIVE HISTORY

Because the statutory language is not ambiguous, it is unnecessary to examine other indicia of legislative intent. See Home Builders, 2000 ME 82, ¶ 4, 650 A.2d at 569. If the legislative history is examined, however, it supports the conclusion that the plaintiffs can proceed with their claim. It is clear that the initial legislative concern was primarily with the problem of intrastate monopolies because federal law could not reach such illegal conduct. See, e.g., R.S. ch. 266, § 1 (1899); Legis. Rec. 55-56 (1913) (statement of Senator Hersey); see also 15 U.S.C.A. § 1 (West 1997); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 247 (1899).

The original statute provided

> It shall be unlawful for any firm or incorporated company, or any number of firms or incorporated companies, or any unincorporated

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statutory language, "[e]very contract . . . or conspiracy, in restraint of trade or commerce in this Commonwealth shall be unlawful," required that the bad acts must have occurred in Kentucky. Id. slip op. at 13.

In Abbott Laboratories, the court examined the legislative history since 1891 of Alabama's antitrust statutes and concluded that the reach of the statutes was no greater in 1999 than when enacted. Abbott Laboratories v. Durrett, 746 So.2d 316, 339 (Ala. 1999). The court did not rely on the language of the statute. See id. at 318.

> company, or association of persons or stockholders, organized for the purpose of manufacturing, producing, refining or mining any article or product which enters into general use or consumption by the people, to form or organize any trust, or to enter into any combination of firms . . . .

R.S. ch. 266, § 1 (1899). The legislature subsequently enacted the original versions of sections 1101 and 1102 in 1913. See R.S. ch. 106, § 1 (1913).

Because the statute has since been addressed by the legislature, the inquiry is not confined to circumstances in 1913. See Pelletier v. Fort Kent Golf Club, 662 A.2d 220, 223 n.5 (Me. 1995) (legislative history of prior statute does not control interpretation of statutory language subsequently enacted). Although the language of sections 1101 and 1102 remains as enacted in 1913, the subsequent enactments must be considered. See Estate of Jacobs, 1998 ME 233, ¶ 4, 719 A.2d 523, 524 (interpreting statute requires consideration of "the whole statutory scheme of which the section at issue forms a part so that a harmonious result, presumably the intent of the Legislature, may be achieved").

In 1977, the legislature amended the Maine antitrust act to make a violation of the act a Class C crime and to provide for treble damages. See 10 M.R.S.A. §§ 1101, 1102 & 1104. As stated by one legislator, the purpose of these amendments was to "give greater protection to the small businessmen against the out-of-state corporations . . . . " 1 Legis. Rec. 633 (1977) (statement of Senator Conley); see id. at 634 (statement of Senator Merrill).

Between the enactment date and the effective date of that amendment, the U.S. Supreme Court determined that the Sherman Act did not authorize indirect

purchaser lawsuits. See Illinois Brick Co. v. Illinois, 431 U.S. 720, 729 (1977). In 1989, the U.S. Supreme Court determined that states could authorize indirect purchaser lawsuits in the context of state antitrust statutes. See California v. ARC America Corp., 490 U.S. 93, 103 (1989).

In Maine, the passage of the Illinois Brick repealer in 1989 provided that new cause of action for indirect purchasers. 10 M.R.S.A. § 1104(1). Its passage reveals a legislative intent to fill the gap outlined in Illinois Brick that prohibited indirect purchaser suits and to reach interstate conduct affecting trade or commerce in Maine. See L.D. 1653, Statement of Fact (114th Legis. 1989) (specifically mentioning California v. ARC America Corp and noting that a state may enact a law making the manufacturer liable to the indirect purchaser); see also Emergency One, Inc. v. Waterous Co., Inc., 23 F. Supp. 2d 959, 964 (E.D. Wis. 1998) ("[T]he best indication that state legislators . . . meant to hold interstate actors accountable in certain situations . . . may be . . . the much-discussed inclusion of an indirect purchaser claim.").

In their complaint, the plaintiffs have stated a claim for which relief can be granted under Maine's antitrust statutes. See Cunningham, 538 A.2d at 267.

The entry is

> The Defendant's Motion for Judgment on the Pleadings is DENIED.

Date: March 24, 2001

Nancy Mills
Justice, Superior Court

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December 5, 2000

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Re: IN RE MICROSOFT
ANTITRUST LITIGATION
Docket No.'s CV-99-709 & CV-99-752

Dear Ms. Bourget:

Enclosed for filing in the above case please find the Maine Attorney General's Application to Intervene and Memorandum of Law as *Amicus Curiae*, with attachments. Thank you for your kind cooperation.

Sincerely,

FRANCIS ACKERMAN
Chief, Public Protection Division

FA/kesp
Enclosures
pc: Robert Mittel, Esq.
Joanne Cicala, Esq.
Randall Weill, Esq.
David B. Tulchin, Esq.

STATE OF MAINE
CUMBERLAND, SS.

SUPERIOR COURT
CIVIL ACTION
DOCKET NOS. CV-99-709
& CV-99-752

IN RE MICROSOFT ANTITRUST LITIGATION	)	APPLICATION OF MAINE ATTORNEY GENERAL TO INTERVENE AS *AMICUS CURIAE*

The Maine Attorney General now applies to intervene in this litigation pursuant to M.R.Civ.P. Rule 24 for the limited purpose of filing a memorandum of law as *amicus curiae* to address a novel issue raised by Defendant Microsoft Corporation's pending Motion for Judgment on the Pleadings. Microsoft Corporation challenges the applicability of Maine's mini-Sherman Act, 10 M.R.S.A. §§ 1101 *et seq.*, to conduct which, while occurring entirely outside Maine's borders, is alleged to have caused anticompetitive effects within the State.

The Attorney General, as the agency charged with antitrust enforcement duties under Maine law, respectfully begs leave to be heard on this issue as *amicus curiae*. Microsoft's argument contradicts a decade of established jurisprudence. Moreover, if adopted as the law of this State, Microsoft's interpretation of the statute would drastically narrow the scope of the state antitrust enforcement, as well as the scope of antitrust relief available to the State and Maine consumers. The importance of the issue addressed, and the Attorney General's interest therein, appear more fully in the memorandum of law submitted herewith for the Court's consideration.

Dated: 12/5/00

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STATE OF MAINE
CUMBERLAND, SS.

SUPERIOR COURT
CIVIL ACTION
DOCKET NOS. CV-99-709
& CV-99-752

IN RE MICROSOFT ANTITRUST LITIGATION	)	**MAINE ATTORNEY GENERAL'S MEMORANDUM OF LAW AS *AMICUS CURIAE***

The Maine Attorney General begs leave to submit this memorandum of law as *amicus curiae* to address a novel issue raised by Microsoft Corporation ("Microsoft") in the context of its pending Motion for Judgment on the Pleadings.

Microsoft challenges the applicability of Maine's mini-Sherman Act, 10 M.R.S.A. §§ 1101 *et seq.*, to conduct which, while physically occurring outside Maine's borders, is nevertheless alleged to have caused anticompetitive effects within the State. Indeed, Microsoft maintains that only conduct of a purely intrastate nature falls within the purview of the statute. This position, however, would contradict more than a decade of established state antitrust jurisprudence, and is founded on erroneous premises.

The Attorney General is the agency charged with antitrust enforcement duties under Maine's mini-Sherman Act. In addition, the Attorney General represents the State in its proprietary capacity in antitrust suits, and represents Maine consumers in such suits in his role as *parens patriae*. We view this issue as a matter of deep concern. If Microsoft's interpretation of the statute should prevail, the scope of the state antitrust enforcement, as well as the scope of antitrust relief available to the State and Maine consumers, would narrow drastically.

