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NOTES AND COMMENTS

ILLINOIS BRICK: THE DEATH KNELL OF ULTIMATE CONSUMER ANTITRUST SUITS

INTRODUCTION

Section 4 of the Clayton Act permits "[a]ny person . . . injured in his business or property by reason of anything forbidden in the antitrust laws" to recover treble damages in a civil suit against the wrongdoer.[1] This section would appear to establish a remedy for anyone whose economic interests are adversely affected by illegal monopolistic practices. Most federal courts, however, have found it necessary to place restrictions upon the categories of injured persons who may maintain an action under section 4.[2] These restrictions stem, in large part, from the courts' recognition that activities in a relatively isolated sector of the economy may often affect a wide

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[1] Section 4 of the Clayton Act, 15 U.S.C. § 15 (1976), provides as follows:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

[2] *See, e.g.,* Hawaii v. Standard Oil Co., 405 U.S. 251, 262 n.14 (1972) (not all injuries that are traceable to antitrust law violations are compensable under the Clayton Act); Long Island Lighting Co. v. Standard Oil Co., 521 F.2d 1269, 1273 (2d Cir.), *cert. denied,* 423 U.S. 1073 (1976) (remote parties with speculative injuries should be denied standing under the Clayton Act); *In re* Multidistrict Vehicle Air Pollution, 481 F.2d 122, 125 (9th Cir.), *cert. denied,* 414 U.S. 1045 (1973) (it has been necessary for federal courts to limit scope of civil antitrust remedy); Loeb v. Eastman Kodak Co., 183 F. 704, 707 (3d Cir. 1910) (only parties who have been directly injured should be permitted to recover); Wilson v. Ringsby Truck Lines, Inc., 320 F. Supp. 699, 701 (D. Colo. 1970) (severity of the treble damage penalty has led courts to limit classes of plaintiffs with standing to sue under the Clayton Act). *But see* Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948) (civil antitrust remedy available to all parties injured by illegal practices). Several commentators have noted the tendency of the federal courts to limit the scope of section 4 of the Clayton Act. *See* 15 J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 115.01[1] (1978) [hereinafter cited as VON KALINOWSKI]; Alioto & Donnici, *Standing Requirements for Antitrust Plaintiffs: Judicially Created Exceptions to a Clear Statutory Policy,* 4 U.S.F.L. REV. 205, 206-07 (1970) [hereinafter cited as Alioto & Donnici]; Beane, *Antitrust: Standing and Passing On,* 26 BAYLOR L. REV. 331, 333 (1974) [hereinafter cited as Beane]; Pollock, *The "Injury" and "Causation" Elements of a Treble-Damage Antitrust Action,* 57 NW. U.L. REV. 691, 698-99 (1963); Schaeffer, *Passing-on Theory in Antitrust Treble Damage Actions: An Economic and Legal Analysis,* 16 WM. & MARY L. REV. 883, 883 (1975) [hereinafter cited as Schaeffer]; Comment, Mangano *and Ultimate-Consumer Standing: The Misuse of the* Hanover *Doctrine,* 72 COLUM. L. REV. 394, 394 (1972) [hereinafter cited as *Ultimate-Consumer Standing*].

spectrum of economic interests.[3] Thus, absent some judicially imposed limitations upon the availability of section 4, a party[4] who has violated an antitrust law would be faced with the possibility of virtually limitless civil liability.[5] In view of the treble damage provisions of the Clayton Act, such a possibility presents almost as serious a threat to the American economic system as do the evils which the antitrust statutes themselves were designed to prevent.[6]

In an attempt to limit the number of potential plaintiffs, the federal courts have focused primarily upon the relationship between the antitrust violator and the injured party.[7] Under this approach, if an injured party's relationship to the violator is remote, he may

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[3] *See* Comment, *Standing to Sue in Antitrust Cases: The Offensive Use of Passing-on,* 123 U. PA. L. REV. 976, 978 (1975) [hereinafter cited as *Standing to Sue*].

[4] Throughout this Note, terms such as party, seller, purchaser, customer, manufacturer, intermediary, wholesaler, plaintiff, defendant, wrongdoer, and violator will be treated as though they referred to individuals. This has been done to preserve stylistic consistency. In most instances, however, these terms actually will refer to corporations or other aggregate entities.

[5] *See, e.g.,* SCM Corp. v. Radio Corp. of America, 407 F.2d 166 (2d Cir.), *cert. denied,* 395 U.S. 943 (1969). Generally, the question whether an antitrust violator intended to injure a particular plaintiff is not determinative in establishing that plaintiff's right to sue under section 4 of the Clayton Act. *See* Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183, 189 (2d Cir. 1970), *cert. denied,* 401 U.S. 923 (1971); Sherman, *Antitrust Standing: From* Loeb *to* Malamud, 51 N.Y.U.L. REV. 374, 388-91 (1976) [hereinafter cited as Sherman].

[6] The purpose of the antitrust laws is to preserve the integrity of the competitive market system. Some commentators, however, have expressed concern that the uncertainties and severe penalties inherent in these laws present a serious threat to the health of private industry. In Handler & Blechman, *Antitrust and the Consumer Interest: The Fallacy of* Parens Patriae *and A Suggested New Approach,* 85 YALE L.J. 626, 660-66 (1976) [hereinafter cited as Handler & Blechman], the authors observe that, at least in the area of retail price-fixing, antitrust offenders are most likely to be small, local tradesmen and professionals such as doctors and lawyers. Enforcing the treble damages penalty against these businessmen, in the authors' view, would present an unfair hardship and drive many otherwise viable businesses out of the marketplace. In Schaeffer, *supra* note 2, at 908-11, the author argues that certain monopolistic practices actually may have beneficial economic and social effects. Thus, overdeterrence of antitrust violations may lead to unanticipated economic difficulties. Accordingly, the author suggests that some antitrust violations must be tolerated if our economic system is to remain stable. *Id.*

Schaeffer also notes, however, that despite the stringent treble damage penalty antitrust violations may be profitable for the wrongdoer under certain circumstances. As a result of judicial construction of § 4, the wrongdoer is not required to pay interest on the fruits of its misconduct until a final judgment has been entered. *See, e.g.,* Trans World Airlines, Inc. v. Hughes, 308 F. Supp. 679, 696 (S.D.N.Y. 1969), *aff'd,* 449 F.2d 51 (2d Cir. 1971), *rev'd on other grounds sub nom.* Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 (1973) (interest on monies recovered as penalties not available under federal law). In view of the protracted nature of antitrust litigation the pre-judgment, interest-free use of its illegal profit may produce substantial economic benefits for the defendant. Schaeffer, *supra* note 2, at 908-11. *See also* Erickson, *The Profitability of Violating the Antitrust Laws: Dissolution and Treble Damages in Private Antitrust Litigation,* 5 ANTITRUST L. & ECON. REV. 101 (1972).

[7] *See* note 23 and accompanying text *infra.*

be precluded from making a civil claim.[8] The remoteness issue is often raised in cases where an illegally fixed price[9] has been absorbed by a purchaser who has not dealt directly with the wrongdoer.[10] In such cases, the purchaser has acquired the product in question through one or more intermediaries who simply incorporated the overcharge in their price and passed it on to the next purchaser in the chain of distribution. While section 4 clearly authorizes a party in privity with the wrongdoer to maintain an action for damages,[11] until recently it was uncertain whether an indirect purchaser who ultimately absorbs the illegal overcharge should be permitted to sue under the statute. In *Illinois Brick Co. v. Illinois,*[12] the Supreme Court rejected this "passing-on" theory of liability and held that the injury sustained by a purchaser who absorbs a passed-on overcharge is too remote, as a matter of law, to support a civil antitrust action under section 4 of the Clayton Act.[13] This decision is expected to have a dampening if not deadening effect upon the growing trend toward affording the ultimate consumer a civil remedy for illegal practices that impair his economic interests. In addition, the *Illinois Brick* decision appears to bring the Court into direct conflict with congressional initiatives that were designed to further this trend.[14] This Note will discuss the background and implications of this conflict, including the impact that the *Illinois Brick* decision can be expected to have upon the emerging field of consumer antitrust law.

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[8] *See* note 2 and accompanying text *supra.*

[9] Price-fixing has been held to be unlawful per se. *See, e.g.,* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 210 (1940).

[10] In an action for treble damages under § 4, the plaintiff must bear the burden of proving by a fair preponderance of the evidence that he has been injured in his business or property. VON KALINOWSKI, *supra* note 2, § 115.02[1]; *see, e.g.,* Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969); Telex Corp. v. IBM, 510 F.2d 894 (10th Cir.), *cert. denied,* 423 U.S. 802 (1975); Alden-Rochelle, Inc. v. American Soc'y of Composers, Authors and Publishers, 80 F. Supp. 888 (S.D.N.Y. 1948). In Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 489-90 (1968) (citing Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390 (1906)), the Supreme Court noted that illegal overcharging produces an "injury to property" within the meaning of section 4 of the Clayton Act. *See* Lessig v. Tidewater Oil Co., 327 F.2d 459, 471 (9th Cir.), *cert. denied,* 377 U.S. 993 (1964). *See generally* Pollock, *Automatic Treble Damages and the Passing-on Defense: The Hanover Shoe Decision,* 13 ANTITRUST BULL. 1183, 1185-86 (1968). The Eighth Circuit, however, recently has held that a consumer who pays an illegal overcharge suffers no *competitive* injury to his "business or property" and therefore does not have standing to sue under § 4. Reiter v. Sonotone Corp., [1978] TRADE REG. REP. (CCH) ¶ 62,098 (8th Cir. June 19, 1978).

[11] *See, e.g.,* Southern Pac. Co. v. Darnell-Taenzer Lumber Co., 245 U.S. 531 (1918).

[12] 431 U.S. 720 (1977).

[13] *Id.* at 728-29.

[14] *See* notes 94-122 and accompanying text *infra.*

THE RIGHT TO SUE—A HISTORY OF CONFUSION

The purpose of the civil treble damage remedy for antitrust violations was two-fold. It was intended to provide compensation for economic injury sustained as a result of certain illegal practices,[15] and was designed to promote national antitrust policies by encouraging private enforcement of the relevant statutes.[16] In this context, the civil treble damage penalty traditionally has been viewed as a vital and effective weapon for combating monopolistic practices and preserving a competitive economic system.[17]

In determining whether a particular plaintiff can maintain an action under section 4 of the Clayton Act,[18] the court must balance

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[15] *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485-86 (1977); Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 502 (1969); E. TIMBERLAKE, FEDERAL TREBLE DAMAGES ANTITRUST ACTIONS § 3.01 (1965) [hereinafter cited as TIMBERLAKE]; VON KALINOWSKI, *supra* note 2, § 115.01[1]; Comment, *Wrongs Without Remedy: The Concept of* Parens Patriae *Suits for Treble Damages Under the Antitrust Law*, 43 So. CAL. L. REV. 570, 592 (1970) [hereinafter cited as *Wrongs Without Remedy*].

[16] *See* Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130-31 (1969); Lawlor v. National Screen Serv. Corp., 349 U.S. 322, 329 (1955); E.J. Delaney Corp. v. Bonne Bell, Inc., 525 F.2d 296, 301 (10th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976); Mulvey v. Samuel Goldwyn Prods., 433 F.2d 1073, 1075 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971); TIMBERLAKE, *supra* note 15, § 3.01; J. VAN CISE, THE FEDERAL ANTITRUST LAWS 61 (3d rev. ed. 1975); VON KALINOWSKI, *supra* note 2, § 115.01[1].

[17] *See* Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 136, 139 (1968); Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 318 (1965); Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958); Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 750 (1947); Alioto & Donnici, *supra* note 2, at 206; Schaeffer, *supra* note 2, at 907; *Standing to Sue, supra* note 3, at 992-93. *But see* Wheeler, *Antitrust Treble-Damage Actions: Do They Work?*, 61 CALIF. L. REV. 1319 (1973).

Several commentators have observed that the criminal provisions of the antitrust laws, *see* 15 U.S.C. §§ 1-2 (1970), have not been particularly effective in deterring violations. *See* AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH, LEGISLATIVE ANALYSIS NO. 7, ANTITRUST PARENS PATRIAE BILL 37-38 (1975) [hereinafter cited as LEGISLATIVE ANALYSIS NO. 7] (citing J. Meehan, Jr. & H. Mann, Antitrust Policy and Allocative Efficiency: Incompatible? (paper presented at a seminar on Problems of Regulation and Public Utilities, Dartmouth College, Aug. 30, 1973)); Handler & Blechman, *supra* note 6, at 671-73; Comment, *To Right Mass Wrongs: A Federal Consumer Class Action Act*, 13 HARV. J. LEGIS. 776, 779-81 (1976). Congress may have implicitly recognized the ineffectiveness of the existing penalties as deterrents when it increased the maximum fines and jail terms for antitrust violations. Act of December 21, 1974, Pub. L. No. 93-528, § 3, 88 Stat. 1706, 1708 (amending sections 1 to 3 of the Sherman Act, 15 U.S.C. §§ 1-3 (1976)). It has been suggested, however, that the statutory penalties are ineffective deterrents because the courts are reluctant to impose severe criminal sanctions on corporate officers who appear before them as defendants. Schaeffer, *supra* note 2, at 907. Thus, the additional penalties may not have the expected effect of discouraging antitrust violations.

[18] Whether a remote injured party may recover treble damages frequently has been treated as a standing problem. *See, e.g., In re* Western Liquid Asphalt Cases, 487 F.2d 191 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974); South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414, 417 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966); Carnivale Bag Co. v. Slide-Rite Mfg. Corp., 395 F. Supp. 287, 292 (S.D.N.Y. 1975); Boshes v. General

these important policy considerations against a variety of other factors, including evidentiary difficulties and the need to minimize burdens upon the federal judiciary. Unfortunately, the Supreme Court's posture on this conflict has been somewhat ambiguous. In *Radovich v. National Football League,*[19] for example, the Court stated that, in view of the congressional policy favoring private antitrust actions, "this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in [the antitrust] laws."[20] Since section 4 requires only that the party seeking damages show injury resulting from illegal activity, the *Radovich* Court seemed to favor a very broad right to sue. Without repudiating the policy enunciated in *Radovich,* however, the Court adopted a strikingly narrower view in *Hawaii v. Standard Oil Co.,*[21] when it stated that "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation."[22] This apparent failure of the Supreme Court to develop a consistent policy on the scope of the right to sue under section 4 resulted in confusing and disparate decisions in the lower federal courts.[23]

Motors Corp., 59 F.R.D. 589 (N.D. Ill. 1973). Several commentators have suggested, however, that the use of the term standing to describe the question raised by the passing-on theory is misleading and that the issue is really one of establishing the legal relationships among the various parties to the transaction. *See, e.g.,* Handler & Blechman, *supra* note 6, at 644-46; Klingsberg, *Bull's Eyes and Carom Shots: Complications and Conflicts on Standing to Sue and Causation Under Section 4 of the Clayton Act,* 16 ANTITRUST BULL. 351, 365-66 (1971); McGuire, *The Passing-On Defense and the Right of Remote Purchasers to Recover Treble Damages Under Hanover Shoe,* 33 U. PITT. L. REV. 177, 179-81 (1971) [hereinafter cited as McGuire].

In Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), the Supreme Court rejected use of the standing approach to the passing-on question. The Court observed that "the question of which persons have been injured by an illegal overcharge for purposes of § 4 is analytically distinct from the question of which persons have sustained injuries too remote to give them standing to sue for damages under § 4." 431 U.S. at 728 n.7 (citation omitted).

[19] 352 U.S. 445 (1957).

[20] *Id.* at 454. In Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948), the Court expressed a similarly broad view when it noted that "[t]he statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of [its] forbidden practices . . . ." *Id.* at 236 (citations omitted).

[21] 405 U.S. 251 (1972).

[22] *Id.* at 263 n.14.

[23] *See* Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review,* 71 COLUM. L. REV. 1, 28 (1971) [hereinafter cited as Handler, *Innovations*]; Note, *Standing To Sue in Private Antitrust Litigation: Circuits in Conflict,* 10 IND. L. REV. 532, 533-34 (1977) [hereinafter cited as *Private Antitrust Litigation*].

A variety of sometimes overlapping and often ambiguous judicial tests were devised to address the multiplicity of "standing" problems which arose in the district and circuit courts

in § 4 suits. Of these tests, among the earliest and simplest to apply was the "direct injury" test enunciated in Loeb v. Eastman Kodak Co., 183 F. 704, 709 (3d Cir. 1910), and apparently approved by the Supreme Court in Southern Pac. Co. v. Darnell-Taenzer Lumber Co., 245 U.S. 531, 533-34 (1918). Under this test, in order to maintain a suit under § 4 of the Clayton Act, the plaintiff was required to be either in privity or in direct competition with the wrongdoer. In articulating the rationale for the direct injury test, the Supreme Court noted that "[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step." 245 U.S. at 534. Thereafter, this test was widely used in the federal courts. *See, e.g.,* Robinson v. Stanley Home Prods., Inc., 178 F. Supp. 230, 233 (D. Mass.), *aff'd,* 272 F.2d 601 (1st Cir. 1959); Snow Crest Beverages, Inc. v. Recipe Foods, Inc., 147 F. Supp. 907, 909 (D. Mass. 1956); Harrison v. Paramount Pictures, Inc., 115 F. Supp. 312, 316-17 (E.D. Pa. 1953), *aff'd per curiam,* 211 F.2d 405 (3d Cir.), *cert. denied,* 348 U.S. 828 (1954). For a discussion of the direct injury test, see *Ultimate-Consumer Standing, supra* note 2, at 399 n.26; *Private Antitrust Litigation, supra,* at 535; *Standing to Sue, supra* note 3, at 977-79. The privity requirement, however, was apparently rejected in Perkins v. Standard Oil Co., 395 U.S. 642 (1969). *See* VON KALINOWSKI, *supra* note 2, § 115.02[4]. *See also* South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414, 417 (4th Cir.), *cert. denied,* 385 U.S. 934 (1966). Despite the earlier rejection of the privity requirement in antitrust suits, the recent Supreme Court rulings in Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968), and Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), appear to have restored the rule, at least in cases involving passed-on overcharges.

A more popular approach among the lower federal courts has been the "target area" test, which focuses upon the area of the economy affected by the illegal practice rather than the relationship between the litigants. This test was aptly described by the Ninth Circuit in Conference of Studio Unions v. Loew's Inc., 193 F.2d 51 (9th Cir. 1951), *cert. denied,* 342 U.S. 919 (1952), wherein the court stated that, in order to sue under § 4, the plaintiff must show not only "that an act has been committed which harms him," but also "that he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry." 193 F.2d at 54-55. *See also* Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292, 1296 n.2 (2d Cir. 1971), *cert. denied,* 406 U.S. 930 (1972). In Yoder Bros. v. California-Florida Plant Corp., 537 F.2d 1347 (5th Cir. 1976), *cert. denied,* 429 U.S. 1094 (1977), the court elaborated upon this definition when it stated that "[o]ne need not be sitting on the bull's-eye in order to be within the target area of an antitrust conspiracy." *Id.* at 1361 (footnote omitted). In Long Island Lighting Co. v. Standard Oil Co., 521 F.2d 1269 (2d Cir.), *cert. denied,* 423 U.S. 1073 (1976), the court reached a rather anomalous result by using the target area test. The plaintiffs, suppliers of electricity to consumers, alleged that the defendant fuel supplier had engaged in a conspiracy to boycott Arab oil dealers, with the result that the plaintiffs had been forced to pay illegally inflated prices for its oil. 521 F.2d at 1272-73. Although the plaintiffs were in privity with the defendant and had been directly and foreseeably injured, they were denied recovery under the target area test. The court reasoned that since the Arab suppliers, rather than the plaintiffs, had been the real target of the conspiracy, the plaintiffs "were not the objects of the alleged antitrust violation." *Id.* at 1273-74. The plaintiffs, however, were permitted to recover under an alternative theory. *Id.* at 1296. For a detailed discussion of the target area test, see Alioto & Donnici, *supra* note 2, at 207-10; Pollock, *The "Injury" and "Causation" Elements of a Treble Damage Antitrust Action,* 57 NW. U.L. REV. 691, 706-07 (1963); Note, *The Effect of Hanover Shoe on the Offensive Use of the Passing-on Doctrine,* 46 SO. CAL. L. REV. 98, 99-100 (1972); *Standing to Sue, supra* note 3, at 977-79. *See generally Private Antitrust Litigation, supra.*

At least two variations on this test, the "proximate target area" test and the "foreseeable target area" test, have been applied to determine standing in civil antitrust actions. The proximate target area test has been described as follows: "If a plaintiff can show himself within the sector of the economy in which the violation threatened a breakdown of competitive conditions *and that he was proximately injured thereby,* then he has standing to sue under section 4." South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414,

The "right to sue" issue presented a particular problem when suit was brought to recover for an illegal overcharge resulting from price-fixing conspiracies.[24] Theoretically, the legal wrong occurs when the wrongdoer sells his product to the direct purchaser at an unlawfully inflated price.[25] In situations involving complex distribu-

418 (4th Cir.), *cert. denied,* 385 U.S. 934 (1966) (emphasis added). As one commentator observed, however, the results in cases using the proximate target area test may not differ substantially from those that use the original target area test. *Private Antitrust Litigation, supra,* at 541. For further discussion of the proximate target area test, see Dailey v. Quality School Plan, Inc., 380 F.2d 484 (5th Cir. 1967); Southern Concrete Co. v. United States Steel Corp., 394 F. Supp. 362 (N.D. Ga. 1975), *aff'd,* 535 F.2d 313 (5th Cir. 1976), *cert. denied,* 429 U.S. 1096 (1977).

The foreseeable target area test was first used in Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9th Cir. 1955), in which the plaintiff, Karseal, alleged that Richfield's illegal practices had injured certain independent retailers who bought Karseal's products through wholesalers. The plaintiff argued that its own business had been diminished because the retailers were no longer able to buy its products. In granting relief to the plaintiff, the court noted "that Karseal was within the target area of the illegal practices of Richfield; that Karseal was not only hit, but was aimed at by Richfield." *Id.* at 365. This test has been used primarily in the Ninth Circuit. *See, e.g.,* Mulvey v. Samuel Goldwyn Prods., 433 F.2d 1073, 1076 (9th Cir. 1970), *cert. denied,* 402 U.S. 923 (1971); Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190, 211-12 (9th Cir.), *cert. denied,* 379 U.S. 880 (1964). For a detailed discussion of the foreseeable target area test, see Alioto & Donnici, *supra* note 2, at 212-13; *Private Antitrust Litigation, supra,* at 549; Sherman, *supra* note 5, at 384-87.

Despite the extensive exploration of these standing tests in the federal courts, they remain somewhat ambiguous and difficult to apply, particularly in cases where illegal price-fixing activities have been the source of the injury. One commentator has stated that these tests are really nothing more than conclusory labels. McGuire, *supra* note 18, at 178; *see* Handler, *Innovations, supra,* at 27; *Ultimate-Consumer Standing, supra* note 2, at 403; *Private Antitrust Litigation, supra,* at 534. Another commentator has described the problem of standing to sue under § 4 as a "body of case law in search of a principle." Handler, *Innovations, supra,* at 27.

It must be noted that the "direct injury" and "target area" concepts were developed almost exclusively in conjunction with cases involving conspiracies to eliminate competitors. In such cases, the court typically was called upon to determine whether a party who was indirectly injured, such as a stockholder, employee or landlord of the affected business entity, could maintain a civil action against the wrongdoer. *See, e.g.,* Dailey v. Quality School Plan, Inc., 380 F.2d 484 (5th Cir. 1967) (plaintiff whose employer was injured by antitrust violation permitted to sue wrongdoer); Loeb v. Eastman Kodak Co., 183 F. 704 (3d Cir. 1910) (stockholder not permitted to sue for injury to corporation in which he owns an interest); Harrison v. Paramount Pictures, Inc., 115 F. Supp. 312 (E.D. Pa. 1953), *aff'd,* 211 F.2d 405 (3d Cir.), *cert. denied,* 348 U.S. 828 (1954) (owner-lessor of movie theater not permitted to sue lessee's competitor for antitrust violations that indirectly reduced his rental income). While such situations may lend themselves to a "target area" or "direct injury" approach, these formulae have had little practical utility for analyzing the problems that price-fixing cases present.

The Supreme Court has never explicitly adopted any one of the standing tests. In Perkins v. Standard Oil Co., 395 U.S. 642, 649-50 (1969), however, the Court appears to have implicitly approved the target area test. *See* VON KALINOWSKI, *supra* note 2, § 115.02[4]; Alioto & Donnici, *supra* note 2, at 211; Beane, *supra* note 2, at 339-40.

[24] *See* VON KALINOWSKI, *supra* note 2, § 109.03[1]; Beane, *supra* note 2, at 347.

[25] *See* Hanover Shoe, Inc. v. United Shoe Mach. Corp, 392 U.S. 481, 489-90 (1968); Southern Pac. Co. v. Darnell-Taenzer Lumber Co., 245 U.S. 531, 534 (1918); Note, *The Effect*

tion patterns, however, it is often difficult to discern exactly who in the chain of distribution actually absorbed the overcharge and, consequently, suffered a legally cognizable injury within the meaning of section 4.[26]

Prior to the Supreme Court's 1968 decision in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*,[27] this problem had been addressed in a somewhat inconsistent fashion.[28] The *Hanover Shoe*

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of Hanover Shoe on the Offensive Use of the Passing-on Doctrine, 46 So. CAL. L. REV. 98, 106 (1972).

[26] Although the civil antitrust action is a creature of statute, its substantive characteristics are derived largely from a body of antitrust decisional law. Since the antitrust laws are broad statements of congressional policy rather than carefully detailed codifications, it has been necessary for the federal courts to develop an adequate conceptual framework for vindicating the rights that are established by the statutes. In analyzing the difficult problem of which parties can maintain a cause of action under section 4 of the Clayton Act, the federal courts have drawn heavily upon the well-established body of common law in the field of tort claims. Tort concepts such as "foreseeability" and "proximate cause" are often found in judicial discussions of the problem. *See* note 23 *supra*. The analogy to tort law, however, may be somewhat misleading. In a typical tort case, injury, duty, proximity, and zone of foreseeable harm are all factually and legally distinct concepts which can be analyzed without reference to each other, whereas in antitrust cases, these elements are so conceptually and factually interrelated as to be analytically inseparable. For example, an economic reversal that is too remote from the wrongful act to support a treble damage action cannot really be considered an injury within the meaning of § 4, since it probably resulted from independent market reversals. Additionally, in a typical tort case, the concept of the defendant's duty can be readily identified and defined in relation to a particular class of potentially injured parties. *See, e.g.*, Palsgraaf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928). The provisions of section 4 of the Clayton Act, however, supply no equivalent concept of the defendant's legal duty with respect to his activities in the marketplace. Under the statute, the defendant has a duty to refrain from certain anticompetitive practices, but the statute provides no clues as to whom this duty is owed. Thus, in order to determine whether a particular plaintiff may maintain an action against an antitrust defendant, the courts must rely solely on the analytical concepts of injury and causation. It is therefore not surprising that some courts have resorted to the concept of legal standing to supplement their arsenal of analytical tools. *See* Pollock, *The "Injury" and "Causation" Elements of a Treble Damage Antitrust Action*, 57 Nw. U.L. REV. 691, 699-700 (1963). *See also* City & County of Denver v. American Oil Co., 53 F.R.D. 620, 629 (D. Colo. 1971) (in price-fixing cases, fact and amount of damages are not conceptually separable); Ohio Valley Elec. Corp. v. General Elec. Co., 244 F. Supp. 914, 933 (S.D.N.Y. 1965) (impact of violation and resultant damages in price-fixing case are coextensive concepts).

[27] 392 U.S. 481 (1968).

[28] The federal courts generally were receptive to the argument that the purchaser who actually absorbed the overcharge should be considered the legally injured party under the statute. Thus, in the oft-cited *Oil Jobber Cases*, Northwestern Oil Co. v. Socony-Vacuum Oil Co., 138 F.2d 967 (7th Cir. 1943), *cert. denied*, 321 U.S. 792 (1944); Twin Ports Oil Co. v. Pure Oil Co., 119 F.2d 747 (8th Cir.), *cert. denied*, 314 U.S. 644 (1941); Clark Oil Co. v. Phillips Petroleum Co., 56 F. Supp. 569 (D. Minn. 1944), *aff'd*, 148 F.2d 580 (8th Cir.), *cert. denied*, 326 U.S. 734 (1945); Leonard v. Socony-Vacuum Oil Co., 42 F. Supp. 369 (W.D. Wisc.), *appeal dismissed*, 130 F.2d 535 (7th Cir. 1942), the defendants were able to resist successfully the claims of plaintiffs who had passed on the illegal overcharges to their customers. *See also* Keogh v. Chicago & N.W. Ry., 260 U.S. 156 (1922); Miller Motors, Inc. v. Ford

Court resolved the issue definitively by holding that the fact that the plaintiff had passed on an illegal overcharge would no longer be accepted as a defense in a civil antitrust suit.[29] In denying the defendant the right to show that the plaintiff's customers were the parties who actually suffered injury, the Court employed two lines of reasoning. First, the Court noted that if the defendant were to successfully assert a passing-on defense, he might escape liability entirely.[30] In the Court's view, it was unlikely that the many ultimate purchasers who had actually absorbed the overcharge in countless minor sales would pursue their relatively small individual claims against the wrongdoer. Therefore, the Court concluded, permitting a defendant to raise the passing-on defense would dilute the effectiveness of the civil action as a method of divesting wrongdoers of their ill-gotten profit.[31] Such a result, according to the Court, would be incompatible with the national policy of using the civil treble damage action as a weapon for enforcing the antitrust laws.[32]

Motor Co., 252 F.2d 441, 448 (4th Cir. 1958); Wolfe v. National Lead Co., 225 F.2d 427, 432 (9th Cir.), *cert. denied,* 350 U.S. 915 (1955); Turner Glass Corp. v. Hartford-Empire Co., 173 F.2d 49, 50-51 (7th Cir.), *cert. denied,* 338 U.S. 830 (1949); Beacon Fruit & Produce Co. v. H. Harris & Co., 160 F. Supp. 95, 102 (D. Mass.), *aff'd per curiam,* 260 F.2d 958 (1st Cir. 1958), *cert. denied,* 359 U.S. 984 (1959).

