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CONSUMER WELFARE LOSS: THE UNAWARDED DAMAGES IN ANTITRUST SUITS

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I. Introduction

Federal antitrust law entitles victims of monopoly overcharges to sue for treble damages. Section 4 of the Clayton Act provides a treble damage remedy to "any person injured in his business or property" by reason of antitrust violations.[1] Courts, therefore, have entertained actions containing allegations of illegal overcharges and have permitted damage recoveries based upon several criteria, including the excess price paid for the goods or services,[2] lost profits,[3] or the going value of the business.[4]

All such damages, however, are based on the loss resulting from actual purchases of the overpriced item. But what of goods or services that were not sold because of the illegal pricing? It is fundamental to

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1. 15 U.S.C. § 15(a) (1988) (providing that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee").

2. Hanover Shoe Co. v. United Shoe Mach. Corp., 392 U.S. 481 (1968).

3. Courts allow damages for lost profits using either (1) "before-and-after" calculations, i.e., the value of profits before the illegal collusion compared with those after, or (2) a "yardstick" theory, i.e., the value of profits for a similar business in the same market during the same period. *See* Lehrman v. Gulf Oil Corp., 500 F.2d 659, 667 (5th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975).

4. Arnott v. American Oil Co., 609 F.2d 873 (8th Cir. 1979), *cert. denied*, 446 U.S. 918 (1980).

economic theory that as price rises, the quantity demanded declines. Therefore, when anticompetitive conduct has caused an increase in the price of an item, there will be a reduction in sales.

In response to this reality, courts have allowed sellers to recover lost profits, i.e., profits not realized because there was no sale.[5] But what of the would-be consumers of the product who did not make purchases at the collusive price, but would have made purchases at a lower, non-monopoly price? Are they not also victims of anticompetitive conduct and therefore entitled to a remedy? This loss, known to economists as "consumer welfare loss" or "deadweight loss,"[6] has gone unrecognized and unawarded in antitrust litigation.[7]

II. The Welfare Loss Due to Monopoly Pricing

"If economists are united on anything, it is the proposition that monopoly prices reduce economic welfare by preventing the realization of the maximum gains from trade in any market."[8] A monopoly price, or more generally any price above the competitive price, causes both a welfare loss and a transfer of wealth from the buyer to the seller.[9] These two separate effects of monopoly pricing are shown in Figure 1.[10] The dollar value of the welfare loss equals the area in the triangle labeled "W." The dollar value of the wealth transferred from the buyer to the seller, which represents the monopoly's profits, equals the area in the rectangle "P."[11]

The equilibrium price in a competitive market is found by equating the quantity demanded with the quantity supplied. The competitive price is shown in Figure 1 as P_c. At the competitive equilibrium, the

5. *E.g.*, Illinois *ex rel.* Hartigan v. Panhandle Eastern Pipeline Co., 852 F.2d 891, 896 (7th Cir.) (en banc) (In determining damages in a utility case, "the loss [to the middleman-supplier] would be its lost profits on the sales it did not make."), *cert. denied*, 488 U.S. 986 (1988); *Arnott*, 609 F.2d at 886-88 (allowing damages for future lost profits of service station lease); *Lehrman*, 500 F.2d at 663-64 (holding that future profits are a proper measure of damages); Rangen, Inc. v. Sterling, Nelson & Sons, Inc., 351 F.2d 851, 855 (9th Cir. 1965) (If plaintiff lost sales because of exclusionary practices, the measure of damages will be the loss of net profit on those sales.), *cert. denied*, 383 U.S. 936 (1966).

6. For a general discussion of consumer welfare loss, see R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 237-43 (1976).

7. There is apparently no reported case in which a court has allowed recovery for consumer welfare loss. In a recent unreported case, the United States District Court for the Central District of California granted a defendant's pretrial motion to exclude any such damage theory. City of Vernon v. Southern Cal. Edison Co., No. 83-8137 (C.D. Cal. Aug. 30, 1990).

8. Wenders, *On Perfect Rent Dissipation*, 77 AM. ECON. REV. 456, 456 (1987).

9. W. NICHOLSON, MICROECONOMIC THEORY: BASIC PRINCIPALS AND EXTENSIONS 426-30 (1978); J. TIROLE, THE THEORY OF INDUSTRIAL ORGANIZATION 67 (1988).