I. INTRODUCTION.

Plaintiffs in this class action are Maine purchasers of computer systems manufactured by Microsoft. In their Complaint, Plaintiffs allege that they have paid higher prices for Microsoft products than they otherwise would have as a result of certain conduct by Microsoft which, they charge, constitutes both unreasonable restraint of trade and monopolization in violation of the Maine mini-Sherman Act, 10 M.R.S.A. §§ 1101 & 1102. Although the Complaint does not say so, the lawsuit is brought pursuant to 10 M.R.S.A. § 1104, which provides, in pertinent part, that "[a]ny person ... injured **directly or indirectly** in its business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by section 1101, 1102 ... may sue for the injury in a civil action" (emphasis added). The Plaintiff class in this action presumably consists largely (if not entirely) of indirect purchasers (*i.e.*, those who purchased Microsoft systems from third parties rather than directly from Microsoft).

As defined in the Complaint, the Plaintiff class is limited to Maine-domiciled individuals and entities. Further, Plaintiffs' proof may be expected to show that Microsoft products are widely available for purchase in Maine, and that at least some (no doubt most) of Plaintiffs' purchases of Microsoft products were consummated in Maine. If it is assumed, for purposes of the pending motion, that the allegations of the Complaint are true, there appears to be no dispute between the parties with respect to two propositions: (1) the conduct attributed to Microsoft occurred entirely outside Maine; and (2) that conduct resulted in anticompetitive effects harmful to purchasers within the State.

Against this background, Microsoft's pending Motion for Judgment on the Pleadings raises a single issue. Microsoft argues that Maine's mini-Sherman Act by its terms does not

apply to conduct which occurs outside the State, even if the anticompetitive harm resulting from that conduct is felt within the State.

In advancing this argument, Microsoft relies straightforwardly on the statutory provisions which respectively prohibit (1) "every contract, combination ... or conspiracy, in restraint of trade or commerce **in this State**" (§ 1101) (emphasis added); and (2) monopolization (or attempts to monopolize) "any part of the trade or commerce **of this State**" (§ 1102) (emphasis added). Microsoft reads this language to limit the purview of Maine's mini-Sherman Act to conduct which occurs entirely within the State. There is no contention that this interpretation of the statute is required by any federal constitutional or statutory provision. Instead, Microsoft relies exclusively on the language and legislative history of the statute itself. The issue presented is therefore one of simple statutory construction.

In the sections below, we explain that the plain language of the statute clearly authorizes suits, like the present litigation, by Maine indirect purchasers damaged by a manufacturer's conduct occurring outside the State. Under accepted canons of statutory construction, that plain language controls. Even if it is nevertheless deemed appropriate to excavate the legislative history of the relevant enactments, we submit that nothing in that history compels a contrary result. Moreover, the Attorney General's longstanding interpretation of a statute he is mandated to enforce, which here squarely supports Plaintiffs' position, is entitled to some measure of judicial deference. Finally, it bears consideration that a grant of Microsoft's pending motion would drastically narrow the scope of state antitrust enforcement as well as the scope of antitrust relief available to the State and to Maine consumers.

II. THE PLAIN LANGUAGE OF MAINE'S MINI-SHERMAN ACT AUTHORIZES SUITS BY MAINE INDIRECT PURCHASERS DAMAGED BY A MANUFACTURER'S CONDUCT OUTSIDE THE STATE.

The language of Maine's mini-Sherman Act is unambiguous. "Any person injured directly or indirectly" by conduct violative of sections 1101 or 1102 "may sue for the injury." Under section 1101

> Every contract, combination ... or conspiracy, in restraint of trade or commerce in this State is declared to be illegal.

Clearly, the sale of computer systems to individuals and entities domiciled in Maine, especially when such sales are consummated in Maine, constitutes trade or commerce "in this State." Moreover, regardless of the location where it is entered upon, a contract or combination which damages Maine indirect purchasers by causing them to pay supracompetitive prices for computer systems certainly affects trade and commerce in this State adversely, *i.e.*, restrains it. Black's Law Dictionary (6th ed. 1990) 1314 (defining "restraint of trade" to include practices which "hamper or obstruct the course of trade or commerce as it would be carried on if left to the control of natural economic forces," including practices which "affect prices ... to [the] detriment of purchasers or consumers of goods"; citing, *inter alia, U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 [1940]).

Similarly, section 1102 unambiguously declares:

> Whoever shall monopolize or attempt to monopolize or combine and conspire with any other person or persons to monopolize any part of the trade or commerce of this State shall be guilty of a Class C crime.

Again, it can hardly be denied that the sale of computer systems in Maine constitutes a part of the trade or commerce "of this State." Moreover, as in section 1101, the phrase "in this state" or "of this state" modifies "trade or commerce" rather than the targeted conduct.

In their Complaint, Plaintiffs allege monopolization of a worldwide market, by means of conduct which, for example, inhibited the development of competing products. Amended Class Action Complaint ¶¶ 19, 26. Maine is, of course, part of this worldwide market. Surely, wherever perpetrated, conduct which inhibits competing products from reaching this worldwide market, including Maine, operates to monopolize a part of the trade or commerce "of this State."

Accordingly, the plain language of Maine's mini-Sherman Act, on its face, authorizes suits by Maine indirect purchasers damaged by a manufacturer's conduct outside the State. The situs of the conduct complained of is quite irrelevant, provided that the conduct has the effect of restraining or monopolizing trade or commerce in Maine. Put differently, conduct that restrains or monopolizes a wholesale market also inevitably restrains or monopolizes downstream retail markets. Since restraint and monopolization of trade and commerce in Maine is squarely alleged on the face of the Complaint, Microsoft's motion necessarily fails.

Ignoring the plain language of the statute, Microsoft's motion is built on a precarious foundation consisting of carefully selected excerpts from the legislative archaeology of various enactments dating back to 1913. This approach is impermissible, since, in the absence of ambiguity, the plain language of the statute is controlling. *Home Builders Association of Maine, Inc. v. Town of Eliot*, 2000 ME 82, 750 A.2d 566, 569 (court will look to legislative history only where ambiguity exists); *Dunelawn Owners Association v. Gendreau*, 2000 ME 94, 750 A.2d 591, 595 (where plain language resolves issue, court will not attempt to infer contrary legislative intent). However, even if Microsoft's resort to legislative history were appropriate, it would still be unavailing, for the reasons explained below.

III. THE LEGISLATIVE HISTORY OF MAINE'S MINI-SHERMAN ACT DOES NOT IN ANY EVENT SUPPORT MICROSOFT'S RESTRICTIVE INTERPRETATION OF ITS APPLICABILITY.

Microsoft's attempt to limit the applicability of Maine's mini-Sherman Act to purely intrastate conduct is founded primarily on excerpts from legislative debate which preceded the original enactment of sections 1101 and 1102 in 1913. The Legislature has, of course, revisited the statute on several subsequent occasions.

The present litigation is an indirect purchaser class action, brought pursuant to an amendment to section 1104 which was passed in 1989. P.L. 1989 ch. 367. In construing the statute as a harmonious whole, *see Estate of Jacobs*, 1998 ME 233, 719 A.2d 523, 524, it behooves us to begin by examining the intent of this more recent enactment.

A. Maine's *Illinois Brick* Repealer Was Broadly Intended To Afford Redress To Maine Indirect Purchasers For Overcharges Traceable to Manufacturer Misconduct Outside, As Well As Within the State.