In the well-noted *Electrical Cases,* however, the passing-on defense was rejected. *See* Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 335 F.2d 203 (7th Cir. 1964); Ohio Valley Elec. Corp. v. General Elec. Co., 244 F. Supp. 914 (S.D.N.Y. 1965); Atlantic City Elec. Co. v. General Elec. Co., 226 F. Supp. 59 (S.D.N.Y.), *appeal denied per curiam,* 337 F.2d 844 (2d Cir. 1964); TIMBERLAKE, *supra* note 15, § 20.05; Pollock, *Automatic Treble Damages and the Passing-on Defense: The Hanover Shoe Decision,* 13 ANTITRUST BULL. 1183, 1191-96 (1968). *See also* Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 396 (1906); State Wholesale Grocers v. Great Atl. & Pac. Tea Co., 202 F. Supp. 768, 771 (N.D. Ill. 1961).

[29] 392 U.S. at 488-94. The defendants in *Hanover Shoe* had been leasing shoe-making machinery to the plaintiff and other shoe manufacturers. In a prior action initiated by the federal government, the defendant's control of the relevant market, coupled with its refusal to sell rather than lease its equipment, had been found to be a violation of section 2 of the Sherman Act, 15 U.S.C. § 16(a) (1976). United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam,* 347 U.S. 521 (1954). This finding constituted prima facie evidence of an antitrust violation for purposes of the subsequent civil suit brought by Hanover Shoe, Inc. under section 4 of the Clayton Act. *See* note 43 *infra.* In an attempt to avoid civil liability, the defendant argued that the plaintiff should not be permitted to recover because he had passed on the overcharge to his customers and thereby avoided actual economic injury. This contention was rejected by the Supreme Court. 392 U.S. at 488.

[30] 392 U.S. at 494.

[31] The *Hanover Shoe* Court stated:

> [U]ltimate consumers . . . would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them.

Id.

[32] *Id.*

Additionally, the *Hanover Shoe* Court considered the pragmatic problem of tracing an overcharge through the distribution chain and weighing the impact of the independent intervening variables.[33] Such an inquiry, according to the Court, would turn the already cumbersome and costly field of civil antitrust litigation into a judicial nightmare.[34] Opting for simplicity, the Supreme Court held that, as a matter of law, a direct purchaser who had paid an illegal overcharge was an injured person within the meaning of the Clayton Act.[35] This direct purchaser would be entitled to recover treble damages, even though the overcharge had been passed on to his customers.[36]

THE OFFENSIVE PASSING-ON THEORY AFTER *Hanover Shoe: Illinois Brick*

Although *Hanover Shoe* effectively eliminated defensive use of the passing-on theory, it did not address the corollary question whether an indirect purchaser could use offensive passing-on as a method of proving injury. The authorities were split on the question. Those who believed that *Hanover Shoe* did not preclude offensive use of the theory tended to emphasize the policy considerations

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[33] The *Hanover Shoe* Court expressed its concern for the pragmatic proof problems involved in permitting the use of the passing-on defense as follows:

> A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether, had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price. Equally difficult to determine, in the real economic world rather than the economist's hypothetical model, is what effect a change in a company's price will have on its total sales. Finally, costs per unit for a different volume of total sales are hard to estimate. Even if it could be shown that the buyer raised his prices in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued. Since establishing the applicability of the passing-on defense would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable. On the other hand, it is not unlikely that if the existence of the defense is generally confirmed, antitrust defendants will frequently seek to establish its applicability. Treble-damage actions would often require additional long and complicated proceedings involving massive evidence and complicated theories.

Id. at 492-93 (footnotes omitted).

[34] *See id.* at 493; Illinois Brick Co. v. Illinois, 431 U.S. 720, 740-41 (1977).

[35] 392 U.S. at 494.

[36] *Id.* at 489.

supporting the decision.[37] In *Hanover Shoe,* the Court was concerned with the possibility that the defendant would escape liability entirely if it were permitted to raise the passing-on defense. Such a concern, it was argued, is inapplicable to situations in which the plaintiff is using the theory to support an independent right of recovery.[38] Others, however, who interpreted *Hanover Shoe* as eliminating offensive use of the passing-on theory, focused primarily upon the practical concerns expressed in the Court's opinion.[39] Reflecting this view, one court stated that the difficulties of proving the fact and extent of an overcharge would be as insuperable for a plaintiff as they were for the defendant in *Hanover Shoe.*[40] This

[37] *See, e.g., In re* Western Liquid Asphalt Cases, 487 F.2d 191 (9th Cir. 1973), *cert. denied,* 415 U.S. 919 (1974); West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079, 1087 (2d Cir.), *cert. denied,* 404 U.S. 871 (1971); Lefrak v. Arabian Am. Oil Co., 405 F. Supp. 597 (E.D.N.Y. 1975); Boshes v. General Motors Corp., 59 F.R.D. 589, 597-98 (N.D. Ill. 1973); McGuire, *supra* note 18, at 194-97; *Ultimate-Consumer Standing, supra* note 2, at 409-10; Note, *The Effect of Hanover Shoe on the Offensive Use of the Passing-on Doctrine,* 46 So. CAL. L. REV. 98 (1972); *Standing to Sue, supra* note 3, at 988. Many courts simply assumed that *Hanover Shoe* did not preclude the offensive use of passing-on theory. *See, e.g.,* Leeward Petroleum, Ltd. v. Mene Grande Oil Co., 415 F. Supp. 158 (D. Del. 1976); *In re* Master Key Antitrust Litigation, 70 F.R.D. 29 (D. Conn. 1976); Carnivale Bag Co. v. Slide-Rite Mfg. Co., 395 F. Supp. 287 (S.D.N.Y. 1975); *In re* Antibiotic Antitrust Actions, 333 F. Supp. 278 (S.D.N.Y. 1971).

[38] *See* note 37 *supra. See generally* Schaeffer, *supra* note 2, at 884; Note, *The Effect of Hanover Shoe on the Offensive Use of the Passing-on Doctrine,* 46 So. CAL. L. REV. 98, 112 (1972); *Standing to Sue, supra* note 3, at 992-93.

[39] Some courts assumed that the rationale in *Hanover Shoe* required a rejection of the offensive use of the passing-on theory. *See* Mangano v. American Radiator & Standard Sanitary Corp., 438 F.2d 1187 (3d Cir. 1971), *aff'g per curiam* Philadelphia Hous. Auth. v. American Radiator & Standard Sanitary Corp., 50 F.R.D. 13 (E.D. Pa. 1970); Stern v. Lucy Webb Hayes Nat'l Training School for Deaconesses & Missionaries, 367 F. Supp. 536 (D.D.C. 1973); Bill Minielli Cement Contracting, Inc. v. Richter Concrete Corp., 62 F.R.D. 381 (S.D. Ohio 1973); Donson Stores, Inc. v. American Bakeries Co., 58 F.R.D. 481 (S.D.N.Y. 1973); Travis v. Fairmount Foods Co., 346 F. Supp. 679 (E.D. Pa. 1972); Balmac, Inc. v. American Metal Prods. Corp., [1972 Transfer Binder] TRADE REG. REP. (CCH) ¶ 74,235 (N.D. Cal. 1972); City of Akron v. Laub Baking Co., [1972 Transfer Binder] TRADE REG. REP. (CCH) ¶ 73,930 (N.D. Ohio 1972); City & County of Denver v. American Oil Co., 53 F.R.D. 620 (D. Colo. 1971); United Egg Producers, Inc. v. Bauer Int'l Corp., 312 F. Supp. 319 (S.D.N.Y. 1970). *See also* City & County of Denver v. American Oil Co., 53 F.R.D. 620, 631 (D. Colo. 1971); VON KALINOWSKI, *supra* note 2, § 109.03[2]; Beane, *supra* note 2, at 345; Handler, *Innovations, supra* note 23, at 7; Handler & Blechman, *supra* note 6, at 643; Comment, *In the Face of Uncertainty—The Passing-On Concept in Civil Antitrust Litigation,* 27 ARK. L. REV. 83, 115-17 (1973); *Ultimate-Consumer Standing, supra* note 2, at 409; *Standing to Sue, supra* note 3, at 988.

[40] Philadelphia Hous. Auth. v. American Radiator & Standard Sanitary Corp., 50 F.R.D. 13, 25-26 (E.D. Pa. 1970), *aff'd sub nom.* Mangano v. American Radiator & Standard Sanitary Corp., 438 F.2d 1187 (3d Cir. 1971). Among the plaintiffs in *Philadelphia Housing Auth.* were new home buyers and resale purchasers who alleged that the prices of their homes had been artificially inflated as a result of a conspiracy on the part of the defendants to fix the prices of certain plumbing fixtures. The fixtures in question had passed through at least three intermediary levels of distribution: wholesalers, plumbing contractors, and home build-

court justified its avoidance of the policy question by stating that the *Hanover Shoe* decision had "laid little stress on this consideration."[41]

The Illinois Brick *Decision*

In *Illinois Brick,* the Supreme Court resolved the uncertainty surrounding the offensive passing-on question by holding that indirect purchasers who had absorbed an illegal overcharge could not recover from the wrongdoer.[42] The *Illinois Brick* defendants were concrete block manufacturers who allegedly had engaged in a price-fixing conspiracy[43] in violation of section 1 of the Sherman Act.[44]

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ers. Because the plaintiffs had failed to demonstrate in their responses to the interrogatories that they had dealt directly with the defendant, the district court dismissed their complaint. 50 F.R.D. at 15, 19. Under the circumstances in the case, the court was clearly justified in ruling that the relationship between the price the plaintiffs had paid for their homes and the initial illegal overcharge was too remote to support a cause of action under section 4 of the Clayton Act.

It is submitted, however, that the facts in *Philadelphia Housing Authority* represent an extreme case. The intervening market variables were not only numerous, but were highly independent and unpredictable as well. *See In re* Western Liquid Asphalt Cases, 487 F.2d 191, 198 n.6 (9th Cir. 1973), *cert. denied,* 415 U.S. 919 (1974). Other situations in which the intervening market variables are less numerous and thus more predictable might be better suited to the offensive passing-on analysis. For example, one commentator has noted that the offensive passing-on theory should be applicable to a situation in which a building supply manufacturer illegally overcharges its wholesale customer, and the wholesale customer in turn passes the overcharge on to municipal consumers. Pollock, *Automatic Treble Damages and the Passing-on Defense: The Hanover Shoe Decision,* 13 ANTITRUST BULL. 1183, 1217 (1968). In this case, according to the author, the effect of the intervening market factors is likely to be minimized. Ironically, this hypothetical situation is almost identical to the facts presented in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), in which the Supreme Court flatly rejected the offensive use of the passing-on theory. *See* note 57 *infra.*

[41] 50 F.R.D. at 29-30.

[42] 431 U.S. at 728.

[43] Prior to the initiation of the civil treble damage action, the federal government had filed a criminal complaint charging the defendants and other cement block manufacturers with violating section 1 of the Sherman Act. The defendants entered a plea of *nolo contendere* and the matter was resolved by consent decree. *See* Illinois v. Ampress Brick Co., 536 F.2d 1163, 1164 (7th Cir. 1976), *rev'd sub nom.* Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

Under the provisions of 15 U.S.C. § 16(a) (1976), a final judgment or decree against a defendant in an antitrust action initiated by the federal government under the antitrust laws becomes prima facie evidence of a violation in any subsequent civil action for damages. The purpose of this provision is to encourage private litigants to bring actions under section 4 of the Clayton Act and to minimize the burden of proof for such litigants. Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 318 (1965); Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 568 (1951). Where the action brought by the Justice Department is resolved by a plea of *nolo contendere* or the entering of a consent decree, however, the provisions of 15 U.S.C. § 16(a) are not available as an aid to private plaintiffs. *See* City of Burbank v. General Elec. Co., 329 F.2d 825 (9th Cir. 1964); Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 323 F.2d 412 (7th Cir. 1963), *cert. denied,* 376 U.S.

Their products had been sold first to masonry contractors and then to general contractors.[45] The general contractors, in turn, had used the cement blocks in the construction of buildings which were purchased by the plaintiffs.[46] In their action for damages against the concrete block manufacturers, the plaintiffs claimed that they had absorbed the illegal overcharge in the purchase price for the buildings and therefore had suffered economic injury.[47]

Justice White, writing for the majority,[48] rejected this claim and held that the rationale of the *Hanover Shoe* rule was dispositive of the offensive passing-on question.[49] According to Justice White, the conceptual and practical difficulties of proof that disturbed the *Hanover Shoe* Court were of equal concern in the offensive passing-on situation.[50] Moreover, the policy considerations that had influenced the Court's earlier ruling would not, in Justice White's view, be served by opening the federal courts to the myriad claims of small, indirect purchasers who could conceivably be injured by illegal pricing.[51] An additional consideration raised by the *Illinois Brick*

939 (1964); Control Data Corp. v. IBM, 306 F. Supp. 839 (D. Minn. 1969), *aff'd sub nom.* Data Processing Financial & Gen. Corp. v. IBM, 430 F. 2d 1277 (8th Cir. 1970); United States v. American Bakeries Co., 284 F. Supp. 864 (W.D. Mich. 1968); Dalweld Co. v. Westinghouse Elec. Corp., 252 F. Supp. 939 (S.D.N.Y. 1966). Thus, had the civil case proceeded to a trial on the merits, the plaintiffs in *Illinois Brick* would have had to bear the full burden of proving that the defendants had violated the antitrust laws.

[44] 431 U.S. at 727. Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976) provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

[45] 431 U.S. at 726.

[46] *Id.* at 726-27. The plaintiffs in *Illinois Brick* were 700 government entities. *Id.* at 727 n.6. All other claimants, including masonry contractors, general contractors, and private builders, had settled their respective claims against the defendant before trial. Illinois v. Ampress Brick Co., 536 F.2d 1163, 1164 (7th Cir. 1976), *rev'd sub nom.* Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

[47] 431 U.S. at 727. The plaintiffs in *Illinois Brick* alleged that they had paid an additional $3 million for the concrete block sold by the defendant. The additional expense was allegedly the result of the defendant's illegal price-fixing practices. *Id.* In one of the many construction jobs involved in the transaction at issue, the concrete block represented 3.9% of the cost of the masonry contract and .49% of the total cost of the project. Petitioner's Reply Brief in Support of the Grant of a Writ of Certiorari at 21, Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

[48] Joining Justice White in this 6-3 decision were Chief Justice Burger and Justices Powell, Rehnquist, Stevens, and Stewart. Justices Blackmun, Brennan and Marshall dissented.

[49] 431 U.S. at 728.

[50] *Id.* at 730-33.

[51] In Justice White's view,

the longstanding policy of encouraging vigorous private enforcement of the antitrust laws . . . supports . . . adherence to the *Hanover Shoe* rule, under which direct

Court was the risk of multiple liability created by *Hanover Shoe*, which held the defendant automatically liable to the direct purchaser.[52] If the subsequent purchasers were also permitted to sue, the defendant could be subjected to at least two levels of civil liability. In view of the treble damage provision in the Clayton Act, the Court was unwilling to expose antitrust defendants to such an onerous risk.