10. To simplify the analysis, we have drawn the supply curve as being horizontal, or perfectly elastic.

11. *See* Fig. 1.

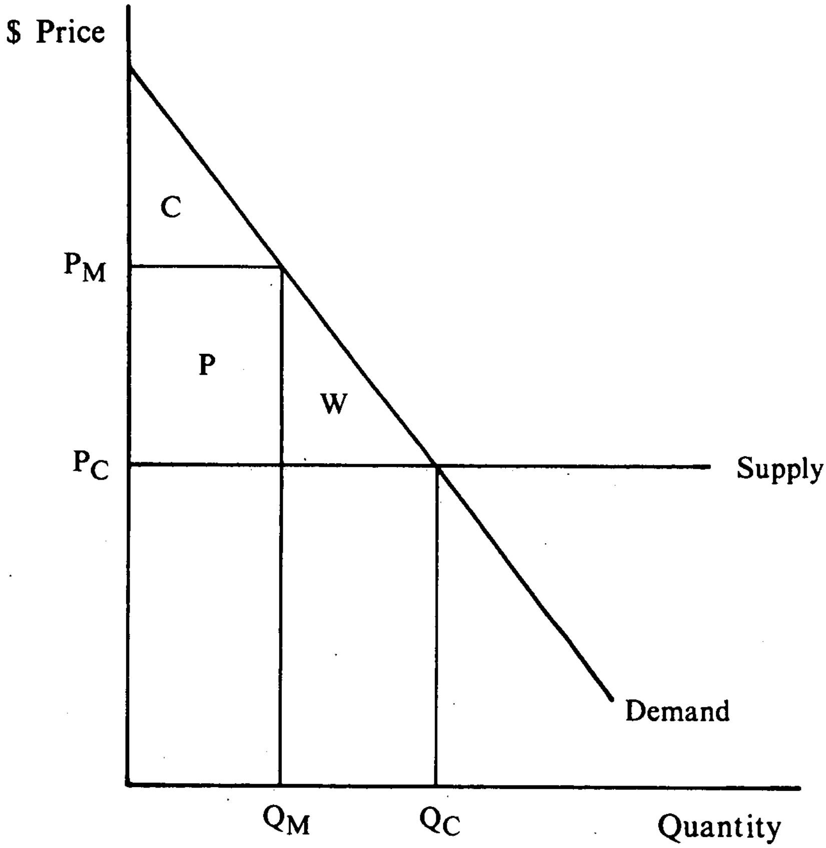

Figure 1.

marginal cost of producing the good equals the price consumers are willing to pay.[12] The quantity of the good consumed at the competitive price is shown in Figure 1 as Q_c.

The area under the demand curve but above the supply curve represents the dollar value of the amount that buyers are willing to pay for the good but, in a competitive market, do not have to pay.[13] This area is called "consumer surplus," and represents the dollar value of the gain to consumers from engaging in trade.[14] If the competitive price is charged, then the "consumer surplus" in Figure 1 is equal to the sum

12. R. MILLER, INTERMEDIATE MICROECONOMICS: THEORY, ISSUES AND APPLICATIONS 248-50 (1978). The marginal cost of producing a good equals the change in the total cost that results from increasing production by one unit. *Id.* at 195-96.

13. *Id.* at 83-88.

14. *Id.*

of the areas denoted "C," "W," and "P."

Suppose that the price of the good is raised to the monopoly level. The monopoly price is shown in Figure 1 as P_m. The quantity of the good consumed at the monopoly price is shown in Figure 1 as Q_m. The reason why "monopoly prices reduce economic welfare by preventing the realization of the maximum gains from trade in any market"[15] can now be seen.

At any price between the competitive price P_c and the monopoly price P_m, some consumers are willing to pay a price that exceeds the cost of producing the good.[16] Thus, there are possible "gains from trade."[17] In a competitive market, when a consumer offers to pay a price greater than the cost of producing the good, a trade occurs.[18] The trade is advantageous to both the buyer and the seller. As one commentator notes: "[t]he discrepancy between [monopoly] price and marginal cost reflects the fact that at the monopoly's preferred output level, consumers are willing to pay more for one more unit of output than it would cost to produce that output. From a social point of view, therefore, output is too low."[19] The effect of the monopoly, thus, is to eliminate a large number of welfare-enhancing trades. The dollar value of the welfare-enhancing trades that are eliminated by the monopoly price equals the triangle "W."[20]

The rectangle "P" equals the monopoly's profits because the cost of producing the monopoly quantity Q_m is P_c per unit, but the monopoly's revenue is P_m per unit.[21] These profits are a wealth transfer from the buyers to the seller.[22] When viewed in conjunction with the elimination of welfare-enhancing trades, the total loss in "consumer surplus" caused by the monopoly equals the sum of "W" and "P."