The indirect purchaser amendment, enacted without floor debate in 1989, "amend[ed] Maine law to provide Maine citizens and corporations with a right to sue a manufacturer for damages suffered as a result of a manufacturer's violation of state antitrust laws, regardless of whether the citizens or corporations are direct or indirect purchasers from the defendant." L.D. 1653, Statement of Fact (114th Legis. 1989). Consistent with this expansive explanation, nothing in the enactment itself, or in the supporting presentation of Commissioner (now Senator) Susan Collins suggested for a moment that the purpose was to provide a remedy only for restraints or monopolizations of trade accomplished by means of purely intrastate conduct.

To the contrary, both the Statement of Fact and the Commissioner's testimony[1] expounded the significance of the indirect purchaser amendment in terms of its jurisprudential context. Specifically, a decade prior to the enactment, the U.S. Supreme Court had ruled that indirect purchaser lawsuits were not authorized by the federal Sherman Act. *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Thus, while direct purchasers could sue under federal law for antitrust injury, indirect purchasers damaged by pass-through overcharges could not. Although a few states legislatively authorized indirect purchaser suits under state antitrust statutes by means of so called "*Illinois Brick* repealers", doubts persisted as to the constitutionality of the repealer provision. Those doubts were resolved by *California v. ARC America Corp.*, 490 U.S. 93 (1989), which made clear that states were free to provide redress to indirect purchasers in the context of state antitrust statutes.

As both the Statement of Fact and the Commissioner's testimony emphasize, L.D. 1653 was proposed and enacted in response to *ARC America's* invitation, as Maine's *Illinois Brick* repealer. Very simply, the new law was intended to provide to Maine indirect purchasers the remedy denied them under the federal Sherman Act by *Illinois Brick*, namely, a right to sue manufacturers to recover overcharges incurred as an indirect result of the manufacturer's anticompetitive conduct.

If the bill's sponsors or Commissioner Collins had believed they were proposing to provide a remedy to indirect purchasers which permitted recovery of overcharges only where those overcharges were incurred as a result of anticompetitive conduct perpetrated by businesses or persons physically located in Maine, such a drastic limitation would surely have been explicitly noted. Indeed, with manufacturing in Maine in steep decline over the past half-

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[1] Copies of the L.D. and the Commissioner's testimony are attached.

century, it seems fair to suggest that such a limitation might well have reduced the utility of the amendment to the vanishing point.

In amending section 1104, then, the 1989 Maine Legislature obviously intended to allow suits by or on behalf of Maine indirect purchasers against out-of-state manufacturers on the basis of their conduct outside (as well as within) the State, to the extent that its harmful effects were felt by persons within Maine. Since the Legislature enacted no simultaneous amendments to sections 1101 and 1102, it must have believed that these provisions were already broad enough to reach such extraterritorial conduct.

Moreover, it is equally clear that this belief was already current at least a dozen years earlier, when the Legislature acted to revitalize then-moribund state antitrust enforcement by increasing the penalties which could be brought to bear for violation of sections 1101 and 1102. P.L. 1977 ch. 175, enacting L.D. 347 as amended (108th Legis. 1977). As Senator Conley stated in support of the bill: "This law is going to give greater protection to the small businessman against the out-of-state corporations, which are the least likely to share our ethics." Legis. Rec. 633 (1977).[2] Microsoft's argument is thus at odds not only with the plain language of sections 1101 and 1102, but also with the Legislature's own understanding of the scope of these provisions, as evidenced in the legislative history of subsequent amendatory enactments, first in 1977, then again in 1989.

Importantly, *Arnold v. Microsoft*, Jefferson Circuit Court, Division Eleven, No. 00-CI-00123 (Opinion and Order dated July 21, 2000) (appended to Microsoft brief at Tab G), cited by Microsoft, actually *supports* our contention that the primary purpose of indirect purchaser

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[2] Copies of these materials are attached to Microsoft's Motion.

statutes is to expand the scope of state antitrust law to include conduct with extraterritorial origins. In *Arnold*, Judge McDonald-Burkman clearly understood that if Kentucky had enacted an *Illinois Brick* repealer statute such as Maine's, private plaintiffs would have been able to sue for "[a]nticompetitive acts performed *largely or totally out of state, against third parties, causing injury to Kentucky residents* . . . ." *Id.* at 5 (emphasis added). Because Kentucky law (unlike that in Maine) does not expressly authorize indirect purchaser suits, the court dismissed plaintiffs' claim, noting pointedly that the Kentucky legislature had had two decades in which to add indirect purchaser language (as Maine did) but failed to do so. *Id.* This Kentucky case thus confirms the obvious -- that indirect purchaser legislation such as Maine's 1989 amendments are intended to remedy monopolistic conduct at the wholesale level because that conduct inevitably distorts in-state markets, regardless of whether such conduct occurred inside the state or elsewhere.[3]

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[3] In addition to Maine, other states to explicitly repeal the *Illinois Brick* rule to allow private indirect purchaser actions include California, CAL. BUS. & PROF. CODE § 16750(a) (West 1997); Wisconsin, WIS. STAT. ANN. § 133.18(1) (a) (West 1989); New Mexico, N.M. STAT. ANN. § 57-1-3 (Michie 1995); Michigan, MICH. COMP. LAWS § 445.778(2) (1989); Minnesota, MINN. STAT. ANN. § 325D.57 (West 1995); Kansas, KAN. STAT. ANN. § 50-801(b) (1994); South Dakota, S.D. CODIFIED LAWS § 37-1-33 (Michie 1994); the District of Columbia, D.C. CODE ANN. § 28-4509 (1996); and North Dakota, N.D. CENT. CODE ANN. § 51-08.1-08(3)- (4) (1989). Other states have enacted more limited provisions: Illinois, ILL. COMP. STAT. ANN. 10/7(2) (West 1993) (allowing only attorney general suits on behalf of indirect purchasers, *see Gaebler v. New Mexico Potash Corp.*, 676 N.E.2d 228, 221 (Ill. App. Ct. 1996)); Maryland, MD. CODE ANN., COM. LAW § 11- 209(b)(2)(ii) (1990) (allowing government suits); Rhode Island, R.I. GEN. LAWS § 6-36-12(g) (1992) (allowing *parens patriae* action with set-off for previously awarded damages); and Hawaii, HAW. REV. STAT. § 480-14(a), (b) & (c) (1993) (allowing attorney general suits and nonclass indirect purchaser actions for single damages).In addition, some state courts have even interpreted their pre-*Illinois Brick* consumer protection and antitrust statutes to allow private indirect purchaser actions. In some of these cases the allegedly anticompetitive conduct occurred primarily outside the state. *See, e.g., Hyde v. Abbott Labs.*, 473 S.E.2d 680 (N.C. Ct. App.), review denied, 478 S.E.2d 5 (N.C. 1996) (interpreting state counterpart of Sherman Act to authorize indirect purchaser suits); *McLaughlin v. Abbott Labs.*, No. CV 95-0628 (Ariz. Super. Ct. Yavapai Co. July 9, 1996) (same); *Blake v. Abbott Labs.*, 1996-1 Trade Cas. (CCH) ¶ 71,369 (Tenn. Ct. App. Mar. 27, 1996) (same); *Mack v. Bristol-Myers Squibb Co.*, 673 So.2d 100 (Fla. Dist. Ct. App. 1996) (interpreting state deceptive practices act to authorize indirect purchaser suits).