Although the Supreme Court found the *Hanover Shoe* rationale dispositive of the questions presented in *Illinois Brick*,[53] it acknowledged that there might be grounds for distinguishing the two cases. The price-fixed product in *Hanover Shoe* was machinery, a capital item that would not itself be resold to the direct purchaser's customers.[54] Only by adding the illegal overcharge into its general overhead costs and then allocating this amount to its consumer products could the direct purchaser pass on the overcharge to its customers.

> purchasers are not only spared the burden of litigating the intricacies of pass-on but are also permitted to recover the full amount of the overcharge. . . . [O]n balance, . . . we conclude that the legislative purpose in creating a group of "private attorneys general" to enforce the antitrust laws under § 4 . . . is better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them than by attempting to apportion the overcharge among all that may have absorbed a part of it.
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> . . . In view of the considerations supporting the *Hanover Shoe* rule, we are unwilling to carry the compensation principle to its logical extreme by attempting to allocate damages among all "those within the defendant's chain of distribution," . . . especially because we question the extent to which such an attempt would make individual victims whole for actual injuries suffered rather than simply depleting the overall recovery in litigation over pass-on issues. Many of the indirect purchasers barred from asserting pass-on claims under the *Hanover Shoe* rule have such a small stake in the lawsuit that even if they were to recover as part of a claim only a small fraction would be likely to come forward to collect their damages.

Id. at 745-47 (citations and footnotes omitted); *see* Pollock, *Automatic Treble Damages and the Passing-on Defense: The Hanover Shoe Decision*, 13 ANTITRUST BULL. 1183, 1215 (1968). The *Illinois Brick* Court's reasoning , however, was not well supported by the facts in the case. The plaintiffs in *Illinois Brick*, a variety of municipal entities, were actually large scale consumers with a substantial stake in the litigation and a strong incentive to come forward and assert their respective claims. The fact that 48 states participated in an *amicus curiae* brief urging the Court to uphold Illinois' claim is a further indication of the substantial financial interests that may be involved in indirect purchaser claims. Significantly, the Court's reasoning in this section of the opinion appears to overlook the impact that the recently enacted Hart-Scott-Rodino Act, 15 U.S.C.A. §§ 15c-15h (West Supp. 1978), can be expected to have on claims of this nature. Under the provisions of this statute, the small claims of many individual indirect purchasers may be aggregated and pursued by the state attorney general acting in *parens patriae*. *See* note 96 *infra*. This aggregation of small claims could have eliminated many of the allocation problems that the *Illinois Brick* Court identified.

[52] 431 U.S. at 730-31.

[53] *Id.* at 728 n.7.

[54] 392 U.S. at 483-84.

In *Illinois Brick,* however, the relationship between the remote purchaser and the initial overcharge was more direct. The product in question was not a capital item, but was rather a component part of the buildings that had been purchased by the plaintiffs. The middlemen in the case, the contractors, could have simply added the overcharge to their materials cost and included it in their price to the ultimate consumer, the plaintiffs.[55] Despite this important dissimilarity, however, the Supreme Court explicitly refused to distinguish the two cases and thereby narrow the scope of *Hanover Shoe.*[56] Having thus rejected the possibility of distinguishing the case before it from *Hanover Shoe,*[57] the *Illinois Brick* Court was

[55] *See* ALI-ABA Seminar, in Miami, Fla. (Feb. 17-18, 1978) (remarks of Judge Real), *discussed in* [1978] ANTITRUST & TRADE REG. REP. (BNA) No. 852, at A-5 (Feb. 23, 1978).

[56] 431 U.S. at 744. Prior to the ruling in *Illinois Brick,* some federal courts analyzed passing-on questions by examining the relationship between the direct purchaser and the price-fixed product. If the direct purchaser "consumed" the price-fixed product or used it to produce a second product, he was permitted to recover treble damages from the wrongdoer, even if he actually had passed on the illegal overcharge to his customers. *See, e.g.,* Standard Indus., Inc. v. Mobil Oil Corp., 475 F.2d 220 (10th Cir. 1973), *cert. denied,* 414 U.S. 829 (1974); *Electrical Cases, supra* note 28; Freedman v. Philadelphia Terminals Auction Co., 301 F.2d 830 (3d Cir.), *cert. denied,* 371 U.S. 829 (1962). In Bill Minielli Cement Contracting, Inc. v. Richter Concrete Corp., 62 F.R.D. 381 (S.D. Ohio 1973), the court used similar reasoning to deny the claim of an indirect purchaser who had absorbed a passed-on overcharge.

If, on the other hand, the direct purchaser had acted as a middleman, selling the product to his customers in a substantially unchanged state, the customers were permitted to recover from the wrongdoer if they had actually absorbed the overcharge. *See, e.g., In re* Western Liquid Asphalt Cases, 487 F.2d 191, 196 (9th Cir. 1973), *cert. denied,* 415 U.S. 919 (1974); South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414, 418-19 (4th Cir.), *cert. denied,* 385 U.S. 934 (1966); Boshes v. General Motors Corp., 59 F.R.D. 589, 597 (N.D. Ill. 1973); *cf.* Obron v. Union Camp Corp., 477 F.2d 542 (6th Cir. 1973) (passing-on defense permitted where the plaintiff-direct purchaser was deemed to be a middleman). *But see* Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948) (mere change in the form of product is not determinative); Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 335 F.2d 203, 208 (7th Cir. 1964) (middleman-consumer distinction rejected). *Cf.* Handler & Blechman, *supra* note 6, at 642 (the middleman-consumer distinction is not helpful because it fails to address the problem of independent intervening market variables). For a discussion of the use of the middleman-consumer distinction, see Pollock, *Automatic Treble Damages and the Passing-on Defense: The Hanover Shoe Decision,* 13 ANTITRUST BULL. 1183, 1192 (1968).

[57] The *Illinois Brick* Court also refused to consider the possibility of broadening the only exception to the general rule of *Hanover Shoe,* the cost-plus exception. Under *Hanover Shoe,* the generally impermissible passing-on defense is allowed if the defendant can establish that the direct purchaser-plaintiff's price to his customers was based on the actual cost of materials plus a prearranged fixed mark-up. 392 U.S. at 494. In such marketing arrangements, the pass-on is actually built into the contract and is therefore easily identified and traced.

For several years after the *Hanover Shoe* decision, there was some uncertainty concerning the scope of this exception. In *in re* Western Liquid Asphalt Cases, 487 F.2d 191, 196 (9th Cir. 1973), *cert. denied,* 415 U.S. 919 (1974), the court concluded that "[t]he [*Hanover Shoe*] Court thus left open for future decision cases in which the passing on of the illegal overcharge might be more readily demonstrable." *See* Pollock, *Automatic Treble Damages*

and the Passing-on Defense: The Hanover Shoe Decision, 13 ANTITRUST BULL. 1183, 1188 (1968). Several commentators had suggested that the cost-plus exception mentioned in *Hanover Shoe* could be interpreted broadly to permit the offensive use of the passing-on theory in a wide variety of situations. *See* Beane, *supra* note 2, at 351-52; Pollock, *supra,* at 1212; *Ultimate-Consumer Standing, supra* note 2, at 411-13. In West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079, 1088 (2d Cir.), *cert. denied,* 404 U.S. 871 (1971), the court extended the *Hanover Shoe* cost-plus exception to a marketing system in which the direct purchaser added a fixed *percentage* mark-up to its cost before passing on the product to its customers. A similar marketing system was employed by the contractors and subcontractors who acted as middlemen in *Illinois Brick.* Brief for Respondent in Opposition to the Grant of a Writ of Certiorari at 8-9, Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). The *Illinois Brick* Court, however, refused to find this arrangement to be a cost-plus system within the meaning of the exception carved out by the *Hanover Shoe* Court. 431 U.S. at 735. Writing for the majority, Justice White noted that "[t]he competitive bidding process by which the concrete block involved in this case was incorporated into masonry structures and then into entire buildings can hardly be said to circumvent complex market interactions as would a cost-plus contract." *Id.* at 736.

Unfortunately, this observation overlooks some significant peculiarities in the public construction industry, which is in some measure insulated from ordinary market influences. First, the contractors in this industry generally calculate their bids by adding a fixed percentage mark-up to the cost of materials. *See* Brief for Respondent in Opposition to the Grant of a Writ of Certiorari at 8-9; Brief of State of California Through Its Attorney General, Evelle J. Younger Amicus Curiae, at 15. Second, in this industry, the contractor does not ordinarily acquire the necessary materials until after it has been awarded the contract. It generally takes the anticipatory bids of subcontractors and suppliers, including any illegal overcharges that have been added to their prices, and calculates its total bid accordingly. *See id.* If the *Illinois Brick* Court had given greater consideration to these facts, it might have concluded that the intermediary contractors in this situation are often mere conduits for the illegal overcharge. Rather than adopting an expansive view and permitting a more extensive factual inquiry, the Court chose to narrowly define the cost-plus exception to pre-arranged contracts in which "[the direct purchaser's] customer is committed to buying a fixed quantity regardless of price." 431 U.S. at 736.

It should be noted that, although it explicitly narrowed the cost-plus exception defined in *Hanover Shoe,* the *Illinois Brick* Court indicated that it might be willing to recognize an additional exception in cases in which "the direct purchaser is owned or controlled by its customer." 431 U.S. at 736 n.16 (citing Perkins v. Standard Oil Co., 395 U.S. 642, 648 (1969), and *In re* Western Liquid Asphalt Cases, 487 F.2d 191, 197, 199 (9th Cir. 1973), *cert. denied,* 415 U.S. 919 (1974)). *Western Liquid Asphalt,* however, presented a situation in which the direct purchaser was controlled not by its customer, the plaintiff, but rather by its supplier, the defendant. 487 F.2d at 198-99. Similarly, in *Perkins,* which involved a violation of the Robinson-Patman Act, 15 U.S.C. § 13 (1976), the plaintiff alleged that the defendant had extended unlawfully favorable treatment to a wholesaler who passed on the advantageous price to his subsidiary, the plaintiff's competitor. 395 U.S. at 647-48.

This discrepancy in the *Illinois Brick* opinion creates a question concerning the scope of the additional exception prescribed by the Court. It is suggested that this exception should be applied in situations such as that presented in *Western Liquid Asphalt,* in which the defendant controlled the intermediary. Although the *Illinois Brick* Court did not explicitly mention this type of situation, it is fair to assume that such an interpretation was intended. Any other interpretation could lead to the anomalous conclusion that antitrust violators could avoid all civil liability under § 4 by simply establishing sham corporations and using them as distributors for price-fixed products. *Cf. Ultimate-Consumer Standing, supra* note 2, at 412-13 (offensive passing-on theory should be permitted where manufacturer controls or influences retail prices through use of suggested list prices).

In Stotter & Co. v. Amstar Corp, [1978] TRADE REG. REP. (CCH) ¶ 61,934 (3d Cir. 1978), the Third Circuit recognized an analogous exception and permitted a § 4 suit by a plaintiff

confronted with the choice of either overruling the earlier decision or extending it to the offensive passing-on situation.[58] Its decision to adopt the latter approach was, in part, a result of a determination to adhere to the principle of stare decisis.[59] A more compelling reason for not overruling the *Hanover Shoe* decision, however, was the *Illinois Brick* Court's fear that "[p]ermitting the use of pass-on theories under § 4 . . . would add whole new dimensions of complexity to treble-damage suits and seriously undermine their effectiveness."[60] Specifically, the Court was concerned with the troublesome complications that may arise in proving the fact and extent of the plaintiff's injury and the difficulty of fashioning a method to eliminate the threat of multiple liability in private antitrust suits.

The Problem of Proving Injury

Both *Illinois Brick* and *Hanover Shoe* reflect the Supreme Court's belief that if the passing-on theory were to be used in civil antitrust suits, such litigation would become hopelessly complicated and fraught with uncertainty.[61] In light of the difficulties involved in tracing the impact of an illegal overcharge through the

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who had not bought the price-fixed product from the defendant, but had bought items containing the price-fixed product from both the defendant and the defendant's subsidiary. In holding that the *Illinois Brick* decision did not bar this plaintiff, the court stated that "to deny recovery in this instance . . . would allow the price-fixer of a basic commodity to escape the reach of a treble-damage penalty simply by incorporating the tainted element into another product." *Id.* at 73,953. Similarly, in Gas-A-Tron v. American Oil Co., [1977 Transfer Binder] TRADE REG. REP. (CCH) ¶ 61,789 (D. Ariz. 1977), the court stated that *Illinois Brick* did not preclude a suit by a plaintiff who purchased from an intermediary where the latter was not the price-fixer, but was a participant in the illegal combination.

[58] 431 U.S. at 736.

[59] *Id.* The *Illinois Brick* Court's determination to adhere to the principle of stare decisis is somewhat surprising in view of the fact that only two weeks later, in Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977), the Supreme Court did in fact overrule a prior antitrust decision and, in the process, swept away a decade of established precedent. The plaintiff in *Continental T. V.* alleged that the defendant had violated section 1 of the Sherman Act, 15 U.S.C. § 1 (1976), by enforcing franchise agreements that limited the sale of defendant's products to certain specified locations. 433 U.S. at 40. In United States v. Arnold Schwinn & Co., 388 U.S. 365 (1967), the Supreme Court had held that such a practice was a per se violation of the antitrust laws. Citing *Illinois Brick* as an illustration of the principle of stare decisis, 433 U.S. at 47, the *Continental T. V.* Court ignored that principle and, without further discussion, explicitly overruled *Schwinn. Id.* at 58. Justice White, who wrote the majority opinion in *Illinois Brick,* however, offered a concurring opinion in *Continental T. V.* in which he argued that the stare decisis rule should control. Although Justice White would have reached the same result as was reached by the *Continental T. V.* majority, he would have done so by distinguishing rather than overruling the prior case. *Id.* at 59-71 (White, J., concurring).

[60] 431 U.S. at 737.

[61] *Id.* at 731-33; 392 U.S. at 494.

various levels of the distribution chain, this concern is clearly a substantial one. There are, however, some indications that the Court overstated the importance of these difficulties, particularly in situations which involve offensive use of passing-on.

Traditional economic theories exist to aid courts in measuring the economic consequences of an overcharge. If, for example, the market for the product in question is highly inelastic, intermediaries in the distribution chain are likely to encounter little difficulty in passing on the overcharge to their customers. If, on the other hand, the market is a highly elastic one where increased prices result in diminished demand, the direct purchaser probably will be forced to absorb the overcharge.[62] In addition, if, as in *Illinois Brick*, the price-fixed product is a relatively small, inexpensive component in a larger unit, the overcharge is more likely to be absorbed at the farther reaches of the distribution chain.[63] Such factors and theoretical constructs are available to assist the courts in determining with some certainty whether an overcharge has been passed on.[64] In declining to rely on these theories as a basis for making such a determi-

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[62] *See* Schaeffer, *supra* note 2, at 887-900.