Where buyers have been damaged as a result of paying monopoly prices, the dollar value of the damages is generally determined to be

15. Wenders, *supra* note 8, at 456.
16. J. TIROLE, *supra* note 9, at 67.
17. *Id.*
18. R. MILLER, *supra* note 12, at 83-88.
19. W. NICHOLSON, *supra* note 9, at 426.
20. *See* Fig. 1.
21. *Id.*
22. Although not relevant to our analysis, there is an interesting question concerning whether or not the wealth transfer represents a welfare loss. Generally, wealth transfers are not treated as welfare losses because the utility or well-being of the individual buyers is assumed to be no more important than the utility or well-being of the individual shareholders who own the monopoly. Posner, however, argues that the dollar value of the rectangle "P" may be a welfare loss. *See* Posner, *The Social Costs of Monopoly and Regulation*, 83 J. POL. & ECON. 807 (1975). He argues that there is competition among rival firms to be the monopolist. *Id.* at 809. The rival firms will waste scarce resources in their attempt to win the right to be the monopolist. *Id.* According to Posner, these "rent-seeking" expenditures are properly treated as welfare losses. *Id.* at 807.

the difference between the monopoly price and the "just and fair market price,"[23] multiplied by the quantity purchased at the monopoly price,[24] i.e., the rectangle "P." This damage is commonly referred to as the "overcharge."[25] Under the federal antitrust laws, the damage is then trebled.[26]

The above analysis shows, however, that the damage caused by the monopoly cannot be attributed solely to the monopoly profits. Rather, the buyers are damaged by an amount equal to their lost consumers' surplus, i.e., the sum of the areas "P" and "W."[27] With respect to "P," the damage occurs when buyers pay the monopoly price P_m rather than the competitive price P_c. With respect to "W," the damage occurs when buyers who are willing to pay a price between the monopoly price and the competitive price no longer purchase the good.

The damage shown by the area "W" represents the reduction in economic welfare caused by monopoly prices that prevent welfare-enhancing trades. In order to deter firms from engaging in anticompetitive conduct that reduces consumer surplus, the total damages caused by such conduct must be assessed. In restricting their attention to the monopoly profits "P," courts have ignored a large part of the damage caused by monopoly prices. Thus, firms engaging in anticompetitive acts that result in supra-competitive prices have been held accountable for only a portion of the total damages they have caused.

III. Antitrust Policy: Promoting Consumer Welfare by Deterring Anticompetitive Pricing

A fundamental purpose of antitrust legislation is to promote the welfare of consumers by encouraging competition in the marketplace. Indeed, one commentator has noted that "[p]opular support for antitrust would dissolve if consumers did not think that the law protected their interests."[28] That consumers priced out of the market by illegal overpricing are without a remedy violates the fundamental purpose of antitrust legislation. "From the standpoint of those who stress the desirability of allocative efficiency" notes one commentator, "[deadweight loss] is what antitrust is all about."[29]

The fact that consumers suffer unremedied losses under current

23. City of Atlanta v. Chattanooga Foundry & Pipe Co., 101 F. 900, 901 (C.C.E.D. Tenn. 1900), *rev'd on other grounds*, 127 F. 23 (6th cir. 1903), *aff'd*, 203 U.S. 390 (1906).

24. Hanover Shoe Co. v. United Shoe Mach. Corp. 392 U.S. 481, 487-94 (1968).

25. *Id.*

26. 15 U.S.C. § 15(a) (1988).

27. *See* Fig. 1.

28. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U. L. Rev. 1020, 1035 (1987).