Against this background, Microsoft's heavy reliance on legislative pronouncements concerning the original versions of sections 1101 and 1102, as enacted in 1913, is far from compelling.

B. The Legislative History of the 1913 Enactment Is Ambiguous.

Upon careful examination, the legislative discussion preceding the 1913 enactment does not support Microsoft's contention that the Legislature clearly intended to exclude from its purview conduct by entities not located in Maine even where the inevitable results of that conduct significantly impact Maine consumers. Certainly it is possible, as Microsoft has done, to highlight carefully selected excerpts inferentially supporting its restrictive interpretation of the statute. However, it is significant that all of the legislative debate cited by Microsoft focussed on a proposal to conduct an investigation of the coal trade in Maine, and preceded the drafting (and therefore could not have construed) the language of the bill which was ultimately enacted and codified in sections 1101 and 1102. The unexpurgated record, accordingly, presents a much more complex, finely nuanced picture than the one painted by Microsoft. Ultimately, given its full context, the history of the 1913 enactment supports a more expansive view of the underlying legislative purpose.

Maine's original antitrust law was enacted in 1889, a decade before the federal Sherman Act. P.L. 1889 ch. 266. In pertinent part, this statute provided:

> It shall be unlawful for any firm or incorporated company, or any number of firms or incorporated companies, or any unincorporated company, or association of persons or stockholders, organized for the purpose of manufacturing, producing, refining or mining any article or product which enters into general use or consumption by the people, to form or organize any trust, or to enter into any combination of firms....

By 1913, however, concerns had arisen that this original antitrust provision was too narrow in scope. In particular, a harsh winter and soaring coal prices statewide led Senator Morey of Androscoggin to call for an investigation. Senator Morey presented anecdotal evidence suggesting that the price spikes were caused by a territorial allocation agreement among coal dealers in Maine. Legis. Rec. 53 –54 (1913). Other legislators were skeptical. Senator Stearns of Oxford, for example, believed it far more likely that the high prices Maine was experiencing had their source at the minehead in Pennsylvania, or elsewhere "far beyond the confines of Maine," and thus "far beyond the reach of any investigation which we may be able to have set in motion." In Senator Stearns' view, the logistics and expense of such a far-ranging investigation were "a matter more properly to be handled by the federal government." *Id.* 52.

Senator Hersey of Aroostook was also concerned that Maine's 1889 antitrust law was not broad enough to reach the conduct on which the investigation would focus.

> Coal is not a product that is mined or refined or manufactured in the State of Maine, therefor[e] it does not come under the trust laws of Maine, and [under the 1889 law] we have no authority over any combination that is formed outside the State of Maine for the purpose of mining or manufacturing coal.

Id. 55. Senator Hersey was rightly concerned that, because the 1889 law applied solely to manufacturers, refineries and mining companies, Maine antitrust enforcement could not reach anticompetitive conduct among coal dealers within the State. He also seems to have held the view that the 1889 law could not reach a combination formed outside the state, in all likelihood because the language of the relevant provision took the form of a regulation of the ability of persons within the state to enter into certain types of business organization.

In response to these concerns regarding the limitations of the 1889 law, the Legislature undertook to broaden the scope of state antitrust enforcement. Indeed, in Senator Morey's view,

the central purpose of the proposed investigation was to offer recommendations in this regard. On this basis, he won an expression of "warm support" from Senator Hersey. *Id.* 55 –56.

Accordingly, the investigation was authorized and conducted by a legislative committee chaired by Senator Morey. In its extensive report, the committee concluded:

> [n]ot only the mine owners and middlemen or brokers, but also the retailers, have been sharers in a greater or less degree in this increased cost of coal to the consumer . . . . the statutes of this State prohibiting combinations and agreements in [restraint] of trade are very limited in their scope, and to end of providing adequate legislation to **prevent all future agreements and combination of every kind in the nature of monopolies or in restraint of trade**, your committee presents herewith the accompanying bill . . . .

L.D. 479 (76th Legis. 1913) at 25 (emphasis added).[4] Of concern to the committee, therefore, were combinations among mine owners, middlemen and brokers out-of-state, as well as among retailers within the State. The committee's goal, as far as possible, was "to prevent all future agreements and combinations of every kind in the nature of monopolies or in restraint of trade." From this expansive language, it seems eminently fair to conclude that the legislative purpose in 1913 in enacting the Morey bill, whose language survives today in sections 1101 and 1102, was to broaden and lengthen the reach of Maine antitrust enforcement both within and outside the state. L.D. 464 (76th Legis. 1913), enacted as P.L. 1913 ch. 106.

At a minimum, the unabridged history of these early provisions does not clearly compel the conclusion that the Legislature intended to exclude conduct originating out-of-state. This underscores the wisdom, in this instance, of the rule that resort to legislative history is proper only where the statutory language yields an absurd or illogical result. *Town of Yarmouth v.*

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[4] A copy of the report, with the accompanying legislative debate, is attached to Microsoft's motion.

Moulton, 1998 ME 96, 710 A.2d 252, 254. Of course, no such illogic or absurdity appears here.

IV. THE MAINE ATTORNEY GENERAL HAS CONSISTENTLY INTERPRETED THE MINI-SHERMAN ACT AS APPLICABLE TO CONDUCT OUTSIDE THE STATE WHICH RESTRAINS OR MONOPOLIZES TRADE OR COMMERCE IN MAINE.

The Attorney General is the agency charged with the enforcement of Maine's mini-Sherman Act, 10 M.R.S.A. §§ 1101 *et seq.* The statute may be enforced criminally or civilly. On the civil side, the Attorney General may seek injunctive relief and civil penalties, or may bring an action for damages on behalf of the State in its proprietary capacity, or as *parens patriae* on behalf of Maine indirect purchasers injured as a result of conduct violative of sections 1101 or 1102. Accordingly, the Attorney General's interpretation of the mini-Sherman Act merits some measure of deference. *See Davric Maine Corp. v. Harness Racing Commission*, 732 A.2d 289, 293, 1999 ME 99 (in context of appeal of agency action, rule is that agency interpretation is entitled to great deference, unless statute compels contrary result).

Over the decade since the enactment of Maine's *Illinois Brick* repealer, the Attorney General has consistently interpreted the mini-Sherman Act to apply to extraterritorial conduct which operated to restrain or monopolize trade or commerce in Maine. *See e.g., State of Maine v. Sandoz Pharmaceuticals Corporation*, No. 90 CIV 8065, (S.D.N.Y. Dec. 14, 1990) (copy of Complaint attached – alleging violations of 10 M.R.S.A. §§ 1101 and 1102 on the basis, *inter alia*, of agreements entered into outside Maine between Sandoz, a Delaware corporation and codefendant Caremark, Inc., a California corporation; *see* at ¶¶ 1, 6-7, 40, 76-83); *State of New York v. Reebok International, Ltd.*, No. 95 CIV 3143 (S.D.N.Y. May 4, 1995) (copy of Complaint attached – alleging violations of 10 M.R.S.A. § 1101 on a factual basis which presumably included extraterritorial conduct; *see* at ¶¶ 8-11, 17, 36-37); *State of Maine v.*

American Optometric Association, No. 98-515-CIV-J-21C (M.D. Fla. May 29, 1998) (copy of Complaint attached – alleging violations of 10 M.R.S.A. § 1101 on the basis, *inter alia*, of extraterritorial conduct; *see e.g.* at ¶¶ 15-19, 102, 106, 113, 144-145); *State of Connecticut v. Mylan Laboratories, Inc.*, No. 1:98CV03115 (D.D.C. Aug. 5, 1999) (copy of Amended Complaint joined by Maine Attorney General attached – alleging violations of 10 M.R.S.A. §§ 1101 and 1102 on the basis, *inter alia*, of extraterritorial conduct; *see e.g.* at ¶¶ 8-12, 30, 37, 116-117).