[63] In situations in which the price-fixed product is a relatively small component in a larger finished unit, the demand for the product probably will not be significantly affected by an increase in the component's price. One commentator has observed that such a market situation may provide a fertile environment for illegal price-fixing activities. *Id.* at 900. However, some commentators have observed that, in such situations, it is extremely difficult to prove that an increase in the price of the finished unit was the direct result of an illegal overcharge for the component product rather than a result of independent market factors. *See, e.g.*, Handler & Blechman, *supra* note 6, at 638-49. Such difficulties of proof may have influenced the court in *Philadelphia Hous. Auth. v. American Radiator & Standard Sanitary Corp.*, 50 F.R.D. 13 (E.D. Pa. 1970), *aff'd sub nom.* Mangano v. American Radiator & Standard Sanitary Corp., 438 F.2d 1187 (3d Cir. 1971), wherein the court was called upon to determine whether the purchasers of new and used homes could recover treble damages from certain plumbing fixture manufacturers who had illegally increased the price of their products by $10 to $20 per unit. In denying the claims of the plaintiffs, the *Philadelphia Hous. Auth.* court concluded that it was unlikely that this small overcharge for a relatively minor component had produced an equivalent increase in the price of the houses. *Id.* at 26.

[64] Many commentators have argued that the *Hanover Shoe* Court exaggerated the difficulties involved in proving the fact and amount of a passed-on overcharge. *See, e.g.*, McGuire, *supra* note 18, at 185; Pollock, *Automatic Treble Damages and the Passing-on Defense: The Hanover Shoe Rule*, 13 ANTITRUST BULL. 1183, 1209-13 (1968); Schaeffer, *supra* note 2, at 915-29; Note, *The Effect of Hanover Shoe on the Offensive Use of the Passing-on Doctrine*, 46 So. CAL. L. REV. 98, 113 (1972); *Standing to Sue*, *supra* note 3, at 983; LEGISLATIVE ANALYSIS No. 7, *supra* note 17, at 11 (quoting Thomas Kauper, Ass't Atty. Gen. in charge of the Antitrust Division of the Justice Dep't). *But see* Handler & Blechman, *supra* note 6, at 643, 654 (statistical analysis and hypothetical economic models are of limited utility in tracing the effect of illegal overcharges). For a discussion of modern techniques available for analyzing the economic problems that arise in antitrust suits, see Lanzillotti, *Problems of Proof of Damages in Antitrust Suits*, 16 ANTITRUST BULL. 329 (1971); Guilfoil, *Damage Determination in Private Antitrust Suits*, 42 NOTRE DAME L. REV. 647 (1967).

nation, the *Illinois Brick* Court observed that economic analyses based upon theoretical models and constructs are not capable of yielding mathematically certain results.[65] The absence of absolute certainty in the results obtained through use of economic theories, however, does not negate their value in complex civil antitrust actions.[66] The testimony of economists as expert witnesses, for example, is commonly used in antitrust suits to establish the factual basis for a claim.[67]

In its concern for certainty, the *Illinois Brick* Court appears to have overlooked the important distinction between proving the fact of injury and proving the amount of damages.[68] Although the level

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[65] The *Illinois Brick* Court noted:

> Under an array of simplifying assumptions, economic theory provides a precise formula for calculating how the overcharge is distributed between the overcharged party (passer) and its customers (passees). *If* the market for the passer's product is perfectly competitive; *if* the overcharge is imposed equally on all of the passer's competitors; and *if* the passer maximizes its profits, then the ratio of the shares of the overcharge borne by the passee and the passer will equal the ratio of the elasticities of supply and demand in the market for the passer's products. Even if these assumptions are accepted, there remains a serious problem of measuring the relevant elasticities—the percentage change in the quantities of the passer's product demanded and supplied in response to a one percent change in price. In view of the difficulties that have been encountered . . . with the statistical techniques used to estimate these concepts, . . . it is unrealistic to think that elasticity studies . . . will resolve the pass-on issue.

431 U.S. at 741-42 (footnotes and citations ommitted) (emphasis in original).

[66] Despite the concerns expressed by the *Illinois Brick* Court, *see* note 65 *supra*, the federal courts have been able, in certain contexts, to ascertain the fact and amount of damages resulting from a passed-on illegal overcharge. *See, e.g., In re* Western Liquid Asphalt Cases, 487 F.2d 191 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974); West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079 (2d Cir), *cert. denied*, 404 U.S. 871 (1971); Carnivale Bag Co. v. Slide-Rite Mfg. Corp., 395 F. Supp. 287 (S.D.N.Y. 1975); Boshes v. General Motors Corp., 59 F.R.D. 589 (N.D. Ill. 1973). In fact, after hearing the facts in *Illinois Brick*, the Court of Appeals, Seventh Circuit, apparently believed that the fact and amount of damages could be proven with sufficient certainty to warrant a trial on the merits. *See* Illinois v. Ampress Brick Co., 536 F.2d 1163 (7th Cir. 1976), *rev'd sub nom.* Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

[67] *See, e.g.*, Atlas Bldg. Prods. Co. v. Diamond Block & Gravel Co., 269 F.2d 950 (10th Cir. 1959), *cert. denied*, 363 U.S. 843 (1960); Klein v. American Luggage Works, Inc., 206 F. Supp. 924 (D. Del. 1962), *rev'd on other grounds*, 323 F.2d 787 (3d Cir. 1963); VON KALINOWSKI, *supra* note 2, § 110.01[1]. The same analytical techniques often are used by industrial planners in making their pricing decisions. In *In re* Antibiotic Antitrust Actions, 333 F. Supp. 278, 289 (S.D.N.Y. 1971), the court observed that the "[m]ost important management decisions in the business world in which these defendants operate are made through the intelligent application of statistical and computer techniques and these class members should be entitled to use the same techniques in proving the elements of their cause of action."

[68] *See, e.g.*, Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562 (1931). *But cf.* Windham v. American Brands, Inc., 565 F.2d 59 (4th Cir. 1977) (en banc) (questions of injury and damages too interrelated to be addressed in bifurcated trial); Pollock,

of proof required to establish the former is generally higher,[69] the Supreme Court has stated that a plaintiff suing for treble damages need show only a "causal connection between the . . . violation . . . and the injury suffered."[70] The same Court also noted that "[i]f there is sufficient evidence in the record to support an inference of causation, the ultimate conclusion as to what that evidence proves is for the jury."[71] It would appear that the theoretical economic models combined with other factual material could be enough in a given case to prove that an indirect purchaser had, in fact, been injured by a passed-on overcharge. The precise extent of the pass-on and the exact amount of the damages are not relevant in this context.[72]

Furthermore, the position of an indirect purchaser attempting to prove a passed-on economic injury should be distinguished from that of a defendant seeking to utilize passing-on as a means of avoiding liability.[73] In the defensive passing-on situation, the defen-

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The "Injury" and "Causation" Elements of a Treble Damage Antitrust Action, 57 Nw. U.L. Rev. 691, 695-96 (1963) (since issues of fact and amount of damages are closely intertwined, they should not be given separate treatment).

[69] Von Kalinowski, *supra* note 2, § 115.02[2]; *see, e.g.,* Hobart Bros. v. Malcolm T. Gilliland, Inc., 471 F.2d 894 (5th Cir.), *cert. denied,* 412 U.S. 923 (1973); Loew's, Inc. v. Cinema Amusements, Inc., 210 F.2d 86 (10th Cir.), *cert. denied,* 347 U.S. 976 (1954).

[70] Perkins v. Standard Oil Co., 395 U.S. 642, 648 (1969); *see* Response of Carolina, Inc. v. Leasco Response, Inc., 537 F.2d 1307 (5th Cir. 1976); Zenith Vinyl Fabrics Corp. v. Ford Motor Co., 357 F. Supp. 133 (E.D. Mich. 1973), *cert. denied,* 419 U.S. 967 (1974).

[71] 395 U.S. at 648 (citation omitted).

[72] In Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969), the Court noted that "damage issues in these [antitrust] cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts." It is probably for this reason that the courts generally have not required plaintiffs seeking treble damages under § 4 to be able to prove the amount of damages with precision. As long as the amount of damages can be reasonably ascertained, the courts have been willing to permit recovery. In Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931), the Supreme Court observed:

> Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts.

See, e.g., Bigelow v. RKO Radio Pictures, Inc. 327 U.S. 251, 264-65 (1946); Woods Exploration & Producing Co. v. Aluminum Co. of America, 509 F.2d 784 (5th Cir.), *cert. denied,* 423 U.S. 833 (1975); Pennington v. United Mine Workers of America, 325 F.2d 804 (6th Cir. 1963), *rev'd on other grounds,* 381 U.S. 657 (1965); National Wrestling Alliance v. Myers, 325 F.2d 768 (8th Cir. 1963). Of course, neither the fact nor the amount of damages can be wholly speculative. Von Kalinowski, *supra* note 2, § 115.02[2].

[73] *See* McGuire, *supra* note 18, at 193 (defensive use of passing-on theory presents more difficult proof problems than does offensive use of theory); Schaeffer, *supra* note 2, at 884 (although economic analysis for offensive and defensive passing-on is the same, nature of what has to be proven is different); *Standing to Sue, supra* note 3, at 990-92 (defensive and offensive passing-on require different levels of proof).

dant must prove that no part of the illegal overcharge was absorbed by the plaintiff-direct purchaser. As the *Hanover Shoe* Court observed, the constructs and hypothetical models of economists probably are not precise enough to establish complete absence of injury on the part of the plaintiff.[74] In fact, even when these economists' tools are coupled with substantial factual information, the defendant's burden of proof on this issue indeed could be "insurmountable." The plaintiff seeking to establish injury and a right to sue under the language of the Clayton Act, however, should only be required to show that he absorbed some part of the overcharge.[75] The precise percentage of the overcharge absorbed by the plaintiff becomes important only in the context of the secondary problem of allocating the total recovery among competing injured claimants. While this allocation process could introduce some additional complications, it should not in itself be a critical factor in the determination of substantive rights.[76]

The Multiple Liability Problem

The multiple liability problem, which was emphasized in *Illinois Brick*,[77] presents one of the strongest arguments against permitting use of the passing-on theory as an offensive weapon.[78] Many

[74] 392 U.S. at 492-93.

[75] Many of the cases construing § 4 have held that the plaintiff need only show that his injury was proximately caused by the defendant's illegal conduct. *See, e.g.,* Perkins v. Standard Oil Co., 395 U.S. 642, 648-49 (1969); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n.9 (1969); Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946); South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414, 418 (4th Cir.), *cert. denied,* 385 U.S. 934 (1966); E.V. Prentice Mach. Co. v. Associated Plywood Mills, Inc., 252 F.2d 473, 477 (9th Cir.), *cert. denied,* 356 U.S. 951 (1958); Momand v. Universal Films Exchs., Inc., 172 F.2d 37, 43 (1st Cir. 1948), *cert. denied,* 336 U.S. 967 (1949); Ohio Valley Elec. Corp. v. General Elec. Co., 244 F. Supp. 914, 933 (S.D.N.Y. 1965); Fiumara v. Texaco, Inc., 204 F. Supp. 544, 547 (E.D. Pa.), *aff'd per curiam,* 310 F.2d 737 (3d Cir. 1962).

[76] In *In re* Western Liquid Asphalt Cases, 487 F.2d 191, 201 (9th Cir. 1973), *cert. denied,* 415 U.S. 919 (1974), the court emphatically stated that "[t]he day is long past when courts, particularly federal courts, will deny relief to a deserving plaintiff merely because of procedural difficulties or problems of apportioning damages." *See* South Carolina Council of Milk Producers, Inc. v. Newton, 360 F.2d 414, 420 (4th Cir.), *cert. denied,* 385 U.S. 934 (1966); Carnivale Bag Co. v. Slide-Rite Mfg. Corp., 395 F. Supp. 287, 292 (S.D.N.Y. 1975). *See also* Handler, *Innovations, supra* note 23, at 30-37.

[77] 431 U.S. at 737-41.

[78] The knotty multiple liability problem has been noted by many courts and commentators. *See, e.g.,* Carnivale Bag Co. v. Slide-Rite Mfg. Corp., 395 F. Supp. 287, 291-92 (S.D.N.Y. 1975); Philadelphia Hous. Auth. v. American Radiator & Standard Sanitary Corp., 50 F.R.D. 13, 30 (E.D. Pa. 1970), *aff'd per curiam sub nom.* Mangano v. American Radiator & Standard Sanitary Corp., 438 F.2d 1187 (3d Cir. 1971); Beane, *supra* note 2, at 348; Handler & Blechman, *supra* note 6, at 649; *Ultimate-Consumer Standing, supra* note 2, at 410. *But see* Boshes v. General Motors Corp., 59 F.R.D. 589, 596 (N.D. Ill. 1973), in which the court stated that

procedural devices exist, however, that reduce the likelihood of multiple liability to a remote possibility. If, for example, all or most of the injured parties have initiated independent lawsuits, the use of interdistrict transfers[79] and consolidation of multidistrict litigation[80] would help to avoid conflicting and overlapping judgments. A defendant who anticipates a multiple liability problem can use statutory interpleader[81] to bring a substantial number of the potential claimants into the litigation.[82] An alternative method for bringing the potential claimants into court would be to invoke the compulsory joinder provisions of Rule 19 of the Federal Rules of Civil Procedure.[83] In addition to these procedural devices, the 4-year statute of limitations which governs civil cases arising under section 4 provides a safeguard against multiple liability.[84] In light of the protracted nature of antitrust litigation, this relatively short period for commencing an action significantly diminishes the danger that a defendant who pays a judgment[85] will be exposed to liability in a

"cutting off the rights of such a substantial number of potentially injured persons merely because such a 'possibility' exists is far too drastic a measure to take." *See also* Schaeffer, *supra* note 2, at 923-33 (threat of multiple liability may be consistent with punitive purposes of statute).

[79] 28 U.S.C. § 1404 (1976).

[80] *Id.* § 1407. The concept of multidistrict coordination developed as a result of the experience of the federal courts in the *Electrical Cases, cited in* note 28 *supra.* For a discussion of the effectiveness of this device, *see* Handler, *Innovations, supra* note 23, at 15-17.

[81] 28 U.S.C. § 1335 (1976).

[82] Despite the apparent benefits of statutory interpleader, the defendant in a complex antitrust action might find the procedural requirements extremely onerous. In order to invoke the interpleader provisions, the defendant would be conceding in effect that it had violated the antitrust laws and that it was liable for the claimed amount of damages. *Id.* § 1335(a)(1). Under the statute, the court could require the defendant to post a substantial bond as a condition precedent to the defendant's use of interpleader. *Id.* § 1335(a)(2). In large treble damage actions, such a requirement could render this procedural device financially prohibitive. Finally, if the defendant wishes to bring all of the potential claimants, including ultimate consumers, into the litigation, it will have to assume the burden of structuring a complex subclass action in much the same manner as would the representative plaintiff making a claim under FED. R. CIV. P. 23. *See* McGuire, *supra* note 18, at 197; *Standing to Sue, supra* note 3, at 993.

[83] FED. R. CIV. P. 19; *see* McGuire, *supra* note 18, at 201-02; *Standing to Sue, supra* note 3, at 997-98. Joinder of all the necessary parties may be impractical, however, in cases involving large classes of plaintiffs.