29. Scherer, *Antitrust, Efficiency, and Progress*, 62 N.Y.U. L. Rev. 998, 998 (1987).

antitrust enforcement is all the more disconcerting in light of the law's goal of deterrence. In allowing treble damage awards, Congress hoped to encourage private enforcement of antitrust laws, indeed to create "private attorneys general" for antitrust enforcement.[30] Private enforcement is considered essential to antitrust law,[31] with private actions constituting the great majority of antitrust litigation.[32]

Awarding treble damages also serves the function of creating a penalty severe enough to discourage anticompetitive behavior. "Because the volume of business transactions dwarfs the number of cases that can be brought and because the costs of litigation, especially antitrust litigation, are high, the antitrust remedy must influence behavior at the planning stage."[33]

In light of these goals it is counterproductive that a significant element of loss — consumer welfare loss — is not included as an element of antitrust damage awards. Failing to fully assess the damages resulting from anticompetitive behavior frustrates the goals of remedying victims and deterring firms from engaging in collusive conduct.

IV. CALCULATING CONSUMER WELFARE LOSS

Consumers suffer a loss in that they are less well-off when they are foreclosed from making purchases as a result of anticompetitive prices. Assessing the monetary loss, however, is arguably difficult. Several commentators have contended that the extreme difficulty in assessing the consumer welfare loss should preclude the possibility of recovery.[34]

As demonstrated in the foregoing discussion, however, consumer

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30. Monarch Life Ins. Co. v. Loyal Protective Life Ins. Co., 326 F.2d 841, 845 (2d Cir. 1963), *cert. denied*, 376 U.S. 952 (1964); Osborne v. Sinclair Ref. Co., 324 F.2d 566, 572 (4th Cir. 1963).

31. Private actions are "a vital means for enforcing the antitrust policy of the United States" and are a "bulwark of antitrust enforcement." Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 136, 139 (1968).

32. In 1981 there were 1,361 private and 66 governmental antitrust suits in federal court. 16H J. VON KALINOWSKI, BUSINESS ORGANIZATIONS: ANTITRUST LAWS AND TRADE REGULATION § 80.01 n.2 (1990) (citing ANNUAL REPORTS OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF U.S. COURTS).

33. Brodley, *supra* note 28, at 1024.

34. *E.g.*, 2 P. AREEDA & D. TURNER, ANTITRUST LAW 190 n.22 (1978) ("Those consumers who would purchase at the lower price but not at the enhanced price are harmed, but they cannot be adequately identified and their harm adequately measured. As a practical matter, therefore, they must be ignored."); Werden and Schwartz, *Illinois Brick and the Deterrence of Antitrust Violations — An Economic Analysis*, 35 HASTINGS L.J. 629, 632 n.18 (1984) ("Measuring welfare loss with any degree of accuracy is impossible, so there would be little or nothing to be gained by doing so."). To accept this argument, however, would in many instances force courts to stop awarding damages based on the excess price paid when collusion occurs. Measuring accurately what the counterfactual "just and fair market price" would have been had the collusion not occurred is also generally impossible.

welfare loss (the "W" triangle in Figure 1) is simply a function of the quantity demanded at the "just and fair market price" compared with the quantity demanded at the non-competitive price. In calculating the "overcharge," courts currently estimate the "just and fair market price." The only additional information required to calculate the dollar value of the consumer welfare loss is an estimate of the demand elasticity. This can be estimated statistically.[35] Alternatively, if the "just and fair market price" is observed prior to the period of collusive pricing, then the quantity demanded at that price can be observed. In this instance, the price elasticity is easily calculated.[36]

Calculations of the elasticity of demand are often performed by the U.S. Department of Justice, Antitrust Division, the Federal Trade Commission, and private parties appearing before the antitrust agencies.[37] Under the U.S. Department of Justice Merger Guidelines,[38] an antitrust market cannot be defined without estimating the demand elasticity.[39] Therefore, calculating consumer welfare loss in the above manner involves nothing more than an application of generally accepted techniques.

V. Why Consumer Welfare Loss Is Not Awarded

Given that consumer welfare loss exists and is calculable, why have courts not recognized consumer welfare loss as an element of damages in antitrust litigation? The threshold issue is whether courts have the power to allow recovery for this loss. Section 4 of the Clayton Act provides a treble damage recovery for any person injured in his business or property by reason of conduct forbidden by the antitrust laws.[40] Because of the lack of specificity in antitrust legislation, courts have been granted wide authority to fashion remedies.[41] The lack of

35. *See* Leamer, *Is It a Demand Curve, or Is It a Supply Curve? Partial Identification Through Inequality Constraints*, 63 Rev. Econ. & Statistics 319, 319 (1981).