Of the actions cited, *Sandoz* and *Reebok* were settled; while *American Optometric* and *Mylan* are still pending. In *Mylan*, significantly, the court has explicitly ruled that the Attorney General possesses *parens patriae* authority to bring suit under the mini-Sherman Act on behalf of indirect purchasers. *F.T.C. v. Mylan Laboratories, Inc.*, 99 F. Supp.2d 1, 7 (D.D.C. 1999).[5]

Thus, at least since the adoption of Maine's *Illinois Brick* repealer in 1989, the Attorney General has consistently interpreted the mini-Sherman Act as applicable to extraterritorial conduct. In view of the plain language of the statute, as well as the legislative history reviewed above, we submit that this interpretation is reasonable, and should be adhered to by this Court.

A grant of Microsoft's motion, conversely, would drastically restrict the scope of the Attorney General's antitrust enforcement program under the mini-Sherman Act. Essentially, the Attorney General would be empowered to bring suit under the statute only on the basis of purely intrastate conduct. By nullifying Maine's *Illinois Brick* repealer, such a ruling would likewise sharply restrict the scope of antitrust relief available to the State as well as to Maine consumers.

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[5] Although strictly speaking, the issue presented on this motion is one of first impression, it is perhaps not without significance that this Court seems to have tacitly acknowledged the applicability of sections 1101 and 1102 to extraterritorial conduct in the context of an indirect purchaser class action. *Karofsky v. Abbott Laboratories*, CV-95-1009 (Me. Super. Ct., Cum. C'ty, Oct 16, 1997) (Saufley, J.), 1998-1 Trade Cas. ¶ 72,121 (denying class certification on other grounds).

It is worth recalling that under *Illinois Brick*, indirect purchasers have no cause of action under the federal Sherman Act. *California v. ARC America Corp* subsequently harmonized the state and federal systems into a complementary whole, affording relief to indirect purchasers under state law and to direct purchasers under federal law. The interpretation urged by Microsoft would destroy that harmony and leave Maine indirect purchasers who suffer the impact of illegal anticompetitive conduct in the national marketplace without a remedy.

CONCLUSION

For all the foregoing reasons, *amicus curiae* the Maine Attorney General urges the Court to deny Microsoft's Motion for Judgment on the Pleadings.

Respectfully submitted,

Dated: 12/5/00

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STATE OF MAINE
CUMBERLAND, SS.

SUPERIOR COURT
CIVIL ACTION
DOCKET NOS. CV-99-709
& CV-99-752

IN RE MICROSOFT ANTITRUST LITIGATION	)	APPLICATION OF MAINE ATTORNEY GENERAL TO INTERVENE AS *AMICUS CURIAE*

The Maine Attorney General now applies to intervene in this litigation pursuant to M.R.Civ.P. Rule 24 for the limited purpose of filing a memorandum of law as *amicus curiae* to address a novel issue raised by Defendant Microsoft Corporation's pending Motion for Judgment on the Pleadings. Microsoft Corporation challenges the applicability of Maine's mini-Sherman Act, 10 M.R.S.A. §§ 1101 *et seq.*, to conduct which, while occurring entirely outside Maine's borders, is alleged to have caused anticompetitive effects within the State.

The Attorney General, as the agency charged with antitrust enforcement duties under Maine law, respectfully begs leave to be heard on this issue as *amicus curiae*. Microsoft's argument contradicts a decade of established jurisprudence. Moreover, if adopted as the law of this State, Microsoft's interpretation of the statute would drastically narrow the scope of the state antitrust enforcement, as well as the scope of antitrust relief available to the State and Maine consumers. The importance of the issue addressed, and the Attorney General's interest therein, appear more fully in the memorandum of law submitted herewith for the Court's consideration.

Dated: 12/5/00

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STATE OF MAINE
CUMBERLAND, SS.

SUPERIOR COURT
CIVIL ACTION
DOCKET NOS. CV-99-709
& CV-99-752

IN RE MICROSOFT ANTITRUST LITIGATION	)	**MAINE ATTORNEY GENERAL'S MEMORANDUM OF LAW AS *AMICUS CURIAE***

The Maine Attorney General begs leave to submit this memorandum of law as *amicus curiae* to address a novel issue raised by Microsoft Corporation ("Microsoft") in the context of its pending Motion for Judgment on the Pleadings.

Microsoft challenges the applicability of Maine's mini-Sherman Act, 10 M.R.S.A. §§ 1101 *et seq.*, to conduct which, while physically occurring outside Maine's borders, is nevertheless alleged to have caused anticompetitive effects within the State. Indeed, Microsoft maintains that only conduct of a purely intrastate nature falls within the purview of the statute. This position, however, would contradict more than a decade of established state antitrust jurisprudence, and is founded on erroneous premises.

The Attorney General is the agency charged with antitrust enforcement duties under Maine's mini-Sherman Act. In addition, the Attorney General represents the State in its proprietary capacity in antitrust suits, and represents Maine consumers in such suits in his role as *parens patriae*. We view this issue as a matter of deep concern. If Microsoft's interpretation of the statute should prevail, the scope of the state antitrust enforcement, as well as the scope of antitrust relief available to the State and Maine consumers, would narrow drastically.

I. INTRODUCTION.

Plaintiffs in this class action are Maine purchasers of computer systems manufactured by Microsoft. In their Complaint, Plaintiffs allege that they have paid higher prices for Microsoft products than they otherwise would have as a result of certain conduct by Microsoft which, they charge, constitutes both unreasonable restraint of trade and monopolization in violation of the Maine mini-Sherman Act, 10 M.R.S.A. §§ 1101 & 1102. Although the Complaint does not say so, the lawsuit is brought pursuant to 10 M.R.S.A. § 1104, which provides, in pertinent part, that "[a]ny person ... injured **directly or indirectly** in its business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by section 1101, 1102 ... may sue for the injury in a civil action" (emphasis added). The Plaintiff class in this action presumably consists largely (if not entirely) of indirect purchasers (*i.e.*, those who purchased Microsoft systems from third parties rather than directly from Microsoft).

As defined in the Complaint, the Plaintiff class is limited to Maine-domiciled individuals and entities. Further, Plaintiffs' proof may be expected to show that Microsoft products are widely available for purchase in Maine, and that at least some (no doubt most) of Plaintiffs' purchases of Microsoft products were consummated in Maine. If it is assumed, for purposes of the pending motion, that the allegations of the Complaint are true, there appears to be no dispute between the parties with respect to two propositions: (1) the conduct attributed to Microsoft occurred entirely outside Maine; and (2) that conduct resulted in anticompetitive effects harmful to purchasers within the State.

Against this background, Microsoft's pending Motion for Judgment on the Pleadings raises a single issue. Microsoft argues that Maine's mini-Sherman Act by its terms does not

apply to conduct which occurs outside the State, even if the anticompetitive harm resulting from that conduct is felt within the State.