If the action is initiated by the indirect purchasers, middlemen seeking to establish their claims could enter the litigation through the mechanisms of intervention as of right and permissive intervention. FED. R. CIV. P. 24. Theoretically, these mechanisms would also be available to indirect purchasers seeking to establish a claim in an action commenced by the direct purchaser. Such intervention is unlikely, however, if the indirect purchasers' claims are small or if the indirect purchasers are not in a position to be aware of the existence of the litigation.

[84] 15 U.S.C. § 15(b) (1976).

[85] The risk of multiple liability to claimants who have not yet come forward may discour-

subsequent suit.[86] Furthermore, some authorities have suggested that the doctrines of collateral estoppel and res judicata might be helpful to a defendant seeking to avoid multiple liability.[87] The combined existence of these procedural devices and legal theories would mean that only in rare instances would a potential claimant escape this net of safeguards and be able to hold a defendant liable after a final judgment has been entered and paid.[88] In such a case, it is conceivable that additional legal theories could be fashioned by the courts to limit the defendant's total liability.[89]

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age the defendant in passing-on cases from reaching an out-of-court settlement with the known plaintiffs. Such a defendant may prefer to wait until the 4-year statute of limitations has run. One commmentator has suggested that this problem might be minimized by allowing the defendant to place the settlement fund into an escrow account to be held in trust for future claimants who emerge before the statute of limitations has run. McGuire, *supra* note 18, at 199-200.

[86] Several authorities have cited the short statute of limitations as a helpful factor in minimizing the multiple liability problem. *See, e.g., In re* Western Liquid Asphalt Cases, 487 F.2d 191, 201 (9th Cir. 1973), *cert. denied,* 415 U.S. 919 (1974); Carnivale Bag Co. v. Slide-Rite Mfg. Corp., 395 F. Supp. 287, 291-92 (S.D.N.Y. 1975); Boshes v. General Motors Corp., 59 F.R.D. 589, 596 (N.D. Ill. 1973).

[87] *See In re* Western Liquid Asphalt Cases, 487 F.2d 191, 201 (9th Cir. 1973), *cert. denied,* 415 U.S. 919 (1974); Boshes v. General Motors Corp., 59 F.R.D. 589 (N.D. Ill. 1973). *See also* VON KALINOWSKI, *supra* note 2, § 109.04[1]-[5]. The concepts of res judicata and collateral estoppel have only limited utility in antitrust cases, however, since a claimant who was not a party to the action generally would not be bound by a prior judgment. *See* 1B MOORE'S FEDERAL PRACTICE ¶¶ 0.411-.412, 0.441[3], at 1251, 3781 (2d ed. 1974); Handler & Blechman, *supra* note 6, at 650. Thus, only if these doctrines were modified to accommodate the special problems of passing-on litigation would they become truly significant aids to antitrust defendants.

[88] One court has observed that the specter of multiple liability is "nothing more than . . . a hypothetical question concerning the allocation of provable injury, not . . . that of the standing necessary to maintain a cause of action." Washington v. American Pipe & Constr. Co., 274 F. Supp. 961, 965 (W.D. Wash. 1967). In fact, although multiple liability is theoretically possible in cases where offensive passing-on is permitted, to date no defendant has actually had to pay duplicative damages to separate claimants. Amicus Curiae Brief for 48 States and Nat'l Assoc. of Attys. Gen. at 38; Brief for United States as Amicus Curiae at 7, Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

[89] Many methods have been suggested to minimize or even eliminate the multiple liability problem in cases involving passed-on overcharges. One commentator has suggested that a shortened 1-year statute of limitations be applied to the initiation of an action by the direct purchaser. This approach is justified on the theory that a direct purchaser who was actually injured by having to absorb an illegal overcharge ordinarily would not choose to delay the commencement of legal action. Indirect purchasers who have, in many cases, less access to information concerning competitive conditions in the wrongdoer's marketplace would continue to have 4 years to initiate their claims. Thus, the antitrust defendant would be exposed to the possibility of multiple liability only if a direct purchaser initiated a lawsuit within a year after the purchase occurred. The author of this proposal further suggests that, in such situations, the court use its discretion to set low bond so that the defendant can interplead the other potential claimants without suffering undue financial hardship. Note, *The Effect of* Hanover Shoe *on the Offensive Use of the Passing-on Doctrine,* 46 SO. CAL. L. REV. 98, 116 (1972). Unfortunately, this approach has some serious weaknesses. Rather than com-

Indirect purchasers, for example, could be precluded from suing the wrongdoer if the latter has already paid a judgment to the direct purchaser.[90] In these situations, the indirect purchaser could be required instead to look to the successful direct purchaser, who would be deemed to hold his recovery in constructive trust for those who had absorbed the passed-on overcharge. In order to ensure the continuing availability of the recovery fund for future claimants, the court could require the successful direct purchaser-plaintiff to place the money in an interest bearing account until the 4-year statute of limitations has run and special masters could be utilized[91] to assist in allocating the fund among the claimants.[92]

One negative aspect of the constructive trust approach is that it could serve to discourage direct purchasers from initiating private

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pletely eliminating the risk of multiple liability, it merely reduces the possibility that the problem will arise. Additionally, this approach works to the detriment of direct purchasers whose legal position would be enhanced if they could wait until the government had initiated a suit against the wrongdoer. *See* note 43 *supra*. In many instances, the direct purchaser does not become aware that he has been victimized by illegal practices until he learns that the Justice Department has initiated an action.

[90] *See* McGuire, *supra* note 18, at 198-201.

[91] FED. R. CIV. P. 53.

[92] *See In re* Western Liquid Asphalt Cases, 487 F.2d 191, 201 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974). The constructive trust approach appears to be conceptually sound. The sole theoretical problem with the concept is that it eliminates the right of the indirect purchaser to relitigate the issue of the amount of damages. Under this approach, the indirect purchaser is effectively bound on the damage issue by the findings of the court in the original action between the direct purchaser and the wrongdoer. This diminution in the indirect purchaser's rights seems to have at least some theoretical support. The constructive trust theory implicitly assumes that, in instances where the direct purchaser has maintained a successful lawsuit, the indirect purchaser has no primary right against the wrongdoer. Instead, his right of action is converted into a secondary right to proceed against the party who directly caused his injury by passing on the illegal overcharge. Under this assumption, there should be no theoretical objection to depriving the indirect purchasers of a right to litigate the damage issue in an adversary proceeding against the original wrongdoer.

A similar doctrine could be evolved to prevent multiple liability in situations in which the indirect purchasers sue and recover before the direct purchaser initiates an action. The *Hanover Shoe* rule, for example, might be modified to create a rebuttable presumption rather than an absolute prohibition of the defensive use of the passing-on theory. The direct purchaser-plaintiff would be presumed to actually have been economically injured by the illegal conduct of the defendant. The defendant, however, would be permitted to rebut the presumption by showing that indirect purchasers had successfully maintained a cause of action and recovered damages from him. Such a recovery would be strong evidence of the fact that a pass-on had occurred and that the direct purchaser-plaintiff was not actually injured. Thus, only in those instances where the second court reached a contrary result and found that, as a question of fact, no pass-on had occurred would the defendant face the problem of multiple liability. *See* McGuire, *supra* note 18, at 200-01. Such an approach would also be useful in cases where the trial court determines that the indirect purchaser absorbed only a portion of the illegal overcharge. In this situation, the defendant could be permitted to use this determination to reduce his liability for damages in a subsequent action brought by the direct purchaser.

treble damage actions. A direct purchaser, for example, might find the prospect of having to defend his recovery fund against claims from its customers too burdensome to warrant the massive expenditure of time and money. In addition, the requirement that the recovery fund be effectively frozen for a number of years could diminish the incentive for direct purchasers to bring suit. It would appear, however, that the prospect of retaining a significant portion of a treble damage award would be sufficient to outweigh these negative factors. Thus, it appears that the *Illinois Brick* Court may have exaggerated the significance of the multiple liability problem.

THE IMPACT OF *Illinois Brick*

The Supreme Court's decisions in *Hanover Shoe* and *Illinois Brick* have produced a rule of law that is straightforward in application but conceptually difficult to justify. Under this rule, a party who purchases directly from the wrongdoer has a right of recovery whether or not he suffers actual economic injury. On the other hand, an indirect purchaser is barred from seeking redress, even though he may have absorbed the illegal overcharge. While it is true that this rule protects antitrust defendants from the threat of multiple liability, it creates the possibility of a windfall for the direct purchaser who was able to recover his economic loss in the marketplace through increased prices. To the extent that this windfall occurs at the expense of an indirect purchaser who is actually injured, the compensatory purposes of the antitrust statutes have been defeated.[93]

This result appears to be in direct conflict with the intent of recent congressional initiatives that were designed to make civil antitrust remedies more available to the individual consumer. For example, the Hart-Scott-Rodino Antitrust Improvements Act of 1976[94] permits the states to sue in *parens patriae*[95] on behalf of

[93] Under the rule established in *Hanover Shoe* and *Illinois Brick*, it is possible for the direct purchaser to recover four times the amount of his actual loss, since he may be able to raise his price to his customers in an amount equal to his loss and still recover treble damages in a suit against the wrongdoer. *See* Pollock, *Automatic Treble Damages and the Passing-on Defense: The Hanover Shoe Decision*, 13 ANTITRUST BULL. 1183, 1218 (1968). The possibility of such a windfall recovery, occurring at the expense of indirect purchasers who actually have absorbed the illegal overcharge, appears to be inconsistent with the compensatory purpose of § 4. *See Ultimate-Consumer Standing, supra* note 2, at 409 n.93; note 15 *supra*.

[94] Pub. L. No. 94-435, tit. III, § 301, 90 Stat. 1383, 1394-96 (codified at 15 U.S.C.A. §§ 15c-15h (West Supp. 1978)) [hereinafter cited as Hart-Scott-Rodino Act].

[95] Historically, the doctrine of *parens patriae* was used to permit the states to sue on behalf of incompetent citizens or to vindicate its own quasi-sovereign interest. *See* Hawaii v. Standard Oil Co., 405 U.S. 251, 257-59 (1972). The concept originated in English common

citizens who are injured by antitrust violations.[96] The statute was enacted in response to the holding in *California v. Frito-Lay, Inc.*,[97] which denied the state a right to maintain an antitrust suit[98] under the Clayton Act on behalf of its citizens. The underlying purpose of the new statute was to establish procedures that would facilitate the institution of antitrust suits and render them manageable.[100] The problem of allocating the proceeds of the lawsuit among competing claimants was resolved by the creation of an innovative procedural device, the fluid recovery fund.[101] Under the terms of the Act, the

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law and, although it was later accepted in several states, it was never widely recognized in the federal courts. *See* H.R. REP. No. 94-499, 94th Cong., 2d Sess. 4-6 (1975), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS, 2572, 2574; note 98 *infra*. For a discussion of the background of the *parens patriae* concept, see Malina & Blechman, Parens Patriae *Suits for Treble Damages Under the Antitrust Laws*, 65 NW. U.L. REV. 193, 197-99 (1970) [hereinafter cited as Malina & Blechman].

[96] 15 U.S.C.A. § 15c(a)(1) (West Supp. 1978) provides in pertinent part:

> Any attorney general of a State may bring a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of [the antitrust laws] . . . .

[97] 474 F.2d 774 (9th Cir.), *cert. denied*, 412 U.S. 908 (1973).

[98] Although government entities have been permitted to sue under section 4 of the Clayton Act for damage to their own proprietary interests, *see, e.g.*, Chattanooga Foundry & Pipe Works v. Atlanta, 203 U.S. 390 (1906), they generally have been precluded from recovering in *parens patriae* for injuries suffered by their citizens. *See, e.g.*, Hawaii v. Standard Oil Co., 405 U.S. 251 (1922); Handler & Blechman, *supra* note 6, at 633 n.39; Malina & Blechman, *supra* note 95, at 197-99. *See also* note 95 *supra*. The approach generally taken by modern courts toward the *parens patriae* concept was aptly expressed in *In re* Multidistrict Vehicle Air Pollution, 481 F.2d 122, 131 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973), in which the court stated: "[P]olitical subdivisions such as cities and counties, whose power is derivative and not sovereign, cannot use as *parens patriae*, although they might sue to vindicate such of their own proprietary interests as might be congruent with the interests of their inhabitants." Although states are sovereign entities, they have been similarly precluded from maintaining actions in the absence of a proprietary interest. *See* note 95 *supra*. *But see In re* Antibiotic Antitrust Actions, 333 F. Supp. 278, 280 (S.D.N.Y. 1971), in which the court observed:

> [I]t is difficult to imagine a better representative of the retail consumers within a state than the state's attorney general. Historically the common law powers of the attorney general include the right and duty to take actions necessary to the maintenance of the general welfare and his presence in these actions is but a modern day application of that right and duty.

[99] H.R. REP. No. 94-499, 94th Cong., 2d Sess. 5 (1975), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2571, 2574-75.

[100] H.R. REP. No. 94-499, 94th Cong., 1st Sess. 8, 15 (1975), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS at 2578, 2584-85.

[101] 15 U.S.C.A. § 15e (West Supp. 1978). This section of the recently enacted statute embodies the concept of the fluid class recovery fund that was suggested by the district court in Eisen v. Carlisle & Jacquelin, 52 F.R.D. 253, 264-65 (S.D.N.Y. 1971), *rev'd*, 479 F.2d 1005

successful plaintiff-state may become the custodian of the recovery fund.[102] Citizens who were actually injured by the antitrust violation would be obliged to establish their individual claims through procedures established at the state level.[103] The state would then apply any unclaimed amounts remaining in the fund to public welfare projects that bear some relation to the violation.[104] In this way, funds that are not used to compensate victims directly may be used to fulfill a more general compensatory goal.

Another important feature of the Hart-Scott-Rodino Act is its simplified requirements for notifying potential claimants. The framers of the Act sought to avoid the costly and cumbersome notice requirements that have been imposed upon class actions.[105] The Act

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(2d Cir. 1973), *aff'd,* 417 U.S. 156 (1974). The district court in *Eisen* explained its use of the fluid recovery concept as follows:

> Distribution of an eventual recovery to the class members . . . need not be viewed solely in terms of personal and individual damages and recoupment thereof. Such a view is appropriate where the disputed transactions themselves are personal and individual and have litigable significance to the plaintiff. The situation here, however, is different. Although the total volume of transactions is very large, each transaction, as far as the issues here are concerned, is thoroughly stereotyped and is sufficiently small so that the benefits of individual recovery are not worth the price of litigating individual claims . . . .
>
> With these indicia present, I think it appropriate . . . to consider distribution of damages to the class as a whole rather than to adopt . . . an inflexible mold of recovery running to specific class members.

52 F.R.D. at 264. Although the *Eisen* court was applying this reasoning to a class action for damages resulting from violations of the laws regulating the sale of securities, it is equally applicable to actions for damages to consumers resulting from violations of the antitrust laws. *But see* Windham v. American Brands, Inc., 565 F.2d 59 (4th Cir. 1977) (en banc) (fluid recovery may be unconstitutional in antitrust suits).