36. Technically, in this instance it is the "arc" demand elasticity that would be calculated. *See* R. Miller, *supra* note 12, at 107.

37. *See* Ordover & Wall, *Understanding Econometric Metholds of Market Definition*, 3 Antitrust 20 (Summer 1989); Scheffman & Spiller, *Geographic Market Definition Under the U.S. Department of Justice Merger Guidelines*, 30 J.L. & Econ. 123 (1987).

38. U.S. Department of Justice, Merger Guidelines-1984, 4 Trade Reg. Rep. (CCH) ¶ 13,103 (June 14, 1984).

39. Technically, it is the residual demand elasticity that must be estimated. In practice, this demand elasticity is sometimes estimated explicitly, but more often is implicit in the market definition. *See* Economic Analysis Group, U.S. Dep't of Justice, Market Delineation Under the Merger Guidelines: The Role of Residual Demand Elasticities 90-3 (1990).

40. 15 U.S.C. § 15(a) (1988).

41. *See* Lehrman v. Gulf Oil Corp., 500 F.2d 659, 663-64 (5th Cir. 1974) ("[G]oing concern value and lost future profits are each viable alternative measures of antitrust damages."), *cert. denied*, 420 U.S. 929 (1975).

restrictive language, noted the Supreme Court in *Blue Shield of Virginia. v. McCready*,[42] "reflects Congress' 'expansive remedial purpose' in enacting section 4: Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations."[43] As stated by the Court in *United States v. United Shoe Machinery Corp.*[44] "[i]n the anti-trust field the courts have been accorded, by common consent, an authority they have in no other branch of enacted law."[45] Therefore, courts have the power to fashion remedies to consumers ("any person" under the Clayton Act) deprived of a product or service by collusive pricing ("injured in his business or property").

The reluctance of the courts to use their remedial power may be attributed to the difficulty in measuring damages with reasonable certainty. As discussed *supra*, determining consumer welfare loss requires ascertaining what the price and quantity demanded would have been in the absence of monopolistic conditions. A similar calculation must be made whenever a direct purchaser sues under the antitrust laws for the unrealized profits on lost sales. The court must determine the quantity of sales and corresponding profits which would have resulted had the collusive pricing not occurred.

Courts generally have been willing to accept calculations for lost profits on lost sales,[46] but some still balk at the idea, and accordingly deny any damage recovery as being too speculative.[47] One commentator notes that for the sake of simplicity in cases as notoriously complicated as antitrust suits, the parties may relinquish the right to recover profits from lost sales.[48]

Surely such squeamishness about calculating damages runs contrary to the intent behind the antitrust laws. The treble damage remedy, designed both to remedy victims and to punish wrongdoers,[49] is not

42. 457 U.S. 465 (1981).

43. *Id.* at 472 (citing Pfizer Inc. v. India, 434 U.S. 308, 313-14 (1978)).

44. 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

45. *Id.* at 348.

46. Illinois *ex rel.* Hartigan v. Panhandle Eastern Pipeline Co., 852 F.2d 891, 896 (7th Cir.) (en banc), *cert. denied*, 488 U.S. 986 (1988); Arnott v. American Oil Co., 609 F.2d 873, 886-88 (8th Cir. 1979), *cert. denied*, 446 U.S. 918 (1980).

47. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) (suggesting that future lost profits may be too speculative until the damage actually occurs); Stevens v. Zenith Distrib. Corp., 568 F. Supp. 1200 (W.D. Mo. 1983) (claim for future profits denied in a price discrimination suit).

48. Mitchell & Lagarias, *Plaintiff's Prosecution of Federal Treble-Damage and Injunction Cases*, in ANTITRUST ADVISOR 648, 705-06 (C. Hills 3d ed. 1985).

49. Lehrman v. Gulf Oil Corp., 500 F.2d. 659, 667 (5th Cir. 1974) (treble damages sanction intended to serve as deterrent against repeated violations and as a general warning to poten-

promoted if damages are calculated solely on the basis of overcharges from actual sales. The fact that monopolies depress spending by businesses and individuals by pricing products out of reach of some consumers is at least an equally harmful consequence. Those harmed by being priced out of the market are left without a remedy. As a consequence, collusive firms are not paying the true cost of their illegal behavior, thus frustrating the purposes of the treble damage penalty: punishment and deterrence.