In advancing this argument, Microsoft relies straightforwardly on the statutory provisions which respectively prohibit (1) "every contract, combination ... or conspiracy, in restraint of trade or commerce **in this State**" (§ 1101) (emphasis added); and (2) monopolization (or attempts to monopolize) "any part of the trade or commerce **of this State**" (§ 1102) (emphasis added). Microsoft reads this language to limit the purview of Maine's mini-Sherman Act to conduct which occurs entirely within the State. There is no contention that this interpretation of the statute is required by any federal constitutional or statutory provision. Instead, Microsoft relies exclusively on the language and legislative history of the statute itself. The issue presented is therefore one of simple statutory construction.

In the sections below, we explain that the plain language of the statute clearly authorizes suits, like the present litigation, by Maine indirect purchasers damaged by a manufacturer's conduct occurring outside the State. Under accepted canons of statutory construction, that plain language controls. Even if it is nevertheless deemed appropriate to excavate the legislative history of the relevant enactments, we submit that nothing in that history compels a contrary result. Moreover, the Attorney General's longstanding interpretation of a statute he is mandated to enforce, which here squarely supports Plaintiffs' position, is entitled to some measure of judicial deference. Finally, it bears consideration that a grant of Microsoft's pending motion would drastically narrow the scope of state antitrust enforcement as well as the scope of antitrust relief available to the State and to Maine consumers.

II. THE PLAIN LANGUAGE OF MAINE'S MINI-SHERMAN ACT AUTHORIZES SUITS BY MAINE INDIRECT PURCHASERS DAMAGED BY A MANUFACTURER'S CONDUCT OUTSIDE THE STATE.

The language of Maine's mini-Sherman Act is unambiguous. "Any person injured directly or indirectly" by conduct violative of sections 1101 or 1102 "may sue for the injury." Under section 1101

> Every contract, combination ... or conspiracy, in restraint of trade or commerce in this State is declared to be illegal.

Clearly, the sale of computer systems to individuals and entities domiciled in Maine, especially when such sales are consummated in Maine, constitutes trade or commerce "in this State." Moreover, regardless of the location where it is entered upon, a contract or combination which damages Maine indirect purchasers by causing them to pay supracompetitive prices for computer systems certainly affects trade and commerce in this State adversely, *i.e.*, restrains it. Black's Law Dictionary (6th ed. 1990) 1314 (defining "restraint of trade" to include practices which "hamper or obstruct the course of trade or commerce as it would be carried on if left to the control of natural economic forces," including practices which "affect prices ... to [the] detriment of purchasers or consumers of goods"; citing, *inter alia, U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 [1940]).

Similarly, section 1102 unambiguously declares:

> Whoever shall monopolize or attempt to monopolize or combine and conspire with any other person or persons to monopolize any part of the trade or commerce of this State shall be guilty of a Class C crime.

Again, it can hardly be denied that the sale of computer systems in Maine constitutes a part of the trade or commerce "of this State." Moreover, as in section 1101, the phrase "in this state" or "of this state" modifies "trade or commerce" rather than the targeted conduct.

In their Complaint, Plaintiffs allege monopolization of a worldwide market, by means of conduct which, for example, inhibited the development of competing products. Amended Class Action Complaint ¶¶ 19, 26. Maine is, of course, part of this worldwide market. Surely, wherever perpetrated, conduct which inhibits competing products from reaching this worldwide market, including Maine, operates to monopolize a part of the trade or commerce "of this State."

Accordingly, the plain language of Maine's mini-Sherman Act, on its face, authorizes suits by Maine indirect purchasers damaged by a manufacturer's conduct outside the State. The situs of the conduct complained of is quite irrelevant, provided that the conduct has the effect of restraining or monopolizing trade or commerce in Maine. Put differently, conduct that restrains or monopolizes a wholesale market also inevitably restrains or monopolizes downstream retail markets. Since restraint and monopolization of trade and commerce in Maine is squarely alleged on the face of the Complaint, Microsoft's motion necessarily fails.

Ignoring the plain language of the statute, Microsoft's motion is built on a precarious foundation consisting of carefully selected excerpts from the legislative archaeology of various enactments dating back to 1913. This approach is impermissible, since, in the absence of ambiguity, the plain language of the statute is controlling. *Home Builders Association of Maine, Inc. v. Town of Eliot*, 2000 ME 82, 750 A.2d 566, 569 (court will look to legislative history only where ambiguity exists); *Dunelawn Owners Association v. Gendreau*, 2000 ME 94, 750 A.2d 591, 595 (where plain language resolves issue, court will not attempt to infer contrary legislative intent). However, even if Microsoft's resort to legislative history were appropriate, it would still be unavailing, for the reasons explained below.

III. THE LEGISLATIVE HISTORY OF MAINE'S MINI-SHERMAN ACT DOES NOT IN ANY EVENT SUPPORT MICROSOFT'S RESTRICTIVE INTERPRETATION OF ITS APPLICABILITY.

Microsoft's attempt to limit the applicability of Maine's mini-Sherman Act to purely intrastate conduct is founded primarily on excerpts from legislative debate which preceded the original enactment of sections 1101 and 1102 in 1913. The Legislature has, of course, revisited the statute on several subsequent occasions.

The present litigation is an indirect purchaser class action, brought pursuant to an amendment to section 1104 which was passed in 1989. P.L. 1989 ch. 367. In construing the statute as a harmonious whole, *see Estate of Jacobs*, 1998 ME 233, 719 A.2d 523, 524, it behooves us to begin by examining the intent of this more recent enactment.

A. Maine's *Illinois Brick* Repealer Was Broadly Intended To Afford Redress To Maine Indirect Purchasers For Overcharges Traceable to Manufacturer Misconduct Outside, As Well As Within the State.

The indirect purchaser amendment, enacted without floor debate in 1989, "amend[ed] Maine law to provide Maine citizens and corporations with a right to sue a manufacturer for damages suffered as a result of a manufacturer's violation of state antitrust laws, regardless of whether the citizens or corporations are direct or indirect purchasers from the defendant." L.D. 1653, Statement of Fact (114th Legis. 1989). Consistent with this expansive explanation, nothing in the enactment itself, or in the supporting presentation of Commissioner (now Senator) Susan Collins suggested for a moment that the purpose was to provide a remedy only for restraints or monopolizations of trade accomplished by means of purely intrastate conduct.

To the contrary, both the Statement of Fact and the Commissioner's testimony[1] expounded the significance of the indirect purchaser amendment in terms of its jurisprudential context. Specifically, a decade prior to the enactment, the U.S. Supreme Court had ruled that indirect purchaser lawsuits were not authorized by the federal Sherman Act. *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Thus, while direct purchasers could sue under federal law for antitrust injury, indirect purchasers damaged by pass-through overcharges could not. Although a few states legislatively authorized indirect purchaser suits under state antitrust statutes by means of so called "*Illinois Brick* repealers", doubts persisted as to the constitutionality of the repealer provision. Those doubts were resolved by *California v. ARC America Corp.*, 490 U.S. 93 (1989), which made clear that states were free to provide redress to indirect purchasers in the context of state antitrust statutes.

As both the Statement of Fact and the Commissioner's testimony emphasize, L.D. 1653 was proposed and enacted in response to *ARC America's* invitation, as Maine's *Illinois Brick* repealer. Very simply, the new law was intended to provide to Maine indirect purchasers the remedy denied them under the federal Sherman Act by *Illinois Brick*, namely, a right to sue manufacturers to recover overcharges incurred as an indirect result of the manufacturer's anticompetitive conduct.

If the bill's sponsors or Commissioner Collins had believed they were proposing to provide a remedy to indirect purchasers which permitted recovery of overcharges only where those overcharges were incurred as a result of anticompetitive conduct perpetrated by businesses or persons physically located in Maine, such a drastic limitation would surely have been explicitly noted. Indeed, with manufacturing in Maine in steep decline over the past half-

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[1] Copies of the L.D. and the Commissioner's testimony are attached.

century, it seems fair to suggest that such a limitation might well have reduced the utility of the amendment to the vanishing point.