The fluid class recovery concept was also used by the court in West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079 (2d Cir.), *cert. denied,* 404 U.S. 871 (1971). For a discussion of this method of distributing damages in large class actions, see Malina, *Fluid Class Recovery As a Consumer Remedy in Antitrust Cases,* 47 N.Y.U.L. REV. 477, 477 (1972).

[102] 15 U.S.C.A. § 15e (West Supp. 1978) provides for the distribution of damages as follows:

> Monetary relief recovered in an action under [this section] shall-
> (1) be distributed in such manner as the district court in its discretion may authorize; or
> (2) be deemed a civil penalty by the court and deposited with the State as general revenues; subject in either case to the requirement that any distribution procedure adopted afford each person a reasonable opportunity to secure his appropriate portion of the net monetary relief.

[103] *See id.* Alternatively, the court may distribute the recovery fund directly to claimants. *Id.*

[104] H.R. REP. No. 94-499, 94th Cong., 2d Sess. 16 (1975), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2572, 2585-86; LEGISLATIVE ANALYSIS No. 7, *supra* note 17, at 10-11. This approach was used in West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079 (2d Cir.), *cert. denied,* 404 U.S. 871 (1971).

[105] *See* LEGISLATIVE ANALYSIS No. 7, *supra* note 17, at 9-10. In Eisen v. Carlisle & Jacque-

permits the states to use whatever means are practicable to apprise injured citizens of their right to make a claim against the recovery fund.[106]

In enacting this innovative legislation, Congress considered the fact that "[t]he economic burden of many antitrust violations is borne in large measure by the consumer in the form of higher prices for his goods and services."[107] The Act's sponsors further noted that antitrust violations have contributed to the current problem of inflation in the national economy.[108] Recognizing that "[f]ederal antitrust statutes do not presently provide effective redress for the injury inflicted upon consumers,"[109] Congress attempted to create a vehicle through which the claims of injured consumers could be vindicated.[110]

The *Illinois Brick* Court did not find this strong expression of congressional intent persuasive. The Court correctly observed that

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lin, 417 U.S. 156, 177 (1974), the Supreme Court held that the representative plaintiff in a class action brought pursuant to FED. R. CIV. P. 23 must furnish and pay for individual notice to all those class members whose names and addresses are ascertainable. This requirement, which imposes a substantial financial burden upon the plaintiff, has had a chilling effect on the use of the class action as a device to vindicate the rights of large groups of claimants with relatively small individual claims. *See generally* H.R. REP. No. 94-499, 94th Cong., 2d Sess. 7 (quoting James Halverson, Dir. of FTC Bureau of Competition), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2572, 2576-77.

[106] *See* 15 U.S.C.A. § 15c(b)(1) (West Supp. 1978). Television, radio and newspaper advertisements would be acceptable forms of notice under the Hart-Scott-Rodino Act. *See* LEGISLATIVE ANALYSIS No. 7, *supra* note 17, at 9-10.

[107] H.R. REP. No. 94-499, 94th Cong., 2d Sess. 3 (1975), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2572, 2573.

[108] H.R. REP. No. 94-499, 94th Cong., 1st Sess. 4 (1975), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2572, 2573.

[109] *Id. See also* Handler & Blechman, *supra* note 6, at 628-29 (*parens patriae* concept was an attempt to avoid manageability problem which has caused many courts to refuse to certify class actions).

[110] H.R. REP. No. 94-499, 94th Cong., 1st Sess. 4 (1975), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2572, 2573. 15 U.S.C.A. § 15d (West Supp. 1978) provides as follows:

> In any action under [this statute], in which there has been a determination that a defendant agreed to fix prices in violation of [the Sherman Act], damages may be proved and assessed in the aggregate by statistical or sampling methods, by the computation of illegal overcharges, or by such other reasonable system of estimating aggregate damages as the court in its discretion may permit without the necessity of separately proving the individual claim of, or amount of damage to, persons on whose behalf the suit was brought.

This section of the new statute was expressly designed to minimize problems of proof and manageability. H.R. REP. No. 94-499, 94th Cong., 2d Sess. 15 (1975), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2572, 2583-85; *see* LEGISLATIVE ANALYSIS No. 7, *supra* note 17, at 10. It is interesting to note that the methods for determining damages approved by Congress in its enactment of the Hart-Scott-Rodino Act are precisely those methods rejected by the Supreme Court in *Hanover Shoe, see* note 33 *supra*, and *Illinois Brick*, 431 U.S. at 731-33.

the Hart-Scott-Rodino Act is a procedural measure which does not establish new substantive rights.[111] Thus, insofar as the Court determined that indirect purchasers have no substantive rights under the Clayton Act, the existence of this new statute did not affect the outcome of the case.[112] There are, however, strong indications in the legislative history that Congress acted upon the assumption that indirect purchasers do indeed have a right of recovery under the Clayton Act.[113] Citing *In re Western Liquid Asphalt Cases,*[114] in which the court accepted an offensive passing-on argument, Congress noted what it believed to be a trend among the federal courts to recognize this right.[115] Moreover, there are indications that Congress intended the ameliorative provisions of the Act specifically to apply to situations in which an illegal overcharge had been passed on to the consumer. During the course of the House debates on the bill, Representative Rodino, one of its sponsors, stated:

> [A]ssuming the State attorney general proves a violation, and proves that an overcharge was "passed-on" to the consumers, injuring them "in their property"; that is, their pocketbooks—recoveries are authorized by the compromise bill *whether or not the consumers purchased directly from the price fixer, or indirectly, from intermediaries, retailers or other middlemen.* The technical and procedural argument that consumers have no "standing" whenever they are not "in privity" with the price fixer, and have not purchased directly from him, is rejected by the compromise bill. Opinions relying on this procedural technicality . . . are squarely rejected by the compromise bill.[116]

The *Illinois Brick* Court was not, of course, bound by this con-

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[111] 431 U.S. at 733 n.14; *see* H.R. REP. No. 94-499, 94th Cong., 2d Sess. 9 (1975), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2572, 2578-79.

[112] 431 U.S. at 733 n.14. The *Illinois Brick* Court's conclusion that the Hart-Scott-Rodino Act did not give ultimate consumers a right of recovery under section 4 of the Clayton Act was anticipated in Handler & Blechman, *supra* note 6, at 647-48. For this reason, the authors of the article concluded that the new statute would have little practical application. *Id.*

[113] *See* 431 U.S. at 757 n.13 (Brennan, J., dissenting). According to one commentator, when the Supreme Court denied the defendant's motion for certiorari in *In re* Western Liquid Asphalt Cases, 415 U.S. 919 (1974), many experts assumed that the Court was tacitly approving the offensive use of the passing-on theory. VON KALINOWSKI, *supra* note 2, § 109.03[2].

[114] 487 F.2d 191 (9th Cir. 1973), *cert. denied,* 415 U.S. 919 (1974). The plaintiffs in *Western Liquid Asphalt* had acquired the price-fixed product from various intermediary contractors. They were seeking to recover treble damages from the wrongdoer under the theory that the illegal overcharges had been passed on to them.

[115] H.R. REP. No. 94-499, 94th Cong., 2d Sess. 7 n.4 (1975), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2572, 2576 n.4.

[116] 16 CONG. REC. H10295 (daily ed. Sept. 16, 1976) (remarks of Rep. Rodino) (emphasis added); *see* H.R. REP. No. 94-499, 94th Cong., 2d Sess. 7-8 (1975), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2572, 2577.

gressional assumption concerning the reach of the Clayton Act, and, in the absence of a statute explicitly establishing a right of recovery for indirect purchasers, the Court was free to conclude that no such right existed.[117] Nonetheless, the *Illinois Brick* holding strips the Hart-Scott-Rodino Act of virtually all significance. The new statute's coverage is confined to "natural persons" who are injured by antitrust violations.[118] All business entities are expressly excluded from the scope of the Act.[119] Under the *Illinois Brick* holding, however, the individual consumer is precluded from suing, except in those rare instances where he has purchased directly from the wrongdoer.[120] Thus, although the *parens patriae* statute remains nominally viable, its effectiveness as an enforcement tool has been severely limited.

In effect, the *Illinois Brick* decision has eliminated the right of individual consumers to recover for injuries sustained as a result of antitrust violations.[121] Presumably, such consumers could still maintain an action against a retailer who has engaged in illegal practices. In such situations, the consumer has had direct dealings with the wrongdoer, apparently satisfying the requirements estab-

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[117] Citing Regional Rail Reorg. Act Cases, 419 U.S. 102, 132 (1974), and National Woodwork Mfrs. Ass's v. NLRB, 386 U.S. 612, 639 n.34 (1967), the *Illinois Brick* Court noted that the current opinions of particular legislators concerning the proper interpretation of a statute such as the Clayton Act cannot retroactively alter the legislative intent that accompanied the statute's enactment. Since, in the view of the *Illinois Brick* Court, indirect purchasers were never intended to have a right to sue under section 4 of the Clayton Act, the current statements by legislators that they should have such a right, *see* note 116 *supra*, are of no practical significance. According to the Court, if Congress now wishes to establish a new right of action for indirect purchasers, it should do so by enacting specific substantive legislation. 431 U.S. at 733-34 n.14. In contrast, Justice Brennan, writing for the dissent, stated that Congress' view of the state of the law should be given greater weight:

> It is difficult to see how Congress could have expressed itself more clearly. Even if the question whether indirect purchasers could recover for damages passed on to them was open before passage of the 1976 Act, . . . Congress' interpretation of § 4 in enacting the *parens patriae* provision should resolve it in favor of their authority to sue.

Id. at 758 (Brennan, J., dissenting).

[118] 15 U.S.C.A. § 15c(a)(1)(B)(ii) (West Supp. 1978).

[119] 15 U.S.C.A. § 15g(3) (West Supp. 1978). The sponsors of the Hart-Scott-Rodino Act believed that the consumer-oriented purposes of the Act would best be served by excluding all parties except natural persons from the scope of its coverage. H.R. REP. No. 94-499, 94th Cong., 2d Sess. 9 (1975), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2572, 2579.

[120] Most consumer class actions brought under the antitrust laws involve passed-on overcharges resulting from horizontal price-fixing. *See* Malina, *Fluid Class Recovery As A Consumer Remedy in Antitrust Cases,* 47 N.Y.U.L. REV. 477, 484 (1972).

[121] The Supreme Court's holding in *Illinois Brick* has already resulted in the elimination of antitrust suits brought by indirect purchasers. *See, e.g., In re* Folding Carton Litigation, 75 F.R.D. 727 (N.D. Ill. 1977) (amending certification of plaintiff class to exclude indirect purchasers in light of *Illinois Brick).*

lished in *Illinois Brick*. Consumer-retailer suits, however, represent a very narrow category of antitrust litigation, since the majority of antitrust violations occur before the product in question reaches the retail level.[122] Therefore, by eliminating the availability of direct actions as well as *parens patriae* suits, the net effect of the *Illinois Brick* decision will be to preclude consumers injured by this broad class of violations from obtaining compensation.

The *Illinois Brick* decision can be viewed as an example of the federal judiciary's tendency to resist involvement in complex, consumer oriented class action litigation.[123] Four years earlier, the Supreme Court exhibited a similar tendency by rejecting congressional efforts to expand and facilitate this type of legal action. In 1966, Congress enacted Rule 23 of the Federal Rules of Civil Procedure.[124] The rule was designed to eliminate technical impediments and create a procedural framework for litigating the interests of large and diverse classes of plaintiffs.[125] In *Eisen v. Carlisle & Jacqueline*,[126]

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[122] *See* Malina, *Fluid Recovery As A Consumer Remedy in Antitrust Cases*, 47 N.Y.U.L. Rev. 477, 484 (1972).

[123] *See* Alioto & Donnici, *supra* note 2, at 211; Comment, *To Right Mass Wrongs: A Federal Consumer Class Action Act*, 13 Harv. J. Legis. 776, 788-92 (1976); Hochberger, *U.S. Weighs New Class-Action Rules*, N.Y.L.J., Jan. 3, 1978, at 1, col. 2. In *Handler & Blechman*, *supra* note 6, at 628-29, the authors note that large class actions brought to vindicate the claims of ultimate consumers have been notoriously unsuccessful. Many such claims have been dismissed on the ground that they were unmanageable. *E.g., In re* Hotel Tel. Charges, 500 F.2d 86, 89-92 (9th Cir. 1974); Cotchett v. Avis Rent A Car Sys., Inc., 56 F.R.D. 549, 553-54 (S.D.N.Y. 1972); Philadelphia v. American Oil Co., 53 F.R.D. 45, 70-74 (D.N.J. 1971); Reinisch v. New York Stock Exch., 52 F.R.D. 561, 563-64 (S.D.N.Y. 1971). In other instances, consumer claims were dismissed because the court found that the plaintiffs had not been injured within the meaning of § 4. *See* note 39 *supra*.

One significant objection to the class action as a form of litigation is that it often produces more reward for the attorney than it does for the claimant. *See* Handler, *Innovations*, *supra* note 23, at 628. Although the individual claimant's recovery may be very small, the attorney's fee may run as high as 25% of the total recovery. *See, e.g.*, Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 275 F. Supp. 146 (E.D. Pa. 1967) (mem.). *But see* Dolgow v. Anderson, 43 F.R.D. 472, 487 (E.D.N.Y. 1968), in which the court observed:

> Those who criticize the class action on the grounds that it stirs up plaintiffs and serves only to provide fees for attorneys overlook the fact that we are not dealing with the traditional lawsuit which concerns primarily those litigants before the court. The public's concern with openness and honesty . . . gives it an interest no less significant than that of particular plaintiffs and defendants.

For a discussion of a recent Justice Department proposal for minimizing abuse of the class-action device by attorneys, see Hochberger, *U.S. Weighs New Class-Action Rules*, N.Y.L.J., Jan. 3, 1978, at 2, col. 3.

[124] *See* Notes of Advisory Committee on 1966 Amendment to Rules, Fed. R. Civ. P. 23, 28 U.S.C. app. at 7765 (1976).

[125] *See generally id.*

[126] 417 U.S. 156 (1974), *aff'g* 479 F.2d 1005 (2d Cir. 1973), *rev'g* 52 F.R.D. 253 (S.D.N.Y. 1971) and 54 F.R.D. 565 (S.D.N.Y. 1972).

the Supreme Court superimposed notice requirements that were so burdensome and costly as to actually discourage potential plaintiffs from initiating class actions under Rule 23.[127] Like the *Illinois Brick* rule, the *Eisen* holding adopted a narrow, technical view of an innovative congressional initiative, thereby emasculating it.