The general reluctance of courts to accept damage assessments based on projections—both in order to determine lost profits and consumer welfare loss—may be a function of a distrust of economics as a reasonably certain science on which to base remedies. One attorney claims that using economic models inflates damages.

> Such a strategy usually places the plaintiff at an advantage because business projections are often more optimistic than actual results . . . . [I]deas are tilted toward explaining what would happen in a perfect world of informed and intelligent choice based solely on profit potential. The real world, in which damages are to be measured, is invariably more hobbled by inertia, misinformation, and other human deficiencies.[50]

Indeed, as the court noted in *Illinois Brick Co. v. Illinois*[51]: "[A]ttention to 'sound laws of economics' can only heighten the awareness of the difficulties and uncertainties involved in determining how the relevant market variables would have behaved had there been no overcharge."[52] Similarly, the court in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*[53] held that determining what price and demand would have been in the absence of collusion was sufficiently complicated so as to justify permitting direct purchaser suits even when the direct purchaser had "passed on" some of the overcharges to the ultimate consumers.[54]

The difficulties of using economic models as noted in *Illinois Brick* and *Hanover Shoe* take on a different hue, however, when viewed outside the context of the "passing-on" defense. In those cases, the Supreme Court concluded that the costs of economic projections outweighed their benefits when determining whether damages were to be

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tial violators, in addition to remedying victims), *cert. denied*, 420 U.S. 929 (1974); *see also* Montreal Trading Ltd. v. Amax Inc., 661 F.2d. 864 (10th Cir. 1981), *cert. denied*, 455 U.S. 1001 (1982).

50. Eakely, *Defense of Private Treble Damage Actions*, in ANTITRUST ADVISOR 761, 802 (C. Hills 3d ed. 1985).

51. 431 U.S. 720 (1977).

52. *Id.* at 742-43.

53. 392 U.S. 481 (1968).

54. *Id.* at 492-93.

paid only to direct purchasers or to the ultimate consumers.[55] The question was not whether the damages were payable, but rather to whom they should be paid. In noting the difficulties of estimating what portion of an illegal overcharge was actually passed on to consumers, the Court held that the difficulty of making such a determination outweighed any benefit.[56] In his dissenting opinion in *Illinois Brick,* Justice Brennan noted, "From the deterrence standpoint, it is irrelevant to whom damages are paid, so long as someone redresses the violation."[57]

With regard to consumer welfare loss, however, it is not a question of who receives the damages, but rather whether those damages will be awarded at all. Surely considerations of the difficulties of applying economic models should be discounted in favor of allowing the remedy to survive.

Courts have generally held that while there is a strict standard of proof for showing that an antitrust injury occurred, once this has been demonstrated courts take a liberal view in proving damages.[58] Indeed, once an antitrust injury has been shown, damages may be proven by any relevant data on which a court could make a "just and reasonable estimate" of the damages.[59] Thus, there is a " 'tendency of the courts . . . to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery . . . .' "[60] Commentators have noted that "[t]he reason for the relatively liberal rule on proof of damages is that it is impossible to know with precision what *might have been* in the absence of the violation."[61] Therefore, difficulties in quantifying antitrust injury with mathematical certainty have led courts to accept a less detailed showing of damages.[62]

The courts' acceptance of such damage estimates is certainly appropriate since any other rule would allow the wrongdoer to benefit at the expense of the victim.[63]

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55. *See* 431 U.S. at 745-47; 392 U.S. at 493-94.

56. 431 U.S. at 745-47; 392 U.S. at 493-94.

57. 431 U.S. at 760 (Brennan, J., dissenting).

58. Shumate & Co. v. National Ass'n of Sec. Dealers, Inc., 509 F.2d. 147 (5th Cir.), *cert. denied,* 423 U.S. 868 (1975).

59. Bigelow v. RKO Radio Pictures Inc., 327 U.S. 251, 264 (1946); Haverhill Gazette Co. v. Union Leader Corp., 333 F.2d 798, 806-07 (1st Cir.), *cert. denied,* 379 U.S. 931 (1964); Flintkote Co. v. Lysfjord, 246 F.2d. 368, 392 (9th Cir.), *cert. denied,* 355 U.S. 835 (1957).

60. *Bigelow,* 327 U.S. at 265-66 (quoting Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 565-66 (1931)).

61. Mitchell & Lagarias, *Plaintiff's Prosecution of Federal Treble-Damage and Injunction Cases,* in ANTITRUST ADVISOR 648, 705 (C. Hills 3d ed. 1985).