In amending section 1104, then, the 1989 Maine Legislature obviously intended to allow suits by or on behalf of Maine indirect purchasers against out-of-state manufacturers on the basis of their conduct outside (as well as within) the State, to the extent that its harmful effects were felt by persons within Maine. Since the Legislature enacted no simultaneous amendments to sections 1101 and 1102, it must have believed that these provisions were already broad enough to reach such extraterritorial conduct.

Moreover, it is equally clear that this belief was already current at least a dozen years earlier, when the Legislature acted to revitalize then-moribund state antitrust enforcement by increasing the penalties which could be brought to bear for violation of sections 1101 and 1102. P.L. 1977 ch. 175, enacting L.D. 347 as amended (108th Legis. 1977). As Senator Conley stated in support of the bill: "This law is going to give greater protection to the small businessman against the out-of-state corporations, which are the least likely to share our ethics." Legis. Rec. 633 (1977).[2] Microsoft's argument is thus at odds not only with the plain language of sections 1101 and 1102, but also with the Legislature's own understanding of the scope of these provisions, as evidenced in the legislative history of subsequent amendatory enactments, first in 1977, then again in 1989.

Importantly, *Arnold v. Microsoft*, Jefferson Circuit Court, Division Eleven, No. 00-CI-00123 (Opinion and Order dated July 21, 2000) (appended to Microsoft brief at Tab G), cited by Microsoft, actually *supports* our contention that the primary purpose of indirect purchaser

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[2] Copies of these materials are attached to Microsoft's Motion.

statutes is to expand the scope of state antitrust law to include conduct with extraterritorial origins. In *Arnold*, Judge McDonald-Burkman clearly understood that if Kentucky had enacted an *Illinois Brick* repealer statute such as Maine's, private plaintiffs would have been able to sue for "[a]nticompetitive acts performed *largely or totally out of state, against third parties, causing injury to Kentucky residents . . . .*" *Id.* at 5 (emphasis added). Because Kentucky law (unlike that in Maine) does not expressly authorize indirect purchaser suits, the court dismissed plaintiffs' claim, noting pointedly that the Kentucky legislature had had two decades in which to add indirect purchaser language (as Maine did) but failed to do so. *Id.* This Kentucky case thus confirms the obvious -- that indirect purchaser legislation such as Maine's 1989 amendments are intended to remedy monopolistic conduct at the wholesale level because that conduct inevitably distorts in-state markets, regardless of whether such conduct occurred inside the state or elsewhere.[3]

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[3] In addition to Maine, other states to explicitly repeal the *Illinois Brick* rule to allow private indirect purchaser actions include California, CAL. BUS. & PROF. CODE § 16750(a) (West 1997); Wisconsin, WIS. STAT. ANN. § 133.18(1) (a) (West 1989); New Mexico, N.M. STAT. ANN. § 57-1-3 (Michie 1995); Michigan, MICH. COMP. LAWS § 445.778(2) (1989); Minnesota, MINN. STAT. ANN. § 325D.57 (West 1995); Kansas, KAN. STAT. ANN. § 50-801(b) (1994); South Dakota, S.D. CODIFIED LAWS § 37-1-33 (Michie 1994); the District of Columbia, D.C. CODE ANN. § 28-4509 (1996); and North Dakota, N.D. CENT. CODE ANN. § 51-08.1-08(3)- (4) (1989). Other states have enacted more limited provisions: Illinois, ILL. COMP. STAT. ANN. 10/7(2) (West 1993) (allowing only attorney general suits on behalf of indirect purchasers, *see Gaebler v. New Mexico Potash Corp.*, 676 N.E.2d 228, 221 (Ill. App. Ct. 1996)); Maryland, MD. CODE ANN., COM. LAW § 11- 209(b)(2)(ii) (1990) (allowing government suits); Rhode Island, R.I. GEN. LAWS § 6-36-12(g) (1992) (allowing *parens patriae* action with set-off for previously awarded damages); and Hawaii, HAW. REV. STAT. § 480-14(a), (b) & (c) (1993) (allowing attorney general suits and nonclass indirect purchaser actions for single damages).In addition, some state courts have even interpreted their pre-*Illinois Brick* consumer protection and antitrust statutes to allow private indirect purchaser actions. In some of these cases the allegedly anticompetitive conduct occurred primarily outside the state. *See, e.g., Hyde v. Abbott Labs.*, 473 S.E.2d 680 (N.C. Ct. App.), review denied, 478 S.E.2d 5 (N.C. 1996) (interpreting state counterpart of Sherman Act to authorize indirect purchaser suits); *McLaughlin v. Abbott Labs.*, No. CV 95-0628 (Ariz. Super. Ct. Yavapai Co. July 9, 1996) (same); *Blake v. Abbott Labs.*, 1996-1 Trade Cas. (CCH) ¶ 71,369 (Tenn. Ct. App. Mar. 27, 1996) (same); *Mack v. Bristol-Myers Squibb Co.*, 673 So.2d 100 (Fla. Dist. Ct. App. 1996) (interpreting state deceptive practices act to authorize indirect purchaser suits).

Against this background, Microsoft's heavy reliance on legislative pronouncements concerning the original versions of sections 1101 and 1102, as enacted in 1913, is far from compelling.

B. The Legislative History of the 1913 Enactment Is Ambiguous.

Upon careful examination, the legislative discussion preceding the 1913 enactment does not support Microsoft's contention that the Legislature clearly intended to exclude from its purview conduct by entities not located in Maine even where the inevitable results of that conduct significantly impact Maine consumers. Certainly it is possible, as Microsoft has done, to highlight carefully selected excerpts inferentially supporting its restrictive interpretation of the statute. However, it is significant that all of the legislative debate cited by Microsoft focussed on a proposal to conduct an investigation of the coal trade in Maine, and preceded the drafting (and therefore could not have construed) the language of the bill which was ultimately enacted and codified in sections 1101 and 1102. The unexpurgated record, accordingly, presents a much more complex, finely nuanced picture than the one painted by Microsoft. Ultimately, given its full context, the history of the 1913 enactment supports a more expansive view of the underlying legislative purpose.

Maine's original antitrust law was enacted in 1889, a decade before the federal Sherman Act. P.L. 1889 ch. 266. In pertinent part, this statute provided:

> It shall be unlawful for any firm or incorporated company, or any number of firms or incorporated companies, or any unincorporated company, or association of persons or stockholders, organized for the purpose of manufacturing, producing, refining or mining any article or product which enters into general use or consumption by the people, to form or organize any trust, or to enter into any combination of firms....

By 1913, however, concerns had arisen that this original antitrust provision was too narrow in scope. In particular, a harsh winter and soaring coal prices statewide led Senator Morey of Androscoggin to call for an investigation. Senator Morey presented anecdotal evidence suggesting that the price spikes were caused by a territorial allocation agreement among coal dealers in Maine. Legis. Rec. 53 –54 (1913). Other legislators were skeptical. Senator Stearns of Oxford, for example, believed it far more likely that the high prices Maine was experiencing had their source at the minehead in Pennsylvania, or elsewhere "far beyond the confines of Maine," and thus "far beyond the reach of any investigation which we may be able to have set in motion." In Senator Stearns' view, the logistics and expense of such a far-ranging investigation were "a matter more properly to be handled by the federal government." *Id.* 52.