CONCLUSION

It is clear that large multiparty and class action litigation presents a series of knotty problems for federal courts, particularly when such litigation arises within the context of the antitrust laws. It is equally clear that the introduction of the passing-on theory into civil antitrust actions would necessarily "transform them into massive efforts"[128] to sort out the rights and liabilities of a large number of parties. Difficulties such as tracing the impact of a violation, ascertaining the fact and amount of damages, allocating the recovery fund among the competing claimants, and protecting the defendant from multiple liability present strong arguments for limiting or even excluding the passing-on theory from the field of civil antitrust litigation. This, in essence, was the conclusion reached by the Supreme Court in *Illinois Brick*.[129] There are, however, equally strong argu-

[127] 417 U.S. at 162. The *Eisen* case was a class action brought on behalf of all odd lot traders who bought or sold securities during the period from May 1, 1962, to June 30, 1966. The class was expected to include as many as 6 million potential claimants, of whom approximately 2¼ million were identifiable by name and address. 52 F.R.D. at 261. If the plaintiff's claims were upheld, each class member was expected to recover less than $5.20 in damages. It was estimated that individual notice to each of the 2¼ million identifiable claimants would cost over $225,000. Recognizing that such an initial outlay would place an almost impossible burden upon the representative plaintiff, the district court devised a cost-saving formula that minimized the requirement of individual notice and permitted notice by publication for certain classes of potential claimants. The use of this formula would have reduced the cost of notifying class members to $21,720. 52 F.R.D. at 263. In addition, the district court in *Eisen* had ruled that the defendants would have to pay 90% of the notice costs. Analogizing to the criteria governing the granting of preliminary injunctions, the court reasoned that, since the plaintiff was likely to prevail on the merits, he should have the benefit of assistance on the initial cost of the lawsuit. 54 F.R.D. at 567. The court's underlying purpose was to ensure that the case would be heard on its merits rather than being withdrawn or dismissed due to overly burdensome notice requirements. The Supreme Court ultimately rejected these relief measures, however, and held that each class member whose name and address were ascertainable had to be given individual notice at the plaintiff's expense. Citing the statutory language requiring "best notice practicable under the circumstances, including individual notice to all members who can be identified," FED. R. CIV. P. 23(c)(2), the Court determined that constitutional due process mandated a more stringent notice procedure, even where such a procedure would render the lawsuit financially prohibitive for the representative plaintiff. 417 U.S. at 173-77.

[128] 431 U.S. at 737.

[129] It should be noted that one of the problems cited by the *Illinois Brick* Court, that of allocating the recovery fund to a multitude of small claimants, was not really applicable to

ments in favor of permitting the passing-on theory to be used offensively. The theory allows the party who has actually been injured by an antitrust violation to sue the wrongdoer and thus promotes the compensatory goal of the Clayton Act. Permitting the indirect purchaser to sue also would be in accord with the broad antitrust enforcement policies embodied in section 4. There are situations in which a purchaser who deals directly with the wrongdoer would be reluctant to pursue his claim, particularly when he can pass on any overcharge to his customers.[130] In such cases, allowing indirect purchasers to sue would prevent the wrongdoer from retaining his illegal profit. Finally, permitting the use of the offensive passing-on theory in civil antitrust suits would be consistent with the developing policy of holding private industry accountable to the consuming public. This policy has already found expression in the tort doctrine of strict liability[131] and in the trend toward elimination of the privity requirement in negligence[132] and breach of warranty actions.[133] The recently enacted Hart-Scott-Rodino Act can be viewed as a legislative effort to extend this policy to the field of civil antitrust law.[134] By its decision in *Illinois Brick*, the Supreme Court has stymied these efforts and done much to reduce the accountability of private industry to consumers.

The underlying concern of the *Illinois Brick* Court was that, if plaintiffs were permitted to use the passing-on theory offensively,

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the facts of the case. In contrast to the thousands of claimants in *Philadelphia Hous. Auth.* and *Eisen*, the *Illinois Brick* claimants were a relatively small group of municipal entities with relatively large claims.

[130] The *Illinois Brick* Court acknowledged that "direct purchasers sometimes may refrain from bringing a treble-damages suit for fear of disrupting relations with their suppliers." 431 U.S. at 746 (footnote omitted). Nevertheless, the Court concluded, without further explanation, that "on balance . . . the legislative purpose . . . is better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them than by attempting to apportion the overcharge among all that may have absorbed a part of it." *Id.* Several other courts and commentators have recognized that direct purchasers may prefer not to sue their immediate suppliers. *See, e.g., In re* Western Liquid Asphalt Cases, 487 F.2d 191, 198 (9th Cir. 1973), *cert. denied,* 415 U.S. 919 (1974); Boshes v. General Motors Corp., 59 F.R.D. 589, 598 (N.D. Ill. 1973); Schaeffer, *supra* note 2, at 913-14; Wheeler, *Antitrust Treble-Damage Actions: Do They Work?,* 61 CALIF. L. REV. 1319, 1325 (1973); Note, *The Effect of Hanover Shoe on the Offensive Use of the Passing-on Doctrine,* 46 So. CAL. L. REV. 98, 112 (1972).

[131] *See* Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944) (Traynor, J., concurring). *See also* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960); Brief for United States as Amicus Curiae at 6, Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

[132] *See* MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

[133] *See* Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962); U.C.C. § 2-318; Prosser, *The Assault Upon the Citadel [Strict Liability to the Consumer],* 69 YALE L.J. 1099, 1124 (1960).

[134] *See* notes 94-116 and accompanying text *supra.*

civil antitrust suits would become wholly unmanageable. The Court feared that, under such circumstances, the effectiveness of the civil antitrust remedy would be placed in serious jeopardy.[135] Notwithstanding the merits of these concerns, enactment of the Hart-Scott-Rodino Act clearly indicates Congress' wish that the federal courts be available to consumers injured by antitrust violations.[136]

Although the *Illinois Brick* ruling has severely hampered congressional efforts to hold the antitrust violator directly liable to the consuming public, it is suggested that the federal courts may not be able to ignore these underlying policy considerations indefinitely.[137] The trend toward providing a remedy for individual consumers who have been injured by the illegal conduct of certain businesses has become too firmly rooted in modern law to be reversed. It is likely that, in the wake of *Illinois Brick,* Congress will enact remedial legislation and clarify its intentions concerning the rights of individual consumers in civil antitrust suits.[138] If this occurs, the federal

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[135] 431 U.S. at 745. A related concern expressed by commentators is the fear that an increase in complex class actions will overtax the federal courts and effectively overwhelm the judiciary system. *See, e.g.,* Handler, *Innovations, supra* note 23, at 4-5. Chief Justice Burger expressed this concern when he observed that "the federal court system is for a limited purpose, and lawyers, the Congress and the public must examine carefully each demand they make on that system." *Id.* at 12 (quoting Burger, *The State of the Judiciary—1970,* 56 A.B.A.J. 929, 933 (1970)).

[136] The sponsors of the *parens patriae* bill noted that the provisions allowing aggregation of damages, fluid recovery and the use of statistical methods for proving the extent of injury should relieve the burdens placed upon the courts in consumer antitrust actions maintainable under the statute. H.R. REP. No. 94-499, 94th Cong., 2d Sess. 14 (1975), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 2572, 2584. Several commentators also have observed that procedures such as those specified in the Act would render large civil antitrust actions more feasible. *See, e.g.,* Kohn, *The Antitrust Class Action as a Social Instrument,* 41 ANTITRUST L.J. 288 (1971); McGuire, *supra* note 18, at 190-91; LEGISLATIVE ANALYSIS No. 7, *supra* note 17, at 9-10. In *In re* Antibiotic Antitrust Actions, 333 F. Supp. 278 (S.D.N.Y. 1971), the plaintiff was a government entity claiming treble damages as a representative of citizens who had been injured by antitrust violations in the pharmaceutical industry. The *Antibiotic* court stated:

> It is far simpler to prove the amount of damage to the members of the class by establishing their total damages than by collecting and aggregating individual damage claims as a sum to be assessed against the defendants. And it is the court's tentative conclusion that this can be done without sacrificing the rights of the defendants.

Id. at 281. The *Antibiotic* court also noted that the problem of allocating the recovery fund among the claimants could be resolved through the use of subclass litigation. *Id.*

[137] It has been observed that the consumer antitrust class action has important social and policy implications. *See* Kohn, *The Antitrust Class Action as a Social Instrument,* 41 ANTITRUST L.J. 288 (1972). *See also* Dolgow v. Anderson, 43 F.R.D. 472, 487 (E.D.N.Y. 1968).

[138] At this writing, Congress is considering specific legislation which would overrule *Illinois Brick* and, in part, *Hanover Shoe.* The Senate measure, S. 1874, 95th Cong., 2d Sess. (1978), which was favorably reported out of the Judiciary Committee on June 14, 1978, would amend § 4 by adding the following:

> Sec. 4I. (1) In any action under sections 4, 4A, or 4C of the Clayton Act, the fact

> that a person or the United States has not dealt directly with the defendant shall not bar or otherwise limit recovery.
>
> (2) In any action under section 4 of the Clayton Act, the defendant shall be entitled to prove as partial or complete defense to a damage claim, that the plaintiff has passed on to others, who are themselves entitled to recover under section 4, 4A, or 4C of this Act, some or all of what would otherwise constitute plaintiff's damage.

Id. § 12, *reprinted in* [1978] ANTITRUST & TRADE REG. REP. (BNA) No. 870, at 12 (Spec. Supp. June 29, 1978). Sponsors of the bill have stated that it is designed to eliminate "the mechanical test of directness versus indirectness," while leaving intact the traditional standing tests. S. REP. No. 95-934, 95th Cong., 2d Sess. (1978), *reprinted in* [1978] ANTITRUST & TRADE REG. REP. (BNA) No. 870, at 9 (Spec. Supp. June 29, 1978) [hereinafter cited as S. REP.; Spec. Supp.]; *see* note 23 *supra.* These tests presumably would remain available to prevent recovery by indirect purchasers whose injury is too remote. S. REP., *reprinted in* Spec. Supp., *supra,* at 5. In addition, although the passing-on defense generally would be available, it could not be raised against direct purchasers if all injured indirect purchasers would be precluded from suing under one of the standing tests. S. REP., *reprinted in* Spec. Supp., *supra,* at 9. These symmetrical provisions were intended to prevent recovery by remote purchasers and, at the same time, insure that at least one party will be able to maintain a suit. *Id.* Critics of the bill, however, have suggested that this language is ambiguous and could be construed as eliminating all standing requirements. S. REP., *reprinted in* Spec. Supp., *supra,* at 16 (Additional Views of Sen. James B. Allen).

The House measure approved by the Monopolies Subcommittee, H.R. 11942, 95th Cong., 2d Sess. (1978), may present a similar problem. It provides in pertinent part:

> (a) Any indirect purchaser in the chain of manufacture, production, or distribution of goods or services shall, upon proof of payment of all or any part of any overcharge for such goods or services, be deemed to be injured within the meaning of section 4, 4A, or 4C of [the Clayton] Act.
>
> (b) Any indirect seller in the chain of manufacture, production, or distribution of goods or services shall, upon proof of receipt of all or any part of any underpayment for such goods or services, be deemed to be injured within the meaning of section 4, 4A, or 4C of [the Clayton] Act.
>
> (c) In any action under section 4 or 4A . . . , any defendant, as a partial or complete defense . . . , shall be entitled to prove that—
>
> (1) a purchaser in the chain who paid any overcharge passed on all or any part of such overcharge to another purchaser in such chain; or
>
> (2) a seller in the chain who received any underpayment passed on all or any part of such underpayment to another seller in such chain.

H.R. 11942, 95th Cong., 2d Sess. § 41(a)-(c) (1978), *reprinted in* [1978] ANTITRUST & TRADE REG. REP. (BNA) No. 859, at F-1 (Apr. 13, 1978). The House version would also simplify the evidentiary and multiple liability problems inherent in the passing-on theory by providing:

> (e)(1) . . . [A]ny damage award in a final judgment heretofore or hereafter rendered against any defendant in any action under section 4, 4A, or 4C of [the Clayton] Act shall be admissible as—
>
> (A) prima facie evidence against any plaintiff, and
>
> (B) conclusive evidence against such defendant, in any other action under section 4, 4A, or 4C of [the Clayton] Act brought against such defendant, as to all fully and fairly litigated matters regarding the amount of damages passed on which would be an estoppel as between the parties thereto.

H.R. 11942, 95th Cong., 2d Sess. § 41(e)(1) (1978), *reprinted in* [1978] ANTITRUST & TRADE REG. REP. (BNA) No. 859, at F-1 to -2 (Apr. 13, 1978). The estoppel effects of this provision are not applicable, however, to consent judgments or consent decrees. *Id.* § 41(e)(2). Unlike the Senate version, the House bill attempts to limit a defendant's total liability by requiring that treble damages be computed solely on the basis of the amount of the illegal overcharge. This provision is intended to eliminate the possibility that the defendant will be held liable

courts will have little choice but to accommodate the complex and sometimes unruly claims of large and diverse classes of plaintiffs. Imaginative and innovative measures will have to be devised to render these claims manageable.[139] Rather than attempt to further obstruct the efforts of Congress by adopting overly technical rules, the federal courts should make a positive contribution by helping to shape new procedural tools for minimizing the practical problem inherent in consumer antitrust litigation.[140] In *Illinois Brick*, the Supreme Court acted in resistance to a clear congressional initiative. The field remains open, however, for the Court to work in cooperation with Congress in shaping the rights and liabilities of the parties in this challenging area of the law.

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for the "ripple effects" of his unlawful conduct. *See* [1978] ANTITRUST & TRADE REG. REP. (BNA) No. 869, at A-11 (June 22, 1978).

Among the most controversial features of both proposals is a provision that would make the legislation retroactive to June 9, 1977, the date of the *Illinois Brick* decision. *See* S. 1874, § 4, 95th Cong., 2d Sess. (1978), *reprinted in* [1978] ANTITRUST & TRADE REG. REP. (BNA) No. 870, at 12 (Spec. Supp. June 22, 1978); [1978] ANTITRUST & TRADE REG. REP. (BNA) No. 869, at A-11 (June 28, 1978). Proponents of the retroactivity provision state that it is necessary to preserve over $800 million in indirect purchaser claims which were pending in the courts before the *Illinois Brick* decision was handed down. *See* [1978] ANTITRUST & TRADE REG. REP. (BNA) No. 866, at A-4 (June 1, 1978). The bills' critics, however, have argued that the retroactive provisions raise serious constitutional problems. *See* S. REP. No. 95-935, 95th Cong., 2d Sess. (1978) (Minority and Additional views), *reprinted in* [1978] ANTITRUST & TRADE REG. REP. No. 870, at 15 (Spec. Supp. June 29, 1978).

[139] The need for the development of innovative and imaginative procedural approaches to the consumer antitrust class action has been noted in City & County of Denber v. American Oil Co., 53 F.R.D. 620, 639 (D. Colo. 1971); *In re* Antibiotic Antitrust Actions, 333 F. Supp. 278, 289 (S.D.N.Y. 1971); Kohn, *The Antitrust Class Action As a Social Instrument*, 41 ANTITRUST L.J. 288 (1971). Recently, the Justice Department has begun to explore proposals for improving the methods by which large class actions involving small individual claims are handled in the federal courts. *See* N.Y. Times, Dec. 11, 1977, § 1, at 51, col. 1.

[140] It has been observed that the federal courts are the most appropriate forum for resolving large consumer antitrust suits, since they have extensive experience in handling complex litigation and a capacity to handle geographically dispersed claims. Comment, *To Right Mass Wrongs: A Federal Consumer Class Action Act*, 13 HARV. J. LEGIS. 776, 792-93 (1976).