62. J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 566 (1981); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123-24 (1969).

63. *Bigelow,* 327 U.S. at 264-65.

> It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply [a liberal rule in setting damages] would mean that the more grievous the wrong done, the less likelihood there would be a recovery.[64]

As the Supreme Court noted in *J. Truett Payne Co. v. Chrysler Motors Corp.*,[65] "it does not 'come with very good grace' for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted."[66] Despite the reluctance to further complicate antitrust litigation,[67] courts should grapple with economic estimates of consumer welfare loss. The alternative is to allow monopolistic behavior to go unsanctioned and unremedied.

Finally, as noted *supra,* the task may not be as difficult as critics predict. The task appears no more difficult than when dueling experts attempt to estimate, for example, how much pain an accident victim has suffered; how much the value of one's life has been diminished by confinement to a wheelchair; how much one's enjoyment of property has been diminished by the operation of a nearby nuisance; or how much money a five-year-old would have earned in her lifetime had she not suffered a wrongful death.

In deciding such cases, courts routinely place dollar figures on losses that are not readily quantifiable. Using the difficulty of assessing damages as a reason for denying recovery of consumer welfare loss essentially establishes a stricter standard of proof in antitrust cases than is generally imposed in civil litigation. As the Court stated in the historic case of *Story Parchment Co. v. Paterson Parchment Paper Co.*[68]:

> 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. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence shows the extent of the damages as a matter of just and reasonable inference, although the result be only approximate . . . .[69]

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64. *Id.*

65. 451 U.S. at 557.

66. *Id.* at 566-67 (quoting Hetzel v. Baltimore & O.R.R., 169 U.S. 26, 39 (1898)).

67. Kansas v. Utilicorp United, Inc., 110 S. Ct. 2807, 2813-14 (interim ed. 1990) (refusing to allow indirect purchaser suits on grounds of complexity of calculation and apportionment of damages).

68. 282 U.S. 555 (1931).

69. *Id.* at 563.

VI. Standing to Sue for Consumer Welfare Loss

Assuming that consumer welfare loss should be a recoverable item of damages in antitrust suits raises the troublesome issue of who should have standing to sue for such losses. This question can be resolved only by determining which is the higher goal of antitrust law: remedying victims or deterring wrongdoing. If the greater purpose is in remedying victims of monopolistic markets, then consumers should have standing to sue for the loss to their welfare. If, however, the promotion of deterrence is of greater importance, then an argument can be made that direct purchasers alone should be given standing.

Section 4 of the Clayton Act[70] has long been recognized as having the dual purposes of remedying victims and, with its treble damage penalty, deterring wrongdoers.[71] In the seminal antitrust standing case of *Hanover Shoe v. United Shoe Machinery Co.*,[72] the Supreme Court grappled with the use of the "passing-on defense." A middleman sued its supplier for overcharges caused by monopolistic behavior.[73] The supplier, in its defense, argued that the retailer had suffered no loss since the overcharge had been passed on to the ultimate consumers.[74] In declining to allow the use of the defense, the court held that the deterrence goal of the antitrust laws would be undercut if the direct purchaser were not entitled to sue.[75] The court held that the buyer suffers loss whenever the seller charges an unfairly inflated price since its costs would otherwise be lower and its profits higher.[76] Furthermore, the costs and complexity of antitrust suits would increase. The task of apportioning damages between direct and indirect purchasers would be difficult.[77] Also, the generally small recoveries to which consumers would normally be entitled would reduce the incentive to file antitrust suits.[78]

The Court's refusal to allow the use of the "passing-on" defense left unanswered, however, the question of whether consumers themselves have standing to sue for antitrust violations when excess costs, at least in part, have been passed on to them. This question was answered in *Illinois Brick Co. v. Illinois*[79] in which the Court denied standing to

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70. 15 U.S.C. § 15 (1988).
71. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485-86 (1977).
72. 392 U.S. 481 (1968).
73. *Id.* at 483.
74. *Id.* at 487-88.
75. *Id.* at 494.
76. *Id.* at 489.
77. *Id.* at 493.
78. *Id.* at 494.
79. 431 U.S. 720 (1977).

the ultimate consumers of monopoly-priced goods on the same rationale as in *Hanover Shoe*: allowing consumers a remedy was not justified in light of the increases that would result in the cost and complexity of antitrust litigation.[80] The Court reasoned that ultimate consumers would have less incentive to sue in light of the presumably small damages they individually suffer, and that such recoveries would be further diminished by the costs of litigating what would become more complex cases.[81] As such, the Court in effect held that the deterrence goal of the Clayton Act was more important than its remedial goal.