Senator Hersey of Aroostook was also concerned that Maine's 1889 antitrust law was not broad enough to reach the conduct on which the investigation would focus.

> Coal is not a product that is mined or refined or manufactured in the State of Maine, therefor[e] it does not come under the trust laws of Maine, and [under the 1889 law] we have no authority over any combination that is formed outside the State of Maine for the purpose of mining or manufacturing coal.

Id. 55. Senator Hersey was rightly concerned that, because the 1889 law applied solely to manufacturers, refineries and mining companies, Maine antitrust enforcement could not reach anticompetitive conduct among coal dealers within the State. He also seems to have held the view that the 1889 law could not reach a combination formed outside the state, in all likelihood because the language of the relevant provision took the form of a regulation of the ability of persons within the state to enter into certain types of business organization.

In response to these concerns regarding the limitations of the 1889 law, the Legislature undertook to broaden the scope of state antitrust enforcement. Indeed, in Senator Morey's view,

the central purpose of the proposed investigation was to offer recommendations in this regard. On this basis, he won an expression of "warm support" from Senator Hersey. *Id.* 55 –56.

Accordingly, the investigation was authorized and conducted by a legislative committee chaired by Senator Morey. In its extensive report, the committee concluded:

> [n]ot only the mine owners and middlemen or brokers, but also the retailers, have been sharers in a greater or less degree in this increased cost of coal to the consumer . . . . the statutes of this State prohibiting combinations and agreements in [restraint] of trade are very limited in their scope, and to end of providing adequate legislation to **prevent all future agreements and combination of every kind in the nature of monopolies or in restraint of trade**, your committee presents herewith the accompanying bill . . . .

L.D. 479 (76th Legis. 1913) at 25 (emphasis added).[4] Of concern to the committee, therefore, were combinations among mine owners, middlemen and brokers out-of-state, as well as among retailers within the State. The committee's goal, as far as possible, was "to prevent all future agreements and combinations of every kind in the nature of monopolies or in restraint of trade." From this expansive language, it seems eminently fair to conclude that the legislative purpose in 1913 in enacting the Morey bill, whose language survives today in sections 1101 and 1102, was to broaden and lengthen the reach of Maine antitrust enforcement both within and outside the state. L.D. 464 (76th Legis. 1913), enacted as P.L. 1913 ch. 106.

At a minimum, the unabridged history of these early provisions does not clearly compel the conclusion that the Legislature intended to exclude conduct originating out-of-state. This underscores the wisdom, in this instance, of the rule that resort to legislative history is proper only where the statutory language yields an absurd or illogical result. *Town of Yarmouth v.*

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Moulton, 1998 ME 96, 710 A.2d 252, 254. Of course, no such illogic or absurdity appears here.

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The Attorney General is the agency charged with the enforcement of Maine's mini-Sherman Act, 10 M.R.S.A. §§ 1101 *et seq.* The statute may be enforced criminally or civilly. On the civil side, the Attorney General may seek injunctive relief and civil penalties, or may bring an action for damages on behalf of the State in its proprietary capacity, or as *parens patriae* on behalf of Maine indirect purchasers injured as a result of conduct violative of sections 1101 or 1102. Accordingly, the Attorney General's interpretation of the mini-Sherman Act merits some measure of deference. *See Davric Maine Corp. v. Harness Racing Commission*, 732 A.2d 289, 293, 1999 ME 99 (in context of appeal of agency action, rule is that agency interpretation is entitled to great deference, unless statute compels contrary result).

Over the decade since the enactment of Maine's *Illinois Brick* repealer, the Attorney General has consistently interpreted the mini-Sherman Act to apply to extraterritorial conduct which operated to restrain or monopolize trade or commerce in Maine. *See e.g., State of Maine v. Sandoz Pharmaceuticals Corporation*, No. 90 CIV 8065, (S.D.N.Y. Dec. 14, 1990) (copy of Complaint attached – alleging violations of 10 M.R.S.A. §§ 1101 and 1102 on the basis, *inter alia*, of agreements entered into outside Maine between Sandoz, a Delaware corporation and codefendant Caremark, Inc., a California corporation; *see* at ¶¶ 1, 6-7, 40, 76-83); *State of New York v. Reebok International, Ltd.,* No. 95 CIV 3143 (S.D.N.Y. May 4, 1995) (copy of Complaint attached – alleging violations of 10 M.R.S.A. § 1101 on a factual basis which presumably included extraterritorial conduct; *see* at ¶¶ 8-11, 17, 36-37)*; State of Maine v.*

American Optometric Association, No. 98-515-CIV-J-21C (M.D. Fla. May 29, 1998) (copy of Complaint attached – alleging violations of 10 M.R.S.A. § 1101 on the basis, *inter alia*, of extraterritorial conduct; *see e.g.* at ¶¶ 15-19, 102, 106, 113, 144-145); *State of Connecticut v. Mylan Laboratories, Inc.*, No. 1:98CV03115 (D.D.C. Aug. 5, 1999) (copy of Amended Complaint joined by Maine Attorney General attached – alleging violations of 10 M.R.S.A. §§ 1101 and 1102 on the basis, *inter alia*, of extraterritorial conduct; *see e.g.* at ¶¶ 8-12, 30, 37, 116-117).

Of the actions cited, *Sandoz* and *Reebok* were settled; while *American Optometric* and *Mylan* are still pending. In *Mylan*, significantly, the court has explicitly ruled that the Attorney General possesses *parens patriae* authority to bring suit under the mini-Sherman Act on behalf of indirect purchasers. *F.T.C. v. Mylan Laboratories, Inc.*, 99 F. Supp.2d 1, 7 (D.D.C. 1999).[5]

Thus, at least since the adoption of Maine's *Illinois Brick* repealer in 1989, the Attorney General has consistently interpreted the mini-Sherman Act as applicable to extraterritorial conduct. In view of the plain language of the statute, as well as the legislative history reviewed above, we submit that this interpretation is reasonable, and should be adhered to by this Court.

A grant of Microsoft's motion, conversely, would drastically restrict the scope of the Attorney General's antitrust enforcement program under the mini-Sherman Act. Essentially, the Attorney General would be empowered to bring suit under the statute only on the basis of purely intrastate conduct. By nullifying Maine's *Illinois Brick* repealer, such a ruling would likewise sharply restrict the scope of antitrust relief available to the State as well as to Maine consumers.

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[5] Although strictly speaking, the issue presented on this motion is one of first impression, it is perhaps not without significance that this Court seems to have tacitly acknowledged the applicability of sections 1101 and 1102 to extraterritorial conduct in the context of an indirect purchaser class action. *Karofsky v. Abbott Laboratories*, CV-95-1009 (Me. Super. Ct., Cum. C'ty, Oct 16, 1997) (Saufley, J.), 1998-1 Trade Cas. ¶ 72,121 (denying class certification on other grounds).

It is worth recalling that under *Illinois Brick*, indirect purchasers have no cause of action under the federal Sherman Act. *California v. ARC America Corp* subsequently harmonized the state and federal systems into a complementary whole, affording relief to indirect purchasers under state law and to direct purchasers under federal law. The interpretation urged by Microsoft would destroy that harmony and leave Maine indirect purchasers who suffer the impact of illegal anticompetitive conduct in the national marketplace without a remedy.

CONCLUSION

For all the foregoing reasons, *amicus curiae* the Maine Attorney General urges the Court to deny Microsoft's Motion for Judgment on the Pleadings.

Respectfully submitted,

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