Writing for the majority, Justice White noted that indirect purchasers would have standing to sue for antitrust violations in cost-plus contracts, since such contracts insulate the direct purchaser from "any decrease in its sales as a result of attempting to pass on the overcharge, because its customer is committed to buying a fixed quantity regardless of price."[82] That is, if the entire overcharge were passed on to the ultimate purchaser, the litigation would not result in the unnecessary complexity otherwise feared. Therefore, *Illinois Brick* seemed to leave the door open to consumer suits where consumers could demonstrate that the entire monopolistic overcharge had been passed on to them.

Nevertheless, in the recent case of *Kansas & Missouri v. Utilicorp United, Inc.*,[83] the Court denied standing in a *parens patriae* suit filed by attorneys general in two states on behalf of consumers who ultimately paid monopolistic overcharges for natural gas. While the Court acknowledged that the full overcharge had been passed on entirely to consumers by the direct purchaser pursuant to regulatory pricing which allowed retail prices to rise in accordance with wholesale prices, the Court denied the consumers standing.[84] Once again, the Court held that allowing only direct purchaser suits would more effectively promote the vigorous enforcement of antitrust laws.[85]

The Court dismissed the contention that utilities, who are allowed by law to pass on all wholesale price increases to consumers, would have no incentive to file suit. The Court reasoned that the direct purchaser would have a greater incentive to sue (since the recovery would not be split among the multitude of consumers) and would have greater knowledge of whether to sue because of its expertise in the business at issue.[86] The Court issued its holding despite the dissenting Justices'

80. *Id.* at 745.
81. *Id.*
82. *Id.* at 736.
83. 110 S. Ct. 2807 (interim ed. 1990).
84. *Id.* at 2812.
85. *Id.* at 2815-17.
86. *Id.* at 2816.

criticism that the plain language of section 4 of the Clayton Act provides a remedy to victims,[87] and that a remedy was being denied them even though it would not result in more complex litigation.[88] Further, there was no showing that the direct purchasers would have any incentive to sue, since such heavily regulated firms may be required to pass any damage recoveries directly on to consumers.

The Supreme Court thus has backed away from its suggestion in *Illinois Brick* that it would allow standing to consumers in cases where the total overcharge had been passed on to them. The Court instead repeated that deterrence, not remedy, is the foremost goal of the Clayton Act.[89] This position is in apparent conflict with the Court's 1977 ruling in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*[90] In *Brunswick,* the court stated that while the law had an important deterrent function, it was designed primarily as a remedy.[91]

If the paramount goal of antitrust laws is to remedy wrongdoing, then consumers should have standing. The Supreme Court's reluctance to allow consumer suits, however, even in the straightforward case of *Utilicorp,* indicates that the deterrence goal of the Clayton Act is best promoted by requiring privity.

VII. CONCLUSION

Firms found guilty of anticompetitive pricing should pay the full costs of the damage they have caused. This damage consists of both the money transferred from buyers to sellers and the deadweight welfare loss. Two obstacles stand in the way of antitrust suits for consumer welfare loss: the fear that the calculation of the damages would prove too speculative and the problem of standing under the Clayton Act. These damages can be measured to a reasonable degree of certainty by utilizing techniques already recognized by the courts. By refusing to award welfare cost damages the Supreme Court has undermined what it views as the primary goal of the Clayton Act: deterrence of anticompetitive pricing. Regarding the standing issue, to whom the welfare cost damages should be paid depends ultimately on one's view of the goals of the Clayton Act.

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87. *Id.* at 2818-19 (White, J., dissenting).
88. *Id.* at 2819-20 (White, J., dissenting).
89. *Id.* at 2815-16, 2818.
90. 429 U.S. 477 (1977).
91. *Id.* at 485-86. Although section four of the Clayton Act has "an important role in penalizing wrongdoers and deterring wrongdoing . . . the treble-damages provision, which makes awards available only to injured parties, and measures the awards by a multiple of the injury actually proved, is designed primarily as a remedy." *Id.* (citations omitted).